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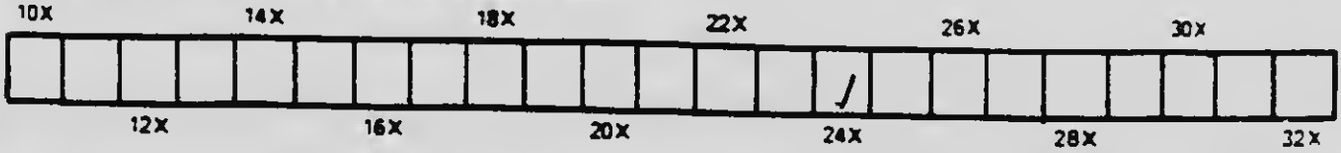

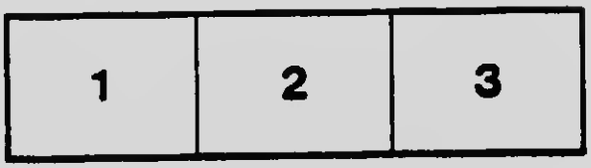

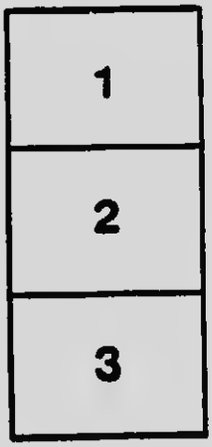

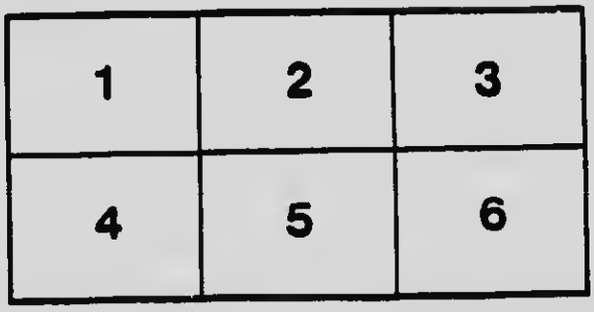

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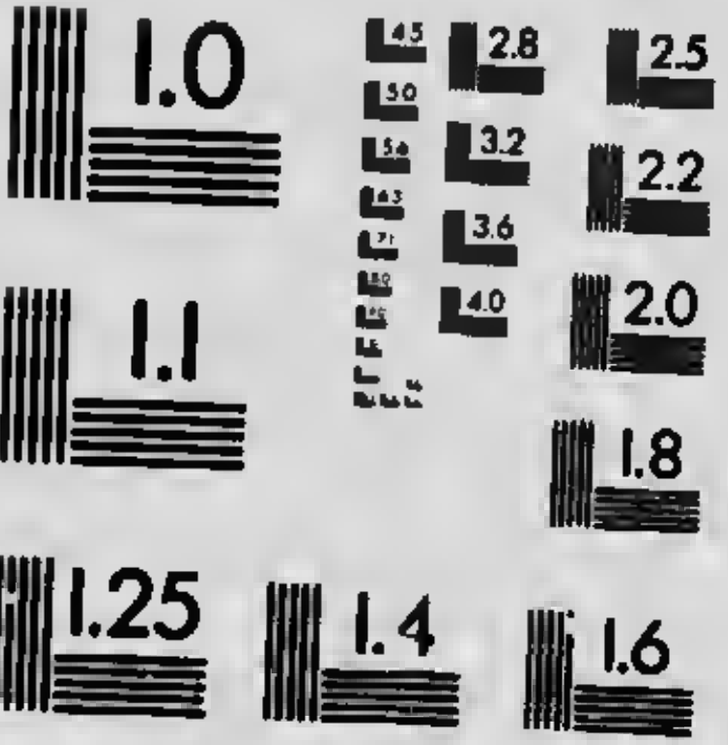

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DIVISION COURTS ACT

TOGETHER WITH

The General Rules and Forms

FULLY ANNOTATED

AND ADDITIONAL FORMS

THIRD EDITION

BY

JAMES BICKNELL
One of His Majesty's Counsel

AND

CHARLES SEAGER
Crown Attorney, Huron

TORONTO:
THE CARSWELL COMPANY, LIMITED
1916

LONDON:
SWEET & MAXWELL, LIMITED

PREFACE TO THIRD EDITION.

Since the publication in the year 1900 of the Second Edition of Bicknell and Seager's Division Courts Act, Mr. James Bicknell, K.C., and Mr. Edwin E. Seager, the Editors of that edition, have both died. But for many months previous to his death, the late James Bicknell and the present writer collaborated in the preparation of the present Third Edition; the manuscript of the same had been prepared and to a large extent revised, and the work was actually being put through the press, when Mr. Bicknell's lamented demise stayed its progress and delayed the publication.

In the work of completing the revision and supervising the press work, the writer has been ably assisted by Mr. Alfred Bicknell, Barrister at Law, Toronto, brother of the late James Bicknell.

TABLE OF CASES

A.

	PAGE
Abhyleix Guardians . Sutcliffe, 20 L. R. Ir. 332	37
Abbott v. Richards, M. & W. 194	544
Abbott and Metcalfe, Re, 20 O. R. 200	486
Aberystwith Pro. Pier Co. v. Cooper, 13 L. T. 273	161
Abbey v. Dale, 10 C. B. 62	508, 509
Abraham v. Newton, 8 Bing. 274	312
Ahrath v. N. E. Ry. Co., 11 Q. B. D. 440; 11 A. C. 247	531
Ackermann v. Ahrensperger, 16 M. & W. 99	80
A'Court v. Cross, 3 Bing. 329	286
Adair v. Wade, 9 O. R. 15	393
Adam v. Townend, 14 Q. B. D. 103	208, 212
Adams, Re, 14 Ch. D. 37	478
Adams v. Acklend, 7 U. C. R. 211	23
Adams v. Adams (1892), 1 Ch. 369	149, 152
Adams v. Blackwell, 19 P. R. 168	538
Adams v. Corfield, 28 L. J. Ex. 317	305
Adams v. Cox, 19 O. L. R. 96	9, 227, 327
Adams v. Gillem, 9 Ir. C. L. R. 148	401
Adams v. Graham, 33 L. J. Q. B. 71	172
Adams v. O. W. Ry. Co., 9 H. & N. 404	160, 291
Adams v. Watson Manufacturing Co., 15 O. R. 218; 16 O. R. 2	218, 220, 221
Adamson v. Adamson, 28 Gr. 221	7
Adamson v. Tuff, 44 L. T. 420	149
Addison v. Gray, 2 Wils. 293	441
Aday v. Deputy Master of Trinity House, 22 L. J. Q. B. 3; S. C. 1 E. & B. 273	84
Adler v. Benjamin, 1 T. L. R. 308	197
Ahrens v. McGillligat, 23 C. P. 171	77, 160, 162, 176, 200, 570
Ainsworth v. Creeke, L. R. 4 C. P. 476	483
Airey v. Mitchell, 21 Gr. 512	275
Aitcheson v. Mann, 9 P. R. 473	234
Aitken v. McMechan (1895), A. C. 310	252
Alanson v. Walker, 3 Dowl 258	246
Alcock v. Royal Ex. Ass. Co., 13 Q. B. 292	307
Alcoy v. Greenhill (1896), 1 Ch. 19	153
Alden v. Beckley, 25 Q. B. D. 543	208, 232
Alden v. Boomer, 2 P. R. 339	461
Alderson v. Pallester, 70 L. J. K. B. 935	371
Aldred v. Constable, 6 Q. B. 370	495
Aldred v. Hicks, 5 Taunt. 186	102
Aldrich v. Aldrich, 23 O. R. 376; 24 O. R. 124	9, 92, 127
Aldrich v. Humphrey, 29 O. R. 427	564
Aldridge v. Hooper, 19 Bing. 118	123
Aldridge v. Medwin, L. R. 4 C. P. 464	175
Alexander v. Alexander, 1 O. L. R. 639	198
Alexander v. Brown, 1 C. & P. 288	264
Alexander v. Dixon, 1 Bing. 360	294
Alexander v. Gloucester (School Trustees), 11 P. R. 157	300
Alexander v. Jones, L. R. 1 Ex. 133	160

PAGE
Alexander v. Thompson, 1 Alta. 501 ..... 226, 228
Allan v. Place, 15 O. L. R. 148 ..... 361, 474
Allan v. Pratt, 13 A. C. 780 350
Allan v. McTavish, 2 A. R. 278 ..... 10, 275
Allcroft v. Morrison, 19 P. R. 59 310
Allen v. Allen, 15 P. R. 458 161
Allen v. Bussey, 4 D. & L. 430 227
Allen v. Carey, 7 E. & B. 463 253
Allen v. Edinburgh Life Ins. Co., 25 Grant 306 491
Allen v. Fairfax Cheese Co., 21 O. R. 598 ..... 128, 200, 228
Allen v. Flood (1898), A. C. 1 522
Allen v. Geddes, L. R. 5 C. P. 291 175
Allen v. Gibbon, 2 Dowl. 292 537
Allen Quillam v. Jarvis, 32 U. C. R. 56 ..... 23, 26
Allen v. Mathers, 9 P. R. 477 ..... 258, 259
Allen v. McTavish, 2 A. R. 278 275
Allen v. Taylor, L. R. 10 Eq. 52 171
Allen v. Thompson, 1 H. & N. 15 172
Allen v. Yoxall, 1 C. & K. 315 294
Allhusen v. Malynreso, 3 O. B. 340 157
Allison v. Breen, 36 C. L. J. 165 276
Allison v. Frisby, Re Frisby, 43 Ch. D. 106 ..... 280, 281, 289
Allmon v. Kensall, 3 P. R. 110 322
Allwright v. Perks, 9 T. L. R. 235 272
Alpha Oil Co. v. Donnelly, 12 P. R. 515 118
Alsept v. Eyles, 2 H. Bl. 108 515
Alston v. Trollope, L. R. 2 Eq. 205 289
Amend v. Murphy, 60 Ill. 338 471
Ambergate Ry. Co. v. Midland Ry. Co., 2 E. & B. 793 115
Amelianburg v. Pitcher, 13 O. L. R. 417 ..... 75, 77
American Concentrated Meat Co. v. Hendry, W. N. (1893) 67, 82; 5 R. 331 116
Ames-Holden Co. v. Hatfield, 29 S. C. R. 95 472
Ames v. Birkenhead, 20 Beav. 332 407
Amey v. Long, 9 East. 473 296
Amen v. Bobbett, 22 Q. B. D. 548 150
Amo v. Fearon, 9 A. & E. 548 135
Amos v. Smith, 1 H. & C. 238 288
Amstill v. Alexander, 16 L. T. 830 295
Ancona v. Marks, 7 H. & N. 686 230
Anderson v. Anderson, 1 Ch. Ch. R. 291 310
Anderson v. Bank of B. C., 2 Ch. D. 644 297
Anderson v. Barber, 13 P. R. 21 ..... 33, 432, 435
Anderson v. Calloway, 1 C. & M. 182 538
Anderson v. Galbraith, 16 U. C. R. 57 93
Anderson v. George, 1 Burr. 353 344
Anderson v. Gorrie (1895), 1 Q. B. 668, C. A. 21
Anderson v. Hamilton, 4 U. C. R. 372 112
Anderson v. Henry, 20 O. R. 719 530
Anderson v. Jellett, 9 S. C. R. 1 88
Anderson v. McEwan, 8 C. P. 532 111
Anderson v. Sanderson, 2 Stark. 204 285
Anderson v. Shaw, 3 Bingh. 290 ..... 253, 260
Anderson v. Titmas, 36 L. T. 711 343
Anderson v. Vanstone, 16 P. R. 243 513
Anderton v. Johnston, 8 U. C. L. J. 46 230
Andrew v. Cooper; Re Bowden, 45 Ch. D. 444 ..... 219, 290

PAGE

Andrews v. Canadian M. L. & Inv. Co., 20 O. R. 365...416, 419, 427, 428, 431
Andrews v Forsyth, 7 O. L. R. 188 219
Andrews v. Morris, 1 Q. B. 3 .....21, 22, 449
Andrews v. Russell, Bull N. P. 81 524
Angell v. Baddeley, 3 Ex. D. 49 355
Anglebart v. Rathier, 27 C. P. 97 514
Angelsea, Re (1901), 2 Ch. 548 326
Anglen v. Minis, 18 C. P. 174 112
Anglo-American v. Rowlin, 20 C. L. J. 371 546
Anglo-Italian v. Davies, 9 Ch. D. 275 244
Anglo-Italian Bank v. Wells, 38 L. T. 197 244
Anlaby v. Praetorius, 20 Q. B. D. 764 .....224, 230, 233, 572
Anon, 4 P. R. 310 .....23, 155, 263
Anthony Birrell Pearce & Co., In re; Doig v. Anthony (1899), 2 Ch. 50 597
Apothecaries Co. v. Jones (1891), 1 Q. B. 89 26
Apothecaries Co. v. Jones, 8 Q. B. D. 434 26
Apothecaries Co. v. Nottingham, 34 L. T. N. S. 76 26
Applebe v. Baker, 27 U. C. R. 486 23
Appleby v. Franklin, 17 Q. B. D. 93 90
Applegarth v. Graham, 7 C. P. 171 111
Appleyard v. Mulligan, 3 O. W. N. 943 .....196, 279
Appleton v. Lepper, 20 C. P. 138 342
Apthorpe v. Apthorpe, 12 P. D. 192 .....403, 405
Archer v. English, 1 M. & G. 873 269
Archer v. Harte, 4 Bing. 464 123
Archer v. Leonard, 15 Ir. Ch. R 7 284
Archibald v. De Lisle, 25 S. C. 352
Archibald v. Hubley, 18 S. C. R. 116 .....113, 183, 529
Archibald v. McLaren, 21 S. C. R. 589 531
Aris v. Orchard, 6 H. & N. 100 158
Arm ge v. Fitzwilliams, W. N. (1875) 238 198
Armour and Township of Onondaga, In re, 14 O. I . 606 15
Armour v. Walker, 25 Ch. D. 673 .....304, 305, 306
Armour v. Kilmer, 28 O. R. 618 .....260, 449
Armstrong, Re (1892), 1 Q. B. 327 212
Armstrong v. Armstrong, 4 O. W. N. 1340 257
Armstrong v. Canada At. Ry. Co., 14 O. L. R. 560..... 277
Armstrong v. Douglas, 8 C. L. T. 49 .....399, 406
Armstrong v. Milburn, 54 L. T. 723 278
Armstrong v. McGourtz, 22 N. B. R. 20 85
Armstrong v. Toronto Ry. Co., 15 P. R. 208 298
Arndt v. Porter, 30 L. J. Ex. 10 158
Arnitt v. Garnett, 3 B. & Ald. 440 553
Arnold v. Hamilton, 1 P. R. 263 114
Arnold v. Higgins, 11 U. C. R. 191 .....111, 525
Arnold v. Robertson, 4 U. C. L. J. 69 231
Arnott v. Brndly, 23 C. P. 1 566
Arpin v. Reg., 14 S. C. R. 376 .....256, 351
Ash v. Downey, 8 Ex. 237 479
Ashby v. James, 11 M. & W. 542, 544 159
Ashby v. Sedgwick, L. R. 15 Eq. 245 303
Ashcroft, Re; Re Howard, L. R. 9 C. P. 347 173
Ashland v. Armstrong, 11 O. L. R. 414 320
Ashley v. Ashley, 17 L. T. 265 146
Ashworth v. Outram, 5 Ch. D. 923 62

PAGE

Askew v. Hayten, 1 Dowl. 510 146
Askew v. Manning, 38 U. C. R. 345 .....15, 111
Aspey v. Jones, 33 W. R. 217 565
Astley v. Weldon, 2 B. & P. 346 130
Astor v. Merritt, 111 U. S. 202 470
Atkins v. Kilby, 11 A. & E. 777 567
Atkins v. Kinnear, 4 Ex. 776 163
Atkins v. Shephard; Re Shephard, 43 Ch. D. 131 210
Atkinson v. Third Equitable Benefit, 25 Q. B. D. 377 289
Atlas v. Miller (1898), 2 Q. B. 500 154
Attack v. Bramwell, 3 B. & S. 520 398
Attenborough v. Henschell (1895), 1 Q. B. 833 347
Attenborough v. London & St. Katharines Dock Co., 3 C. P. D. 450 537
Attenborough v. Thompson, 2 H. & N. 559 172
Attorney-General v. Birmingham, 15 Ch. D. 423 220
Attorney-General v. Churchill, 8 M. & W. 192 .....99, 574
Attorney-General v. Davison, McCle. & Y. 160 .....308, 318
Attorney-General v. Gooderham, 10 P. R. 259 305
Attorney-General v. Hamilton St. Ry. (1903), A. C. 524; 7 Can. Cr. Cas. 326 .....193, 323
Attorney-General v. Leatherseliers Co., 7 Beav. 157 295
Attorney-General v. London & N. W. Ry. (1892), 3 Ch. 377.... 151
Attorney-General v. O'Reilly, 6 A. R. 576 48
Attorney-General v. Rogers, 11 M. & W. 670 344
Attorney-General v. Sillem, 10 L. T. R. 434 348
Attorney-General v. Simpson (1901), 2 Ch. 671 353
Attorney-General v. Walker, 3 A. R. 195 278
Attorney-General v. Wilson, 9 Sim. 526 298
Attorney-General for Ontario v. Attorney-General for Canada.. 4, 50
Attwood v. De Forrest, 19 Conn. 517 471
Atwood v. Chichester, 3 Q. B. D. 269 .....193, 231, 232
Atwood v. Taylor, 1 M. & G. 279 .....138, 140, 327
Auerbach v. Hamilton, 19 O. L. R. 570 244
Augustien v. Challis, 1 Ex. 279 552
Angustine Automatic v. De Sherbinin, 4 O. W. N. 834 245
Aurora Scrutiny, Re, 28 O. L. R. 475 .....66, 75, 77
Austin v. Dowling, L. R. 5 C. P. 534 89
Austin v. Mills, 9 Ex. 288 .....5, 127, 450
Australian Newspaper Co. v. Bennett (1894), A. C. 284 .....252, 342
Avards v. Rhodes, 8 Ex. 312; 17 Jur. 71 73
Avery v. Bowden, 6 E. & B. 953, 974 253
Avery v. Cayuga, 28 O. L. R. 517 .....399, 453, 472
Awberry v. McLean, 19 C. L. J. 335.....150, 153
Axford v. Perrett, 4 Bing. 586 121
Ayscongh v. Bullar, 41 Ch. D. 341 .....221, 222
Ayleaford v. G. W. Ry. Co., 8 T. L. R. 786; (1892), 2 Q. B. 626 571
Ayton v. Bowles, 4 Bing. 105 284

B.

Babbage v. Coulbourn, 9 Q. B. D. 235 69
Babcock v. Ayers, 27 O. R. 47 139
Babcock v. Mun. Council of Bedford, 8 C. P. 527 173
Baby v. Ross, 14 P. R. 446 507
Backhouse v. Bright, 13 P. R. 117 .....75, 341
Bache v. Billingham (1894), 1 Q. B. 107 441

	PAGE
Bacon v. Cresswell, 1 Hodges 189	437
Bacon v. Langton, 9 C. B. 410	121
Badcock v. Cumberland Gap Park Co., 9 T. L. R. 113	161
Badar Bee v. Habib (1909), A. C. 615	5, 8
Baddeley v. Denton, 4 Ex. 508	86
Baddeley v. Gilmour, 1 M. & W. 55	312
Badeley v. Consolidated Bank, 34 Ch. D. 536; 38 Ch. D. 238	406
Badische & Analine, etc., Co. v. Levinstein, 24 Ch. D. 156, 319	596
Baggalay v. Borthwick, 10 C. B. N. S. 61	19
Bagge v. Whitehead (1892), 2 Q. B. 355; 20 A. R. 347	471
Bagshawa (Ltd.) v. Deacon (1898), 2 Q. B. 173	468, 551
Baildon v. Walton, 1 Ex. 617	289
Bailey v. Bailey, 13 Q. B. D. 855	127
Bailey v. Bank of Hamilton, 21 A. R. 156	445
Bailey v. Bryant, 1 E. & E. 340	160
Bailey v. Macaulay, 13 Q. B. 815	388
Bailey v. Plant (1901), 1 Q. B. 31, 33	500
Baillie v. Goodwin, 33 Ch. D. 604	63, 201, 211
Baillie v. Inchiquin, 1 Asp. 435	283
Bain v. Anderson, 24 A. R. 296; 28 S. C. R. 481	134
Bain v. Gregory, 14 L. T. 601	171, 175
Baines v. Bromley, 6 Q. B. D. 694	149, 154, 272
Baines v. Woodstock, 10 O. L. R. 694	219
Baird v. Almonte, 41 U. C. R. 415	74
Baird v. Nolan, 20 O. R. 311	402
Baird v. Story, 23 U. C. R. 624	347, 509, 557
Baker v. Adam, 102 L. T. 248	153
Baker v. Cave, 1 H. & N. 674	24
Baker v. Clark, L. R. 8 C. P. 121	78
Baker v. Coghlan, 7 C. B. 131	194
Baker v. Dening, 8 A. & E. 94	107
Baker v. G. T. Ry. Co., 11 A. R. 68	252
Baker v. Jackson, 10 P. R. 624	311, 312
Baker v. Kelly, 14 O. L. R. 623	443
Baker v. Walt, L. R. 9 Eq. 103	161
Baldwin v. Benjamin, 16 U. C. R. 54	233
Baldwin v. Kingstone, 18 A. R. 63, 83, 98, 109, 672	419
Bales v. Wingfield, 2 N. & M. 831	495
Balfour v. Crase (1902), 1 Ch. 733	34
Balfour v. Allison, 8 U. C. L. J. 330	467
Balkis, Re, 36 W. N. 392	3
Ball v. Bell, 26 O. R. 123	138, 140, 141
Ball v. G. T. Ry. Co., 16 C. P. 552	86
Balzold v. Upper, 4 O. L. R. 116	334
Bamford v. Clewes, L. R. 3 Q. B. 729	563
Bank of Bengal v. Fagan, 7 Moo. P. C. 61	354
Bank of B. N. A. v. Eddy, 9 P. R. 468	383
Bank of B. N. A. v. Gibson, 121 O. R. 613	188
Bank of B. N. A. v. Mallory, 17 Gr. 102	335
Bank of B. N. A. v. Strong, 1 App. Cas. 307	531
Bank of Hamilton, v. Anderson, 8 O. L. R. 153	219
Bank of Hamilton v. Bains, 12 P. R. 439	142
Bank of Hamilton v. Baldwin, 28 O. L. R. 175	279
Bank of Hamilton v. Blakeslee, 9 P. R. 130	208
Bank of Hamilton v. Davidson, 4 O. W. N. 749	245
Bank of Hamilton v. Durrell, 15 A. R. 200	477
Bank of Hamilton v. Easery, 15 P. R. 202	512

PAGE

Bank of Hamilton v. Isaacs, 16 O. R. 450 342
Bank of Hamilton v. Kramer, 3 O. W. N. 73 33
Bank of Hamilton v. Stark, 13 P. R. 213 .....257, 259
Bank of Hamilton v. Western Assurance Co., 38 U. C. R. 609.. 225
Bank of London v. Wallace, 13 P. R. 176 223
Bank of Mianesota v. Page, 14 A. R. 347 .....242, 243
Bank of Montreal v. Cameron, 2 Q. B. D. 530 502
Bank of Montreal v. Douglas, 17 U. C. R. 208 444
Bank of Montreal v. Gilchrist, 0 A. R. 650 85
Bank of Montreal v. Lingham, 50 L. R. 510; 70 L. R. 164 288
Bank of Montreal v. Little, 17 Gr. 685 545
Bank of Montreol v. Munroe, 23 U. C. R. 414 .....466, 469
Bank of Montreal v. McFaul, 17 Gr. 234 32
Bank of Montreal v. McTovish, 13 Gr. 395 475
Bank of Montreal v. Partridge, 3 O. W. N. 149 532
Bonk of Montreal v. Payne, 7 Man. L. R. 270 67
Baak of Montreal v. Pyaer, 11 C. L. T. 84 68
Bank of Montreal v. Richardson, 34 C. L. J. 329 426
Bonk of Montreal v. Stattea, 1 C. L. T. 66 .....255, 350, 358
Bank of New South Wales v. O'Connor, 14 App. Cas. 273....266, 431
Bonk of Nova Scotia v. Ward, 20 N. S. R. 230 533
Bank of Ottowo v. Johnston, 0 C. L. T. 251 244
Baak of Ottawo v. McLaughlin, 8 A. R. 543 ..129, 130, 240, 241, 570
Bank of Ottawa v. Smith, 16 L. J. N. S. 223 .....31, 57
Bank of Ottawa v. Wade, 21 O. R. 480 .....71, 324
Bank of Toronto v. Burton, 4 P. R. 56 .....220, 402
Bank of Torouto v. Hall, 6 O. R. 653 473
Bonk of Toronto v. Keilty, 17 P. R. 250.....242, 243
Bank of Toronto v. McDougall, 28 C. P. 345 93
Bank of Toroato v. Wilmott, 10 U. C. R. 73 32
Bank of Upper Canada v. Ackerman, 15 U. C. C. P. 363 206
Bonk of Upper Caaada v. Wallace, 2 P. R. 352 408
Bank of Whitehaven v. Thompson, W. N. (1877) 45 .....198, 199
Bank Russe v. Clark, W. N. (1894) 20 192
Bankes v. Jarvis (1903), 1 K. B. 549 148
Banks v. Hollingsworth (1893), 1 Q. B. 442 144
Banka v. Self, 5 Touat. 234 416
Banque d'Hochelaga v. Maritime News Co., 29 N. S. R. 358..244, 248
Banque National v. Betournay, 18 R. L. 175 206
Banque Provincial v. Arnoldi, 2 O. L. R. 264 206
Baaner v. Berridge, 18 Ch. D. 254 283
Barber v. Adams, 16 P. R. 156 .....199, 312
Borber v. Bingham, 20 C. L. J. 65 218
Barber v. Blaeberg, 19 Ch. D. 473 149
Barber v. Daniell, 12 C. P. 68 464
Barber v. Dallas, 83 Tex. 147 225
Borber v. McCuaig (2), 31 O. R. 593 5
Barber v. Russell, 0 P. R. 433 .....226, 245
Barber v. Wood, 2 M. & Rob. 172 .....203, 204
Barclay v. Sutton, 7 P. R. 14 .....111, 113
Bardell v. Miller, 7 C. B. 733 227
Baring and Doulton, Re, 8 T. L. R. 701 439
Borker v. Furlong (1891), 2 Ch. 185 534
Barker v. Lewis (1013), 3 Ch. 34 45
Barker v. Palmer, 51 L. J. Q. B. 110..70, 71, 74, 75, 171, 190, 191, 361
384, 465, 572
Bark-Fong v. Cooper, 49 S. C. R. 14 131

	PAGE
Barkwell's Case, Re, 11 M. L. R. 404	187
Barlow v. Bailey, 18 W. R. 783	319
Barnard v. Molson, 15 S. C. R. 716	417
Barned's Banking Co. (Ltd.) v. Reynolds, 36 U. C. R. 256	278
Barnes v. Cox, 16 C. P. 236	146
Barnes v. Glenton (1898), 2 Q. B. 223; (1899) 1 Q. B. 885	280
Barnes v. Marshall, 18 Q. B. 785	138, 157
Barnes v. Metcalfe, 17 U. C. R. 388	287
Barnes v. Williams, 1 Dowl. 615	294
Barnett v. Eccles (1900), 2 Q. B. 423	34
Barnum v. Turnbull, 13 U. C. R. 277	85, 86, 87
Barr v. Clarke, 8 C. L. T. 39	327
Barr v. McMillan, 7 O. L. R. 70	350
Barraclough v. Brown (1897), A. C. 615	77, 493, 503
Barrett v. Davies, 91 L. T. 736	568
Barrett v. Deere, M. & M. 200	283
Barrett v. Long, 3 H. L. Cases 395	263
Barrett v. Phillips, 33 O. L. R. 200	288
Barrie v. Toronto & Niagara Power Co., 11 O. L. R. 48	358
Barrie Gaa Co. v. Sullivan, 5 A. R. 100	247
Barrow v. Capreol, 2 U. C. L. J. 210	134
Barrow v. Isaacs (1891), 1 Q. B. 417	521
Barrowman v. Fader, 31 N. S. R. 29	132
Barry v. Barclay, 15 C. B. N. S. 849	389
Bartholomew v. Freeman, 3 C. P. D. 316	311
Bartholomew v. Rawlings, W. N. (1876), 56	544
Bartlett v. Bartlett Mines, Ltd., 3 O. W. N. 958	152, 153
Bartlett v. Wells, 1 B. & S. 836	398, 502
Bartram v. London Free Press, 18 P. R. 11	29
Barwick v. Barwick, 21 Gr. 39	321
Barwick v. De Blanquiere, 4 P. R. 267	285
Bassano v. Bradley, 1896, 1 Q. B. 645	502
Bassi v. Sullivan, 32 O. L. R. 14	85
Bateman v. Brider, 3 Q. B. 574	99
Bateman v. Hunt (1904), 2 K. B. 530	284
Bateman v. Pinder, 3 Q. B. 574	187
Bateman v. Mackay, 1 O. R. 34	285
Bateman v. Tounley, 2 Exch. 152	121, 123
Bath v. White, 3 C. P. D. 175	102
Bathard v. London Sewers Co., 54 J. P. 135	96
Bathurst v. Macpherson, 4 A. C. 256	163
Batt v. Price, 1 Q. B. D. 264	277
Batters, Ex parte: Re Harrison, 43 L. T. 2	144
Battershy v. O'Dell, 23 U. C. R. 482	238
Baum, Re: Ex parte Cooper, 10 Ch. D. 313	93
Baxter v. Gray, 3 M. & G. 771	466
Baxter v. Nurse, 6 M. & G. 935	137
Bayley v. Rimmell, 1 M. & W. 506	134
Baylis v. Dinely, 3 M. & S. 477	136
Baylis v. Lintott, L. R. 8 C. P. 345	29
Bazett v. Morgan, 24 Q. B. D. 48	271
Beal v. Michigan Central Ry., 19 O. L. R. 502	351
Beal v. South Devon Ry. Co., 3 H. & C. 337	353
Beale v. MacGregor, 2 T. L. R. 311	813
Beales v. Tennant, 20 L. J. Q. B. 188	233
Beam v. Beatty, 3 O. L. R. 345; 4 O. L. R. 554	172
	292, 326

	PAGE
Beamish v. Richardson, 49 S. C. R. 595	94
Bean v. Wade, 1 C. & E. 510	278
Beard v. Knight, 8 E. & B. 865	554
Beard v. Ketchum, 5 U. C. R. 114	284
Beasley v. Roney (1891), 1 Q. B. 509	404
Beattie v. Barton, 2 C. L. T. 104	511
Beattie v. Holmes, 29 O. R. 264	67, 79, 139
Beattie v. McDonald, 34 C. L. J. 198	75
Beatty v. Maxwell, 1 P. R. 85	431
Beatty v. Rumble, 21 O. R. 184	470
Beaty v. Fowler, 10 U. C. R. 382	47, 62
Beaty v. Cromwell, 9 P. R. 547	166
Beaty v. Hackett, 14 P. R. 395	406, 408, 420, 431, 434
Beauchamp v. Cass, 1 P. R. 291	172
Beaufort (Duke) v. Crawshay, L. R. 1 C. P. 699	312
Beaufort (Duke) v. Ashburnham (Earl), 13 C. B. N. S. 598	316
Beck v. Valin, 10 O. L. R., per Garrow, J.A., p. 27	6
Becker v. Ball, 18 U. C. R. 192	121
Beckett v. G. T. Ry. Co., 13 A. R. 184	342
Beddall v. Maitland, 17 Ch. D. 174	149, 152
Beddington v. Beddington, 1 P. D. 426	167
Bedford (Duke) v. Ellis (1901), A. C. 1	210
Beebe, Re, 3 P. R. 270	514
Beeston v. Collyer, 4 Bing. 313	135
Beeswing, Re, 10 P. D. 18	356
Beland v. L'Union St. Thomas, 19 P. R. 747	56
Belcher v. Brown, 24 U. C. R. 124	590
Belcher v. Goodered, 4 C. B. 472	174
Belhouse v. Mellor, 4 H. & N. 116	418
Bell, Re; Lake v. Bell, 34 Ch. D. 462	291
Bell v. Goodison Thresher Co., 12 O. L. R. 611	165
Bell v. Lamont, 7 P. R. 307	340
Bell v. Manning, 11 Gr. 142	32
Bell v. Oakley, 3 M. & S. 259	566
Bell v. Vincent, 7 D. & R. 233	192
Bell Telephone Co. and Minister of Agriculture, 7 O. R. 605	66
Bellamy v. Hoyle, L. R. 10 Ex. 220	571
Bellamy v. Jones, 8 Ves. 31	311, 312
Bellamy v. Porter, 28 O. L. R. 572	360
Belmont v. Aynard, 4 C. P. D. 352	537
Belt v. Lawes, 12 Q. B. D. 356	343
Bence v. Shearman (1898), 2 Ch. 582	190
Benedict v. Boulton, 4 U. C. R. 96	253
Benfield v. Stevens, Re, 17 P. R. 399	538
Benjamin v. Turner, 18 C. L. T. 395	154
Benner v. Edmonds, 30 O. R. 676	342
Bennett v. Bayes, 5 H. & N. 391	479
Bennett v. Brumfit, L. R. 3 C. P. 28	74, 107
Bennett v. Cosgriff, 38 L. T. 177	157
Bennett v. Parker, Ir. R. 2 Ch. 89	266
Bennett v. Potter, 2 C. & J. 622; 1 L. J. [illegible] 258	230
Bennett v. Powell, 1 Jur. N. S. 719	507
Bennett v. White (1910), 2 K. B. 643	148
Bennetts v. McIlwraith (1896), 2 Q. B. 464	220
Bentley v. Murphy, 2 O. L. R. 665	266
Bentley v. Vilmont, 12 App. Cas. 471	112

	PAGE
Berdan v. Greenwood, 20 Ch. D. 769 .....262, 270, 303, 305, 306,	353
Beresford-Hope v. Sandhurst, 23 Q. B. D. 79	260
Berkeley v. Elderkin, 1 E. & B. 805	127
Berkeley v. Thompson, 10 App. Cas. 45	200
Berlin and Waterloo Street Ry. Co. and Town of Berlin, Re, 19 O. L. R. 57	443
Berlin Piano Co. v. Trunisch, 15 P. R. 68.....	541
Bermondsey v. Ramsay, L. R. 6 C. P. 247	204
Berneski v. Tourangeau, 18 P. R. 263	407, 420
Bernadin v. North Dufferin, 10 S. C. R. 581.....	134
Berridge v. Berridge, 44 Ch. D. 168	33
Berridge v. Fitzgerald, L. R. 4 Q. B. 639	171
Berrington v. Phillips, 1 M. & W. 48	327
Berry v. Donovan, 21 A. R. 14	50
Berryman v. Wise, 4 T. R. 366	16
Bertrand v. Heaman, 11 Man. L. R. 245	407
Besley v. Besley, 37 Ch. D. 648	223
Bestwick v. Bell, 1 Terr. L. R. 103	372
Beswick v. Boffey, 9 Ex. 315	349
Bethell, Re, 34 Ch. D. 561	284
Betteley v. McLeod, 3 Bing. N. C. 405	295
Betterbee v. Davis, 3 Camp. 70	265
Bettes v. Farewell, 15 C. P. 540	327
Betts v. G. T. Ry. Co., 12 P. R. 86	208
Bevans v. Rees, 5 M. & W. 306	265
Beverley (Co.) v. Barlow, 10 C. P. 178	182
Bevin v. Bletcher, 23 U. C. R. 28	166
Bew v. Bew (1899), 2 Ch. 467	352
Bickers v. Speight, 22 Q. B. D. 7	228
Bidder v. Bridges, 26 Ch. D. 1	310, 311, 430, 597
Biddlecombe v. Bond, 4 A. & E. 332	38
Biddleson v. Whitel, 1 W. Bl. 507	9
Biddulph v. Gray, 5 Dow. 406	240
Bigelow v. Dougherty, 30 N. S. R. 393	231
Bigelow v. Powers, 25 O. L. R. 28	209
Biggerstaff v. Rowatt's Wharf (1896), 2 Ch. 93	227
Biggs v. Freehold Loan & S. Co., 26 A. R. 232.....	248, 189
Bilbie v. Lumley, 4 East, 469	419
Bingham v. Allport, 1 N. & M. 398	263
Bingham v. Cabbot, 3 Dallas 19	74
Birch, Re, 15 C. B. 743	75
Birch v. Birch, 8 P. D. 163	403
Bird v. Barstow (1892), 1 Q. B. 94	247
Bird v. Brown, 4 Ex. 796	483
Bird v. Gammon, 3 Bing. N. C. 883	283
Birdsall v. Corp. of Asphodel, 45 U. C. R. 149	15
Birk v. Guy, 4 Esp. 184	286
Birkin v. Forth, 33 L. T. 532	291
Birmingham Land Co. v. London & N. W. Ry. Co., 34 Ch. D. 261	219
Birmingham v. Malone, 32 C. L. J. 717	400
Birmingham Estates v. Smith, 13 Ch. D. 506	152
Birnie v. Marshall, 35 L. T. 373	86
Bishop, Ex parte, 15 Ch. D. 400	324
Bisnett v. Schrader, 12 O. W. R. 656	106
Bissicks v. Bath Colliery Co., 3 Ex. D. 174	466
Black v. Allan, 17 C. P. 248	265

PAGE
Black v. Johnston, Re, 5 O. W. N. 968 .....170, 173
Black v. Ottomaa Bank, 0 L. T. 703 205
Black v. Smith, Peake 88 .....263, 264
Black v. Wesley, 8 U. C. L. J. 277 .....143, 144
Black & Co.'s Case, L. R. 8 Ch. App. 254 151
Blackley v. Elite Costume Co., 0 O. L. R. 382 158
Blackwell v. Eagland, 8 E. & B. 54 172
Blades v. Lawrence, L. R. 9 Q. B. 374 .....22, 35
Blair v. Asseltine, 15 P. R. 211 355
Blake v. Beech, 1 Ex. D. 320 .....40, 240
Blake v. Shaw, 10 U. C. R. 180 134
Blaks v. Walsh, 29 U. C. R. 545 230
Blakeley v. Blaase, 12 P. R. 565 203
Blakewny v. Pattenshall (1894), 1 Q. B. 247 355
Blamey v. Blamey (1902), W. N. 138 171
Blaad v. Aadrews, 45 U. C. R. 431 .....75, 401
Blaad v. Rivers, 19 O. R. 407 .....73, 340, 545, 547
Blaney v. Headricks, 2 W. Bl. 761 325
Blates v. Arundel, 1 M. & G. 711 539
Blencarn v. Hodge's Distillery Co., 10 L. T. 608 135
Blenkham v. Loagstaffe, 52 L. T. 681; 54 L. J. Ch. 516 597
Bletcher v. Burn, 24 U. C. R. 250 121
Blewitt v. Gordon, 1 Dowl. N. S. 815 232
Bloor v. Husten, 15 C. B. 266 546
Bloxam v. Sanders, 9 B. & C. 941 113
Blue v. Fullerton, Ir. Rep. C. L. 233 204
Blumberg v. Life Interests Corp. (1897), 1 Ch. 171; (1898), 1 Ch. 27 263
Blyth v. Birmingham W. W. Co., 11 Ex. 781 389
Blyth v. Fladgate (1891), 1 Ch. 362 .....277, 278
Boast v. Firth, L. R. 4 C. P. 1 .....136, 506
Boatwright v. Boatwright, L. R. 17 Eq. 71 .....285, 288, 290
Boden v. Roscoe (1894), 1 Q. B. 608 .....114, 115
Bodenham v. Purchas, 2 B. & Ald. 39 431
Bodenham v. Ricketts, 6 N. & M. 537 67
Bodger v. Nicholls, 28 L. T. 441 .....100, 103, 108
Bodine v. Howe, 1 O. L. R. 208 364
Bogart v. Robertson, 11 O. L. R. 295 .....29, 32, 205, 206
Bohia & San Francisco Ry. Co., Re, L. R. 3 Q. B. 584 418
Bolce v. O'Loane, 7 P. R. 359 .....10, 275, 276, 320
Boileau v. Rowlin, 2 Ex. 665 8
Bokstal, Re, 17 P. R. 201 477
Bolingbroke v. Townsend, L. R. 8 C. P. 645 183
Bolton Partners v. Lambert, 41 Ch. D. 295 483
Bonaker v. Evans, 16 Q. B. 171 40
Bonar v. Macdonald, 3 H. L. C. 226 32
Bonbright v. Bonbright, 1 O. L. R. 629; 2 O. L. R. 240.....161, 162
Bond v. Conmee, 15 O. R. 710; 16 A. R. 398 567
Bongard v. McWhirtler, 12 U. C. R. 143 79
Bonomi v. Backhouse, 9 H. L. Cas. 503 6
Bonser v. Cox, 4 Beav. 379 29
Bonsey v. Wordsworth, 18 C. B. 325 138
Boorman v. Nash, 8 B. & C. 145 398
Booth v. Clive, 10 C. B. 827 .....21, 91
Booth v. Moffatt, 11 Man. L. R. 25 .....256, 354
Booth v. Preston and Berlin Ry. Co., 6 U. C. L. J. 57 540

	PAGE
Booth v. Trail, 12 Q. B. D. 8	390, 400, 403
Booth v. Hurl. L. R. 10 Eq. 182	363
Booth v. Vlcars, 13 L. J. Ch. 147	179
Born v. Turner (1900), 2 Ch. 211	34
Borough of Freeport v. Marks, 59 Penn. 253-257	74
Borradaile v. Nelson, 14 C. B. 655	200
Borthwick v. Walton, 15 C. B. 501	156, 157, 158
Borthwick v. Ravenscroft, 5 M. & W. 31	182
Bos v. Helsham, L. R. 2 Ex. 72	544
Boston Deep Sea Co. v. Ansell, 39 Ch. D. 339	135
Boswell v. Piper, 17 P. R. 257	167, 202
Boswell v. Roberts, Barnes 422	192
Bothwell v. Burnside, 4 Can. Cr. Cas. 450	378
Bottomley v. Brougham (1908), 1 K. B. 584	21
Bouch v. Sevenoaks, 4 Ex. D. 138	400
Boucbler v. Patton, 3 U. C. L. J. 45	233
Boughton v. Citizens Ins. Co., 11 P. R. 110	207
Boultbee v. Burke, 0 O. R. 80	288
Boultbee v. Stubbs, 18 Ves. 1	32
Boulton v. Laugmalr, 17 C. L. T. 397	270
Boulton v. Smith, 17 U. C. R. 400	468
Bourne v. O'Donoghue, 17 P. R. 522	231, 232
Bowden, Re; Andrew v. Cooper, 45 Ch. D. 444	219, 290
Bowen, Re, 15 Jur. 1196	76, 86
Bowerman v. Phillips, 15 A. R. 679	467
Bowes v. Foster, 2 H. & N. 779	521
Bowes v. Caustic Soda Syndicate, 0 T. L. R. 328	245
Bowden v. Greenwood, L. R. 13 Eq. 281	283
Bowie, Re, 16 Ch. D. 484	159
Bowles v. Johnston, 1 W. Bl. 36	292
Bowman v. Bowman, 1 Ch. Cham. 172	400
Bown v. Child, 3 Sim. 457	311
Box v. Green, Re, 9 Ex. 503	560, 563
Boyce, Re, 2 E. & B. 521	517
Boyce v. Sacker, L. R. 30 Ch. D. 351	195
Boyd v. Haynes, 5 P. R. 15	226, 402, 404
Boyd v. McNutt, 9 P. R. 403	507
Boyd v. Nasmith, 17 O. R. 40	186
Boyd v. Richards, 20 O. L. R. 119	131
Boyd v. Sergeant, 19 O. W. R. 377	176, 425
Boyd v. Spriggins, 17 C. L. T. 58	173
Boyle v. Rothschild, 16 O. L. R. 424	300, 306, 446
Boys v. Simpson, 8 Ir. C. L. R. 523	403
Boys v. Smith, 9 C. P. 27	116
Boy's Home v. Lewis, 3 O. L. R. 209	335
Boyse, Re; Crofton v. Crofton, 20 Ch. D. 760	304, 305
Broce v. Calder (1895), 2 Q. B. 253	135
Bracken, Re, 43 Ch. D. 1	338
Brackenbury v. Laurie, 3 Dowl. 180	538
Bradburn v. Edinburgh, 5 O. L. R. 657	263
Bradburn v. Hall, 16 Ir. 518	489
Bradbury, Ex parte, 14 C. B. 15	506
Bradlaugh, Ex parte, 3 Q. B. D. 509	145
Bradley v. Bradley, 1 O. W. N. 110	137
Bradley v. Chamberlyn (1893), 1 Q. B. 439	237
Bradley v. Fisher, 13 Wallace 335	74

	PAGE
Brndley v. Jsmes, 11 C. B. 825	287
Brsdley v. McIntosh, 5 O. R. 227	296
Brsdley v. Richards, 8 Bing. 57	296
Brsdley v. Wilson, 8 O. L. R. 184	300
Brndshaw v. Duffy, 4 P. R. 50	86
Brndshaw v. Widdington (1902), 2 Ch. 430, 450	288, 333
Brsham v. Sawyer, 1 D. & L. 466	240
Brsine v. Hunt, 2 Dowl. 391	539
Brsmston v. Rohins, 4 Bing. 11	431
Brsnch v. Roth, 10 O. L. R. 284	133
Brsnd v. Green, 12 Mnn. L. R. 337	402
Brsnden v. Hihbert, 4 Camp. 37	94
Brsnd v. Craddock, 27 L. J. Ex. 314 (Amer. reprint, 3 H. & N. 958)	89
Brsnd v. Duniop (1905), A. C. 454	186
Brsnscombe v. Scarborongh, 6 Q. B. 13	398
Brsnwhite, Ex psrte, 40 L. T. 652	153
Brash, qui tsm v. Haggart, 16 C. P. 415	227
Brown v. Dnvis, 14 C. L. T. 1914; 9 Man. L. R. 534	202
Bray v. Ford (1896), A. C. 44	252
Bray v. Tofield, 18 Ch. D. 551	219
Brazili v. Johns, Re, 24 O. R. 209	67, 69, 70, 76, 80, 170, 177
Brearley v. London & N. W. Ry. Co., 15 T. L. R. 237	253
Breed, Re, 1 Ch. D. 226	411
Breeden v. Capp, 9 Jnr. 781	78
Brega v. Hodgson, 4 P. R. 47	258
Brenan v. Crawley, 16 W. R. 754	159
Brenan v. Morrisey, 26 L. R. Ir. 618	403
Brennan v. Cameron, 1 O. W. N. 430	7
Bresiauer v. Barwick, 36 L. T. 52	152
Brethour v. Brooke, 15 P. R. 205	542
Brett v. Smith, 1 P. R. 609	173
Breuil, Ex parte, 16 Ch. D. 488	158, 160
Brewer v. Dew, 11 M. & W. 625	120
Brice v. Bannister, 3 Q. B. D. 569	187, 188, 189
Bridger v. Savage, 15 Q. B. D. 363	93
Bridges v. Dongias, 13 C. L. J. 358	161
Brigden v. Heighes, 1 Q. B. D. 330	96
Brigstocke v. Smith, 1 C. & M. 483; 8 Tyr. 445; 38 R. R. 676	286
Briggs, In re (1906), 2 K. B. 209	186
Briggs v. Boss, L. R. 8 Q. B. 263	172
Briggs v. Briggs, 5 P. D. 163	13
Briggs v. Freehoid, 26 A. R. 232	291, 331
Briggs v. Wiison, 5 D. M. & G. 12	287, 291
Brighnm v. Smith, 3 Ch. Cham. 313	274
Brighton Arcade Co. v. Dowling, L. R. 3 C. P. 175	476
Brighton Sewers Act, 9 Q. B. D. 723	83
Brindley, Ex parte, 35 W. R. 596	409
Brishane v. Martin (1892), A. C. 249	252, 342
Briscoe v. Stephens, 2 Bing. 213	67
Briscoe v. W. of Engiand L. M. & Inv. Co. v. Taylor, 24 O. R. 286	32
British Coiumhia Fur Co. v. Tugweii, 20 C. L. T. 144	216
British Industry Life Ass, Co. v. Wnrd, 17 C. B. 644	354
British Wagon Co. v. Grny, 1896, 1 Q. B. 35	5
Britton v. Branaom (1898), 1 Q. B. 219	272
Britton v. Rossiter, 11 Q. B. D. 123	136

PAGE

Broad v. Ham, 5 N. C. 725 531
Broad v. Perkins, 20 Q. B. D. 533 ..... 67, 78
Brock v. McLean, Tay. R. 398 253
Brock v. Parker, 5 Ind. 538 225
Brocklebank, Ex parte, 6 Ch. D. 358 133
Broderick v. Scole, L. R. 6 C. P. 98 172
Brodericht v. Merner, Re, 17 P. R. 264 144
Bromley, Ex parte; Re Redfearn, 12 L. T. 783 302
Brook v. Hook, L. R. 6 Ex. 95 483
Brooker v. Smith, 4 L. T. 545 197
Brookfield v. Brooke (School Trustees), 12 P. R. 485 83
Brooks v. Aylmer, 73 L. T. Jour. 80 243
Brophy and Village of Gananoque, Re, 26 C. P. 290 15
Brophy v. Victoria, 2 O. L. R. 651 151
Broster, Re; Ex parte Pruddah (1897), 2 Q. B. 429 ..... 554, 555
Broughner v. Meyer, 5 Colo. 71 95
Brown's Estate, Re (1893), 2 Ch. 300 275
Brown v. Blackwell, 26 C. P. 43 260
Brown v. Cinqmars, 2 P. R. 202 444
Brown v. Cocking, L. R. 3 Q. B. 672 ..... 76, 86
Brown v. Comrs. of Railways, 15 App. Cas. 246 252
Brown v. Croft, 1 Chitty Pr. 82 135
Brown v. Gossage, 15 C. P. 20 206
Brown v. Grady, 31 O. R. 73 233
Brown v. Gugy, 2 Moo. P. C. N. S. 341 359
Brown v. Harper, 68 L. T. 488 291
Brown v. London & N. W. Ry. Co., 4 B. & S. 326 162
Brown v. Mitchell, 7 U. C. L. J. 298 125
Brown v. Muller, L. R. 7 Ex. 319 398
Brown v. Murray, 4 O. & R. 836 257
Brown v. McCruffin, 5 P. R. 231 406
Brown v. Nelson, 11 P. R. 121 ..... 152, 478
Brown v. Overbury, 11 Ex. 715 94
Brown v. Paxton, 19 U. C. R. 426 31
Brown v. Perrott, 4 Beav. 585 474
Brown v. Porter, 11 P. R. 250 ..... 258, 259
Brown v. Ruttan, 7 U. C. R. 97 551
Brown v. Rutherford, 14 Ch. D. 687 279
Brown v. Shaw, 1 Ex. D. 425 ..... 361, 384, 447
Brown v. Toronto, 18 O. W. R. 996 276
Brown v. Watkins, 6 Q. B. D. 125 318
Brown v. Wildbore, 1 M. & G. 276 240
Brown v. Wright, 35 U. C. R. 378 31
Brown v. Zimmerman, 15 U. C. R. 568 110
Browne v. Smith, 1 P. R. 347 ..... 182, 235
Bruce v. Ancient Order of United Workmen, 11 Q. L. R. 633 ..... 320, 546
Bruce v. Hunter, 3 Camp. 467 324
Brune v. Thompson, 4 Q. B. 543 270
Brunning v. Oldham, 75 L. T. 602 251
Brunsden v. McHumphrey, 14 Q. B. D. 141 ..... 6, 139
Brunskell v. Powell, 1 L. M. & P. 550 140
Bryant v. Herbert, 3 C. P. D. 689 106
Bryce v. Kinnie, 17 Q. B. D. 544 ..... 507, 530, 541
Brydges v. Fisher, 4 M. & Sc. 458 ..... 304, 311
Brydges v. Plumptre, 9 D. & Ry. 746 280
Bryne v. Knipe, 5 D. & L. 659 501

PAGE
Bryson v. Claudinan, 7 U. C. R. 198 253
Bubb v. Yelverton: Re. Ker. 24 L. T. 822 93
Buccleugh v. Met. Board of Works, L. R. 5 Ex. 221 65
Buchanan v. Frank, 15 C. P. 198 466
Buck v. Robson, 3 Q. B. D. 686 187
Buckley v. Barber, 6 Ex. 164 383
Buckley v. Cooke, 7 K. & J. 20 312
Buckley v. Hann, 5 Ex. 43 .....158, 162
Budgett v. Budgett (1895), 1 Ch. 202 334
Buffalo & Lake Huron Ry. Co. v. Brooksbanks, 16 U. C. R. 337.. 483
Buffalo & Lake Huron Ry. Co. v. Hemingway, 22 U. C. R. 562... 71
Buffington v. Gerrish, 15 Mass. 156 111
Bugbee v. Clerque, 27 A. R. 96 270
Buggin v. Bennet, 4 Burr. 2035 67
Building & Loan Ass. v. Helmrod, 3 C. L. T. 361..129, 130, 218, 571
Building & Loan Ass. v. Poaps, 27 O. R. 476 .....251, 272
Bullen v. Moodie, 13 C. P. 126 .....40, 56, 63, 302, 500
Bullen v. Dunlop, 2 Ex. D. 43 450
Bulll Coal Co. v. Osborne (1899), A. C. 351 48
Bunbury v. Fuller, 9 Ex. 111 77
Bunch v. Kenington, 1 Q. B. 680 115
Burford v. Chambers, 25 O. R. 693 .....74, 438, 443
Burgess, Re, 25 Ch. D. 243 133
Burgess v. Tully, 24 C. P. 549 .....488, 498
Burham v. Hall, 15 C. L. J. 204 514
Burke v. Glover, 21 U. C. R. 294 .....123, 437
Burke v. McWhirter, 35 U. C. R. 1 .....111, 112
Burke v. Shaver, 29 O. L. R. 365 101
Burlinson v. Hall, 12 Q. B. D. 347 .....185, 180
Burnett v. Hope, 9 O. R. 10 135
Burnett v. Eastman, 67 L. J. Q. B. 517 400
Burnham, doe d. v. Simmonds, 9 U. C. R. 436 489
Burns v. Butterfield, 12 U. C. R. 140 82
Burns v. Rutherford, 12 U. C. R. 146 82
Burr v. Marsh, M. T. 4 Vic. 63
Burr v. Munroe, 6 O. S. 57 112
Burrowes, In re, 18 C. P. 463.....69, 70, 172, 258, 324, 361
Burstat v. Beyfus, 26 Ch. D. 35 108
Burton v. Roberts, 6 H. & N. 93 461
Burton v. War Ordinance Syndicate, 8 T. L. R. 246 319
Ruse v. Roper, 41 L. T. 457 181
Rush, Re, 10 C. L. T. 184 14
Bush v. Fry, 12 O. R. 122 112
Bush v. Pinlott, 9 C. P. 54 111
Rushell v. Moss, 11 P. R. 252 .....76, 85, 86
Bushill, Ex parte, 41 Sol. Jour. 625; 4 U. C. L. J. 243; 4 U. C. L. J. 259; 11 O. L. J. 156 556
Buskin, Re, 15 R. 117 282
Butler v. Ahlewhite, 6 C. B. N. S. 747 160
Butler v. Butler, 14 Ch. D. 329 205
Butler v. Ford, 1 Cromp. V. M. 662 16
Butler v. Knight, L. R. 2 Ex. 109 .....260, 367
Butler v. McMicken, 32 O. R. 422 10
Butler v. McMillan, 32 O. R. 422 480
Butler v. O'Neill, 4 C. P. D. 354 172
Butler v. Rosenfeldt, 8 P. R. 175 518

	PAGE
Butler v. Toronto Multoscope Co., 11 O. L. R. 12	300
Butler v. Wearing, 17 Q. B. D. 182	433
Butt v. Newman, Gow. 97	565
Butters, Ex parte; Re Harrison, 14 Ch. D. 265	355
Butterworth v. Walker, 3 Burr 1689	75
Bullen v. Thompson, L. R. 4 C. P. 330	135

C.

Cadman v. Lubbock, 5 D. & R. 289	265
Caine v. Coulton, 1 H. & C. 764	431
Caird v. Fitzell, 2 P. R. 262	234
Caird v. Moss, 33 Ch. D. 22, 35	140
Cairns v. Corth, 10 P. R. 100	100
Cairns v. Ottawa (Water Commissioners), 25 C. P. 551	278
Calsse v. Tharp, 5 P. R. 265	404
Calder v. Halkett, 3 Moo. P. C. 28	22
Caldwell v. Cocksbutt, 5 O. W. N. 591	8
Caledon (Trustees) v. Caledon (Tp.), 12 C. P. 301	563
Caledonian Ins. Co. v. Gilmour (1893), A. C. 85	68
Caledonian Ry. Co. v. Greenock & Wemyss Ry. Co., L. R. 2 H. L. (Sc.), 347	68
Caledonian Ry. Co. v. Lockhart, 3 Marq. 808	440
Calvert v. Moggs, 10 A. & E. 632	567
Cambefort v. Chapman, 19 Q. B. D. 229	7
Cameron, Re; Mason v. Cameron, 15 P. R. 272	338
Cameron v. Allen, 10 P. R. 102	237, 340, 433
Cameron v. Campell, 1 P. R. 173	202
Cameron v. Wart, 3 A. R. 194	170, 234, 392
Campbell, Re, 10 U. C. R. 41	480
Campbell v. Barrie, 31 U. C. R. 270	481
Campbell v. Beamish, 8 U. C. R. 520	241
Campbell v. Coulthard, 25 U. C. R. 621	478, 494, 524, 533
Campbell v. Cushman, 4 U. C. R. 9	538
Campbell v. Davidson, 19 U. C. R. 222	447
Campbell v. Dellhanty, 24 U. C. R. 236	488
Campbell v. Doherty, 18 P. R. 243	542
Campbell v. Elzier, 10 P. R. 440	320
Campbell v. Farley, 18 P. R. 97	204, 210, 220
Campbell v. Lepan, 21 C. P. 363	113
Campbell v. Maddea, Drn. R. 2	50
Campbell v. Peden, 3 U. C. L. J. 68	404
Campbell v. Wheler, 17 P. R. 289	352
Camplon v. Palmer (1896), 2 Ir. R. 445	400
Canada Central Ry. Co. v. McLaren, 8 A. R. 564	303
Canada Cotton Co. v. Parmalee, 13 P. R. 308	167
Canada General Electric v. Tagona, 6 O. L. R. 641	245
Canada General Electric v. Dodds, 7 O. W. N. 605	245
Canada Guarantee Co. v. Milne, 25 Grant 261	33
Canada Permanent v. East Selkirk, 13 C. L. J. 351	406
Canada Permanent v. Todd, 22 Q. R. 515	5, 8
Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527	150
Canada West F. M. & S. Ins. Co. v. Merritt, 20 U. C. R. 444	30
Canadian Bank of Commerce v. Crouch, 8 P. R. 437	407
Canadian Bank of Commerce v. Jenkins, 10 O. R. 215	486
Canadian Bank of Commerce v. Middleton, 12 P. R. 21	321

PAGE
Canadian Bank of Commerce v. Northwood, 14 O. R. 207..... 205
Canadian Bank of Commerce v. Northwood, 8 C. L. T. 356; 5 Man. L. R. 342 152
Canadian Bank of Commerce v. Perram, 31 O. R. 116 222
Canadian Bank of Commerce v. Tasker, 8 P. R. 351 540
Canadian Bank of Commerce v. Tennant, 5 O. L. R. 524 195
Canadian Land & Emigration Co. v. Dysart, 9 Q. R. 495.....16, 323
Canadian Mining & Investment Co. v. Wheeler, 3 O. L. R. 210.. 490
Canadian Oil Co. v. McCannell, 27 O. L. R. 549...68, 76, 78, 81, 159, 170
C. P. R. v. Carruthers, 17 P. R. 277 538
C. P. R. v. Cobban, 22 S. C. R. 132 344
C. P. R. v. Grant, 11 P. R. 208 .....154, 478
C. P. R. v. Matthews, 5 O. W. N. 437 240
C. P. R. v. Quebec, 30 S. C. R. 73 8
C. P. R. v. Toronto, 5 O. L. R. 717; (1906) A. C. 33 326
Canadian Ry. Acc. Ins. Co. v. Kelly, 17 Man. R. 645 306
Canadian Ry. Acc. Ins. Co. v. Williams, 21 O. L. R. 172 ....473, 474
Canadian Securities Co. v. Prentice, 9 P. R. 329 .....152, 154
Cann v. Clappertan, 10 Ad. & El. 582 (589) 92
Canaan v. Wood, 2 M. & W. 470 431
Canalf v. Bogart, 6 C. P. 474 .....116, 120, 123
Cannan v. Toronto Corn Exchange, 5 A. R. 268 .....10, 74
Cappelens v. Brown, W. N. (1875) 231 153
Carey v. Lawless, 13 U. C. R. 285 176
Carlill v. Carbolic Smoke Ball Co. (1892), 2 Q. B. 484..... 93
Carlisle v. Orde, 7 C. P. 459 .....230, 240
Carlyle v. Oxford, 30 O. L. R. 413 .....9, 13, 274
Carmarthen & Cardign Ry. Co. v. Manchester & Milford Ry. Co., L. R. 8 C. P. 60 42
Carney v. Plummer (1897), 1 Q. B. 634 93
Caron v. Graham, 18 U. C. R. 315 .....113, 525, 528, 542
Carpenter v. Mason, 12 A. & E. 620 510
Carpenter v. Pearce, 27 L. J. Ex. 143 542
Carr v. Baycroft, 4 U. C. L. J. 209 410
Carr v. London & N. W. Ry. Co., L. R. 10 C. P. 307 451
Carratt v. Marley, 1 Q. B. 18 22
Carroll v. Lunn, 7 C. P. 516 483
Carruthers v. Graham 9 Dowl. 947 305
Carruthers v. Reynolds, 12 C. P. 596 473
Carslake v. Mapledoram, 2 Term. R. 473 72
Carsley v. Fiskin, 4 P. R. 225 157
Carter v. Clarkson, 15 P. R. 370 218
Carter v. Long, 26 S. C. R. 430 .....116, 113, 128, 537
Carter v. Smith, 4 E. & B. 696 .....75, 339, 542
Carter v. Stewart, 7 P. R. 85 545
Carter v. White, 25 Ch. D. 666 206
Carver v. Bucclengh, 33 Sol. Jur. 286 245
Carvell v. Fortune, 12 C. P. 504 440
Carvell v. Greenwood, 3 P. R. 175 118
Cartwright v. Hinds, 3 O. R. 384-395 .....159, 522
Carus Wilson's Case, 7 Q. B. 1015 556
Casford v. Poor Law, 103 L. T. 463 30
Cashmere, The, 62 L. T. 814 .....44, 53, 447
Caspar v. Keachie, 41 U. C. R. 599 .....55, 276
Cassidy v. Firman, 15 W. R. 432 287

	PAGE
Castle v. Baird, 1 O. W. N. 403; 15 O. W. R. 273	213
Castle v. Rutlan, 4 C. P. 252	468
Castle (F. J.) Co. v. Korlu, 18 O. L. R. 462	245, 340
Caston v. Consolidated Plate Glass Co., 26 A. R. 63	220
Castrique v. Imrie, L. R. 4 H. L. 414	112
Caswell v. Catton, 9 U. C. R. 382	121
Catarqui Cemetery v. Burrowes, 3 U. C. L. J. 47	144
Catheart v. Haggart, 37 U. C. R. 47	287, 288
Caudle v. Seymour, 1 Q. B. 889	521
Caughell v. Brower, 17 P. R. 438	56
Cavallier v. Michael, 17 L. T. 290	231
Cavendish v. Greaves, 24 Beav. 163	153
Cowley v. Furnell, 12 C. B. 291	280
Cazenove v. Vaughan, 1 M. & S. 4	314
Central Bank v. Ellis, 20 A. R. 304	403
Chabot v. Morpeth, 15 Q. B. 446, 450	66
Chadd v. Meagher, 24 C. P. 54	343
Chadwick v. Ball, 14 Q. B. D. 855	176
Chalile v. York, 6 Esp. 45	325
Challoner v. Lobo, 1 O. L. R. 202; 32 S. C. R. 505	353
Chalmers v. Piggot, 11 Gr. 475	480
Chamberlain v. Chamberlain, 11 P. R. 50	150, 152
Chamberlain v. Kine, L. R. 6 C. P. 474	92
Chamberlen v. Clark, 1 O. R. 135; 9 A. R. 213	335
Chambers v. Chambers, 3 U. C. L. J. 205	146
Chambers v. Green, L. R. 20 Eq. 552	78
Chambers and Tp. of Burford, Re, 25 O. R. 276	15
Chandler v. Grieves, 2 H. Bl. 606 (note); 3 R. R. 525	136
Chandler v. Grand Trunk Ry., 5 O. L. R. 580	219
Chandler v. Sanger, 114 Mass. 364	530
Chapman v. Biggs, 11 Q. B. D. 27	404
Chapman v. Davis, 1 Dowl. N. S. 239	293
Chapman v. Knight, 5 C. P. D. 308	255
Chapman v. Speller, 14 Q. B. 621	465
Chapman v. Withers, W. N. (1887) 235	350
Chard v. Jervis, 9 Q. B. D. 178	508
Chard v. Rae, 18 O. R. 375	12, 275, 290
Charity Comrs. of England, Re, 1807, 1 Q. B. 407	82
Charlebois v. Martin, 3 O. W. N. 1155	245
Charlebois v. Surveyor, 27 S. C. R 556	531
Charles v. Branker, 12 M. & W. 743	276
Charlton v. Charlton, 16 Ch. D. 273	364
Charlton v. Morris (1895), 2 Ir. R. 541	160
Charrington v. Witherby, 23 Sol. Jour. 230	195
Chase v. Sing, 6 B. C. R. 454	69
Chasemore v. Turner, L. R. 10 Q. B. 500	282
Chatfield v. Comerford, 4 F. & F. 1008	531
Chatham Harvester v. Campbell, 12 P. R. 666	512
Chatterton v. Crothers, 9 O. R. 683	131
Chatterton v. Watney, 17 Ch. D. 261	403, 416, 417
Cheese v. Scales, 10 M. & W. 488	3
Cheshire v. Burlington, 34 Conn. 329	411
Cheslyn v. Dalby, 4 Y. & C. 238	283, 285
Chesterton v. Farler, 7 A. & E. 713	66, 70, 71
Chevalier v. Ross, 3 O. L. R. 219	267
Chew v. Holroyd, 8 Ex. 249	77

PAGE

Chichester v. Gordon, 25 U. C. R. 527 50
Chief Superintendent, Re; Shorey v. Thresher, 30 U. C. R. 504.. 15
Chilten v. Carrington, 15 C. B. 730 100
Chinn v. Bullen, 8 C. B. 447 570
Chisholm v. Doulton, 58 L. J. M. C. 133 389
Chisholm v. Morse, 11 C. P. 589 7
Chisholm v. Oakville, 12 A. R. 225 .....76, 77
Chisholm v. Prov. Ins. Co., 20 C. P. 11 476
Chivers v. Savage, 5 E. & B. 697 .....75, 89
Christie v. Casey, 31 C. L. J. 35 .....400, 403
Christie v. Taunton (1893), 1 Ch. 181 190
Christie v. Toronto Junction, 24 O. R. 443 .....74, 443
Christie v. Unwin 63
Chowe v. Price, 22 Q. B. D. 429 405
Christmas, Re, 33 Ch. D. 332 87
Christmas v. Eick, 6 D. & L. 156 193
Christopher v. Croll, 16 Q. B. D. 66 171
Christopherson v. Lotinga, 15 C. B. N. S. 809 502
Churcher v. Stringer, 2 B. & Ald. 777 325
Churchill v. Durham, 29 C. P. 474 590
Churchill v. Siggers, 3 E. & B. 937 464
Churchward v. Coleman, L. R. 2 Q. B. 18 .....22, 543, 546
Cinnamon v. Woodmen of the World, 4 O. W. N. 1042 258
Citizens' Ins. Co. v. Parsons, 7 App. Cas. 96 27
Clark v. Baillie, 19 O. L. R. 506 327
Clark v. Barber, Re, 26 O. R. 47 .....138, 139, 140
Clark v. Bellamy, 30 O. R. 532; 27 A. R. 435 .....288, 290
Clark v. Bradlaugh, 8 Q. B. D. 63 465
Clark v. Cullen, 0 Q. B. D. 355 314
Clark v. Hooper, 10 Bing. 480 284
Clark v. McDonald, 4 O. R. 310.....130, 176, 207, 240, 310, 397
Clark v. Regina, 14 Q. B. D. 92 26
Clark v. St. Catharines, 10 P. R. 205 320
Clark v. Silvester, noted in Re Radcliffe v. Crescent M. & I. Co., 1 O. L. R. 332 67
Clark v. Smith, 2 H. & N. 753 210
Clark v. Woods, 2 Ex. 395 .....530, 566, 567
Clarke, Re (1898), 1 Ch. 336 .....63, 467
Clarke v. Barron, 6 A. R. 309 .....253, 345
Clarke v. Berger, 36 W. R. 809 226
Clarke v. Birley, 41 Ch. D. 422 .....82, 205
Clarke v. Cobley, 2 Cox 173 292
Clarke v. Cookson, 2 Ch. D. 746 385
Clarke v. Davey, 4 Moore 465 565
Clarke v. Easton, 14 U. C. R. 251 470
Clarke v. Fuller, 2 U. C. R. 99 240
Clarke v. Garrett, 28 C. P. 75 483
Clarke v. Moore, 94 L. T. Jour. 390 561
Clarke v. Skipper, 21 Ch. D. 134 385
Clarke v. Traske, 1 O. L. R. 207 23
Clarke, doe d. v. Thompson, 9 Dowl. 948 293
Clarke and Chamberlain, Re, 18 O. R. 270 182
Clarkson v. Devon, 17 P. R. 92, 206 .....227, 243
Clarkson v. Musgrave, 0 Q. B. D. 386 351
Clarkson v. McNaught, 3 O. W. N. 741 238
Clarkson v. Severs, 17 O. R. 592 .....433, 477

PAGE

Clarkson and Forgie v. Wishart (1913), A. C. 828 473
Clay Comm. Telephone Co. v. Root, 33 Alb. L. J. 215 137
Cleave v. Jones, 7 Ex. Ch. 421 .....280, 297
Cleeves v. Howard, 4 Ch. D. 413 223
Clegg v. Baretta, 56 L. T. 775 100
Clement v. Kirby, 7 P. R. 103 518
Clements, Re, 46 L. J. Ch. 375 558
Clerk v. Withers, 2 Ld. Raymd. 1074 491
Cleveland Press v. Fleming, 24 O. R. 335 .....73, 103
Clifton v. Crawford, 18 P. R. 316 218
Clifton v. Davis, 7 E. & B. 302 545
Clifton v. Furley, 7 H. & N. 783 83
Clinton v. Peabody, 7 M. & G. 399 307
Clissold v. Machell, 25 U. C. R. 80 557
Cloche, Re, 65 L. T. 455; 61 L. J. Ch. 60 597
Close v. Phipps, 7 M. & G. 586 530
Clough, Ex parte; Re West (1892), 2 Q. B. 102 431
Clough v. London & N. W. Ry. Co., L. R. 7 Ex. 26 112
Clowes v. Hilliard, 4 Ch. D. 415 221
Clydebank v. Ramos (1905), A. C. 6 131
Coates, Ex parte; Re Skelton, 5 Ch. D. 979; 6 L. C. G. 17 519
Cobb v. Charter, 32 Conn. 358 530
Cobbett v. Hudson, 1 E. & B. 11 260
Coburn v. Collins, 56 L. T. 431 251
Cock v. Allcock, 21 Q. B. D. 178 .....303, 304
Cochrane v. Hamilton Prov. & Loan Society, 15 O. R. 128 8
Cockburn v. Imperial Lumber Co., 26 A. R. 19; 30 S. C. R. 80.. 443
Cockerell v. Van Diemans Land Co., 16 C. B. 261 247
Codd v. Cube, 1 Ex. D. 352 566
Coe and Township of Pickering, In re, 24 U. C. R. 439 15
Coffyn v. Dyke, 48 J. P. 757 .....551, 559
Cohen v. Hale, 3 Q. B. D. 371 .....399, 406
Cohen v. Mitchell, 25 Q. B. D. 262 186
Cohen v. Webber, 24 O. L. R. 173 .....185, 189
Coke v. Jones, 4 L. T. 306 84
Cole v. Davis, 1 Ltd. R. 724 466
Cole v. Miles, W. N. 1888, 150 85
Cole v. Sherard, 11 Ex. 482 465
Colebrook v. Dobbs, 3 Burr. 1319 258
Colledge v. Horn, 3 Bing. 119; 28 R. R. 606 283
Coleman v. Bank of Montreal, 16 P. R. 159 304
Coleman v. Kerr, 27 U. C. R. 5 112
Coles v. Coles, L. R. 1 C. P. 70 .....295, 296
Colin Campbell, Re, 9 C. L. T. 145 192
Collette v. The King, 16 Can. Cr. Cas. 282 378
Colley v. Richards, 19 Beav. 401 297
Collinge v. Heywood, 9 A. & E. 633 277
Collingridge v. Paxton, 11 C. B. 683 .....474, 475
Collins v. Collins, 26 Beav. 306 .....475, 544
Collins v. Hickok, 11 A. R. 620 242
Collins v. Rose, 5 M. & W. 194 566
Collins v. Slimson, 11 Q. B. D. 142 131
Collinson v. Margesson, 27 L. J. Ex. 305 286
Collis v. Lewis, 20 Q. B. D. 202 .....356, 548
Col[illegible] v. Slack, 1 H. & N. 605 282
Colonial Bank v. Whinney, 30 Ch. D. 261 186

PAGE

Colonial Bank of Australasia v. Willan, L. P. 5 P. C. 417..6, 75, 76, 1215
Colvin v. Buckle, 8 M. & W. 680 278
Colvin v. Rich, 3 Port. 175 401
Combined Weighing & Ld. M. Co., Re, 43 Ch. D. 99 .....416, 417
Comfort v. Betts (1891), 1 Q. B. 737 185
Commercial Bank v. Hughes, 3 U. C. R. 361; 4 U. C. R. 167 253
Commercial Bank v. Jarvis, 5 U. C. L. J. 66 403
Commercial Bank v. Watson, 5 L. J. 163 486
Commercial Bank v. Wilson, 3 E. & A. 257; 14 Gr. 473 467
Commercial Bank v. Woodruff, 21 U. C. R. 602 444
Commercial Bank of Manitoba, Re (Barkwell's Case), 11 Man. L. R. 494 186
Commissioner of Railways v. Brown, 13 A. C. 133 .....252, 342
Compagnie General v. Low (1899), A. C. 431 .....161, 201
Comstock v. Gaibraith, 21 U. C. R. 4297 309
Comstock v. Harris, 12 P. R. 17; 13 O. R. 467 293
Comstock v. Tyrrell, 12 C. P. 173 309
Concha v. Concha, 11 A. C. 541 .....5, 6
Congrieve v. Evetts, 10 Ex. D. 298 551
Confederation Life Assn. and Cordingly, Re, 19 P. R. 16, 89.... 538
Confederation Life Assn. v. Kinnear, 23 A. R. 497 292
Conmee v. C. P. Ry. Co., 11 P. R. 149; 12 A. R. 744....74, 149, 244, 298, 438, 439
Connan, Re; Ex parte Hyde, 26 Q. B. D. 600 415
Connecticut Mut. Fire Ins. Co. v. Kavanagh (1892), A. C. 473.. 354
Connecticut Mut. Fire Ins. Co. v. Moore, 6 A. C. 644 .....252, 352
Connell v. Hickok, 105 A. R. 518 .....110, 121, 537
Connor v. Dempsey, 6 O. L. R. 354 159
Connor v. Princess Theatre, 27 O. L. R. 466 100
Connors v. Birmingham, 29 C. L. J. 16 129
Connyheare v. Farries, L. R. 5 Ex. 16 363
Conrad v. Alberta Mining Co., 17 C. L. T. 133 183
Constantinople, etc., Hotel Co., Re, L. R. 5 Ch. 302 291
Consumers' Gas v. Kissock, 5 U. C. R. 542 240
Cook v. Allen, 2 Dowl. 11 540
Cook v. Birt, 5 Taunt. 765 513
Cook v. Cook, Andrew 319 550
Cook v. Dey, 2 Ch. D. 118 .....197, 199
Cook v. Dodds, 6 O. L. R. 608 .....289, 333
Cook v. Grant, 32 C. P. 511 291
Cook v. Jones, 17 Gr. 488 .....82, 340
Cook v. Palmer, 6 B. & C. 739 495
Cook v. Shaw, 25 O. R. 124 58
Cooke v. Gill, L. R. 8 C. P. 107 138
Cooke v. Rickman (1911), 2 K. B. 1125 .....7, 145
Cookney v. Anderson, 1 D. J. & S. 365 167
Cool v. Mulligan, 13 U. C. R. 613 113
Cool v. Switzer, 19 U. C. R. 199 30
Codley v. Smith, 46 U. C. R. 543 342
Coolman v. Hunter, 7 P. R. 237 .....22, 82
Coope v. Creswell, L. R. 2 Ch. 112 281
Cooper, In re, 5 P. R. 256 .....251, 513
Cooper, Ex parte; In re Bourn, 10 Ch. D. 313 406
Cooper v. Board of Works, 14 C. B. N. S. 180 40
Cooper v. Brayne, 3 H. & N. 972 418

PAGE
Cooper v. Caswell, 10 Sol. J. 636 158
Cooper v. Cooper, 13 A. C. 88 363
Cooper v. Erie Nat. Gas and Fuel Co., 29 S. C. R. 591 8
Cooper v. Lawson, 0 T. L. R. 34 417
Cooper v. Pritchard, 11 Q. B. D. 351 506
Coore v. Calloway, 1 Esp. 115 266
Coote v. Ford (1899), 2 Ch. 03 269
Cope v. Crichton, 18 P. R. 462 153
Cope v. Scottish Union Ins. Co., 5 B. C. R. 329 27
Copeland v. Blenheim, 11 P. R. 54 202
Copeland v. Business Systems, 11 O. L. R. 292 350
Copeman v. Hart, 14 C. B. N. S. 731 138
Copes v. Brewer, 24 W. R. 40 ..... 197, 199
Coplin v. Adamson, L. R. 9 Ex. 345 166
Coquillard v. Hunter, 36 U. C. R. 316 111
Corbett, Re, 4 H. & N. 452 83
Corbett v. Hudson, 1 E. & B. 11 260
Corbett v. Johnston, 11 C. R. 317 112
Corbett v. The General Steam Nav. Co., 4 H. & N. 482 163
Corbey v. Roblin, 5 U. C. L. J. 225 146
Corbin v. Lewin, W. N. (1884) 62 100
Corby v. Forster, 29 O. L. R. 83 100
Coren v. Barne, 22 Q. B. D. 249 413
Cork & Brandon Ry. Co. v. Goode, 13 C. B. 836 ..... 13, 533
Cormick v. Ronayne, 22 L. R. Ir. 140 407
Cornforth v. Smithard, 5 H. & N. 13 282
Cornwall v. Hawkins, 26 L. T. 607 291
Cornwell v. Saunders, 3 B. & S. 206 84
Corp. of Ontario v. Paxton, 27 C. P. 104 32
Corp. of Rawdon v. Word, 27 U. C. R. 609 30
Corp. of Welland v. Brown, 4 O. R. 217 37
Corsellis, Re, 31 W. R. 414 133
Cosmopolitan Life Assn., Re, 15 P. R. 185 ..... 56, 65
Costa Rica v. Strausberg, L. R. 16 Ch. D. 18 ..... 502, 506
Coster v. Merest, 7 Moo 87 344
Coté v. Halliday, 17 C. L. T. 58 ..... 350, 360
Cotes v. Davis, 1 Camp. 485 260
Cotten v. Cadwell, 12 N. & M. 399 566
Cotten v. Mitchell, 3 O. R. 241 278
Cotten v. Vansillart, 20 Gr. 244 408
Coulburn v. Carshaw, 32 W. R. 33 198
Couling v. Case, 6 C. B. 703 295
Coulson v. O'Council, 29 C. P. 341 87
County Courts of British Columbia, Re, 31 S. C. R. 446 21
Court v. Scott, 32 C. P. 146 104
Court v. Sheen, 7 T. L. R. 556 244
Courtney v. Williams, 3 Hare 539 286
Cousins v. Crank, 17 P. R. 348 ..... 10, 233, 571
Cousins v. Lombard Bank, 1 Ex. D. 404 351
Cousins v. Podden, 2 C. M. & R. 558 336
Coventry v. London B. & S. C. Ry. Co., L. R. 5 Eq. 104 180
Cowan, Ex parte, 3 B. & A. 123 71
Cowan v. Affie, In re, 24 O. R. 358 ..... 73, 83, 253, 385, 394
Cowan v. Carlill, 52 L. T. 431 ..... 417, 561
Cowan v. McQuade, 19 C. L. T. 108 571
Cowan v. O'Connor, 20 Q. B. D. 640 157

	PAGE
Cowans v. Marshall, Re, 28 S. C. R. 161	344
Cowell v. Amman Co., 6 B. & S 333	271
Cowell v. Taylor, 31 Ch. D. 34	320
Cowley v. Local Board (1892), A. C. 345	387
Cox v. Baine, 2 D. & L. 718	538, 553
Coy v. Arndt, 8 O. L. R. 101	167
Coyle v. Coyle, 30 C. L. J. 129	248
Coyne v. Brodly, 15 A. R. 159	291
Crabtree v. Messersmitb, 19 Iowa R. 179	126
Cragg v. Lemarsh, 4 Can. Cr. Cas. 246	368, 372
Craig v. Craig, 13 C. L. J. 326	466, 539, 551
Craig v. Dillen, 6 A. R. 116	130
Craig v. Milne, 25 C. P. 346	33
Craignish, Re (1892), 3 Ch. 180	161
Cramer v. Matthews, 7 Q. B. D. 425	545
Crampton v. Ridley, 20 Q. B. D. 48	441
Crane v. Julllan, 2 Ch. D. 220	199
Cranston v. Blair, 15 P. R. 167	247
Crawcour v. Salter, 18 Ch. 30	2, 297
Crawford v. Beattie, 39 U. C. R. 13	506, 564, 572
Crawford v. Canada Life, 24 A. R. 643	199
Crawford v. Crawford, 9 P. R. 178	238, 243
Crawford v. Gilmore, 30 L. R. Ir. 238	238, 243
Crawford v. Seney, Re, 17 O. R. 74	76, 85, 86, 87
Crayston v. Massey Harris Co.	100, 125
Credits Gerundeuse v. Van Weede	538
Cremeth v. Crom, 4 Q. B. D. 225	490
Crerar v. Holbert, 17 P. R. 283	343
Crescent, Re, The, 68 L. T. 556	351
Crippen v. Ogllvy, 2 Ch. Ch. 304	311
Crlpps v. Davis, 12 M. & W. 159	285
Croften v. Croften; Re Boyse, 20 Ch. D. 760	304, 305
Crombie v. Davidson, 19 U. C. R. 369	270
Cromer, Ex parte, 12 Can. Cr. Cas. 339	252
Crompton v. Hutton, 3 Taunt. 230	294
Cronshaw v. Chapman, 7 H. & N. 911	470
Crooks v. Stroud, 10 P. R. 131	511
Cropper v. Cropper, 1 Cab. & E. 152	466
Cropper v. Smith, 26 Ch. D. 700	183
Cropper v. Warner, 1 C. & E. 152	539
Cross v. Watts, 13 C. B. N. S. 239	96
Cross v. Davidson, 17 C. L. T. 189	470, 551
Crown v. Chamberlain, 27 Gr. 551	490
Crowther v. Appleby, L. R. 9 C. P. 23	296, 298
Crowther v. Boult, 13 Q. B. D. 680	364
Crowther v. Elgood, 34 Ch. D. 691	507
Crowtber v. Nelson, 7 T. L. R. 653	307
Crowther v. Thorley, 48 L. T. 644	162
Crowe v. Graham, 22 O. L. R. 145	92
Croyden v. Dicklnson, 2 C. P. D. 46	206
Crozer v. Dilling, 4 B. & C. 26	263
Crozier v. Cundey, 6 B. & C. 232	566
Cruickshank and Corbey, Re, 30 C. R. 466	428
Cruickshank v. Rose, 5 C. & P. 19	96
Crumbie v. Wallsend, 1891, 1 Q. B. 503	6
Crump v. Cavendish, 5 Ex. D. 211	247

PAGE

Crysler v. Campbell, 1 U. C. R. 416 50
Cuckney v. Gives, 20 O. R. 500 265
Cuckson v. Stones, 1 E. & E. 248 136
Cuddeford, Ex parte 497
Culham v. Love, 30 U. C. R. 410 .....121, 123
Culloden v. McDowell, 17 U. C. R. 359 .....465, 469
Culverhouse v. Wickens, L. R. 3 C. P. 295 .....416, 418
Cummings and The County of Carleton, Re, 25 O. R. 607.....66, 78
Cummings v. Scott, L. R. 20 Eq. 11 107
Cummings v. Usher, 1 P. R. 15 327
Cundy v. Lindsay, 3 A. C. 459 .....111, 112, 406
Cunliffe v. Whitehead, 3 Dowl. 634 307
Cunningham, Re, 55 L. T. 766 50
Curling v. Robertson, 7 M. & G. 525 316
Curlewis v. Clark, 3 Ex. 375 480
Curran v. G. T. Ry. Co., 25 A. R. 407 343
Currie v. Hodgins, 42 U. C. R. 601 32
Currie v. Misa, L. R. 10 Ex. 153; 1 A. C. 554 206
Curry, Re, 32 O. R. 150 333
Curtis v. Norris, 8 Pick. 280 .....405, 422
Curtis v. Williamson, L. R. 10 Q. B. 57 7
Curwen v. Milburn, 42 Ch. D. 424 .....282, 283
Cushen v. Hamilton, 4 O. L. R. 267 8
Cutler v. Wright, W. N. (1890), 28 309

D.

D. v. D., 1903, P. 144 4
Dabbs v. Humphries, 10 Bing. 446 282
Dagenham, In re, L. R. 8 Ch. 1022 131
Dakins, Ex parte, 16 C. B. 17 .....500, 508, 516
Dalby v. Humphrey, 37 U. C. R. 514 331
Dale v. Blanchard, 21 O. L. R. 497 34
Dale v. Heuld, 1 C. & P. 314 258
Dales v. Weaver, 18 W. R. 993 58
Daley v. Dublin, 1892, 30 L. R. Ir. 514 6
Dallas v. G. W. Ry. Co., 57 J. P. 584 252
Dalling v. Matchett, Willes 215 16
Dallew v. Garrold, 14 Q. B. D. 543 .....408, 434
Dalton v. St. Mary Abbotts, 47 L. T. R. 349 218
Damer v. Busby, 5 P. R. 356 532
Daudo v. Boden (1893), 1 Q. B. 318 227
Dane v. Mortgage Ins. Co. (1894), 1 Q. B. 54 244
Danaher v. Little, 13 P. R. 363 87
Daniel v. Metropolitan Ry. Co., L. R. 5 H. L. 45 253
Daniel v. Sinclair, 6 A. C. 181 327
Danks, Ex parte, 2 De G. & M. & G. 936 264
Daragu v. Duna, 7 L. J. 273 471
Darby v. Cousins, 1 T. R. 552 66
Darby v. Waterlow, L. R. 3 C. P. 453 530
Darey v. Garrogher, 18 L. R. Ir. 317 402
Dark v. Huron and Bruce, 7 C. P. 378 13
Darley Main v. Mitchell & ., 11 A. C. 127 6
Darling v. Collaton, 10 P. R. 110 .....539, 540
Darling v. Darling, 9 P. R. 560 .....307, 310
Dart v. Citizens' Ins. Co., 11 P. R. 513 195

PAGE

Dartmouth College v. Woodward, 4 Wheaton 518, 636 421
Dartnell v. Quarter Sessions of Prescott, 26 U. C. R. 430 53
Davey v. Sadler, 1 O. L. R. 626 .....243, 249, 265
David v. Rees (1904), 2 K. B. 435 204
Davidson, In re, 4 P. R. 153 204
Davidson v. Belleville & N. H. Ry. Co., 5 A. R. 315.....5, 8
Davidson v. Cochrane, 34 C. L. J. 318 401
Davidson v. Douglas, 15 Gr. 347 408
Davidson v. Grange, 5 P. R. 258 467
Davidson v. Head, 18 C. L. T. 260; 34 C. L. J. 415 .....255, 358
Davidson v. McClelland, 32 O. R. 382 167
Davidson v. Taylor, 14 P. R. 78 .....400, 402
Davidson v. Q. S. of Waterloo, 24 U. C. R. 66 563
Davies v. Davies, L. R. 6 Eq. 468 202
Davies v. Edwards, 7 Ex. 22 288
Davies v. Petrie (1906), 2 K. B. 786 160
Davies v. Westmacott, 7 C. B. N. S. 829 246
Davies and James Bay Ry. Co., Re, 20 O. L. R. 534 328
Davis, Re, 17 Gr. 613 486
Davis v. Flagstaff Silver Mining Co., 3 C. P. D. 228 ....151, 155, 274
Davis v. Fletcher, 2 E. & B. 271 .....516, 565
Davis v. Freethy, 24 Q. B. D. 516 .....406, 434
Davis v. Hewitt, 0 O. R. 435 93
Davis v. Hughes, L. R. 6 Q. B. 687 8
Davis v. Hyman (1903), 1 K. B. 854 213
Davis v. Lovell, 4 M. & W. 678 204
Davis v. Lowndes, 7 Dowl 161 .....312, 377
Davis v. Moore, 4 U. C. R. 209 .....470, 478
Davis v. Morris, 16 Q. B. D. 436 .....209, 213
Davis v. National Ass. Co., 16 P. R. 116 271
Davis v. Pearce, L. R. 5 C. P. 435 .....195, 234
Davis v. Reilly (1898), 1 Q. B. 1 222
Davis v. Spence, 1 C. P. D. 721 242
Davis v. Walker, 5 O. L. R. 173 333
Davis v. Williams, 13 C. P. 365 .....143, 155
Davy, Doe d. v. Haddon, 3 Doug. 316 16
Davy v. Baines, 9 T. L. R. 29 480
Davy v. Johnston, 31 U. C. P. 153 478
Davey v. Williamson (1898), 2 Q. B. 194 487
Dawdy, Re, 15 Q. B. D. 426 544
Dawson v. Beeson, 22 Ch. D. 504 .....224, 572
Dawson v. Graham, 41 U. C. R. 532 222
Dawson v. Great Northern Ry. Co. (1904), 1 K. B. 277; (1905), 1 K. B. 260 186
Dawson v. Wood, 3 Taunt 256 472
Day v. Carr, 17 Ex. 887 558
Day v. McGill, In re, 16 O. L. R. 408 333
Day v. McLea, 22 Q. B. D. 616 480
Dayfoot v. Byrens, 7 C. L. T. 21 503
Deacon v. G. W. Ry. Co., 6 C. P. 241 7
Deadman v. Owen, 27 U. C. R. 176 23
Deal v. Potter, 26 U. C. R. 578 .....116, 118
Deal v. Scholfield, L. R. 3 Q. B. 8 96
Dean v. Brown, 1909, 2 K. B. 579 ..... 1, 11
Dean v. James, 4 B. & Ald. 547 264
Dean v. Whittaker, 1 C. & P. 347 472

	PAGE
Dean of Ely v. Bliss, 2 D. M. & G. 459	86
Death, Ex parte, 18 Q. B. 647	66
Death v. Harrison, L. R. 6 Ex. 15	547
Debarre v. Leverett, 4 T. R. 756	297
Debenham v. Wardroper, 48 L. T. 235	508
De Bussche v. Alt, 8 Ch. D. 286	418, 495
De Cadaval v. Collins, 4 A. & E. 858	530
De Habar v. Portugal (Queen), 17 Q. B. 171	67, 78
De Hart v. Stevenson, 1 Q. B. D. 313	218, 222
Delafield v. Jones, Can. Pr. C. P. 34	194
Delafield v. Tanner, 1 Marsh 391	231
Delany v. Moore, 9 U. C. R. 294	521
Delany v. McLellan, 13 P. R. 63	320
Delap v. Charlebois, 26 S. C. R. 221	232
Delesdernier v. Burton, 12 Gr. 569	133
Dempsey v. Casper, 1 P. R. 134	545
Denneen v. Walberg, 3 O. W. N. 1511	160
Denham v. Patrick, 20 O. L. R. 347	135
Dennis v. Seymour, 4 Ex. D. 80	247
Dennis v. Wethern, L. R. 9 Q. B. 345	466
Dennison v. Knox, 9 U. C. L. J. 241	144, 145, 476
Denison v. Woods, 17 P. R. 549	270
De Bernales v. New York Herald (1893), 2 Q. B. 97 (note)	196, 198
Denton v. Marshall, 1 H. & C. 654	67, 69
Denton v. Strong, L. R. 9 Q. B. 117	446
De Forrest v. Bunnell, 15 U. C. R. 370	171, 172
De Pass v. Capital & Industries Cor. (1891), 1 Q. B. 216	400
De Pothenier v. De Mattos, E. B. & E. 461	476
De St. Martin v. Davis, W. N. (1884) 86	546
Detroit Soap Co. v. Thatcher, 15 C. L. T. 161	162, 501
Derbon, Re, 36 W. R. 667	572
Derry v. Peek, 14 A. C. 337	398
Derlandes v. Saint Jacques, 33 Que. S. C. 380	306
Devonshire v. Foote, Ir. R. 7 Eq. 365	71
Dew v. Parsons, 2 B. & Ald. 562	8
Dewar v. Carrique, 14 C. P. 737	464
Dewar v. Sparling, 18 Gr. 633	29, 33
Dewar v. Winter, 12 T. L. R. 54	232, 238
De Winton v. Brecon, 28 Beav. 200	401
Dewis v. Peak, 32 U. C. R. 168	118
Dews v. Riley, 11 C. B. 443	18, 41, 421, 508, 509
Dey v. McGill, In re, 10 O. L. R. 408	81, 117
Diamond v. Waldron, Re, 28 O. R. 478	158, 159
Dibb v. Walker (1893), 2 Ch. 429	280
Dick v. Fraser (1897), 2 Ch. 181	285
Dicklnson, In re (1888), W. N. 94	148
Dickenson v. Shee, 4 Asp. 68	264
Dickenson v. Harrison, 4 Price 282	138, 140
Dickenson v. Hatfield, 5 C. & P. 40	285
Dickenson v. Toronto Ry. Co., 2 O. W. N. 832	542
Dicker v. Clarke, 11 W. R. 625	198
Dickerson v. Ratcliffe, 19 P. R. 223	89, 224
Dickson v. Jarvis, 5 O. S. 694	277
Dickson v. Neath & Brecon Ry. Co., L. R. 4 Ex. 87	501
Dickson v. Reuter's Tel. Co., 2 C. P. D. 62	398
Diggle v. Higgs, 2 Ex. D. 422	94

	PAGE
Dillaree v. Doyle, 43 U. C. R. 442	472
Dillen v. Cunningham, L. R. 8 Ex. 23	506
Dimes v. Grand Junction Canal Co., 3 H. L. C. 759	22
Dingley v. Robinson, 2 Jur. N. S. 1145	403
Dingor v. Matthews, 65 L. T. 748	38
Dini v. Fauquier, 8 O. L. R. 112	333
Dissett, doe d. v. McLeod, 3 U. C. R. 297	480
Dis Urban Sanitary Authority v. Aldrich, 2 Q. B. D. 179	369
Ditman v. Mixon, 24 South. 847, 848; 120 Ala. 206	225
Ditton v. Borneman, 3 T. L. R. 3	198
Dixon, Re; Heynes v. Dixon (1899), 2 Ch. 561; (1900) 2 Ch. 561	326
Dixon v. Brown, 32 Ch. D. 597	9
Dixon v. Clarke, 5 C. B. 365	203
Dixon, doe d. v. Grant, 3 O. S. 511	280
Dixon v. Lee, 3 Dowl. 259	294
Dixon v. Snarr, 6 P. R. 336	76
Doble v. Lemon, 12 P. R. 64	231, 232, 242, 274
Dobson v. Lesti (1891), 2 Q. B. 92	201, 209
Dodd v. Drummond, 1 Dowl. 381	240
Dodd v. Wigley, 17 C. B. 115	138
Dodson v. Mackay, 4 N. & M. 327	283
Doe v. Kelly, 4 Dowl. 273	296
Doe v. Pattison, 3 Dowl. 35	304
Doe v. Ross, 7 M. & W. 102	206
Doe v. Wrightman, 5 Asp. 5	368
Doer v. Rand, 10 P. R. 165	546
Doldge v. Mimms, 19 C. L. T. 201	69
Dolg v. Anthony (1899), 2 Ch. 50	597
Dolby v. Iles, 11 A. & E. 335	269
Dolphin v. Layton, 4 C. P. D. 130	401, 402
Dombey v. Pinyfair (1893), 1 Q. B. 368	238
Dominion, etc., Co. v. Stinson, 9 P. R. 177	316
Dominion Bank v. Bell, 13 P. R. 471	308
Dominion Bank v. Davidson, 12 A. R. 90	537
Dominion Bank v. Toronto Mica Co., 1 O. W. N. 803	245
Dominion Sav. & Inv. Co. v. Kilroy, 12 P. R. 19	538, 541
Dominion Coal Co. v. Kingswell S. S. Co., 30 N. S. R. 397	194, 240
Dominion Express v. Munghan, 20 O. L. R. 310	213
Donaldson v. Wherry, 29 O. R. 552	32
Donnelly v. Hall, 7 O. R. 581	539
Donnelly v. Stewart, 25 U. C. R. 398	127
Doner v. Ross, 19 Gr. 229	335
Donohue v. Hall, 24 S. C. R. 683	403
Donovan v. Bacon, 16 Gr. 472	490
Donovan v. Brown, 4 Ex. D. 148	360
Donovan, Re; Wilson v. Beatty, 10 P. R. 71	7
Dooley v. Watson, 39 Ch. D. 148	278
Doolittle v. Electric Maintenance, etc., Co., 3 O. L. R. 460	159
Doran v. Toronto Suspender Co., 14 P. R. 103	538, 541
Doremus v. Kennedy, 2 Gr. 657	198
Dougall v. Cline, 6 U. C. R. 540	278, 287
Dougall v. Leggo, West. L. T. 203	75, 102
Dougherty v. Williams, 32 U. C. R. 215	342
Douglas v. Hutchinson, 5 O. S. 341	143
Douglas v. Patrick, 3 T. R. 683	263
Dover v. Child, 1 Ex. D. 172	450

PAGE

Dow v. Dickenson, W. N. (1881) 52 344
Dowler v. Duffie, Re, 29 O. R. 40 ..... 417, 501, 502
Dowling v. Miller, 9 U. C. R. 227 112
Dowle v. Partle, 15 P. R. 313 542
Downey v. Patterson, 38 U. C. R. 513 343
Dowsell v. Impey, 1 B. & C. 163 22
Doyle v. Kaufman, 3 Q. B. D. 7, 340 ..... 195, 219, 465
Doyle v. Lasher, 10 C. P. 203 ..... 541, 548
Doyle v. Wurtzburg, 32 N. S. R. 197 136
Drake v. Mitchell, 3 East. 251; 7 P. R. 449 204
Dreschel v. Amer. Inc. Light Co., 28 S. C. R. 208 363
Dresser v. Johns, 6 C. R. N. S. 420 ..... 402, 518
Drinkwater v. Cinrridge, In re, 8 P. R. 504 184
Dryden v. Smith, 12 P. R. 500 160
Duberly v. Gunning, 1 Penke 97 258
Dublin, Wicklow & Wexford Ry. Co. v. Slattery, 3 A. C. 1155.. 252
Duck v. Bates, 13 Q. B. D. 840 260
Duck v. Braddyll, McClel. 217 550
Duck v. Mazen, (1892) 2 Q. B. 511 ..... 32, 33
Duckett v. Gover, 6 Ch. D. 82 221
Dudden v. Long, 3 Dowl. 139 538
Ducber Watch Case Co. v. Taggart, 29 A. R. 205; 30 S. C. R. 373 204
Duff v. Barnett, 17 Gr. 187 32
Duff v. Canada Mut. Fire Ins. Co., 9 P. R. 292 185
Duffll v. Erwin, 18 U. C. R. 431 111
Duffus v. Creighton, 14 S. C. R. 740 ..... 70, 551
Duigaan v. Walker, 5 Jur. N. S. 979 163
Duke v. Davis (1893), 2 Q. B. 170, 260 143
Duke of Beaufort v. Crawshay, L. R. 1 C. P. 699 312
Duke of Beaufort v. Earl of Ashhurhnm, 13 C. B. N. S. 598 316
Duke of Buccleuch, Re (1892), P. 201 221
Duke of Newcastle, Re, L. R. 8 Eq. 700 410
Dulmage v. Judge of Leeds and Grenville, 12 U. C. R. 32 21
Dulmage v. Laparder, 3 O. W. N. 986 260
Dumenko v. Swift Canadian Co., Ltd., 32 O. L. R. 87 99
Duncan v. Cashin, L. R. 10 C. P. 554 537
Duncan v. Tees, 11 P. R. 66, 296 541
Duncan, doe d. v. Edwards, 9 A. & E. 554 3
Duncan and the Town of Midland, In re, 16 O. L. R. 132 15
Duncombe v. Brighton Club and Norfolk Hotel Co., L. R. 10 Q. B. 371 325
Dundas v. Johnson, 24 U. C. R. 547 342
Dunlop v. Higgins, 1 H. L. C. 381 27
Dunn v. Gourlay, Re, 17 C. L. T. 415 158
Dunn v. Malone, 6 O. L. R. 484 382
Dunn v. Salter, 1 Duv. 345 520
Dunnett v. Harris, 14 P. R. 437 ..... 243, 246
Dunsmuir v. Klondyke Gold Fields, Ltd., 6 B. C. R. 200 112
Dunstan v. Paterson, 5 C. B. N. S. 267 160
Duplex v. De Roven, 2 Vern. 540 276
Durham (Mayor) v. Fowler, 22 Q. B. D. 304 32
Durham v. Robertson (1898), 1 Q. B. 765 ..... 185, 220
Durham v. Spence, L. R. 6 Ea. 46 157
Durrell v. Evans, 1 H. & C. 174 197

PAGE
Dutens v. Robson, 1 H. Bl. 100 76
De Vigier v. Lee, 2 Hare 326 276
Dwight and Macklem, Re, 150 R. 148 .....207, 208
Dyer v. Evans, In re, 30 O. R. 637 .....70, 125, 431
Dyke v. Stephens, 30 Ch. D. 189 133
Dymond v. Croft, 3 Ch. D. 512 198
Dyment v. Jerrett, 9 C. L. T. 141 512

E.

Ealing Local Board, Ex parte, Re Trehearn, 63 L. T. 323; 39 W. R. 119 433
Earl of Lisburne v. Davies, L. R. 1 C. P. 259 164
Earle v. Burland, 27 A. R. 549 325
Earle v. Oliver, 2 Ex. 90 281
Earle v. Stoker, 2 Vern. 251 19
Early v. Bowman, 1 B. & Ad. 889 270
Early v. McGill, 1 Ch. Ch. 257 310
East Dulwich Bldg. Socy., Re, 30 W. R. 32 144
East & West India Dock Co. v. Kirk, 12 App. Cas. 738 438
East India Co. v. Naish, Bunb. 320 312
Eastern Telegraph v. Dent (1899), 1 Q. B. 835 132
Easton v. Brantford Street Ry. Co., C. P. Divl. Ct. 29 Nov. 1897. 343
Easton v. Rose, L. R. 4 Q. B. 4 77
Easy, Re, Ex parte Hill, 13 Q. B. D. 538 .....107, 420
Ebberts v. Brooke, Re, 19 P. R. 257; 11 P. R. 296 .....9, 92
Eby-Blain v. Montreal Packing, 17 O. L. R. 292 .....187, 451
Ecclestone v. Jarvis, 1 U. C. R. 379 119
Echart v. Henderson, 1 O. W. N. 150 246
Eddy v. Ottawa City P. Ry. Co., 31 U. C. R. 569, 570 363
Ede v. Jackson, 1 Fort. 345 78
Edgar v. McGee, 1 O. R. 287 278
Edgar v. Watson, 1 C. & M. 494 269
Edge (S. F.), Ltd. v. Welgel, 97 L. T. 447 .....149, 151
Edison Gen. Elec. Co. v. Westminster, etc. Co. (1897), A. C. 193 445, 450
Edison Co. v. Hough, 98 L. T. Jour. 374 305
Edmonds v. Pearson, 3 C. P. 1113 294
Edmonds v. Wallingford, 14 Q. B. D. 811 530
Edmunds v. Dorins, 2 C. & M. 549 .....284, 285
Edward v. Lowther, 45 L. J. C. P. 417 218
Edwards, Re, 65 L. T. 453 326
Edwards v. Bridges, 2 Stark. 396 472
Edwards v. Carter (1893), A. C. 360 292
Edwards v. Davison, W. N. (1888) 59 597
Edwards v. English, 7 E. & B. 564 541
Edwards v. G. W. Ry. Co., 11 C. B. 588 326
Edwards v. Mallan (1908), 1 K. B. 1002 191
Edwards v. Yeates, Ry. & M. 360 260
Elgie v. Butt, 2 A. R. 13 519
Elgie v. Edgar, 8 O. W. R. 914 185
Elgin, Re, Judge of, 9 U. C. L. J. 238 82
Eisdell v. Cunningham, 28 L. J. Ex. 213; 4 H. & N. 871..... 408
Electric Contract Co. v. Thompson-Houston Co., 19 T. L. R. 103 238, 243

PAGE

Elliott, Re, Ex parte Bushill, 41 Sol. Jour. 625; 4 U. C. L. J. 243; 4 U. C. L. J. 259 556
Elliott v. Biette, Re, 21 O. R. 595 ..... 72, 74, 103, 107
Elliott v. Capell, 9 P. R. 35 400
Elliott v. C. P. Ry. Co., 12 P. R. 503 311
Elliott v. Elliott, 20 O. R. 134 7
Elliott v. May, 11 Man. L. R. 306 68
Elliott v. Norris, 17 O. R. 78 ..... 157, 498
Ellis v. Ellis (1905), 1 Ch. 613 ..... 285, 288
Ellis v. Fleming, 1 C. P. D. 237 ..... 72, 78
Ellis v. Loftus Iron Co., L. R. 10 C. P. 10 398
Ellis v. Wadeson (1899), 1 Q. B. 714 216
Ellis v. Watt, 8 C. B. 614 75
Elmsley v. Cosgrave, 0 P. R. 164 ..... 171, 311
Elmsley v. Harrison, 17 P. R. 425, 525 251
Elphinstone v. Monpland Iron & Coal Co. 130
Elston v. Rose, L. R. 4 Q. B. 4 76
Elvy v. Norwood, 5 De G. & M. 242 275
Elwell v. Jackson, 1 C. & E. 362 ..... 399, 405
Ely v. Morile, 5 Ex. 918 451
Emanuel v. Bridger, L. R. 9 Q. B. 290 416
Emden v. Carte, 17 Ch. D. 169 ..... 222, 223
Emerson v. Brown, 7 M. & G. 470 193
Emerson v. Heelis, 2 Taunt. 38 108
Emery v. Barnett, 4 C. B. N. S. 423 ..... 82, 84, 86
Emery v. Wase, 5 Ves. 846 440
Emes v. Emes, 11 Gr. 325 290
Emma Silver Mining Co., In re, L. R. 10 Ch. 194 296
Empey v. Carscallen, 24 O. R. 658 344
Empire Loan & Savings Co. v. McRae, 5 O. L. R. 710 131
Empire Oil Co. v. Vallerand, 17 P. R. 27 158
England v. Marsden, L. R. 1 C. P. 529 530
English v. Mulholland, In re, 9 P. R. 145 ..... 76, 85, 86
Enraght v. Penzance, 7 A. C. 240 ..... 76, 86
Erichson v. Last, 8 Q. B. D. 414 162
Erlebson v. Brand, 14 A. R. 014 532
Errington v. Court Douglas, Re, 14 O. L. R. 75 ..... 75, 77
Erving v. Peters, 3 T. R. 685 336
Erwin v. Powley, 2 U. C. R. 270 192
Esdaile v. Visser, 13 Ch. D. 421 508
Euprasia, Re Clerk of, 12 U. C. R. 622 82
Eureka Woollen Co. v. Moss, 11 S. C. R. 91 351
European Central Ry. Co., Re, 4 Ch. D. 33 332
Evans, Ex parte, 2 Dowl. N. S. 410 78
Evans v. Bowen, 19 L. J. Q. B. 8 ..... 121, 123
Evans v. Bremridge, 2 Jur. N. S. 134 32
Evans v. Davies, 4 A. & E. 840 ..... 285, 533, 544
Evans v. Gill, 1 B. & P. 52 232
Evans v. Hoare (1892), 1 Q. B. 593 107
Evans v. Matthews, 26 L. J. Q. B. 166 362
Evans v. Nicholson, 32 L. T. 778 157
Evans v. Roe, L. R. 7 C. P. 138 134
Evans v. Simon, 9 Ex. 282 284
Evans v. Sutton, In re, 8 P. R. 367 ..... 77, 341
Evans v. Wills, 1 C. P. D. 229 517

PAGE

Everard v. Watson, 1 E. & B. 804 175
Everett v. Robertson, 1 E. & E. 16 280
Eversfield v. Newman, 4 C. B. N. S. 418 80
Every v. Wheeler, 3 L. J. 11 282
E. W. A., Re, (1901), 2 K. B. 642 206
Ewart v. Latta, 4 Mac. H. L. 983 206
Ewer v. Ambrose, 5 D. & R. 629 206
Ewin v. Lancaster, 6 B. & S. 571 206
Ewing v. Thompson, 6 U. C. L. J. 332 146
Exchange Bank v. Springer, 13 A. R. 390 .....32, 121
Exchange Bank v. Stinson, 32 C. P. 158 153
Exley v. Day, 15 P. R. 353 405
Eyles v. Ellis, 4 Bing. 112 431
Eyre v. Highway Board, 8 T. L. R. 648 341
Eyre v. Hughes, 2 Ch. D. 148 152
Eyton, Re, 45 Ch. D. 458 205

F.

Fair and Bell, Re, 2 A. R. 632 406
Fair v. The Crew, 31 U. C. R. 590 85
Fairbanks v. Saunders, 9 O. W. R. 184 185
Fairman v. Oakford, 5 H. & N. 635 .....134, 135
Fallis v. Wilson, 13 O. L. R. 595 .....390, 40, 406
Fan v. Neuman, 4 T. R. 621 472
Farden v. Richter, 23 Q. B. D. 124 .....231, 247
Farley v. Graham, 9 U. C. R. 438 296
Farley v. Lincoln, 11 N. H. 577 111
Farmer v. Ellis, 2 O. L. R. 544 243
Farmers Bank v. Big Cities Realty Co., 1 O. W. N. 307 . .245, 248
Farmers Bank v. Sargent, 17 P. R. 67 .....241, 242
Farmers Loan v. Patchett, 8 O. L. R. 569 32
Farquhar v. Robertson, 13 P. R. 156 446
Farquhar v. Toronto, 26 O. R. 356 100
Farquharson v. Imp. Oil Co., 29 O. R. 206; 30 S. C. R. 188 .. 347
Farquharson v. Morgan (1894), 1 Q. B. 552 .....65, 67, 69, 181
Farr v. Ward, 3 M. & W. 25 325
Farrant v. Thompson, 5 B. & Ald. 826 472
Farrell v. Stephens, 17 U. C. R. 3[illegible] 307, 309
Farrow v. Tohin, 10 A. R. 69 547
Farrow v. Wilson, L. R. 4 C. P. 744 ..... 1[illegible]
Farwell v. Jameson, 26 S. C. R. 588 554
Faulds v. Faulds, 17 P. R. 480 108
Faulds v. Harper, 2 O. R. 405 490
Faulkner v. Bune, 1 F. & F. 254 295
Faveiell v. Eastern Counties Ry. Co., 2 Ex. 344 437
Fawcett v. Cash, 5 B. & Ad. 905 135
Fawkes v. Swaizie, 31 O. R. 256 361
Fayna v. Langley, 31 O. R. 254 409
Fearnside v. Flint, 22 Ch. D. 579 275
Fearn v. Lewis, 6 Bing 349; 31 R. R. 434 287
Fearon v. Nowell, 4 D. & L. 439 69
Federal Bank v. Hope, 6 O. R. 209 243
Fee v. McIlhargey, 9 P. R. 329 .....75, 203, 339
Felgate v. Helger, 9 O. L. R. 315 320

PAGE

Fell v. Whittaker, L. R. 7 Q. B. 120-124 398
Fell v. Williams, 3 C. L. T. 358 240
Fellows v. The Lord Stanley (1803), 1 Q. B. 98 568
Fellows v. Thornton, 14 Q. B. D. 335 ..... 403, 413
Fenwick v. Laycock, 2 Q. B. D. 108; 3 U. C. L. J. 197-214; 4 U. C. L. J. 12-38 ..... 538, 540
Ferguson v. Carman, 26 U. C. R. 26 ..... 196, 404, 420
Ferguson v. Corp. of Howick, 25 U. C. R. 547 73
Ferguson v. Davidson, 8 Q. B. D. 470 271
Ferguson v. Earl of Kinnoul, 9 Cl. & Fin. 251 ..... 21, 176
Ferguson v. Elliott, 7 P. R. 7 174
Ferguson v. Millican, 11 O. L. R. 35 ..... 259, 305, 308
Ferguson v. Reid, 33 N. S. R. 580 351
Ferguson v. Southwold, 27 O. R. 60 343
Ferguson v. Fyffe, 8 Cl. & F. 121 327
Ferguson v. Sampey, 16 C. L. T. 110 143
Ferand v. Bingley, 56 J. P. 277 ..... 252, 342
Ferris and Eyre, Re, 18 O. R. 395 438
Ferris v. Fox, 11 U. C. R. 612 133
Field, Re, 2 Curt. 752 107
Field v. Adames, 12 A. & E. 649 115
Field v. Bennett, 56 L. J. Q. B. 89 197
Field v. Hart, 22 A. R. 449 471
Field v. McIlhargey, 9 P. R. 327 572
Field v. Rice, 20 O. R. 309 ..... 75, 81, 402
Finch v. Boning, 4 C. P. D. 143 263
Finch v. Brook, 1 Bing. N. C. 253 264
Finch v. Miller, 5 C. B. 428 265
Findlay v. Pedan, 26 C. P. 483 296
Finlay v. Misenmpell, 20 O. R. 20 387
Finlayson v. Howard, 1 P. R. 224 642
Firmin v. International Club, 5 T. L. R. 612 212
Fisher v. Berrell, 1 Dow. N. S. 565 311
Fisher v. Izatarny, E. B. & E. 321 307
Fisher v. Keane, 11 Ch. D. 353 ..... 13, 19, 60, 174
Fisher v. Linton, 28 O. R. 322 208
Fisher v. Mewbray, 8 East. 330 20
Fisher v. Waltham, 4 Q. B. 889 93
Fisk v. Mitchell, 24 L. T. 272 283
Fiskin v. Stewart, 33 C. L. J. 41 288
Fitchett v. Mellow, 10 P. R. 161 128
Fitzgerald v. Mandas, 21 O. L. R. 314 328
Fitzgibbon v. Duggan, 11 Gr. 188 490
Fitzhugh v. Lee, Ambl. 65 311
Fitzroy v. Cave (1905), 2 K. B. 364 ..... 185, 186
Fitzsimmons v. McIntyre, 5 P. R. 119 72
Fitzmartin v. Newbury, 10 W. R. 267; 2 O. W. N. 1114 ..... 160, 161
Flanagan v. McMahan, 7 U. C. L. J. 155 39
Flarty v. Adlum, 3 T. R. 681 403
Flatt and Prescott, Re, 18 A. R. 1 34
Flatt v. Waddell, 18 O. R. 539 354
Fleming v. Lee (1901), 2 Ch. 594 149
Fleming v. Livingstone, 6 P. R. 63 ..... 76, 103
Fleming v. Manchester & Sheffield Ry. Co., 4 Q. B. D. 81 101
Fleming v. Stephenson, 28 C. L. J. 570 403

PAGE
Fletcher, Re, 28 Gr. 413 513
Fletcher v. Baker, L. R. 9 C. B. 372 .....269, 384
Fletcher v. Calthrop, 0 Q. B. 891 .....56, 518
Fletcher v. Campbell, 26 O. L. R. 591 131
Fletcher v. London & N. W. Ry. Co. (1892), 1 Q. B. 122 253
Fletcher v. Noble, 9 P. R. 255; 3 C. L. T. 360 ..129, 210, 319, 546, 570
Flett v. Way, 14 P. R. 312 .....87, 478
Fleuty v. Orr, 13 O. L. R. 59 353
Flitters v. Allfrey, L. R. 19 C. P. 29 450
Florence v. Drayson, 1 C. B. N. S. 584 332
Flower v. Allen, 2 H. & C. 688 197
Flower v. Lloyd, 6 Ch. D. 297; 10 Ch. D. 327 340
Flynn v. Cooney, 18 P. R. 321 539
Floyd v. Barker, 12 R. 23 22
Fonkes v. Beer, 9 A. C. 609 480
Foley v. Moran, Re, 11 P. R. 316 .....73, 340, 547
Folger v. McCallum, 1 P. R. 352 172
Folger v. Minton, 10 U. C. R. 423 110
Follett v. Sacco, 11 O. W. R. 377 341
Foord v. Noll, 2 Dowl. N. S. 617 265
Foot v. Baker, 5 M. & G. 335 94
Forbes v. Central Ry. Co., 20 O. R. 584 6
Forbes v. Cobb, 18 Q. B. D. 494 45
Forbes v. Michigan Central Ry. Co., In re, 20 A. R. 584..178, 257, 324
Forbes v. Wells, 3 Dowl. 318 307
Ford v. Baynton, 1 Dowl. 357 537
Ford v. Crabb, 8 U. C. R. 274 82
Ford v. Harvey, 9 T. L. R. 328 .....244, 245
Ford v. Spafford, 8 U. C. R. 17 289
Ford v. Taylor, 3 C. P. D. 21 385
Fordham v. Wallis, 10 Hare 217 285
Forfar v. Climie, 10 P. R. 90 105
Forget v. Astigny (1895), A. C. 318 94
Forth v. Bush, 9 Jur. N. S. 431 197
Forrest v. Great N. W. Cent. Ry. Co., 12 Man. L. R. 472 134
Forrester v. Masher, 9 P. R. 383; 2 O. R. 38 465
Forsdike v. Stone, L. R. 3 C. P. 607 .....49, 557
Forster, Re, 4 B. & S. 187 78
Forsyth v. Bustowe, 8 Ex. 718 280
Forsyth v. Canniff, 20 O. R. 478 409
Fortescue v. Paton, 3 L. T. 268 83
Forwood v. Toronto (City), 22 O. R. 351 344
Foster v. Cantley, 10 Ha. App. 24 133
Foster v. Amory, 14 P. R. 1 350
Foster v. Glass, 26 U. C. R. 277 469
Foster v. Reeves (1892), 2 Q. B. 255 .....100, 104, 125, 127
Foster v. Smith, 13 U. C. R. 243 469
Foster v. Temple, 5 D. & L. 639 ....75, 279
Foster v. Toronto Ry. Co., 31 O. R. 1 .....193, 230, 251, 323
Foster v. Usherwood, 3 Ex. 3 181
Foster v. Van Wormer, 12 P. R. 597 .....502, 506, 511
Foster v. Weston, 0 Bing. 709 324
Foulds v. Chambers, 11 Man. L. R. 300 .....406, 408, 415, 428
Foulger v. Taylor, 5 H. & N. 202 554
Foulkes, Ex parte, 15 M. & W. 612 515

	PAGE
Fowler v. Roberts, 2 Gr. 226	399, 401
Fox v. Sleeman, 7 P. R. 492	298
Fox v. Symington, 13 A. R. 256	356, 547, 548
Fox v. Toronto & Nipissing Ry. Co., 7 P. R. 157	253, 268, 301
Fradenburgh v. Hastings, 12 A. R. 257	344
France v. Campbell, 6 Car. 195	474
France v. Dutton (1891), 2 Q. B. 208	107, 183, 494
Francis Hanford & Co., Re (1899), 1 Q. R. 566	213
Francis v. Hawkesley, 1 E. & E. 1052	286
Francis v. Steward, 5 Q. B. 994	67
Frank v. Carson, 15 C. P. 135	308, 309
Frank v. Edwards, 8 Ex. 214	32
Frankel v. Grand Trunk Ry. Co., 3 O. L. R. 705	213
Franklin v. Cream, 20 U. C. R. 84	30
Franklin v. Owen, In re, 15 C. L. T. Occ. N. 105, 158, 185	139, 163, 166, 201, 424
Fraser and Bell, Re, 21 O. R. 455	262, 266
Fraser v. Drew, 30 S. C. R. 241	343
Fraser v. Fothergill, 14 C. B. 298	543
Fraser v. Gore District M. R. Ins. Co., 2 O. R. 416	30
Fraser v. Ham, 7 O. L. R. 449	384
Fraser v. London St. Ry. Co., 29 O. R. 411	258, 343
Fraser v. Nevins, 4 T. L. R. 448	304
Fraser v. Orbendorfer, 36 C. L. J. 101	145
Fray v. Blackburn, 3 B. & S. 576	22
Frederick v. Vanderzee, 2 C. P. D. 70	502
Freed v. Orr, 6 A. R. 690	491, 492
Freehold Loan & S. Co. v. McLean, 8 Man. L. R. 116	331
Freeland v. Brown, 9 L. J. 299	347
Freeman v. Cooke, 2 Ex. 654	418
Freeman v. Ontario & Quebec Ry. Co., 6 O. R. 413	438
Freeman v. Read, 9 C. R. N. S. 301	278
French v. Brink, 1 O. W. N. 189	94
French v. Lewis, 16 U. C. R. 547	404
French v. Macale, 2 Drew. & War. 274	132
Fresten, Re, 11 Q. B. D. 545	295
Frey v. Aultman, 50 Kansas 182, 184	520
Frey v. Blackburn, 3 B. & S. 576	74
Frey v. Wellington, 4 A. R. 293	27
Friendlander v. London Assn. Co., 4 B. & Ad. 193	296
Frieker v. Van Grutten (1896), 2 Ch. 649	223
Friendly v. Needler, 10 P. R. 267	70
Frisby, Re, Allison v. Frisby, 43 Ch. D. 106	280, 281
Fritz v. Hobson, 14 Ch. D. 542	364
Frontenac (License Commrs.) v. Frontenac, 14 O. R. 741	571
Frost v. Bengough, 1 Bing. 267	281, 285
Frost v. McMillen, In re, 2 O. L. R. 303	170, 175, 179
Frost and Wood Co., Ltd. v. Leslie, 27 O. L. R. 450	134
Fry v. Moore, 23 Q. B. D. 395	198, 199
Fryer, Ex parte, 17 Q. B. D. 718	507
Fuller v. Alexander, 47 L. T. N. S. 443	243
Fuller v. Cleveley, 17 Jur. 736	353
Fuller v. Mackay, Re, 2 E. & B. 573	159
Fuller v. Prentice, 1 H. Bl. 49	293
Fuller v. Redmon, 26 Benv. 614	284

PAGE

Furber, Ex parte, 3 H. & N. 521 84
Furber v. Cobb, 18 Q. B. D. 494 174
Furber v. King, 50 L. J. Ch. 496 197
Furlong v. Carroll, 7 A. R. 145 394
Furlong v. Reid, 12 P. R. 201 362
Furness v. Booth, 4 Ch. D. 587 151
Furnival v. Saunders, 26 U. C. R. 119; 2 C. L. J. 245 .....103, 104

G.

Gabourie, Re, 12 P. R. 254 259
Gage v. Collins, L. R. 2 C. P. 381 546
Galbraith v. Fortune, 10 C. P. 109 .....551, 552
Gallagher v. Battue, 2 C. L. J. 73 143
Gallant v. Young, 11 C. L. J. 217 74
Galliard v. Laxton, 2 B. & S. 363 566
Galligar v. Payne, 34 La. An. 1058 411
Galloway v. Keyworth, 15 C. B. 228 311
Galmaye v. Cowan, 58 L. J. Ch. 769 404
Gandy v. Gandy, 7 P. D. 168 220
Gardiner v. Gardiner, 2 O. S. 520 492
Gardiner v. Juson, 2 E. & A. 188 .....483, 489
Gardner v. Green, 3 Dowl. 343 240
Gardner v. Irwin, 4 Ex. D. 49 296
Garland v. Omnium Securities Co., 10 P. R. 135 158
Garner v. Coleman, 19 C. P. 106 22
Garrard v. Edgar, 37 W. R. 501 319
Garratt v. Roberts, 10 A. R. 650 ..... 133, 255, 354. 363
Garton v. G. W. Ry. Co., 1 E. & E. 258 146
Gastonguay v. Savoie, 29 S. C. R. 613 496
Gates v. Bent, 31 N. S. R. 544 .....110, 122
Gates v. Seagram, 19 O. L. R. 226 ...149, 272, 273, 352, 356, 410, 446
Gates v. Smith, 13 C. P. 572 469
Gaulard and Gibbs Patent, Re, 57 L. J. Q. B. 209 184
Gay v. Mathews, 4 B. & S. 425 .....110, 566
Gaze, Ex parte, Re Lane, 23 Q. B. D. 74 289
Geary v. Saxten, 28 N. S. R. 278 351
Gebruder Naj v. Platon, 25 Q. B. D. 13 15
Gegg v. Adams, 9 C. L. T. 311 145
Gegg v. Bassett, 13 O. L. R. 263 473
Gemmell v. Cotton, 16 C. P. 57 284
General Horticultural Co., Re, Ex parte Whitehouse, 32 Ch. D. 512 .....406, 415
General Rail Syndicate, Re (1900), 1 Ch. 365 244
Genge v. Freeman, 14 P. R. 330 415
Gent v. Catto, 11 Q. B. 288 121
George v. Green, 13 O. L. R. 189; 14 O. L. R. 578 325
George v. Glagett, 7 T. R. 359 148
Gerardot v. Welton, 19 P. R. 162, 201 150
German-American Bank v. Keyston, 12 O. L. R. 555 245
Gerow v. Hoyle, Re, 28 O. R. 405 .....40, 82, 293, 572
Gerrard v. Clewes (1892), 2 Q. B. 11 432
Gesner, Re (not reported) 513
Gibbings v. Strong, 20 Ch. D. 66 237
Gibbon v. Bagshott, 5 C. P. 211 287
Gibbons v. Connell, 4 O. W. N. 270 .....67, 177

PAGE

Gibbons v. Chadwick, 12 C. L. T. 207, 328 .....71, 80
Gibbons v. Farewell, 34 Alb. L. J. 497 466
Gibbs v. Cruickshank, L. R. 8 C. P. 454 .....119, 120, 398, 450
Gibbs v. Chadwick, 18 Man. L. R. 209 68
Gibbs v. Gulld, 8 Q. R. D. 296; 9 Q. D. 59 .....48, 277
Gibbs v. Soulbam, 5 B. & Ad. 911 31
Giblin v. McMullen, L. R. 2 P. C. 317 253
Gibson v. Le Temps, 6 O. L. R. 690; 8 O. L. R. 707 .....211, 213
Gibson v. McDonald, 7 O. R. 401 24
Gidley v. Palmerston (Lord), 3 B. & B. 275 405
Gilbert v. Gilbert, 4 C. L. J. 329 ....139, 140
Gilbert v. Stiles, 13 P. R. 121 597
Gilchrist v. Conger, 11 U. C. R. 197 .....13, 118
Gildersleeve v. Balfour, 15 P. R. 293 220
Gilding v. Eyre, 10 C. B. N. S. 592 464
Giles v. Grover, 1 Cl. & F. 12 467
Giles v. Hemming, 6 Dowl. 325 193
Giles v. Wellington, 30 O. R. 610 83
Gill v. Ellis, 5 R. C. R. 137 307
Gill v. Woodfin, 25 Ch. D. 707 237
Gillespie v. Nickerson, 7 U. C. R. 541 260
Gillett v. Rippon, Moo. & M. 406 34
Gillies v. Wood, 13 U. C. R. 357 111
Gilmer, Re, 17 L. R. Ir. 1..... 473
Gilmour v. Buck, 24 C. P. 187 110
Gilmour v. Gilbert, 7 N. B. R. 50 252
Gilmour v. Magee, 14 P. R. 120 196
Gilmour v. McPhail, 16 P. R. 151.....351, 361
Gilroy v. Conn, 3 O. W. N. 732 398
Girard v. Cyrs, 5 R. C. R. 45 401
Giraud v. Austin, 1 Dowl. N. S. 703 259
Girdlestone v. Brighton Aquarium Co., 3 Ex. D. 137; 4 Ex. D. 107 450
Girven v. Grepe, 13 Ch. D. 174 246
Given v. Burke, 19 O. R. 204 494
Given v. Scott, 11 U. C. R. 542 87
Gladstone v. Padwick, R. R. 6 Ex. 203 .....410, 466, 493
Gladwell v. Blake, 1 C. M. & R. 636 566
Glascott v. Day, 5 Asp. 48 264
Glass v. Allen, 26 U. C. R. 123 70
Glass v. Cameron, 9 O. R. 712 .....465, 467
Gleason v. Williams, 27 C. P. 03 296
Glendenning v. Buck, Ex parte, 62 L. T. 517 32
Glenwood v. Phillips (1904). A. C. 405 110
Glenn v. Rudd, 3 O. L. R. 422 134
Glidden v. Yarmouth, 17 O. L. R. 343 124
Glines v. Cross, 12 Man. L. R. 442 356
Glover v. Coles, 7 Moore 231 112
Glynn v. Hood, 1 Giff. 328 473
Goate v. Goate, 1 H. & N. 29 286
Goddard v. Hapgood, 25 Vermont 181 .....405, 422
Goddard v. O'Brien, 9 Q. B. D. 37 480
Godolphin v. Tudor, 2 Salk. 468 28
Godson v. City of Toronto, 10 O. R. 275; 16 A. R. 452; 18 S. C. R. 30 66
Goff or Gough v. Mills or Miller, 2 D. & L. 23 294

PAGE
Goggs v. Huntingtown, 2 M. & W. 503 .....102, 193
Gold v. Turner, L. R. 10 C. P. 149 157
Gold Ores Reduction v. Parr (1892), 2 Q. B. 14 227
Golding v. Bellnap, 26 U. C. R. 163 121
Golding v. Caudwell, 2 L. M. & P. 175 145
Golding v. Wharton, 1 Q. B. D. 374 352
Goldsmith's Co. v. Metropolitan Ry. Co. (1904), 1 K. B. 574
Good v. Toronto H. & B. Ry. Co., 25 A. R. 133; 30 S. C. R. 114. 439
Goodes v. Cluff, 13 Q. B. D. 694 351
Goodland v. Blewith, 1 Camp. 477 262
Goodlock v. Cousins (1877), 1 Q. B. D. 348 .....558, 543
Goodman v. Boyes, 17 A. R. 528 284
Goodman v. Blake, 19 Q. B. D. 77; 352 542
Goodman v. Robinson, 18 Q. B. D. 332 .....189, 413
Goodman v. Sayers, 2 J. & W. 249 16
Goodwin v. Parton, 41 L. T. 91 287
Gordon v. Carte, 17 Ch. D. 169 223
Gordon v. Jennings, 9 Q. B. D. 45 409
Gordon v. Ellis, 2 C. B. 821 264
Gordon v. O'Brien, Re, 11 P. R. 287 138
Gordon v. Rumble, 19 A. R. 446 .....551, 560
Gorman v. Dixon, 29 S. C. R. 87 .....32, 353, 354
Gorslett v. Harris, 29 L. T. O. S. 75 161
Goslin v. Tune, 2 U. C. R. 177 540
Gossett v. Howard, 19 Q. B. 411 65
Gough v. Bench, 6 O. R. 699 183
Gough or Goff v. Miller or Mills, 2 D. & L. 23 294
Gould v. British American Ass. Co., 27 U. C. R. 473 344
Gould v. Close, 21 Gr. 273 153
Gould v. Gapper, 7 P. R. 766 72
Gould v. Hope, In re, 21 O. R. 624; 20 A. R. 347 .....73, 435, 471
Gould v. McCrae, 14 O. L. R. 194 134
Gould v. White, 4 O. S. 124 468
Government Co. v. Dempsey, 50 L. J. Q. B. 199 244
Gourley v. Maloney, 29 N. S. R. 319 278
Gowanlock v. Mans, 9 P. R. 270 226
Gower v. Lusse, 16 O. R. 88 393
Grace v. Walsh, In re, 3 P. R. 196 .....138, 140
Graham, Re, 25 O. L. R. 5 442
Graham v. Bourque, 6 O. L. R. 700 406
Graham v. Devlin, 13 P. R. 245 .....504, 506, 511, 512
Graham v. Furber, 14 C. B. 414 406
Graham v. McArthur, 25 U. C. R. 478 137
Graham v. Nelson, 6 C. P. 280 492
Graham v. Newcastle (1893), 1 Q. B. 643 .....92, 272
Graham v. O'Callaghan, 14 A. R. 477 118
Graham v. Smart, 18 U. C. R. 482 .....21, 65, 449
Graham v. Spettigue, 12 A. R. 261 86
Graham v. Stewart, 15 C. P. 169 309
Graham v. Tomlinson, Re, 12 P. R. 367 .....105, 196, 176
Grand Hotel Co. v. Cross, 44 U. C. R. 153 88
Grand Junction Canal Co. v. Dimes, 3 H. L. C. 759 22
Grand River Nav. Co. v. Wilkes, 8 U. C. R. 249 240
Grand Trunk Ry. Co. v. Toronto, 32 O. R. 120 239
Grant v. Aldrich, 38 Cal. 514 189

PAGE
Grant v. Anderson (1892), 1 Q. B. 108 .....201, 211
Grant v. Banque Franco, Egyptienne 303
Grant v. Cameron, 18 S. C. R. 716 283
Grant v. Easton, 13 Q. B. D. 302 .....9, 228
Grant v. G. W. Ry. Co., 7 C. P. 438; 5 L. J. 210 362
Grant v. Holland, W. N. (1880), 156 171
Grant v. McAlpine, 46 U. C. R. 284 478
Grant v. McDonald, 9 C. P. 195 .....285, 288, 289
Grant v. McDonell, 39 U. C. R. 412 .....333,, 406
Grant v. Peoples Loan & Deposit Co., 17 A. R. 85; 18 S. C. R. 262 331
Grant v. Shaw, 16 Mass. 341 .....172, 405, 422
Grant v. Young, 23 U. C. R. 387 108
Grantham v. Bishop, 1 C. P. 237 294
Grantham v. Powell, 6 U. C. R. 494 287
Grass v. Allan, 26 U. C. R. 123 .....75, 78
Grass v. Austin, 7 A. R. 511 538
Grassett v. Carter, 10 S. C. R. 165 353
Grattan v. Ottawa Sept. S. T., 8 O. L. R. 135 124
Gray v. Bartholomew, 1895, 1 Q. B. 209 271
Gray v. Haffer, 5 B. C. R. 56 403
Gray v. Ingersoll, 16 O. R. 194 30
Gray v. Jones, 14 C. B. N. S. 743 172
Gray v. McCarty, 22 U. C. R. 568 521
Gray v. Purdy, 5 B. C. R. 241 403
Gray v. Richford, 2 S. C. R. 431 354
Gray v. Richmond, 22 O. R. 256 104
Gray v. Webb, 21 Ch. D. 802 272
Grant v. Wilson, L. R. 1 C. P. 50 440
Greatorix v. Shackle, 1895, 2 Q. B. 249 540
Great Northern Committee v. Inett, 2 Q. B. D. 284 447
Great Northern Ry. Co. v. Mossop, 17 C. B. 138 .....256, 340
Great North-West Cent. Ry. Co. v. Charlebois, 1899, A. C. 114.. 232
Great West v. Shields, 15 O. W. R. 166 .....231, 237
Great Western Ry. Co., Ex parte, 2 H. & N. 557 146
Greaves, Re, 18 Ch. D. 551 219
Gebruder v. Platon, 25 Q. B. D. 13 155
Green, Re, 15 C. L. J. 35 .....322, 422
Green v. Beach, L. R. 8 Ex. 208 157
Green v. Crawford, 21 O. L. R. 36 .....83, 106
Green v. Duckett, 11 Q. B. D. 275 .....115, 530
Green v. Harris, 16 S. C. R. 714 153
Green v. Hamilton, 31 C. P. 574 228
Green v. Humphries, 26 Ch. D. 474 .....284, 286
Green v. Penzance, 6 A. C. 657 422
Green v. Ponton, 8 O. R. 471 30
Green v. Stevens, 2 H. & N. 146 538
Greene v. Reece, 8 C. B. 88 261
Greenizen v. Burns, 13 A. R. 481 73
Greenless v. Picton School Board, 2 O. L. R. 387 124
Greenough v. Eccles, 5 C. B. N. S. 786 295
Greenshields doe d. v. Garrow, 5 U. C. R. 273 465
Greenwood v. Sutcliffe, 1892, 1 Ch. 1 265
Greer, Re, 1895, 2 Ch. 271 .....401, 402
Gregory v. Hurill, 1 Bing. 324 280

PAGE

Gregory v. Parker, 1 Camp. 394; 10 R. R. 712 285
Gregson, In re, 36 Ch. D. 223 148
Gregson and Armstrong, In re, 70 L. T. R. 106 442
Grenfell v. Girdlestone, 2 Y. & C. 662 284
Gretton v. Mees, 7 Ch. D. 839 265
Greville v. Stuitz, 11 Q. B. 907 307
Grieve v. Molson's Bank, 8 O. R. 162 341
Griffin, Ex parte, 14 Ch. D. 37 478
Griffin v. Griffin, Re, 1899, 1 Ch. 408 188
Griffin v. Patterson, 45 U. C. R. 536 491
Griffin v. Boscowitz, 18 S. C. R. 718 342
Griffin v. Dickenson, 7 Dowl. 860 259
Griffin v. Hodges, 1 C. & P. 419 265
Griffin v. Taylor, 2 C. P. D. 194 92
Griffiths v. Cannonica, 5 B. C. R. 48 503
Griffiths v. Grantham (Municipality), 0 C. P. 274 15
Griffiths v. Vesey, 1906, 1 Ch. 796 131
Grill v. General Iron Screw Co., L. R. 1 C. P. 600 309
Grills v. Farrand, 21 O. L. R. 457 .....149, 151
Grimbley v. Aykroyd, 1 Ex. 479 .....137, 138
Griswold v. Buffalo, Brantford & G. Ry. Co., 3 U. C. L. J. 115 220, 404
Grocock v. Edgar Allen & Co., 4 O. W. N. 1406 259
Grogan v. London & M. Ins. Co., 56 L. T. 761 159
Groenvelt v. Burwell, 1 Ld. Raym. 454 22
Groom v. Rathbone, 41 L. T. 591 244
Groom v. Shuter, 69 L. T. 293 345
Grove v. Young, 3 DeG. & S. 397 311
Grosvenor v. West End Terminal Hotel Co., Re, 70 L. T. 339 75
Grundy v. Townsend, W. N. 1888, 67 .....157, 159
Grymes v. Bowern, 6 Bing. 437 472
G. T. R. Co. v. Rainville, 29 S. C. R. 201 354
G. T. R. Co. v. Toronto, 9 O. W. R. 071 6
Guess v. Perry, 12 P. R. 460 192
Gujen v. Sampson, 4 F. & F. 974 172
Gullivar v. Cozens, 1 C. B. 788 115
Gundy v. Johnston, 3 O. W. N. 1601 246
Gunn v. Burgess, 5 O. R. 685 473
Gunther v. McTear, 1 M. & W. 201 311
Gurney v. Atlantic, etc., R. Co., 2 N. Y. S. Ct. 453 409
Gutierrez, Ex parte, Re Gutierrez, 11 Ch. D. 298 518
Gutteridge v. Smith, 2 H. Bl. 374 253
Guy v. G. T. Ry. Co., 10 P. R. 572 .....71, 120, 166, 195
G. W. Ry. Co. v. Braid, 1 Moo. P. C. 101; 8 Jur. N. S. 339.... 342
G. W. Ry. Co. v. Chadwick, 3 U. C. L. J. 29 115
G. W. Ry. Co. v. Miller, 12 U. C. R. 654 440
G. W. Ry. Co. v. McEwan, 28 U. C. R. 528 .....113, 117
G. W. Ry. Co. v. Waterford, 17 Ch. D. 493 72
Gwynne v. Rees, 2 P. R. 282 402
Gwynne v. Knight, 1 Ex. 802 86
Gyles v. Hall, 2 P. Wms. 377 266

H.

	PAGE
Haacke v. Markham (Municipality), 17 U. C. R. 562	15
Haacke v. Marr, 8 C. P. 441	111
Haacka v. Gordon, 6 U. C. R. 424	333
Hackett v. Eible, 12 P. R. 42	540
Hackett v. Lalor, 12 L. R. Ir. 45	239
Haddow v. Morton (1894), 1 Q. B. 95, 565	544
Hadley v. Green, 2 Cromp. & J. 379	7
Haggart v. Kernahan, 17 U. C. R. 341	110, 120
Haggart v. Pellicier, 1892, A. C. 61	151
Haggin v. Compton d'Escompte de Paris, 23 Q. B. D. 519	161
Hagle v. Dairymple, 8 P. R. 183	157
Haines v. East India Co., 11 Moo. P. C. 39	515
Haldan v. Beatty, 43 U. C. R. 914	170, 545
Haldimand (Corporation) v. Martin, 19 U. C. R. 178	203
Hales v. Stevenson, 7 L. T. 317; 8 L. T. 798	283, 284
Hall, Ex parte, Re, Townsend, 14 Ch. D. 132	466
Hall v. Brown, 3 P. R. 293	200
Hall v. Brunall, 1911, 2 Ch. 551	131
Hall v. Curtain, 28 U. C. R. 533	102
Hall v. Goslee, 15 C. P. 101	465, 489
Hall v. Hatch, 3 O. L. R. 147	475
Hall v. Kennedy, 8 A. R. 157	256
Hall v. Kissock, 11 U. C. R. 9	540
Hall v. Pritchett, 3 Q. B. D. 215	400, 403
Hall v. Scotson, 9 Ex. 238	200
Hall v. Thompson, 9 C. P. 257	32
Hallack v. Cambridge, 1 Q. B. 593	72
Hallett v. Mears, 13 East. 15	294
Hallett v. Andrews, 42 Sol. Jour. 68	237
Hallett v. Hallett, 13 Ch. D. 232	148
Hallman v. Price, 41 L. T. 627	154
Hamm v. Lasher, 24 U. C. R. 357	605
Hambridge v. De La Crouee, 3 C. B. 742	444
Hamelyn v. Whyte, 6 P. R. 120;	231, 296, 297
Hamer v. Giles, 11 Ch. D. 942	408
Hamilton v. Bouck, 5 O. S. 664	468
Hamilton v. Cousineau, 19 A. R. 293	531
Hamilton v. Garner, 12 O. W. R. 758	86
Hamilton v. Harrison, 46 U. C. R. 127	538
Hamilton v. Johnston, 5 Q. B. D. 263	353
Hamilton v. Perry, 24 O. L. R. 38	80, 230
Hamilton Mfg. Co. v. Victoria Lumber Co., 19 C. L. T. 209	354
Hamilton P. & L. Co. v. Campbell, 5 O. R. 371	538
Hamilton P. &. L. Socy. v. McKim, 13 P. R. 125	176
Hamlet v. Richardson, 9 Bingham 643	8
Hamlyn v. Betteley, 6 Q. B. D. 65, 69	356, 383, 384
Hammerton v. Honey, 24 W. R. 643	88
Hammond v. McLaw, 19 L. J. 269	110
Hammond v. Schofield, 1891, 1 Q. B. 453	7, 205, 231
Hammond v. Smith, 33 Beav. 452	284
Hammond v. Stewart, 1 Str. 510	294
Hampden v. Walsh, 1 Q. B. D. 189	94
Hampson v. Guy, 64 L. T. 778	252

PAGE

Hancock v. Smith, 41 Ch. D. 456 402
Hand v. Hull, 2 Ex. D. 355 550
Handley v. Franchi, L. R. 2 Ex. 34 521
Hands v. Clements, 11 M. & W. 815 172
Hands v. Law Society, 17 A. R. 41 60
Hands v. Upper Canada Furniture Co., 12 P. R. 292 312
Hanford v. Howard, 1 W. B. Eq. 241 332
Hanna v. Coulson, In re, 23 O. R. 493; 21 A. R. 602 .....417, 501
Hanna v. McKenzie, 0 C. L. T. 358 467
Hapungan v. Burgess, 3 C. L. T. 103 113
Hannah v. Mackett, 12 B. & C. 939 115
Hanns v. Johnston, 3 O. R. 100 .....25, 239, 528
Hannum v. McRae, 17 P. R. 567; 18 P. R. 185 ....296, 297, 298, 312
Hansard v. Lethbridge, 8 T. L. R. 346 .....35, 529
Hanney v. Stanton, 13 C. L. J. 108 405
Harding v. Barrett, 3 L. J. 31 423
Harding v. Davies, 2 C. & P. 77 264
Harding v. Harding, 6 P. R. 93 186
Harding v. Knust, 15 P. R. 80 .....44, 300, 605
Harding and Wren, Re, 18 S. C. R. 714 441
Hardy and Lake Erie & N. Ry. Co., Re, 7 O. W. N. 308 442
Hardy v. Pickard, 12 P. R. 428 364
Hares v. Lea, L. R. 10 Eq. 683 143
Hargrave v. Sprink (1892), 1 Q. B. 25 111
Hargreaves v. Diddams, L. R. 10 Q. B. 582 84
Hargreaves v. Hayes, 5 E. & B. 272 78
Hargreaves v. Meyers, 26 U. C. R. 10 .....123, 143
Hargreaves v. Scott, 4 C. P. D. 21 .....21, 44
Harlock v. Ashberry, 19 Ch. D. 539 284
Harmer v. Cornelius, 5 C. B. N. S. 236 136
Harmer v. Cowan, 23 U. C. R. 749 542
Harnwall v. Parry Sound Lumber Co., 24 A. R. 110 134
Harper v. Child, 1 F. & F. 652 175
Harper v. Davis, 45 U. C. R. 442 .....262, 270
Harper v. Serimegeour, 5 C. P. D. 366 508
Harper v. Young, 34 Alb. L. J. 376; 37 Alb. L. J. 181 97
Harrington v. Edison, 11 U. C. R. 114 .....16, 440
Harrington v. McMorris, 5 Taunt. 228 416
Harrington v. Ramsay, 8 Ex. 879 71
Harris v. Amery, L. R. 1 C. P. 148 162
Harris v. Andrews, 3 L. J. 31 249
Harris v. Bank of B. N. A., 19 P. R. 51 558
Harris v. Canada Permanent, 16 C. P. 54 551
Harris v. Elliott, 28 O. L. R. 340 94
Harris v. Jenns, 9 C. B. N. S. 152 96
Harris v. Judge (1892), 2 Q. B. 565 143
Harris v. Meyers, 10 G. 117 171
Harris v. Slater, 21 Q. B. D. 359 .....509, 512
Harris v. Wishart, 1 O. W. N. 503 .....305, 306
Harris v. Wood, 7 O. W. N. 613 216
Harrison, Re, Smith v. Allen (1891), 2 Ch. 349 ..220, 238, 355, 497
Harrison v. Barry, 7 Price 690 550
Harrison v. Bottenheim, 26 W. R. 362 .....242, 246
Harrison v. Cornwall Mineral Ry. Co., 18 Ch. D. 334 368
Harrison v. Douglas, 40 U. C. R. 410 269

	PAGE
Harrison v. Good, L. R. 11 Eq. 338	180
Harrison v. Paynter, 6 M. & W. 387	475
Harrison v. Smith, 9 B. & C. 243	230
Harrison v. Wardle, 5 B. & A. 154	121
Harrison v. Wright, 13 M. & W. 819	71
Harrup v. Bailey, 6 E. & B. 228	366
Harry v. Davey 2 Ch. D. 721	221
Hartt v. Edmonton Steam Laundry, 2 Alt. 130	226, 227
Hart v. Reynolds, 13 C. P. 501	468, 551
Hart v. Ruttan, 23 C. P. 613	322, 521
Hartley v. Wharton, 11 A. & E. 934	285
Hartland v. General Exch. Bank, 14 L. T. 803	397
Harvester Co. v. Kerton, 7 O. W. R. 453	156
Harvey v. Aitkins, 17 P. R. 71	511
Harvey v. Croyden Union Rural Sanitary Authority, 26 Ch. D. 249	238, 260
Harvey, Ex parte, 4 DeG. M. & G. 881	32
Harvey v. McNeil, 12 P. R. 362	477
Harvey v. McPherson, 6 O. L. R. 60	140
Harwood v. Williamson, 14 Can. Cr. Cas. 76	373
Hasklns v. St. Louis & S. E. Ry. Co., 109 U. S. Sup. Ct. 923	16, 440
Hastelow v. Jackson, 8 B. & C. 221	94
Hatchard v. Mege, 18 Q. B. D. 771	224
Hathaway v. Dolg, 6 A. R. 264; 28 Gr. 461	222
Hatton v. Harris (1892), A. C. 547	121
Hatton v. Haywood, L. R. 9 Ch. 229	410
Hausberg v. People, 35 Alb. L. J. 98	914
Hawke v. Brear, 14 Q. B. D. 841	154, 446
Hawkes v. Richardson, 9 U. C. R. 229	99, 574
Hawkins, Re, 16 P. R. 139	24
Hawkins v. Batzold, Re, 2 O. R. 704	67, 69, 503, 508, 516
Hawkins v. Eccles, 2 B. & P. 359, 361	119
Hawkins v. Gathercole, 1 Drew. 12	407
Hawkins v. Rutter (1892), 1 Q. B. 668	87
Hawksley v. Bradshaw, 5 Q. B. D. 22, 302	262
Hawley v. North Staffordshire By. Co., 2 DeG. & S. 33	16
Hawley v. Young, 9 C. L. T. 346	81
Hay v. Johnston, 12 P. R. 596	228
Haydon v. Crawford, 3 O. S. 583	465, 538
Haydon v. Williams, 7 Bing. 163	284, 285
Hayes v. Keene, 12 C. B. 233	512
Hayley v. Grant, Sayer. 63	258
Haman v. Governors of Rugby School, L. R. 18 Eq. 28	23
Hays v. Armstrong, 7 O. R. 621	239
Haythorn v. Rush, 2 Dowl. 641	539
Hayward v. Hague, 4 Esp. 93	266
Haywood v. Haswell, 9 A. & E. 265	120
Hayward v. Lely, 56 L. T. 418	251
Hazlett v. Hall, 24 U. C. R. 486	466
Hazlett v. McArthur, 11 Man. L. R. 602	468
Heaman v. Seale, 29 Gr. 278	250
Heath v. Breiver, 15 C. R. N. S. 803	92
Heath v. Long, 1 M. L. & P. 333	158
Heath v. Weaverham (1894), 2 Q. B. 108	6

PAGE

Heath v. White, 2 D. & L. 40 193
Henwood v. Bone, 13 Q. B. D. 179 410
Hebing v. Duggan, 1 C. L. T. 108 .....82, 86
Hedley v. Bates, 13 Ch. D. 498 71
Hedley v. Closter, 13 U. C. R. 333 123
Hefford v. Alger, 1 Taunt. 218 123
Heineman v. Hnle (1891), 2 Q. B. 83 .....201, 208, 209, 211
Heintzman v. Graham, 15 O. R. 137 342
Heize v. Shan'a, 1 O. L. R. 48 360
Heley v. Cousins, 34 U. C. R. 63 .....116, 123
Helmore v. Smith, 35 Ch. D. 436 473
Hemming v. Binnton, 42 L. J. C. P. 158 301
Hemming v. Williams, L. R. 6 C. P. 480 355
Heming v. Wilton, 5 C. & P. 54 7
Henchett v. Kimpson, 2 Wils. 140 .....550, 551
Henderson v. Brown, 18 Gr. 79 153
Henderson v. Dickson, 19 U. C. R. 592 500
Henderson v. Hnil, 8 P. R. 355 167
Henderson v. Henderson, 6 Q. B. 288 228
Henderson v. Preston, 21 Q. B. D. 362 515
Henderson v. Rogers, 15 P. R. 241 340
Henderson v. Sil'a, 8 C. P. 68 .....110, 120
Henderson v. Squire, L. R. 4 Q. B. 170 398
Henderson Rolier Bearings, Ltd., Re, 2 O. W. N. 160 .....477, 549
Hendricks v. Hendricks, 13 P. R. 79 137
Hendry, Re, 27 O. R. 297 .....52, 513
Henly v. Lyme (Mayor), 5 Bing. 108 176
Henneli v. Dnvies (1893) 1 Q. B. 367 .....262, 269
Henney v. Scott, Re, 8 P. R. 251 223
Henry v. Cook, 8 C. P. 29 113
Henry v. Cousins, 34 U. C. L. J. 63 120
Herbert v. Pnrk, 25 C. P. 37 363
Herman v. Lawson, 5 B. C. R. 353 300
Hermann v. Seneschnl, 13 C. B. N. S. 392 92
Hernnman v. Smith, 10 Ex. 659 157
Herring v. Wilson, 4 O. R. 607 530
Herrington v. Carey, 7 O. W. N. 473 .....231, 233
Herschfeld v. Clarke, 11 Ex. 712 502
Hespeller v. Shaw, 16 U. C. R. 104 145
Hesse v. Buffalo Chambers, 30th March, 1897 422
Hesse v. St. John Ry. Co., 30 S. C. R. 218 342
Hestop v. McGeorge, 18 L. T. 109 543
Hewsrd v. Wolfenden, 14 Gr. 188 490
Hewat v. Davenport, 21 W. R. 78 405
Hewitt v. Barr (1891), 1 Q. B. 98 195
Hewitt v. Cory, L. R. 5 Q. B. 418 271
Hewlett v. Cruchley, 5 Tsunt. 277 344
Heyd v. Miller, 29 O. R. 735 188
Heyinnd v. Scott, 10 C. P. 165 309
Heymann, Ex parte, L. R. 7 Ch. D. 488 558
Heymann, Re, L. R. 7 Ch. D. 488 558
Heynes v. Dixon (1899), 2 Ch. 561; (1900), 2 Ch. 561 326
Heyworth v. London (Mayor), 1 C. & E. 312 .....70, 77
Hibbitt v. Schilbroth, 18 O. R. 399 .....71, 195, 377
Hick v. Raymond (1893), A. C. 22 32

PAGE

Hicks, Re, 5 P. R. 88 500
Hicks v. Faulkner, 8 Q. B. D. 167 531
Hicks v. Jacobs, 19 C. L. T. 88 .....165, 201
Hickson v. Wilson, 17 C. L. T. 303 73
Higginbotham v. Moore, In re, 21 U. C. R. 326 .....102, 525
Higgins, Ex parte, 10 Jur., 838 75
Higgins v. Barton, 26 L. J. Ex. 342 112
Higgins v. Brady, 10 L. J. 268 .....510, 521
Higgins v. Sargent, 2 Bq. & C. 348 324
Higgins v. Willes, 3 M. & R. 382 441
Higham v. Braddely, Gow. 213 205
Higham v. Ridgway, 3 Sm. L. C. (Edson Ed.), 1007; Taylor on Evi., 8th ed., 588 317
Hill, Ex parte, 10 Ch. D. 615 .....138, 197
Hill v. Barclay, 18 Ves. 63 132
Hill v. Fox, 4 H. & N. 359 97
Hill v. Hicks, 28 O. R. 390 .....68, 163, 177, 180
Hill and Hymans, Ex parte, Re Easy, 19 Q. B. D. 538 420
Hill v. Managers of Met. Asylum Dist., 4 Q. B. D. 440, 441 ..74, 449
Hill v. South Staffordshire Ry. Co., L. R. 18 Eq. 170 326
Hill v. Swift, 24 L. J. Ex. 137 103
Hill and Walker, 4 K. & J. 166 334
Hillie India Rubber Co., Re, W. N. 1897, 29 495
Hillyard v. Smith, 36 W. R. 7 .....196, 108
Hills v. Mesnard, 10 Q. B. 266 431
Hillyard v. Royal Ins. Co., 12 P. R. 285 441
Hincks v. Sowerby, 4 A. R. 113 493
Hind v. Brett, W. N. 1883, p. 37 22
Hindley v. Haslam, 3 Q. B. D. 481 153
Hiram Maxim Lamp Co., In re, 1903, 1 Ch. 70 151
Hirsch v. Coates, 18 C. B. 757 406
Hitchcock v. Smith, 5 Dowl. 248 240
Hitchman v. Stewart, 3 Drew. 271 324
Hoare v. Niblett, 1891, 1 Q. B. 781 7
Hobbs v. Midland Ry. Co., 20 Ch. D. 418 180
Hobbs v. Scott, 23 U. C. R. 619 .....506, 511
Hobern v. Fowler, 9 T. L. R. 6 295
Hobhouse v. Courtenay, 12 Sim. 140 198
Hobson v. Shannon, 27 O. R. 115 .....324, 408, 436
Hobson v. Thelluson, L. R. 2 Q. B. 642 .....31, 398
Hoby v. Birch, 62 L. T. 404 244
Hockley v. Grand Trunk Ry. Co., 6 O. W. R. 57 343
Hodder v. Williams, 1895, 2 Q. B. 663 117
Hodge v. The Queen, 9 App. Cas. 117 .....27, 569
Hodgson, Re, 31 Ch. D. 177 204
Hodgson v. Dowling, 5 Dowl. P. C. 419 513
Hodgson v. Gascoigne, 5 B. & Ald. 88 550
Hodgson v. Graham, 26 U. C. R. 127 73
Hodgson v. May, 7 D. & L. 4 172
Hodgson v. Lynch, 5 Ir. R. C. L. 353 .....
Hodgson v. Towning, 5 Dowl. P. C. 410 513
Hodsoll v. Baxter 9
Hodson, Re, (1894), 2 Ch. 425 201
Hoey v. McFarlane, 4 C. B. N. S. 718 .....23, 24, 28
Hoffman v. Crerar, 17 P. R. 404 .....206, 207

PAGE

Hogaboom v. MacCullock, 17 P. R. 877 25
Hogaboom v. Grundy, 16 P. R. 47 .....537, 541
Hogg v. Brooks, 14 Q. B. D. 475 240
Holborn v. Jones, L. R. 4 C. P. 14 82
Holden v. Langley, 11 C. P. 407 548
Holland, Re, 37 U. C. R. 214 145
Holland v. Bennett (1902), 1 K. B. 867 158
Holland and Doyle, 102 L. T. Newspaper 327 127
Holland v. Wallace, 8 P. R. 186 .....68, 425
Hollender v. Foulkes, 16 P. R. 175 227
Holliday v. Hogan, 22 O. R. 235; 20 A. R. 298; 22 S. C. R. 479.. 32
Holliday v. Jackson, 22 S. C. R. 479 205
Hollingshead, Re, Hollingshead v. Webster, 37 Ch. D. 651 287, 289, 290
Hollingshead v. Webster, 37 Ch. D. 651 .....287, 289, 290
Holloway v. Lindberg, 30 N. S. R. 421 134
Holman and Lea, Re, 27 O. L. R. 432 .....65, 67, 69
Holme v. Brunskill, 3 Q. B. D. 495 32
Holmes v. Canadian Pacific Ry. Co., 5 Man. L. R. 245 304
Holmes v. Mackrell, 3 C. B. N. S. 789 283
Holmes v. Millage (1893), 1 Q. B. 551 403
Holmes v. Reeve, 5 P. R. 58 .....143, 144
Holmes v. Russell, 9 Dowl. 487 193
Holt, Re, W. N. (1879), 48 293
Holt v. Frost, 3 H. & N. 821 538
Holt v. Jarvis, Dra. 190 16
Holtby v. Hodgson, 24 Q. B. D. 103 .....18, 230, 402
Holton v. Guntrip, 3 M. & W. 145 539
Holton v. McDonald, 12 C. P. 240 402
Home v. Camden, 2 H. Bl. 536 .....75, 125
Honan v. Bar of Montreal, 10 C. L. T. 377 76
Honduras v. Tucker, 2 Ex. D. 301 220
Hong Kong & Shanghai Banking Co. v. Harris, 14 P. R. 437.... 248
Honsinger v. Lord, 16 O. R. 176 207
Hood v. Crohkite, 29 U. C. R. 98 510
Hooke v. Ind. Coope & Co., 36 L. T. 467 538
Hooman, Ex parte, L. R. 19 Eq. 63 172
Hooper v. Christoe, 14 C. P. 121 256
Hooper v. Exeter, 56 L. J. Q. B. 457 9
Hooper v. Keay, 1 Q. B. D. 178 96
Hoorigan v. Driscoll, 8 P. R. 181 .....113, 116, 117
Hoover v. Craig, 12 A. R. 72 .....112, 478
Hoover v. Zavitz, T. T. 1 & 2 Vic. 123
Hopcroft v. Hickman, 2 S. & S. 30 441
Hope v. Evered, 17 Q. B. D. 338 531
Hope v. Hope, 19 Beav. 327; 4 DeG. M. & G. 328 198
Hopkins v. Abbott, L. R. 18 Eq. 222 476
Hopkins v. Can. Nat. Ex. Assn., 5 O. W. N. 630 349
Hopkins v. Ware, L. R. 4 Ex. 268 431
Hopper, Re, L. R. 2 Q. B. 373 431
Hopper v. Warburton, 7 L. T. N. S. 722 73
Hopper v. Wallison, 16 O. L. R. 452 425
Hopton v. Robertson, 23 Q. B. D. 126 (n) W. N. (1884), 77 231
Horan v. Evans, 31 O. R. 448 34
Hornby v. Holmes, 4 Ince 306 108
Hornick v. Romney (Tp.), 11 C. L. T. 329 .....44, 300
Horse Shoe Quarry Co. and St. Marys, Re, 22 O. L. R. 429 446

	PAGE
Horsfall v. Sutherland, 31 N. S. R. 471	120, 121
Horton, Re, 8 Q. B. D. 434	26
Hoskin v. Knight, 1 M. & S. 245	551
Hough v. Edwards, 1 H. & N. 171	408
Hough v. Morley, 20 O. L. R. 484	204
Houlden v. Smith, 14 Q. B. 841	21
House v. House, 24 C. P. 526	200
Household F. Ins. Co. v. Grant, 4 Ex. D. 216	27, 157
How v. London & N. W. Ry. Co. (1892), 3 Q. B. 301	353
Howard, Re, Re Ashcroft, L. R. 9 C. P. 347	173
Howard v. Dulari, 11 T. L. R. 451	304
Howarth v. McGugan, 3 O. R. 396	343
Howarth v. Sutcliffe (1895), 2 Q. B. 358	85, 887
Howe v. Smith, 27 Ch. D. 89	131
Howe v. Earl Winterton (1896), 2 Ch. 626	290
Howell v. Listowel Rluk Co., 13 O. R. 476	294
Howell v. Metropolitan Dist. Ry. Co., 19 Ch. D. 308	401, 403
Howereen v. Bradburn, 22 Gr. 96	275
Howes v. Barber, 18 Q. B. 588	268, 294
Howick v. Romney, 11 C. L. T. 399	605
Howkins v. Baldwin, 16 Q. R. 375	307
Howland v. Dominion Bank, 15 P. R. 56; 22 S. C. R. 130	196
Howland v. Rowe, 25 U. C. R. 467	532
Howlett v. Tarte, 10 C. R. N. S. 813	7, 8
Howorth v. Sutcliffe	84
Hoye v. Buch, 1 M. & C. 775	566
Hubbard v. Goodley, 25 Q. B. D. 156	164
Huddersfield v. Lister (1895), 2 Ch. 273	200
Hudson v. Fernybough, 61 L. T. R. 722, 822; T. Jour. 253	222
Hudson v. McCrae	84
Hudson v. Toothe, 3 Q. B. D. 46	10, 171, 161
Huff v. Cameron, 1 P. R. 255	444
Huffer v. Allen, 2 Ex. 15	450
Huffman v. Doner, 12 P. R. 492	227
Huggins v. Tweed, 10 Ch. D. 359	352
Hughes v. Buckland, 15 M. & W. 346	91
Hughes v. Can. P. L. & S. Soey., 39 U. C. R. 221	136
Hughes v. Field, 9 P. R. 127	200
Hughes v. Griffiths, 13 C. B. N. S. 334	171
Hughes v. Hughes, 6 A. R. 373	290
Hughes v. Justin (1894), 1 Q. B. 607	332
Hughes v. Pump House Hotel Co. (1902), 2 K. R. 190	185
Hughes v. Smallwood, 25 Q. B. D. 306	554
Hughes v. Towers, 16 C. P. 287	552
Hughson v. Gordon, 10 P. R. 565	243
Humphrey v. Archibald, 21 O. R. 553	208
Humphreys v. Jones, 14 M. & W. 1	283
Humphries v. Humphries (1910), 2 K. R. 531	7, 145
Hunsberry v. Kratz, 50 L. R. 635	403
Hunt v. Great Northern Ry. Co., 2 L. M. & P. 268	144
Hunt v. Great Northern Ry. Co., 16 C. R. 904	88
Hunt v. Keith, Hutt v. Gilleland, 1 U. C. R. 546	123
Hunt v. North Staffordshire Ry. Co., 2 H. & N. 451	89
Hunt v. Taplin, 24 S. C. R. 459	350
Hunt v. Wenham, Re Wenham (1892), 3 Ch. D. 59	289
Hunter v. Rhodes, 5 Taunt. 225	120

PAGE

Hunter v. G. T. Ry. Co., 6 P. R. 67 146
Hunter v. Greensill, L. R. 8 C. P. 24 .....401, 403
Hunter v. Patterson, 2 O. W. N. 61 362
Huntsworth, Re 86
Hurd v. Morley, 1 C. & P. 372 297
Huron, Re (1st Division Court), 5 P. R. 467 75
Hurrell v. Wink, 8 Taunt. 369 112
Hurst v. Hurst, 21 Ch. D. 278 220
Hurst v. Parker, 11 B. & Ald. 92 281
Hurst v. Sheldon, 13 C. B. N. S. 750 537
Husband, Re, 12 L. T. 403 171
Huskisson v. Lawrence, 26 U. C. R. 570 112
Hutchings v. Mines, 1 Moo. P. C. 243 483
Hutchinson v. Birch, 4 Taunt. 619 117
Hutchinson v. Gillespie, 11 Ex. 798 228
Huthance v. Raleigh, 17 P. R. 458 219
Hutson v. Villiers, 19 A. R. 154 .....104, 356
Hutt v. Gilliland, Hunt v. Keith, 1 U. C. R. 540 123
Hutt v. Shaw, 3 T. L. R. 354 402
Hutton v. Federal Bank, 9 P. R. 586 332
Hutton v. Fowke, 1 Rep. 648 74
Huyck v. Wilson, 18 P. R. 44 .....227, 322, 441
Hyde, Ex parte, Re Connan, 20 Q. B. D. 690 415
Hyde v. Cavan, Re, 31 O. R. 189 508
Hyde v. Warden, 1 Ex. D. 309 318
Hyland v. Canadian Development Co., 9 B. C. R. 32 313

I.

Ianson v. Clyde, 36 C. L. J. 215 491
Ibbotson v. Henry, 8 O. R. 625 .....113, 115
Ibotson v. Phelps, 6 M. & W. 626 240
Ide, Ex parte, In re Ide, 17 Q. B. D. 755 211
Imperial Bank v. Bank of Hamilton (1903), A. C. 40 56
Imperial Bank v. Dickey, 8 P. R. 246 503
Imperial Gas Co. v. London Gas Co., 10 Ex. 39 277
Imperial Oil Co. v. Deming, 29 N. S. R. 98 233
Imperial Trusts Co. v. New York Security & Trust Co., 10 O. L. R. 289 327
Imray v. Oakshette (1897), 2 Q. B. 218 132
Inchmaree v. Re Astria, 6 Can. Ex. C. R. 178 .....218, 351
Independent Cordage Co. v. The King, 13 O. L. R 627 325
Indigo Co. v. Ogilvy (1891), 2 Ch. 31 209
Ing Kon v. Archibald, 17 O. L. R. 484 96
Inglis v. Haigh, 8 M. & W. 769 278
Inglis v. Wellington Hotel Co., 29 C. P. 287 327
Ingram v. Barnes, 7 E. & B. 132 409
Ingram v. Little, 1 Cab. & E. 186 285
Ingram v. Taylor, 7 A. R. 216 538
Innes v. East India Co., 17 C. B. 351 404
Innes v. Hutcheon, 9 O. L. R. 392 123
Innes v. London & S. W. Ry. Co., L. R. 4 C. P. 17 271
Insley v. Jones, 4 Ex. D. 16 .....73, 104
Institute of Patent Agents v. Lockwood (1894), A. C. 347 568
International Harvester Co. v. Kerton, Re, 7 O. W. R. 453 156
International Wrecking Co. v. Lobb, 12 P. R. 207 363

	PAGE
Ireland v. Pelatier	92
Irish Land Commission v. Ryan (1900), 2 Ir. R. 565	5
Irvine, Re, 12 P. R. 297	400
Irving v. Askew, L. R. 5 Q. B. 208	323, 358, 568
Irving v. Clark, 12 P. R. 20	320
Irving v. Morrison, 27 C. P. 242	153
Irving v. Veitch, 3 M. & W. 90	288
Irwin v. Speery, 11 P. R. 299	149
Irwin v. Victoria Harbour (Holmested's Jud. Act, 4th ed., 197)	326
Israel v. Benjamin, 3 Camp. 40	269
Isaac v. Wild, 7 Ex. 163	103
Ives v. Hitchcock, Drn. 247	115
Ives v. Ives, T. T. 3 Vic.	277

J.

Jackson v. Barry Ry. Co., 9 T. L. R. 90	439
Jackson v. Beaumont, 11 Ex. 300	157, 158
Jackson v. Cassidy, 2 O. R. 521	405
Jackson v. Clarke, Re, 36 C. L. J. 68	22, 83, 132
Jackson v. Copeland, 8 T. L. R. 250	73
Jackson v. De Kadich (1904), W. N. 168	131
Jackson v. Everett, 1 B. & S. 859	9
Jackson v. Grand Trunk Ry. Co., 2 O. L. R 689; 32 S. C. R. 245.	342
Jackson v. Grimbley, 16 C. B. N. S. 380	157, 158
Jackson v. Haason, 8 M. & W. 477	121
Jackson v. Hughes, 1 O. W. N. 478	310
Jackson v. Jacob, 3 Bing. N. C. 869	264
Jackson v. Litchfield, 8 Q. B. D. 474	212
Jackson v. Metropolitan, 3 A. C. 193	253
Jackson v. Ogg, 1 Johns 397	287
Jackson v. Richardson, 1 N. B. Eq. 325	331
Jackson v. Spittall, L. R. 5 C. P. 542	157
Jackson v. Woolley, 8 E. & B. 783	289
Jacobs, Re, 1 Har. & W. 123	294, 506
Jacobs v. Beaver, 17 O. L. R. 496	246
Jacobs v. Booth Distillery, 85 L. T. R. 204	245
Jacobs v. Brett, L. R. 20 Eq. 1	78
Jacobs v. Humphrey, 2 C. & M. 413	495
Jacomb v. Henry, 13 C. P. 377	203
Jacomb v. Turner (1892), 1 Q. B. 47	77
James, Ex parte, L. R. 9 Ch. 609	9
James v. James, 22 Q. B. D. 669; 23 Q. B. D. 12	439
James v. Newton, 2 New Eng. Rep. 820	189
James v. Rockwood Co. (1912), 28 L. T. R. 215	38
James v. South Western Ry. Co., L. R 7 Ex. 287	73
James v. Vane, 28 L. J. Q. B. 169	271
Jameson v. Jones, 3 Ch. Ch. 98	305
Jameson v. Kerr, 6 P. R. 3	112
Jarvis v. Legatt, 10 C. L. T. 155	103
Jay v. Budd (1898), 1 Q. B. 12	196, 197, 198, 199
Jeff. Davis, The, L. R. 2 A. E. 1	407
Jeffrey v. Bastard, 4 A. & E. 823	121
Jeffs v. Day, L. R. 1 Q. B. 372	476
Jelly, Re, Union Trusts v. Gamon, 6 O. L. R. 481	333

PAGE

Jenkins v. Cook, 1 P. D. 80 27
Jenkins v. Fereday, L. R. 7 C. P. 358 506
Jenkins v. Miller, 10 P. R. 95 .....70, 104
Jenkins v. Morris, 14 Ch. D. 674 .....341, 343
Jenkyns v. Brerin, 14 Q. B. 503 263
Jenkins v. Gaisford, 3 S. W. & Tr. 93 107
Jennings v. Willis, 22 O. R. 439 .....189, 431
Jephson v. Greenway, 2 Dowl. Ex. Pr. 102 312
Jervis v. Peel, 1 T. L. R. 306 402
Jeune v. Mersman, 2 O. W. N. 418 160
Jewell v. Brond, 20 O. L. R. 176 133
Johns v. Williams (1904), 1 K. B. 600 255
Johnson, Re, 20 Q. B. D. 68 557
Johnson v. Allen, 26 O. R. 550 389
Johnson v. Credit Lyonnnise Co., 3 C. P. D. 40 418
Johnson v. Crook, 12 Ch. D. 639 410
Johnson v. Diamond, 11 Ex. 73 .....307, 399, 401, 403
Johnson, Ex parte, 52 Ch. D. 112 572
Johnson v. Lukeman, 2 Dow. 640 347
Johnson v. Leigh, 6 Tannt. 246 .. ..116, 513
Johnson v. Martin, 19 A. R. 532 .....418, 494
Johnson v. Moffatt, W. N. (1875), 248 199
Johnson v. Moody, 12 P. R. 203 407
Johnson v. McKenna, 10 U. C. R. 520 464
Johnson v. Parke, 12 C. P. 179 .....121, 123
Johnson v. Provincial Ins. Co., 26 C. P. 113; 27 C. P. 464 252
Johnson v. Therrien, 12 P. R. 442 .....79, 81, 422, 429
Johnston, Ex parte, 3 B. & S. 947 371
Johnston v. Consumers Gas Co., 17 P. R. 297 220
Johnston v. De Veber, 8 C. L. T. 383 193
Johnston v. Galbraith, 18 C. L. T. 58 .....70, 78, 355
Johnston v. Hogg, 10 Q. B. D. 432 .....466, 470
Johnston v. Kayler, Re, 18 O. L. R. 248 73
Johnston v. Knights, Re, 18 O. L. R. 248 253
Johnston v. Petrolia, 17 P. R. 332 .....351, 360
Johnston v. Rex (1904), A. C. 817 327
Johnston v. Robertson, 13 Can. Cr. Cas. 452 378
Johnston v. Snowden, 19 Gr. 224 491
Johnston v. Wardle, 3 Dowl. 550 257
Johnston v. Wild, 44 Ch. D. 140 205
Johnston v. Wilson, 44 Ch. D. 146 205
Jonas v. Adamas, 20 L. J. Q. B. 397 352
Jones' Trustees v. Gittins, 51 L. T. 599 .....73, 339
Jones, In re, 1 L. M. & P. 65 .....195, 354
Jones, Re, Ex parte Kelly, 7 C. P. 149 .....407, 418
Jones, Re, Ex parte Lloyd, 1891, 2 Q. B. 231 409
Jones v. Arthur, 8 Dowl. 442 263
Jones v. Brown, 9 C. P. 201 .....282, 404
Jones v. Burnstein (1899), 1 Q. B. 470 554
Jones v. Cargill, 11 L. T. 566 198
Jones v. Cook, 2 P. R. 396 116
Jones v. Curry, 2 L. M. & P. 474 89
Jones v. Evans, 31 Sol. Jour. 11 133
Jones v. Gibbons, 8 Ex. 920 126
Jones v. Godson, 25 O. R. 444; 23 A. R. 34 441

PAGE

Jones v. Gooday, 9 M. & W. 736 (745) 92
Jones v. Heavens, 4 Ch. D. 636 58
Jones v. Humphreys (1902), 1 K. B. 10 186
Jones v. James, Re, 19 L. J. Q. B. 257 69
Jones v. Jones, 5 D. & L. 628 .....323, 489
Jones v. Julian, In re, 28 O. R. 601 .....70, 73, 253, 393, 572
Jones v. Macdonald, 14 P. R. 535 .....35, 529
Jones v. Mason, 18 P. R. 442 .....242, 243
Jones v. McDonald, 15 P. R. 345 512
Jones v. Owen, 5 D. & L. 669 .....67, 181
Jones v. Parcell, 11 Q. B. D. 430 356
Jones v. Paxton, 19 A. R. 163 .....485, 498
Jones v. Scottish Accidental Ins. Co., 17 Q. B. D. 421 160
Jones v. Spencer, 70 L. T. 536 342
Jones v. Stone, 1894, A. C. 124 .....241, 244
Jones v. Stroud, 2 C. & P. 196 317
Jones v. Thompson, 1 E. B. & E. 63 .....226, 400, 402, 403
Jones v. Tobin, 4 Bing. N. C. 123 311
Jones v. Tuck, 11 S. C. R. 197 351
Jones v. Whittaker, 3 L. T. 723 206
Jones dem. Griffiths v. Marsh, 4 T. R. 464 239
Jordan v. Marr, 4 U. C. R. 53 .....65, 73
Joselyne, Ex parte, Re Watt, 8 Ch. D. 327, at p. 330 416
Joseph v. Henry, 4 Q. B. 369 76
Joseph v. Miller, 2 New Mexico 621 94
Journal Printing Co. v. Maclean, 23 A. R. 324 345
Judge of Division Court, Toronto, Re, 23 U. C. R. 376 556
Julius v. Oxford (Bishop, 5 App. Cas. 214 .....410, 446, 449
Junghelm Hopkins & Co. v. Foukelman, 1909, 2 K. B. 948 6
Jupp v. Powell, 1 C. & E. 349 287

K.

Kalar v. Cornwall 566
Kavanagh v. Kingston (Corp.), 39 U. C. R. 415 226
Kay v. Atherton Local Board, 42 J. P. 792 272
Kny, Re, 1897, 2 Ch., at p. 519 377
Kny v. Marshall, 8 C. & F. 245 354
Kay v. Storry, Re, 8 O. L. R. 45 .....68, 500, 503, 507, 508
Keane v. Steadman, 10 C. P. 435 545
Kearsley v. Cole, 16 M. & W. 128 29
Kearsley v. Phillips, 10 Q. B. D. 465 298
Keating v. Graham, 26 O. R. 361 .....6, 67, 178
Keating v. Parkin, 23 C. P. 569 113
Kenna v. O'Hnra, 16 C. P., at p. 438 .....353, 482
Keenan, Re, 3 Ch. Chamb. 285 490
Keighley, Maxstead & Co. v. Bryan, Durnnt & Co., 9 T. L. R. 107. 439
Keightley v. Birch, 3 Camp. 521 495
Kelley v. Wnde, 14 P. R. 13 174
Kelly, Ex parte, 7 C. P. 149 .....407, 418
Kelly v. Metropolitan (1895), 1 Q. B. 944 101
Kelly v. Ottawa St. Ry. Co., 3 A. R. 616, 627 363
Kelly v. Isolated Risk and F. F. Ins. Co., 26 C. P. 299 226
Kelly v. Rider, 11 T. L. R. 206 402
Kelly v. Selwyn (1905), 2 Ch. 117 187

PAGE

Kelly doe. d. v. Hunt, 1 P. R. 44 310
Kemble v. Farren, 6 Bing. 141 130
Kemp, Ex parte, L. R. 9 Ch. 383 308
Kemp v. Baerselman (1906), 2 K. B. 604 189
Kemp v. King, 2 Moo. & Rob. 437 296
Kemp v. Neville, 10 C. B. N. S. 545 22
Kemp v. Owen, 14 C. P. 432 .....156, 157
Kempland v. Macaulay 468
Kempton v. Willey, 9 C. B. 719 .....67, 78
Kendall v. Hamilton, 4 App. Cas. 504 .....7, 204, 220, 399
Kenley v. Wakley, 9 T. R. 571 306
Kenaedy v. Beal, 29 O. R. 549 442
Kennedy v. Kennedy (1914), A. C. 215, 220 7
Kenaedy v. Lyell, 23 Ch. D. 387; 9 App. Cas. 81 297
Kenaedy v. Macdonell, 1 O. L. R. 256 9
Kennedy v. Patterson, 22 U. C. R. 556 .....470, 544
Kennedy v. Purcell, 14 S. C. R. 453 171
Kennen v. Macdonald, 22 O. R. 484 .....120, 123, 534
Keaneth v. Westminster Improvement Com'rs., 11 Ex. 349 ....404, 434
Kenney v. May, 1 M. & Rob. 56 524
Keaalngton, Ex parte, 8 Jur. N. S. 1111 355
Kenny v. Hutchlason, 6 M. & W. 134 174
Kent v. Jones, 3 Dowl. 343 240
Kent v. La Commalmute (1903), App. Cas. 220 222
Keat v. Olds, 7 U. C. L. J. 21 372
Kent v. Tompkinson, L. R. 2 C. P. 502 417
Kingston Commissioners, Ex parte, 18 L. R. Ir. 509 66
Kenworthy v. Sidebottom (aareported) C. P. D. 16th May, 1876.. 145
Kenyon v. Enstwood, 57 L. J. Q. B. 54 .....235, 557
Kepp v. Wiggett, 10 C. B. 35 30
Kerby v. Cahlll, 6 O. S. 510 111
Kerby v. Denby, 1 M. & W. 306 117
Kerchand v. Chantler, 26 L. T. 474 83
Kerkin v. Kerkln, 3 E. & B. 390 ....72, 74
Kero v. Powell, 25 C. P. 448 .....30, 479
Kerr v. Bain, 11 Gr. 423 489
Kerr v. Cornell, 1 C. L. J. 326 146
Kerr v. Douglns, 26 U. C. B. 357 174
Kerr v. G. T. Ry. Co., 4 P. R. 303 258
Kerr v. Hnyaes, 2 L. T. 11 160
Kerr v. Klnsey, 15 C. P. 531 469
Kerr v. Roberts, 17 C. L. T. 337 104
Kerr v. Smith, 27 O. R 409 ..... 0, 16
Kerr v. Styles, 26 Gr. 309 490
Kerr v. Suter, 6 Terr. L. R. 255 321
Kersterman v. McLellnn, 16 P. R. 122 519
Kerwood v. Eastwood, 57 L. J. Q. B. 455 504
Kettlewell v. Bnrstow, L. R. 7 Ch. 686 208
Keynsham v. Baker, 12 H. & C. 729 167
Keyes v. McKeon, 2 O. W. N. 899 542
Keyes v. McKeon, 23 O. L. R. 529 596
Keyser v. Mitchell, 67 Penn. 473 408
Kidd v. O'Connor, 43 U. C. R. 193 507
Kidd v. Perry, 14 P. R. 364 .....304, 305, 306
Kidd v. Walker, 2 B. & Ad. 705 269

PAGE

Klely v. Massey, 6 L. R. Ir. 445 237
Killens v. Street, M. T. 4 Vic. 194
Kilmer v. British Columbia (1903), A. C. 319 131
Kimbray v. Draper, L. R. 3 Q. B. 160 569
Kimpton v. Willey, 9 C. B. 719 .....138, 140
King, Re, 18 P. R. 365 14
King v. Burrell, 12 A. & E. 468 389
King v. Charing Cross Bank 78 78
King v. Edelston, 17 Can. Cr. Cas. 155 389
King v. England, 4 B. & S. 782 496
King v. Farrell, 8 P. R. 119 158
King v. Flxwell, 3 Ch. D. 518 161
King v. Hoare, 13 M. & W. 494 .....7, 204, 309
King v. Kemp, 8 L. T. 255 93
King v. Koogo, 9 Can. Cr. Cas. 56 373
King v. Langlois, 20 Can. Cr. Cns. 183 371
King v. Macdonald, 15 C. P. 397 468
King v. McCabe, 18 Can. Cr. Cas. 217 378
King v. McKay, 21 Can. Cr. Cas. 211 .....369, 372
King v. Norman, 4 C. B. 884 30
King v. Rogers, 1 O. L. R. 73 .....283, 284, 286
King v. Simmonds, 7 Q. B. 289 259
Kingsford v. Merry, 11 Ex. 577 712
Kingsley v. Dunn, 13 P. R. 300 .....241, 247
Klagsnlll v. Millard, 11 Ex. 313 164
Klngston Election, Re Stewart v. Macdonald, 41 U. C. R. 313.... 447
Kingston (City) v. Brown, 4 U. C. R. 117 191
Kingston (City) v. Shaw, 6 U. C. L. J. 280 551
Kingston v. Kingston (1897), A. C. 509 342
Klngston (Corp.) v. Shaw, 20 U. C. R. 223 551
Kinnalrd v. Tensley, 27 O. R. 398 256
Klnnaird v. Webster, 10 Ch. D. 139 96
Klnning, Ex parte, 4 C. B. 507 .....508, 509
Kluning v. Buchanan, 8 C. B. 271 508
Kinsey v. Rocke, 8 P. R. 515 105
Kino v. Rudkin, 6 Ch. D. 160 .....218, 219, 220, 223
Kirby v. North British (1896), 2 Q. B. 99 360
Kirkendall v. Thomas, 7 U. C. R. 30 123
Kirchoffer v. The Imperinl L. & I. Co., 7 O. L. R. 295 308
Klrkpatrick, Re Kirkpatrick v. Stevenson, 19 P. R. 4 325
Klrton v. Braithwaite, 1 M. & W. 310 263
Kitchen v. Murray, 16 C. P. 69 343
Kitchen v. Saville, 17 C. L. T. 88 .....507, 512
Kitchen v. Shaw, 6 A. & E. 729 347
Kitchen v. Wilson, 4 C. B. N. S. 483 197
Klocke, Re, 28 Ch. D. 175 336
Knapp v. Bower, 17 Gr. 695 266
Knickerbocker v. Rntz, 16 P. R. 191 352
Knight, Re, 1 Ex. 802 86
Knight v. Abbott, 10 Q. B. D. 11 226
Knight v. Bennett, 2 Bing. 361 120
Knight, Re, Knight & Gardiner (1892), 2 Ch. 376 408
Knight v. Egerton, 7 Ex. 407 398
Knight v. Lee (1893), 1 Q. B. 41 93
Knight v. Medorn (Tp.), 11 O. R. 138; 14 A. R. 112..85, 86, 143
166, 176

PAGE
Knill v. Prowse, 33 W. R. 163 .....185, 186
Knowles v. Halden, 24 L. J. Ex. 223 .....67, 71
Knox v. Gye, L. R. 5 H. L. 656 278
Kormann v. Tookey, 6 P. R. 112 44
Kotchie v. Galden Sovereigns, Ltd. (1898), 2 Q. B. 164 544
Knatt v. Warren, 4 D. & Ry. 179 286
Knox v. Porter, Brown v. Porter, 11 P. R. 250 258
Knubb v. McCanvey, 1 O. W. N. 1417 265
Koksilah v. McQueen, 5 B. C. R. 600 371
Koster, Ex parte, Re Parke, 14 Q. B. D. 597 507
Kreamer v. Glass, 10 C. P. 475 518
Kraus v. Arnold, 7 Moo. 59 264
Kreb v. Bisbap, 17 C. L. T. 278 7
Krehl v. Great Central Gas. Co., L. R. 5 Ex. 289-293 465
Kreutziger v. Brax, 32 O. R. 418 .....105, 106
Kwang Wa, Re, 2 B. C. R. 336 372
Kyle v. Barnes, 10 P. R. 20 519

L.

La Banque Jacques Cartier v. Strachan, 5 P. R. 159 184
Labatt v. Chisholm, 11 C. L. T. 188 .....78, 498
Labelle v. O'Connar, 15 O. L. R. 519 131
Labouchere v. Wharncliffe, 13 Ch. D. 346 19
La Bourgoine (1899), P. 1 161
La Campaignie Général, Re (1891) 2 Ch. 451 321
Lacey v. Farrester, 3 Dowl. 668 342
Ladouceur v. Salter, 9 P. R. 305 .....160, 194
Lags v. Grunwaldt (1909), W. N. 216 237
Laidlaw v. Campbellford, L. O. and W. R. W. Co., 31 O. L. R. 209 439
Laidlaw v. O'Connor, 23 O. L. R. 696 101
Laing v. Matthews, 14 Gr. 36 489
Laird v. Briggs, W. N. (1880), 205 535
Lake, Re, 42 U. C. R. 206 376
Lake v. Bell, Re Bell, 34 Ch. D. 462 291
Lake v. Biggar, 11 C. P. 179 112
Lake v. Haseltine, 55 L. J. Q. B. 2050 .....151, 322
Lamb v. Beaumont, 27 Ch. D. 356 596
Lambe, Ex parte, Re Soatham, 19 Ch. D. 169 .....45, 174
Lambe v. Smith, 15 L. J. Ex. 287; 15 M. & W. 434 160
Lambert v. Clark, 7 O. L. R. 130 350
Lambert v. Hutchinson, 1 Beav. 277 218
Lambkin v. S. E. Ry. Co., 5 App. Cas. 352 343
Lamond v. Effie, 3 Q. B. D. 910 519
Lamont v. Crook, 6 M. & W. 615 295
Lamman v. Davis, 1 U. C. R. 179 284
Lancashire v. Spectator, 29 O. L. R. 203 216
Lancaster v. Ryckman, 15 P. R. 199 321
Lands Allotment Co., Re (1894), 1 Ch. 616 290
Landman v. Croales, 4 Gr. 353 325
Landens v. Shiels, 3 D. P. C. 90 145
Lathbury v. Brown, 19 Moo. 106 343
Laughlin v. Harvey, 24 A. R. 438 344
Lane, Re, Ex parte Gaze, 23 Q. B. D. 74 289

	PAGE
Lane v. Dungannon Agrl. Assn. 22 O. R. 264	188
Lane v. Isaacs, 3 Dowl. 652	231
Lang v. Mackenzie, 4 C. & P. 463	282
Lang v. Thompson, 16 P. R. 516	216
Langdon v. Robertson, 12 P. R. 140	259
Langen v. Tate, 24 Ch. D. 528	303, 306
Langley v. Law Society, 3 O. L. R. 245	220
Langley v. Meir, 25 A. R. 372	553
Langley v. Van Allen, 32 O. R. 216	8
Lanyon v. Toogood, 13 M. & W. 27	472
La Pointe v. G. T. Ry. Co., 26 U. C. R. 479	35
Larchin v. Western Bank, L. R. 10 Ex. 64	172
Latham v. Spedding, 17 Q. B. 444	87
Latimer v. Veader, 46 N. Y. Supp. 823, 829, and 20 App. Div. 418	225
Latom v. Smith, 12 P. R. 214	300
Law v. Hanson, 25 S. C. R. 69	7
Law v. Llewellyn (1906), 1 K. B. 487	22
Law v. Redditch (Local Bd.) (1892), 1 Q. B. 127	130
Law Can., etc Corporation, In re, (1612), 1 Ch. 405	151
Lawford v. Partridge, 1 H. & N. 621	73, 86, 447
Lawless v. Radford, 9 P. R. 33	118, 121
Lawless v. Sullivan, 6 App. Cas. 373	62
Lawrence v. Willcox (1892), 1 Q. B. 696	327
Lawrey v. Tuckett, 2 O. L. R. 162	151
Lawrenson v. Hill, 16 Ir. C. L. R. 177	512
Laws v. Grunwald (1909), W. N. 216	237
Law v. Society v. Macdougall, 13 O. R. 104; 15 A. R. 100; 18 S. C. R. 203	26
Law Society v. Wsterlow, 8 App. Cas. 407	26
Lawson v. Vacuum Brake Co., 27 Ch. D. 137	304
Lazier v. Henderson, 29 O. R. 673	553
Lazier v. Facey, 16 Q. B. D. 352	62
Lazier v. Parker, 13 Q. B. D. 835	409
Leader v. Rys, 100 C. B. N. S. 369	100
Leader v. Tod-Hatley W. N. (1891), 38	226
Leah v. Order of Chosen Friends, 27 C. L. J. 64	33
Leaming v. Woon, 7 A. R. 42	404
Leary v. Saxton, 28 N. S. R. 278	531
Leath v. Vine, 30 L. J. M. C. 167	84
Leatherdale v. Sweepstone, 3 C. & P. 342	264
Leather v. Andrew, W. N. (1875) 256	212
Le Blanch v. Wilson, 21 W. R. 109	34
Lechmere v. Fletcher, 1 C. & M. 623; 3 Tyr. 456	285
Leckey v. McDermott, 8 S. & R. 500	111
Lee v. Ashwin, 1 Times 291	152
Lee v. Bude Ry. Co., L. R. 6 C. P. 576	11
Lee v. Charmington, 23 Q. B. D. 45	272, 531
Lee v. Cohen, 71 L. T. 824	67, 70, 181
Lee v. Danger (1892), 1 Q. B. 231, 241, 242	466, 561
Lee v. Friedman, 20 O. L. R. 49	187, 188, 189
Lee v. Howes, 30 U. C. R. 292	465, 488, 489
Lee v. McMahon, 2 O. R. 654	153
Lee v. Turner, 20 Q. B. D. 773	172
Lee v. Wilmot, L. R. 1 Ex. 364	282, 283
Lees, Ex parte & C. C. Judge of Carleton, 24 C. P. 214, 389	555, 558

PAGE
Lees v. Carleton (County), 33 U. C. R. 409 .....13, 14
Lees v. Ottawa, 31 O. R. 567 360
Lefountain v. Beaudoin, 28 S. C. R. 89 354
Legarie v. Canada Loan and Banking Co., Re, 11 P. R. 512..100
104, 125, 128, 228, 397
Leibes v. Ward, In re, 45 U. C. R. 375 24
Leitch v. Molsons Bank, 27 O. R. 621 335
Lemny v. McRae, 16 O. R. 307; 16 A. R. 348; 18 S. C. R. 280
439, 440
Lemni v. Mitchell (1912), A. C. 409 5
Lemon v. Lemon, 6 P. R. 184 .....506, 511
Lempriere v. Lange, 12 Ch. D. 675 202
Leslie v. Eamons, 25 U. C. R. 243 23
Lented v. Congdon, 1 O. L. R. 1 .....425, 426
Lenter v. Congdon, 1 O. R. 1 68
Lester v. Garland, 15 Ves. 248 25
Le Tulleur v. S. E. Ry. Co., 3 C. P. D. 18 .....162, 163, 302
Lett v. Morris, 4 Sim. 607 189
Lett v. St. Lawrence, 1 O. R. 545 394
Lever v. Pearce, W. N. (1888) 105 205
Levi v. Edwards, 5 O. W. R. 83 .....307, 321
Levy, Re, 60 L. T. N. S. 317 172
Levy v. Moylan, 10 C. B. 189 558
Levy v. Wilson, 9 C. L. J. 191 230
Lewis v. Blurton, 7 C. B. 102 240
Lewis v. Burrell, 77 L. T. 626 272
Lewis v. Calor, 1 F. & F. 306 171
Lewis v. Graham, 20 Q. B. D. 780 162
Lewis v. Jones, 4 B. & C. 515 32
Lewis v. Kingsbury, 4 T. L. R. 626, 630 303
Lewis v. Holding, 3 Scott. N. R. 191 545
Lewis v. Lewis, 45 Ch. D. 281 260
Lewis v. Londesborough (Earl), (1893), 2 Q. B. 19 .....319, 596
Lewis v. Nobbs, 8 Ch. D. 591 133
Lewis v. Old, Re, 17 O. R. 610 .....73, 253, 346, 385
Lewis v. Owen (1894), 1 Q. B. 102 .....349, 560
Lewis v. Teale, 32 U. C. R. 108 110
Lewis v. Rumney, L. R. 4 Eq. 451 .....280, 334
Lewis and Thorne, Re, 14 O. R. 133 487
Lexden v. Southgate, 10 Ex. 201 75
Life and Fire Ins. Co. v. Wilson, 8 Peters 291 74
Liffin v. Pitcher, 1 Dowl. N. S. 767 179
Light v. Antleosti, 58 L. T. 25 306
Light v. Lyons, 7 U. C. L. J. 74 .....139, 140
Lightburn v. McMyn, Re, 33 Ch. D. 575 207
Lilley v. Elwin, 11 Q. B. 742 .....134, 135
Lilley v. Harvey, 5 D. & L. 648 .....84, 86
Lilly v. Smales, 8 T. L. R. 410 108
Lince v. Faircloth, 14 P. R. 253 336
Linden v. Buchanan, In re, 29 U. C. R. 1 .....49, 83, 174, 468
Lindsay v. Martin, 5 T. L. R. 322 245
Lindus v. Bradwell, 5 C. B. 583 260
Linsell v. Bonsor, 2 Bing. N. C. 241 .....285, 289
Lintott, Ex parte, L. R. 4 Eq. 184 826
Lipscombe v. Holmes, 2 Camp. 441 269
Liquor License Act, 1883, Re, 5 C. L. T. 66 27

PAGE

Lisburn (Earl) v. Davies, L. R. 1 C. P. 259 164
Lister, Re, Ex parte Pyke, 8 Ch. 754 93
Lister v. Hoosoa (1908) 1 K. B. 174 148
Lister v. Northern Ry. Co., 19 C. P. 408 544
Lister v. Perryman, L. R. 4 H. L. 521 531
Lister v. Stubbs, 45 Ch. D. 1 135
Lister v. Wood, 23 Q. B. D. 229 341
Little v. Dundas, etc., Road Co., 2 C. P. 399 530
Liverpool Gas Light Co. v. Evertoa (Overseers), L. R. 6 C. P. 414 .....76, 77
Livingston v. Gartshore, 23 U. C. R. 166 343
Llsarda v. Dawsoa, 32 U. C. R. 237 278
Llade v. Morgan, 23 C. P. 517 294
Lloyd, Ex parte; Re Jones (1891), 2 Q. B. 231 400
Lloyd v. Hendersoa, 6 P. R. 254 311
Lloyd v. Joaes, 6 C. B. 81 .....84, 88
Lloyd v. Key, 3 Dowl. 253 304
Lloyd v. Maund, 2 T. R. 760 .....281, 285
Lloyd v. Walkey, 9 C. & P. 771 209
Lloyd v. Wallace, 9 P. R. 335 .....401, 403
Lloyd's Banking Co. v. Ogle, 1 Ex. D. 262 .....238, 242
Lockart v. Gray, 2 C. L. J. 163 .....49, 551, 554
Locke v. McConkey, 26 C. P. 475 552
Locke, Re, Ex parte Popperton 566
Lockridge v. Lacey, 30 U. C. R. 494 .....264, 265
Lockwood v. Bew, 19 P. R. 655 307
Logan v. Bank of Scotland (1904), 2 K. B. 495 .....161, 201
Logg v. Allwood, 14 A. R. 496 342
Logos v. Grunwoldt (1909), W. N. 216 231
Logue v. McCuish, 21 N. S. Reps. 95 94
Logue v. Prescott, 18 C. L. T. 186 120
London v. S. E. Ry. Co. (1893), App. Cas. 429 326
London & Can. L. & A. Co. v. Thompson, 8 P. R. 91 198
London & Can. L. & A. Co. v. Morphy, 14 A. R. 577 207
London & Can. L. & A. Co. v. Morris (Tp.), 14 C. L. J. 58 405
London Chartered Bank of Australia v. Lempriere, L. R. 4 P. C. 572 491
London Loan Co. v. Manley, 26 S. C. R. 443 332
London (Mayor) v. Cox, L. R. 2 H. L. 261 ..65, 67, 68, 72, 75, 77, 80, 416, 565
London (Mayor) v. London Joint Stock Bank, 6 App. Cas. 400.. 410
London Mutual Fire Ins. Co. v. McFarlane, Re, 26 O. R. 15..227, 228, 383
London & N. W. Ry. Co. v. Grace, 2 C. B. N. S. 555 358
London & N. W. Ry. Co. v. Lindsay, 3 MacQ. H. L. Cas. 99.... 22
London & N. W. Ry. Co. v. Whinray, 19 Ex. 77 32
London, Chatham & Dover Ry. Co. v. S. E. Ry. Co. (1892), 1 Ch. 120 325
London Scottish Perm. Bldg. Socy., Re, 63 L. J. Q. B. 112 73
London S. W. Ry. Co. v. Blackmore, L. R. 4 H. L. 610 180
London & Yorkshire Bank v. Cooper, 15 Q. B. D. 473 298
London Universal Bank v. Clanearty (1892), 1 Q. B. 689..... 327
Long, Re, Ex parte Cuddeford, 20 Q. B. D. 316 497
Long v. Crossley, 13 Ch. 388 216
Long v. Clark (1894), 1 Q. B. 119 .....116, 117

PAGE
Long v. Hancock, 12 S. C. R. 532 364
Long v. Long, 17 Gr. 251 264
Longbottom v. Longbottom, 8 Ex. 203 144
Long Point Co. v. Anderson, Re, 19 O. R. 487; 18 A. R. 491..75, 76, 77, 86
Loppky v. Hofley, 18 C. L. T. 369; 12 Man. L. R. 335 70
Lord v. G. E. Rail. Co. (1908), 2 K. B. 54 148
Lord v. Hall, 8 C. B. 627 260
Lord Advocate v. Wemyss (1899), W. N. 124 292
Lord Wellesley's Case, 2 Rus. & Myl. 639 295
Lossing v. Jennings, 9 U. C. R. 406 .....470, 551
Lott v. Cameron, Re, 29 O. R. 70 .....67, 72, 74, 103, 104, 107
Louden v. Milmine, 15 O. L. R. 53 .....291, 292
Louis, Re, Ex parte Law Society (1891), 1 Q. B. 649 27
Love v. Culham, 30 U. C. R. 410 123
Love v. Fox, 15 Q. B. D. 679 174
Lovegrove v. White, L. R. 0 C. P. 440 260
Lovejoy v. Cole (1894), 2 Q. B. 861 104
Lovejoy v. Mercer, 23 O. L. R. 29 8
Lovell v. Newton, 4 C. P. D. 7 62
Lovell v. Gibson, 10 Gr. 280 492
Lovell v. Phillips, 5 O. L. R. 235 102
Lovell v. Wardroper, 4 P. R. 265 546
Lovely v. White, 12 L. R. Ir. 381 422
Low v. Blackmore, L. R. 19 Q. B. 485 416
Lowden v. Martin, 12 P. R. 496 243
Lowe v. Dixon, 16 Q. B. D. 544 205
Lowe v. Fox, 15 Q. B. D. 679 45
Lowe v. Owen, 12 C. P. 101 175
Lowndes v. Garnett, etc., Gold Mining Co., 10 L. T. 329 286
Lowson v. Canada Farmers M. Ins. Co., 9 P. R. 309 465
Lowter v. Radnor (Earl of), 8 East. 113 74
Lucas v. Dixon, 22 Q. B. D. 357 .....106, 285
Lucas v. Elliott, 9 L. J. 147 100
Lucas v. Harris, 18 Q. B. D. 127 403
Lucas v. Ross, 9 P. R. 261 228
Ludmore, Re, 13 Q. B. D. 415 497
Luke v. South Kensington, 11 Ch. D. 121 221
Lumb v. Benumont, 27 Ch. D. 356 319
Lumb v. Teal, 22 Q. B. D. 675 .....355, 358
Lumley v. Brooks, 41 Ch. D. 323 140
Lumley v. Gye, 3 E. & B. 114 308
Luxen, Ex par Re Pidsley, 20 Ch. D. 701 171
Lydall v. Martin, 5 Ch. D. 780 .....221, 258, 259
Lyles v. Southend (1895), 2 K. B. 1 101
Lyman v. Brethern, 2 Chamb. R. 108 173
Lyman v. Sheriff, 9 C. L. T. 289 120
Lynch v. O'Hara, 6 C. P. 259, 268 37
Lynch v. Wilson, 9 U. C. L. J. 242 347
Lyade v. Waithman (1895), 2 Q. B. 180 226
Lyon v. Tiffany, 16 C. P. 197 283
Lyon v. Weldon, 2 Bing. 334 524

M.

	PAGE
Maber v. Maber, L. R. 2 Ex. 153	288
Macara v. Dines, 2 West. L. R. 99	85, 86
Macara v. Morish, 11 C. P. 74	85
Macauley v. Rumball, 19 C. P. 284	400, 406
Macbeath v. Haldimand, 1 T. R. 172	405
Macbeth v. Ashley, L. R. 2 Sc. App. 352	410
Maccord v. Osborne, 1 C. P. D. 568	291
MacDonald, Re; Dick v. Fraser (1897), 2 Ch. 181	285
Macdonald, Re, Ex parte Grant, W. N. (1888), 130	33, 205, 287
Macdonald v. Anderson, 9 C. L. T. 158	404
Macdonald v. Balfour, 20 A. R. 404	338
Macdonald v. Carlington, 4 C. P. D. 28	151
Macdonald v. Crombie, 2 O. R. 243	431, 465
Macdonald v. Macdonald, 5 U. C. L. J. 60	160, 275, 406
Macdonald v. The World, 16 P. R. 324	321
Macdonald v. Whitfield; Whitfield v. The Merchant's Bank, 27 S. C. R. 94	33, 34, 205
Macdonald v. Worthington, 7 A. R. 531	252, 312
MacDonell v. Blake	568
Macdougall v. Knight, 14 App. Cas. 194	4, 354
Macdougall v. Paterson, 11 C. B. 755	160, 234, 392
Mace and County of Frontenac, Re, 42 U. C. R. 70	15
Macgie v. Hutchinson, 12 P. R. 167	75, 408
Macgie v. Hunter, 9 P. R. 149	465, 538
Macgie v. Pearson, 8 O. R. 745	523
Mack v. Ward, W. N. (1884) 16	401, 403
Mackenzie v. Rosa, 14 P. R. 290	228
Mackonochie v. Lord Peaznace, 6 App. Cas. 424	66, 72, 74, 80
Maclean v. Anthony, 0 O. R. 330	539
Maclure, Ex parte, L. R. 5 Ch. 737	136, 135
Macnee v. Ontario Bank	571
Macpherson and City of Toronto, Re, 26 A. R. 351; 30 S. C. R. 321	328
Macrae v. Clarke, L. R. 1 C. P. 403	398, 515
Maddison v. Alderson, 8 App. Cas. 473	136
Maddocks v. Holmes, 1 B. & P. 228	231, 274
Madigan v. Ferland, 17 P. R. 124	542
Magann v. Ferguson, 20 O. R. 235	226, 274
Magee v. Lavell, L. R. 9 C. P. 107	130
Mager v. Canadian Tin Plate Decorating Co., Re, 7 O. L. R. 25,	226, 227, 228, 317, 383
Maguire v. Maguire, 11 A. R. 178	8
Mahew v. Crickett, 2 Sw. 185	205
Mahew v. Stone, 26 S. C. R. 58	334
Mahon v. Inkster, 6 Man. L. R. 253	361
Mair v. Cameron, 18 P. R. 484	195
Maissonneuve v. Roxborough (Tp.), 30 O. R. 127	69
Major v. McKenzie, 23 C. P. 261	223
Malcomn v. Leys, 15 P. R. 75	104
Malcolm v. Malcolm, 15 Gr. 13	163
Malcom v. Perth M. F. Ins. Co., 29 O. R. 406	17, 513
Malcolmson v. Hamilton P. & L. Soc'y, 10 A. R. 610	342
Mafloch v. Plunkett, 11 Gr 439	489
Malzard v. Hart, 27 S. C. R. 510	357
Manby v. Manby, 3 Ch. D. 101	219, 279

PAGE
Mandeville v. Welch, 5 Wheat. 280 188
Mander v. Frolike (1891), 3 Ch. 488 197
Manitoba Free Press v. Martin, 21 S. C. R. 518 344
Manning v. Anhall, 23 U. C. R. 302 351
Manning v. Luan, 2 C. & K., 13 265
Manning v. Moriarity, 12 L. R. Ir. 372 238
Manoque v. Mason, 3 Man. L. R. 903 246
Manson v. Gurnett, 2 P. R. 389 110
Manufacturers & Mer. M. Ins. Co. v. Campbell, 1 C. L. T. 134 176
Mapleson v. Nasine, 5 Q. B. D. 144 322
Mapleson v. Sears, 105 L. T. 630 403
Marchant v. Morton (1901), 2 K. B. 829 186
Margate Pelr Co. v. Hannam, 3 B. & Ald. 266 ..... 16, 24
Marks v. Beyfus, 25 Q. B. D. 494 288
Marks v. Marks, 13 B. C. R. 161 310
Marks v. Windsor, 17 O. R. 719 393
Marples v. Hartley, 1 B. & S. 1 400
Marriott v. Hampton, 2 Smith's L. C. 421 8
Marsden v. Wardle, 3 E. & B. 695 ..... 70, 85
Marsh, In re, 16 L. J. Q. B. 330 430
Marsh v. Conquest, 17 C. B. N. S. 418 160
Marsh v. Dewes, 17 Jur. 558 84
Marshall v. Blunan, 10 T. L. R. 85 394
Marshall v. Central Ont. Ry. Co., 28 O. R. 241 135
Marshall v. Jamieson, 42 U. C. R. 115 ..... 108, 126
Marshall v. Lamb, 5 Q. B. 115 116
Marshall v. May, 12 Man. L. R. 381 407
Marshall v. McRae, 19 A. R. 139 40
Marshall v. Poole, 13 East. 101 325
Marshall v. Whiteside, 1 M. & W. 188 260
Marshalsea Case, The, 10 Rep. 76 22
Marston v. Allen, 8 M. & W. 494 158
Marter and Gruvenhurst, Re, 18 O. R. 243 82
Martin, Ex parte, 4 Q. B. D. 212 126
Martin v. Andrews, 7 E. & B. 1 298
Martin v. Bannister, 4 Q. B. D. 491 ..... 126, 128, 132, 248, 312
Martin v. Bearman, 45 U. C. R. 205 190
Martin v. Clarke, 3 O. W. N. 560 246
Martin v. Corbett, 7 U. C. R. 169 343
Martin v. Mackonochie, 3 Q. B. D. 747 66
Martin v. McCharles, 25 U. C. R. 270 ..... 173, 259
Martin v. Nadel, 1906, 2 K. B. 26 414
Martin v. Travellers Ins. Co., 1 F. & F. 505 205
Martindale, Re (1894), 3 Ch. 193 4
Mason, Re, Turner v. Moson, W. N. (1883), 134 ..... 220, 298, 367
Mason v. Comeron, Re Cameron, 15 P. R. 272 338
Mason v. Cooper, 15 P. R. 418 347
Mason v. Harris, 11 Ch. D. 97 ..... 221, 223
Mason v. Irwin, 15 O. L. R. 89 361
Mason v. Johnson, 20 A. R. 412 ..... 10, 112, 276, 480
Mason v. Moggeridge, 18 C. B. 642 414
Mason v. Morgan, 3 P. R. 325 ..... 146, 538
Mason v. Peterborough, 20 A. R. 683 224
Mason v. Wirral Highway Bd., 4 Q. B. D. 459 349
Massey Mfg. Co., Re, 11 O. R. 463 83
Massey v. Burton, 2 H. & N. 597 161

	PAGE
Massey v. Heynes, 21 Q. B. D. 330	220
Massey v. Sladen, L. R. 4 Ex. 13	557
Massie v. Toronto Ptg. Co., 11 O. R. 302	343, 400, 403
Masters v. Stanley, 8 D. P. C. 109	474
Matheson v. Kelly, 24 C. P. 508	264
Mathews v. Marsh, 5 O. L. R. 540	183
Mathews v. Munster, 20 Q. B. D. 141	200
Mathews v. Smallwood (1910), 1 Ch. 777	132
Mathews v. Usher (1902), 2 Q. B. 535	218, 222
Mathews v. Victoria (City), 5 B. C. R. 287	188
Maunsell v. Ainsworth, 8 Dowl. 680	294
Maw v. Jones, 25 Q. B. D. 107	134, 135, 136
Maw v. Whyatt, 7 Jur. N. S. 1300	347
Maxwell v. Clarke, 10 Man. L. R. 401	68
Maxwell v. Searfe, 18 O. R. 531	25
May v. Childley (1894), 1 Q. B. 451	238
May v. Lane, 64 L. J. Q. B. 236	189
May v. Lee, 104 L. T. Newspaper 357	343
May v. Standard Fire Ins. Co., 30 C. P. 54	474
May v. Standard Fire Ins. Co., 5 A. R. 605	466
Mayer v. Farmer, 3 Ex. D. 325	349
Mayhew v. Herrick, 7 C. B. 229	398
Mead v. Creary, 8 P. R. 374; 32 C. P. 1	166, 176, 273, 400, 403
Medwin, Ex parte, 1 E. & B. 600	22, 74
Meek v. Scobell, 4 O. R. 533	72
Mein v. Hall, 13 C. P. 518	469
Mellish v. Buffalo B. & G. Ry. Co., 2 U. C. L. J. 230; 14 C. L. J. 256	405
Mellows v. Braunlster, 31 W. R. 238	198
Meloche v. Reaume, 34 U. C. R. 606	55, 121, 123
Mellville Mut. M. & F. Ins. Co. v. Driscoll, 11 S. C. R. 183	308, 309, 315
Menelly v. McKenzie, 3 E. & A. 209	469
Mercer v. Graves, L. R. 7 Q. B. 499	408, 478
Mercantile Bank v. Evans (1899), 2 Q. B. 613	185, 188
Mercantile Bank of Sydney v. Taylor (1893), A. C. 317	29
Merchants' Bank v. Herson, 10 P. R. 117	541, 548
Merchants' Bank v. Lucas, 18 S. C. R. 704	107
Merchants' Bank v. McKay, 15 S. C. R. 272	206
Merchants' Bank v. Montelth, 10 P. R. 467	333
Merchants Bank v. Van Allen, 16 P. R. 338	40, 71, 195, 207
Merchants Nat. Bank v. Ontario Coal Co., 16 P. R. 87	230
Merchants' Shipping Co. v. Armitage, L. R. 9 Q. B. 99	325
Meredith v. Whithingham, 1 C. B. N. S. 216	75
Meriden Britannia Co. v. Bowell, 4 B. C. R. 520	406, 428
Merrell v. McFarren, 1 C. L. T. 133	511
Merritt v. Hepenstal, 25 S. C. R. 150	133, 354
Mersey Docks Board v. Lucas, 8 App. Cas. 891	62
Mersey Steel v. Naylor, 9 Q. B. D. 648	151
Metallic Roofing v. Local Union Workers, 5 O. L. R. 424; 9 O. L. R. 178	216
Metcalf v. Birtle, 34 Sol. Jour. 284	383
Metrop. Asylum Dist. v. Hill, 5 A. C. 582	352
Metrop. Bd. of Works v. Steed, 8 Q. B. D. 415	247
Metrop. Loan & Sav. Co. v. Mara, 8 P. R. 355	571
Metrop. Ry. Co. v. Wright, 11 A. C. 152	252, 342
Meyer v. Bell, 13 O. R. 35	90

PAGE
Meyerhoff v. Froehlick, 3 C. P. D. 333; 4 C. P. D. 63 ....282, 284
Meyers v. Baker; Hargeaves v. Meyers, 26 U. C. R. 16 ..121, 123, 143
Meyers v. Kendrick, 9 P. R. 363 .....501, 503
Meyers v. Wonnacott, Re, 23 U. C. R. 611 15
Meyerstein v. Barber, L. R. 2 C. P. 661; L. R. 4 H. L. 317 119
Michie v. Reynolds, 24 U. C. R. 303, 325 471
Middlefield v. Gould, 19 C. P. 14 .....37, 42
Middlesex v. Smallman, 19 O. R. 349; 20 O. R. 487 30
Middleton v. Pollock, 4 Ch. D. 49 235
Middleton v. Scott, 4 O. L. R. 451 265
Midgley v. Midgley (1893), 3 Ch. 282, 285, 289 334
Midland Banking Co. v. Chambers, L. R. 4 Ch. 400 354
Midland Ry. Co. v. Martin (1893), 2 Q. B. 172 5
Mighell v. Johore (Sultan) (1894), 1 Q. B. 149 198
Milan Tramways Co., Re, Ex parte Theys, 25 Ch. D. 587 190
Mildmay v. Methuen, 3 Drew. 91 326
Miles & Township of Richmond, Re, 28 U. C. R. 333 15
Miles v. Roe, 10 P. R. 218 .....389, 519
Millard v. Baddeley, W. N. (1884), 96 243
Miller, Ex parte, Re Miller v. Smith, 34 N. B. R. 5 474
Miller v. Beaver M. F. Ins. Assn., 14 C. P. 399 453
Miller v. Caldwell, 3 D. & Ry. 267 286
Miller v. Corbett, 26 U. C. R. 478 ..... 7, 32
Miller v. Dell (1891), 1 Q. B. 408 279
Miller v. Flewelling, 17 C. L. T. 265 .....183, 254
Miller v. Huddlestone, 22 Ch. 233 401
Miller v. Macdonald, 14 P. R. 490 519
Miller v. Mann, 55 Vt. 479 189
Miller v. Mynn, 1 E. & E. 1975 401
Miller v. Nolan, 1 C. L. J. 327 538
Miller v. Ryerson, 22 O. R. 309 .....279, 280
Miller v. Smith, Re, 34 N. B. R. 5 474
Miller v. Tunis, 10 C. P. 423 34
Miller v. Wiley, 16 C. P. 529 491
Milliken v. Laurentia Pulp Co., 6 Que. R. 134 304
Mills v. Hamilton St. Ry. Co., 17 P. R. 74 .....363, 393
Mills v. Long, 58 Ala. 458 225
Mills v. Mercer Co., 15 P. R. 281 199
Mills v. Mills, 12 P. R. 473 .....303, 306
Mills v. Scott, L. R. 8 Q. B. 496 183
Mills v. Small, 14 O. L. R. 105 135
Mills v. Welbank, 3 Scott N. R. 177 307
Milne v. Moore, 24 O. R. 456 185
Milner, Ex parte, 15 Jur. 1037 .....82, 83
Milner v. Harewood, 18 Ves. 277 202
Milner v. Ostrander, 12 Gr. 349 202
Milltown v. Boardman, 10 C. L. T. 250 561
Milson v. Day, 3 M. & P. 333 203
Milwall, The (1905), P. 155 34
Minet v. Morgan, L. R. 5 Exch. App. 361 207
Minns v. Omemee, 8 O. L. R. 508 277
Minor v. L. & N. W. Ry. Co., 1 C. B. N. S. 325 .....78, 79, 102
Miron v. McCabe, 4 P. R. 171 .....78, 79, 102
Mitchell's Case, L. R. 6 Ch. 823 286
Mitchell's Claim, L. R. 6 Ch. 828 .....282, 283
Mitchell v. Foster, 12 A. & E. 472 171
Mitchell v. Brown, 1 El. & El. 275 508

PAGE

Mitchell v. Darley Main Colliery Co., 10 Q. B. D. 457 319
Mitchell v. Doyle, 4 O. W. R. 725 .....68, 70, 159, 170, 176, 177, 178
Mitchell v. G. W. Ry. Co., 38 U. C. R. 471 441
Mitchell v. Goodall, 44 U. C. R. 398; 5 A. R. 164 188
Mitchell v. Hender, 18 Jur. 430 162
Mitchell v. Lee, L. R. 2 Q. B. 259 400
Mitchell v. Mulholland, 14 C. L. J. 55 340
Mitchell v. Scribner, 20 O. R. 17 .....81, 532
Mitchell v. Smith (1894), 2 Ir. R. 351 558
Mitchell v. Sparling, 1 O. W. N. 297 .....10, 323
Mittleberger v. Merritt, 2 U. C. R. 413 .....80, 81
Moberly v. Collingwood (Town), 25 O. R. 625 .....77, 84, 85, 86, 87
Moffat v. Carleton Place Board of Education, 5 A. R. 202 163
Moffat v. Grover, 4 C. P. 402 401
Moffat v. Leonard, 6 O. L. R. 383 320
Moffat v. Parsons, 5 Taunt. 307 263
Molson's Bank v. Dillabough, 13 P. R. 312 .....174, 233
Molson's Bank v. Heilig, 25 O. R. 503 205
Molson's Bank v. McMeekin, 15 A. R. 535 .....467, 485
Molson's Bank v. Sawyer, 19 P. R. 316 322
Mondel v. Steel, 8 M. & W. 858 147
Monison v. Wright, 1 O. W. N. 727 242
Monks v. Jackson, 1 C. P. D. 683 494
Montagu v. Harrison, 3 C. B. N. S. 202 295
Montague v. Forwood (1893), 2 Q. B. 350 148
Montefiore v. Lloyd, 15 C. B. N. S. 203 30
Montgomery v. Foy (1895), 2 Q. B. 321 .....151, 218
Montgomery v. Ryan, 16 O. L. R. 75 332
Montreal (City) v. Lemoine, 23 S. C. R. 390 351
Montreal (City) v. Cadieux, 20 S. C. R. 616 354
Montreal Ass. Co. v. McCormick, 25 U. C. R. 440 419
Montreal Gas Co. v. St. Laurent, 26 S. C. R. 176 354
Moodie v. Bannister, 4 Dr. 432 280
Moody v. Canadian Bank of Commerce, 14 P. R. 258 478
Moody v. Tyrrell, 6 P. R. 314 .....260, 263
Moora v. Brompton C. C. Bailiff 561
Moore v. Conn. Mut. Life Ins. Co., 6 S. C. R. 644 253
Moore v. Denn, 2 B. & P. 247 87
Moore v. Farquharson, 15 C. L. T. 103 .....340, 345
Moore v. Gaingee, 25 Q. B. D. 224 69
Moore v. Gidley, 32 U. C. R. 233 523
Moore v. Gurney, 22 U. C. R. 209 344
Moore v. Hicks, 6 U. C. R. 27 344
Moore v. Knight (1891), 1 Ch. 547 201
Moore v. Peachy, 66 L. T. 198 .....408, 431
Moore v. Rose, L. R. 4 Q. B. 486 515
Moora v. Wallace, 13 P. R. 201 .....77, 432, 433, 527
Moorehouse v. Kidd, 28 O. R. 35 .....33, 205
Moorewood v. South Yorkshire Ry. Co., 3 H. & N. 798 172
Moran v. Thomas, 9 Q. B. D. 643 247
Moreton v. Holt, 10 Ex. 707 451
Morgan, Ex parte, Re Simpson, 2 Ch. D. 72 384
Morgan v. Billings, 7 O. W. N. 138 .....76, 77, 508
Morgan v. Davies, 3 C. P. D. 260 255
Morgan v. Hughes, 2 T. R. 225 521
Morgan v. Mather, 2 Ves. Jr. 15 19

PAGE

Morgan v. McFee, 18 O. L. R. 30 97
Morgan v. Palmer, 2 B. & C. 729 8
Morgan v. Rowlands, L. R. 7 Q. B. 493 288
Morgan v. Wheatley, 6 Ex. 88 115
Moritz v. Canada Wood Specialty Co., 17 O. L. R. 53 .....221, 223
Morley v. Bank of B. N. A., 10 U. C. L. J. 128 174
Morphett, Re, 2 D. & L. 967 16
Morphy v. Colwell, 3 O. L. R. 314 406
Morphy v. Freehan, 2 Ch. Ch. 53 50
Morrell v. Frith, 3 M. & W. 402 .....283, 285
Morris v. Cameron, 12 C. P. 422 101
Morris v. Coles, 2 Dowl. 79 193
Morris v. Tharle, 24 O. R. 159 138
Morris v. Matthews, 2 Q. B. 293 121
Morris v. Richards, 45 L. T. 210 278
Morrison v. Wright, 11 O. W. N. 727 .....245, 247
Morrow v. C. P. Ry. Co., 21 A. R. 149 252
Morrow v. McDougall, 16 P. R. 129 .....304, 310
Morse v. Phinney, 22 S. C. R. 563 520
Morton v. Bank of Montreal, 18 C. L. T. 157 .....25, 174
Morton v. Palmer, 51 L. J. Q. B. 7 410
Morton v. Grand Junction Canal Co., 6 W. R. 543 87
Moser v. Marsden (1892), 1 Ch. 487 219
Moses, Ex parte (1896), A. C. 245 125
Moses v. Moses, 13 P. R. 12 .....144, 105
Mosea v. Parker (1896), A. C. 245 125
Moss, Ex parte, Re Toward, 14 Q. B. D. 310 188
Mostyn v. West Mostyn Coal & Iron Co., 1 C. P. D. 145 ....152, 153
Mostyn v. Coles, 31 L. J. Ex. 151 343
Moufiet v. Cole, L. R. 8 Ex. 32 .....163, 217, 421
Moufiet v. Washburn, 54 L. T. 16 69
Moulls v. Owen (1907), 1 K. B. 746 93
Mountford v. Gibson, 4 East 411 333
Mountroy v. Collier, 1 E. & B. 630 85
Mowat v. Londesborough, 4 E. & B. 1 326
Moxam, The, 1 P. D. 107, 116 305
Moxam v. Grant (1899), 1 Q. B. 484 205
Moxon v. London Tramways Co., 60 L. T. 248; a.c. 37 W. R. 132 .....75, 340, 341
Muckleston v. Smith, 17 C. P. 401 .....537, 541
Muir v. Crawford, L. R. 2 H. L. (Sc.) 456 32
Mullett v. Hunt, 11 C. & M. 752 293
Mulligan v. White, 15 Mnn. L. R. 40 306
Mulvaney v. Hopkins, 18 U. C. R. 174 .....590. 121
Mumford v. Hitchcocks, 14 C. B. N. S. 361 171
Munn v. McConnell, 7 C. L. T. 169 319
Mundell v. Tinkiss, 6 O. R. 625 521
Munday v. Thames Iron Works Co., 19 Q. B. D. 59 144
Munro v. Orr, 17 P. R. 53 .....241, 243
Munro v. Pike, 15 P. R. 164 227
Munsie v. McKinley, 15 C. P. 50. 87 433
Munster v. Cox, 10 App. Cas. 680 208
Munster v. Lamb, 11 Q. B. D. 588 22
Murphy v. Green, 26 L. R. Ir. 610 400
Murphy v. Guardians Belmullet Union, 22 L. R. Ir. 25 402
Murphy v. Nolan, 18 L. R. Ir. 468 238

PAGE

Murphy v. Phœnix Bridge Co., 18 P. R. 406, 495 201
Murray v. Enri of Stair, 2 B. & C. 82 432
Murray v. G. W. Ry. Co., 6 P. R. 211 239
Murray v. Simpson, 8 Ir. C. L. R. App. xlv. 401
Murtagh v. Barry, 24 Q. B. D. 632 .....341, 343
Muskoka and Gravenhurst, Re, 6 O. R. 352 74
Muskoka Mill and Lumber Co. v. McDermott, 21 A. R. 129 85
Musurus Bey v. Gadban (1894), 2 Q. B. 352 .....198, 280
Myers v. Defries, 4 Ex. D. 180 446
Myers v. Wonnacott, Re, 23 U. C. R. 611 372
Myles v. Thompson, 23 U. C. R. 553 108

Mc.

McAllister v. Cushing, 8 C. L. T. 447; 26 N. B. R. 62 353
McArthur v. Cool, 19 U. C. R. 476 .....7. 30, 31. 32, 540
McArthur v. Michigan Cent. Ry. Co., 15 P. R. 77 542
McArthur v. Southwold, 8 P. R. 27 364
McAskell v. Power, 30 N. S. R. 189 467
McAvilla v. McAvilla, 6 P. R. 311 57
McBain v. Waterloo Mfg. Co., 8 O. L. R. 620 326
McBride v. Hamilton Prov. & L. Socy., 29 O. R. 161 297
McCabe v. Middleton, Re, 27 O. R. 170 .....68, 69, 178, 424. 425, 426
McCabe v. Thompson, 6 Gr. 175 490
McCallum v. School Sec. 6 Tp. of Brant, 17 O. R. 451 ....82, 83
McCallum v. Cookson, 5 C. B. N. S. 498 358
McCallum v. Gracey, 10 P. R. 514 159
McCallum v. Provincial Ins. Co., 6 P. R. 101 240
McCance v. London & N. W. Ry. Co., 7 H. & N. 477 269
McCann v. Waterloo F. M. Ins. Co., 34 U. C. R. 376 267
McCargar v. McKinnon, 15 Gr. 361 62
McCarron v. Metropolitan Life Ass. Co., 35 C. L. J. 421 .....351, 360
McCaughey v. Stringer (1914), 1 O. R. 73 18
McCausland v. Quebec Fire Ins. Co., 25 O. R. 330 352
McCheane v. Gyles (1902), 1 Ch. 911 221
McClenaghan v. Grey, 4 O. R. 329 219
McClevertie v. Massie, 21 C. P. 516 476
McClive, Re, 9 P. P. 213 327
McClinaghan v. Perkins, 5 O. L. R. 129 334
McColo v. Waddell, 19 C. P. 213 349
McCombie v. Anton, 6 M. & G. 27 314
McConnell, Re, 3 Ch. Chas. R. 423 133
McCord v. Cammell (1896), A. C. 57 393
McCormack v. Berzey, 1 U. C. R. 388 286
McCormack v. Park, 9 C. P. 330 406
McCormack v. Toronto Ry. Co., 13 O. L. R. 657 186
McCormick v. Wurnica, 3 O. L. R. 427 105
McCorg v. Arnot, Re, 8 O. L. R. 110 39
McCraney v. McLeod, 10 P. R. 539 405
McCrea Waterloo M. F. Ins. Co., 26 C. P. 437 .....28, 267, 346. 530
McCrendie v. Thomson (1907), S. C. 1176 22
McCreavy v. Brennan, Re, 3 O. W. N. 1052 398
McCullis v. Allen, 57 Vt. 505 112
McCullough v. Sykes, 11 P. R. 337 .....10, 275
McCullough v. Anderson, 27 O. R. 73 (note) 343
McCullough v. Newlove, 27 O. R. 627 325

PAGE

McCullough v. Clemowe, 26 O. R. 467 .....324, 325
McDiarmid v. McDiarmid, 15 A. R. 287 105
McDonald v. Burton, 2 C. L. J. 190 231
McDonald v. Cameron, 13 Gr. 84 .....489, 494
McDonald v. Cleland, 6 P. R. 293 .....322, 466
McDonald v. Dawson, 8 O. L. R. 72 542
McDonald v. Dowdall, 27 O. R. 212 .....138, 140
McDonald v. Elliott, 12 O. R. 98 275
McDonald v. Field, 12 P. R. 213 260
McDonald v. Forrestal, 29 Gr. 300 112
McDonald v. Lane, 7 S. C. R. 462 113
McDonald v. McMillan, 22 Gr. 362 258
McDonald v. McDonald, 17 A. R. 192 492
McDonald v. McDonnell, 2 E. & A. 393 490
McDonald v. Reynolds, 14 Gr. 691 490
McDonnld v. Richardson, 7 O. W. R. 844 85
McDonald v. Stevenson, 4 O. W. N. 732 170
McDonald v. Sullivan, 5 O. L. R. 001 .....400, 401
McDonald v. Whitfield, 8 A. C. 733 205
McDougall v. Campbell, 41 U. C. R. 332 449
McDougall v. G. T. Ry. Co., 27 O. L. R. 369 101
McDougall v. Patterson, 11 C. B. 755 249
McDougall v. Van Allen Co., Ltd., 19 O. L. R. 351 136
McDougall v. Waddell, 28 C. P. 191 .....466, 472
McDowall v. Holllater, 3 W. R. 522 403
McDowell v. McDowell, 10 C. L. J. 48 .....474, 541
McEdward v. Ogilvie Milling Co., 8 C. L. T. 150; 5 Man. L. R. 77 135
McElheran v. London Masonic Ben. Ass., 11 P. R. 181 .....33, 435
McEvoy v. Clune, 21 Gr. 515 491
McEwan v. Crombie, 25 Ch. D. 177 151
McFadden v. Kerr, 12 Man. L. R. 487 403
McFee, Ex parte, 9 Ex. 261 .....73, 543
McGee v. The Queen, 3 Can. Exch. Ct. R. 304 297
McGibbon v. Eager, 18 C. L. T. 311 .....88, 104, 125, 128, 397
McGill v. McLean, 1 Cham. L. 6 231
McGill v. Walton, 15 O. R. 389 531
McGivern v. McCausland, 19 C. P. 470 489
McGlinchy v. Winchall, 63 Maine 31 405
M'Gorlick v. Ryall, Re, 26 O. R. 435 .....87, 96, 136, 184
McGowan v. Middleton, 11 Q. B. D. 469 .....150, 152, 274
McGregor v. Gaulin, 4 U. C. R. 378 327
McGregor v. Hawke, 5 O. S. 496 275
McGregor v. Harris, 9 C. L. T. 504 232
McGregor v. McDonnld, 7 C. L. T. 20 350
McGregor v. McNell, 32 C. P. 538 112
McGregor v. Norton, 13 P. R. 223 ..15, 73, 77, 181, 268, 271, 384, 503, 551, 561
McGregor v. Union Life, 7 O. W. R. 423 147
McGugan v. McGugan, 21 O. R. 289 .....127, 128, 132, 142, 143
McGugan v. Smith, 21 S. C. R. 263 137
McGuin v. Benjamin, 1 Chamb. R. 142 240
McGuin v. Fretts, 13 O. R. 699 222
McGuire v. Corry, 1 O. L. R. 590 364
McHardy v. Hitchcock, 17 L. J. Ch. 256 311
McInnes v. McGow, 30 O. R. 38 404

PAGE

McIntosh, Re, 17 C. L. T. 300 69
McIntosh v. G. W. Ry. Co., 4 Giff. 696 .....311, 325
McIntosh v. Jarvis, 8 U. C. R. 532 .....30, 141
McIntosh v. Leckie, 13 O. L. R. 54 .....473, 474
McIntosh v. McIntosh, 18 Gr. 58 537
McIntyre v. Canada Co., 18 Gr. 367 231
McIntyre v. Hockin, 16 A. R. 498 135
McIntyre v. Mum, 6 O. L. R. 290 226
McIntyre v. Stata, 4 C. P. 248 469
McIver v. Burns (1895), 2 Ch. 630 216
McKay v. Atherton, 12 P. R. 464 511
McKay v. Clare, Re, 20 O. L. R. 344 139
McKay v. Fee, 20 U. C. R. 268 332
McKay v. Howard, 6 O. R. 135 530
McKay v. Martin, 21 O. R. 104 569
McKay v. Palmer, 12 P. R. 219 75
McKay v. Stoiry, 8 O. L. R. 45 69
McKay v. Tait, 11 C. P. 72 399
McKay v. Talbot, Re, 3 O. L. R. 256 .....25, 179, 239, 240, 241
McKay v. Wayland, 12 O. W. N. 471 266
McKellop v. Logan, 7 C. L. T. 171 441
McKelvey v. McLean, 34 U. C. R. 635 .....121, 122, 535
McKenna v. Everett, 2 Beav. 188 .....310, 311
McKenzie v. Dancey, 12 A. R. 317 24
McKenzie v. Bussell, 3 O. S. 343 521
McKenzie v. Harris, 10 U. C. L. J. 213 192
McKenzie v. Keene, 5 U. C. L. J. 225 .....143, 340
McKenzie v. Ryan, 6 P. R. 323 .....103, 525, 568
McKenzie v. Ryan, Re, 6 P. R. 323 ..... 6, 77
McKenzie v. Stewart, 10 U. C. R. 634 259
McKeown v. Joint Stock Inst. (1899), 1 Ch. 671 50
McKindsey v. Armstrong, 11 P. R. 200 .....404, 425
McKinley v. McGregor, 3 Whar. 396 111
McKinnell v. Robinson, 3 M. & W. 434 93
McKinnon's Case, Re Ontario Sugar Co., 24 O. L. R. 332 5
McKinnon v. Crowe, 17 P. R. 291 511
McLaughlin v. Schaefer, 13 A. R. 253 108
McLardy v. Slatern, 24 Q. B. D. 504 239
McLaren v. Canada Central Ry. Co., 10 P. R. 328 328
McLaren v. Marks, 10 P. R. 451 205
McLean v. Allen, 14 P. R. 84 420
McLean v. Bradley, 2 S. C. R. 535 521
McLean v. Bruce, 14 P. R. 192 .....403, 413
McLean v. Hamilton St. Ry. Co., 11 P. R. 193 152
McLean v. Jones, 2 C. L. J. 206 206
McLean v. Osgoode, 30 O. R. 430 .....73, 171, 175, 340, 384
McLean v. Pinkerton, 7 A. R. 490 .....38, 241
McLean v. McLeod, 5 P. R. 467 .....75, 408, 435
McLean v. Shields, 9 O. R. 699 166
McLean v. Sudworth, 4 U. C. L. J. 233 403
McLeish v. Howard, 3 A. R. 506 .....31, 46
McLellon v. McKinnon, 1 O. R. 238 377
McLeod v. Amiro, 27 O. L. R. 232 .....83, 378
McLeod v. Chelwynd, 10 C. L. T. 345 354
McLeod v. Clark, 8 O. W. R. 403 399
McLeod v. Emigh, 12 P. R. 503 .....80, 500, 508, 512

PAGE

McLeod v. Enright, 12 P. R. 450 500
McLeod v. Fortune, 10 U. C. R. 98 470
McLeod v. Nohle, 12 A. R. 459 66
McLeod v. Power (1898), 2 Ch. 295 .....7, 204, 205
McLeod v. St. Aubyn (1899), A. C. 540 557
McMahon v. Ingersoll, 6 O. S. 301 21
McMahon v. Spencer, 13 A. R. 430 10
McManus v. Cooke, 35 Ch. D. 681 136
McManus v. Rothschild, 25 O. L. R. 710 131
McMaster v. Canada Paper Co., 21 C. L. J. 216 187
McMichael v. Wilkie, 18 A. R. 464 430
McMicking v. Gibbons, 24 A. R. 586 275
McMillan v. Byers, 15 S. C. R. 194 112
McMillan v. Fortier, 2 O. L. R. 231 .....69, 107, 276
McMillan v. Gore District M. F. Ins. Co., 21 C. P. 123 344
McMillan v. McDonald, 22 Gr. 362 259
McMillan v. McMillan, 8 C. L. J. 825 316
McMillan v. Orillia, 6 O. L. R. 126 187
McMulkin v. Traders Bank of Canada, 26 O. L. R. 1 414
McMullen v. Wetlafer, 32 O. L. R. 178; 7 O. W. N. 797 531
McMurray v. E. Missouri, 21 O. L. R. 40 124
McMurray v. Northern Ry. Co., 22 Gr. 476 572
McMurtry v. Munroe, 14 U. C. R. 166 108
McMyn, Re, Lightboun v. McMyn, 33 Ch. D. 575 .....34, 207
McNab v. Oppenheimer, 11 P. R. 214 .....512, 516
McNah v. Howland, 1 C. P. 434 119
McNish v. Wagstaff, 15 U. C. R. 588 253
McNair v. Collins, 27 O. L. R. 44 100
McNaughton v. Hays, 12 O. W. R. 858 (1033), ...157, 159
McNaughton v. Webster, 6 U. C. L. J. 17 .....399, 419, 473
McNeil v. Haines, 13 P. R. 115 85
McNiven v. Pigott, 31 O. L. R. 365 10
McPhadden v. Bacon, 9 C. L. J. 226 518
McPhatter v. Leslie, 23 U. C. R. 573 521
McPherson v. Forrester, 11 U. C. R. 362 127
McPherson v. McPhee, 21 O. R. 280 .....411, 324
McPherson v. Osborne (Trustees), 1 O. L. R. 261 124
McPherson v. Riter-Conly Mfg. Co., 35 N. S. R. 429 304
McPherson v. Tisdale, 11 P. R. 261 .....399, 401
McPherson v. U. S. Fidelity Co., 4 O. W. N. 1140 245
McPhillips v. Stevenson, 1 O. W. N. 940 244
McRae, Re, 10 O. L. R. 238 188
McRae v. Clarke, L. R. 1 C. P. 403 31
McRae v. Lemay, 18 S. C. R. 284 .....439, 443
McRae v. Robins, 20 C. P. 135 .....102, 140
McShadden v. Lachance, 5 Can. Cr. Cas. 43 378
McVicar v. McLaughlin, 16 P. R. 450 .....227, 233
McWhitier v. Bongard, 14 U. C. R. 84 79
McWhitier v. Learmouth, 18 C. P. 136 548

N.

Nadin v. Bassett, 25 Ch. D. 21 .....304, 305
Nagle-Gillman v. Christopher, 4 Ch. D. 173 504
Nash v. Dickenson, L. R. 2 C. P. 252 466
Nash v. Hill, 1 F. & F. 198 287
Nash v. Hodgson, 25 L. J. Ch. 186; 6 DeG. M. & G. 474 288

PAGE
Nash v. Lucas, L. R. 2 Q. B. 590 514
Nash v. Peace, 47 L. J. Q. B. 766 .....401, 403, 404
Nassau Press v. Tyler, 70 L. T. 376 244
Natat Inc. Co., Re, L. R. 3 Ch. 355 476
Nathans v. Giles, 5 Taunt. 558 .....405, 422
National Alliance Co., Re, Axworth's Case, 7 L. T. 64 153
National Fire Ins. Co. v. McLaren, 12 O. R. 682 206
National Prov. Bank of England v. Harle, 6 Q. B. D. 626....185, 188
National Provincial Bank v. Marshall, 40 Ch. D. 112 132
National Society v. Gibb (1900), 2 Ch. 280 353
Naylor v. Farrer, 26 W. R. 809 152
Nazer v. Wade, 1 B. & S. 728 219
Neads v. McMillan, 29 U. C. R. 415 85
Neale v. Clarke, 4 Ex. D. 205 149
Neale v. Ellis, 1 D. & L. 163 140
Neale v. Reid, 117 L. T. Jour. 292 271
Neck v. Taylor (1893), 1 Q. B. 560 .....150, 151, 322
Nedley v. Buffalo B. & G. Ry. Co., 3 U. C. L. J. 111 422
Neil v. Almond, 29 O. R. 63 55
Neilson v. Jarvis, 13 C. P. 182 .....435, 465, 480, 485
Nelson v. Baby, 14 U. C. R. 235 31
Nelson v. Couch, 15 C. B. N. S. 108 .....8, 141
Nelson v. Lenz, 0 O. L. R. 50 .....211, 214, 428
Nelson v. Roberts, 69 L. T. 352 148
Nelson v. Thorner, 11 A. R. 616 351
Nerlich v. Clifford, 6 P. R. 212 .....67, 71, 81
Nerlich v. Malley, 4 A. R. 430 .....31, 176
Nerlick v. Marks, 31 O. R. 677 .....340, 342, 344, 516
Nesbit v. Galna, 3 O. L. R. 429 320
Nesbitt v. Armstrong, 12 C. L. T. 43 230
Ness v. Stevenson, 9 Q. B. D. 245 410
Ness v. Saltfleet (Mun.), 13 U. C. R. 408 15
Neville v. Eaton, 2 O. W. N. 1432 258
Newcastle (Duke), Re, L. R. 8 Eq. 700 410
New Westminster Brewery Co. v. Hannah, W. N. (1877), 35 ..221, 222
New v. Byrns, 71 L. T. 681 307
New v. Dorins, 64 L. J. Q. B. 104 306
Newbould v. Smith, 29 Ch. D. 882 287
Newcombe v. De Roos, 2 E. & E. 271 157
Newby v. Van Appen, etc., Co., L. R. 7 Q. B. 203 161
Newby v. Sharp, 8 Ch. D. 39 184
Newell v. Jones, 4 C. & P. 124 324
Newell v. National Prov. Bk. of England, 1 C. P. D. 496 ....148, 152
Newell v. Van Prnagh, L. R. 8 Ex. 23 .....508, 509
New Fenix Compagne v. General Accideat T. & L. Ass. Co. (1911), 2 Q. B. 619 .....151, 322
Newfoundland (Govt.) v. Newfoundland Ry. Co., 13 A. C. 200 .153, 190
New Haven Saw Mill Co. v. Fowler, 28 Con. 108 225
Newman, Re, 4 Ch. D. 724 130
Newman v. Lever, 4 T. L. R. 91 244
Newman v. Newman, 28 Ch. D. 678 187
Newmnn v. Rook, 4 C. B. N. S. 434 414
Newsome v. Co. of Oxford, 28 O. R. 442 13
News Ptg. Co. v. Macrae, 26 S. C. R. 695 360
New Par Consols, Re (No. 2) (1898), 1 Q. B. 669 66
Newton, Re, 8 Jnr. N. S. 405 348

PAGE
Newton v. Chaplin, 10 C. B. 356 260
Newton v. Hurland, 1 M. & G. 956 .....293, 294
Newton v. Sherry, 1 C. P. D. 246 337
Niagara District (Judge of), Re, 3 O. S. 437 23
Nicholl v. Cartwright, Tay. 464 444
Nicholl v. Thompson, 1 Camp. 52 (n) 325
Nichols v. Regents Canal Co., 63 L. J. Q. B. 641 284
Nichols v. Walker, Cro. Car. 394 22
Nicholls v. Cumming, 1 S. C. R. 395 .....40, 302
Nicholls v. Jones, 2 H. & M. 588 298
Nicholls v. Lundy, 16 C. P. 160 447
Nickolson v. Brooke, 2 Ex. 213 290
Nickall v. Crawford, Tay. 277 .....444, 488
Niemonen v. Dome Mines, 4 O. W. N. 301 507
Nightingale v. Bank of Montreal, 26 C. P. 74 431
Niles v. Crysler, 1 O. W. N. 895, 940 245
Nisbet v. Cock, 4 A. R. 200 173
Nitro Phosphate v. London & St. Catharines Dock Co., 9 Ch. D. 503 31
Nixon v. Jamieson, 18 O. L. R. 625 158
Nobels Explosive Co. v. Jones, 25 W. R. 653 221
Noble v. Cline, 18 O. R. 33 157
Noble v. Gunn, Limited, 1 O. W. N. 844 134
Nolan, Ex parte, 1 H. & C. 267 145
Nolan v. Crook, 5 Humphrey 312 .....405, 422
Noonan v. Bank of B. N. A., 10 C. L. T. 03 .....259, 260
Norburn v. Hilliam, 22 L. T. 67 .....341, 394
Nordheimer v. McKillop, 10 P. R. 246 305
Nordheimer v. Robinson, 2 A. R. 305 112
Norman v. Hope, 13 O. R. 556; 14 O. R. 287 ....31, 116, 120, 121, 590
Norman v. Marchant, 7 Ex. 723 158
Norman v. McMurray, 1 O. W. N. 1256 26
Norman v. Ricketts, 21 Sol. Jour. 124 431
Normanby v. Jones, 3 D. & L. 143 174
Norris v. Carrington, 16 C. B. N. S. 300 75
Norris v. Beazley, 2 C. P. D. 80 .....151, 219, 221
North v. Fisher, 0 O. R. 200 .....10, 276
North v. McDonald, 1 Biss. 59 520
North v. Stewart, 15 App. Cas. 463 407
North American Life Ass. Co. v. Collins, 9 O. L. R. 579 ....256, 323
North British & Mer. Ins. Co. v. Tourville, 25 S. C. R. 177....256, 354
North Ontario Election Case, Wheeler v. Cubb, 3 S. C. R. 374.351, 362
North Perth Election, Re, 21 O. R. 538 66
North Victoria Election Case, 1 Hodgins' E. C. 612 51
Northern Crown Bank v. Yearsley, 1 O. W. N. 655 245
Northern Hardwood v. Shields, 5 O. W. N. 757 .....68, 70
Northern Ry. Co. v. Lister, 4 P. R. 120, 192 227
Northey Stone Co. v. Gidney (1894), 1 Q. B. 99 157
Northumberland and Durham (Judge), Re, 19 C. P. 299 ....67, 102
Northwood v. Rennie, 28 C. P. 202; 3 A. R. 37 397
Norton v. Bertie Sch. Tr., 17 O. L. R. 413 350
Norton v. Melbourne, 3 Bing. N. C. 67 .....304, 311
Norton v London & N. W. Ry. Co., 11 Ch. D. 118 361
Notham v. Cohen, 3 Dowl. 370 172
Notman v. Crooks, 10 U. C. R. 105 287,
Nott v. Gordon, 20 C. L. J. 379 441
Nott v. Nott, 5 O. R. 283; Russell 249 438

PAGE

Nott v. Sands, W. N. (1883) 74 400
Nottawasaga v. Nottawasaga, 15 A. R. 310 .....103, 139, 141, 525
Nawlan v. Ablett, 2 C. M. & R. 54 135
Noxan v. Holmes, 24 C. P. 54 157
Nugent v. Chambers, 3 U. C. L. J. 108 144
Nussey v. Glendinning, 23 L. T. 93 102

O.

Oakes v. Margan, 8 C. L. J. 248 253
O'Brien, Re, 10 S. C. R. 107 557
O'Brien v. Irving, 17 P. R. 308 101
O'Callaghna v. Cowan, 41 U. C. R. 272 538
O'Connor v. Defoe, 15 U. C. R. 586 402
O'Connor v. Fielder, 25 O. R. 568 406
O'Connar v. Hamilton, 8 O. L. R. 391 277
O'Connor v. Ireland (1807), 2 Ir. Rep. 150 406
O'Connor v. O'Connor, 5 O. W. R. 10 333
O'Connor v. Star Newspnper, 30 L. R. Ir. 1 198
O'Donahue v. Hall, 24 S. C. R. 012 .....406, 433
O'Donohue v. Wiley, 43 U. C. R. 303 .....27, 157
O'Donnell v. Duchenault, 14 O. R. 1 .....121, 123, 590
O. C. S., Re (1904), 2 K. B. 161 364
Odell, Ex parte, Re Walden, 10 Ch. D. 76 466
O'Donavan v. Dillon, 24 L. R. Ir. 442 415
Offay v. Offay, 26 U. C. R. 303 .....235, 237, 519 522
Ogden v. Craig, 10 P. R. 378 540
Ogle v. Kalpe, L. R. 8 Eq. 4, ... 476
O'Grady v. Syman (1900), 2 Ir. R. 602 6
Ohlsen v. Terrero, L. R. 10 Ch. 129 312
O'Keefe v. Walsh (1903), 2 Ir. R. 681 219
Okura v. Forsbacka (1014), 1 K. B. 715 161
Oldham B. & M. Co. v. Heald, 3 H. & C. 132 160
Oldham v. Ledbetter, 11 Howard (Miss.) 43 401
Oldham v. Rumsden, 32 L. T. 825 93
O'Leary v. Stewart, 0 C. L. T. 494 130
Oliphant v. Leslie, 24 U. C. R. 398 572
Oliver v. Dickey, 2 Ch. Ch. R. 87 311
Oliver v. Fryer, 7 P. R. 325 .....82, 83
Oliver v. White, 18 S. C. 241 470
Olmstead nnd Errington, 11 P. R. 367 .....81, 158
Olsan v. Cameron, 12 Can. Cr. Cas. 63; 9 B. C. R. 319 369
Olson v. Mnclln, 4 O. W. N. 287 188
Omerod v. Todmorden Co., 8 Q. B. D. 664 .....352, 410, 506
O'Nelll, Ex parte, 10 C. B. 57 512
O'Nelli v. Atty.-Gen., 26 S. C. R. 122 .....16, 42
O'Neill v. Cunalngham, 6 Ir. L. R. 503 401
O'Neill v. Hobbs, 29 O. R. 487 .....262, 270
Ontario Bnak v. Burke, 10 P. R. 56 243
Ontario Bank v. Kerby, 16 C. P. 35 485
Ontario Bank v. Mitchell, 32 C. P. 73 502
Ontario Baak v. Young, 2 O. L. R. 761 244
Ontario Glass Co. v. Swartz, 0 P. R. 252 .....197, 200
Ontario Loan & Deb. Co. v. Hobbs, 16 A. R. 255; 18 S. C. R. 483 551
Ontario v. Quebec, Re, 6 L. J. N. S. 212 .....16, 19
Ontaria Salt Co. v. Merchants Salt Co., 18 Gr. 551 8

PAGE

Ontario Sugar Co., Re, McKinnon's Case, 24 O. L. R. 332 5
Oram v. Breary, 2 Ex. D. 347 170
O'Rourke v. Lee, 18 U. C. R. 607 112
O'Shaughnessy v. Ball, 21 S. C. R. 415 113
O'Shea v. Wood (1891), P. 286 206
Ostrom v. Benjamin, 21 A. R. 470 102
Ostrom v. Sills, 28 S. C. R. 495 222
Ostrom and Township of Sydney, Re, 15 A. R. 372 15
O'Sullivan v. Lake, 16 S. C. R. 636 363
O'Sullivan v. Murphy, 78 L. T. 213 231
Orr v. Barrett, 9 C. L. T. 72 82
Orton v. Brett, 19 C. L. T. 117 184
Osborne v. Kerr, 17 U. C. R. 134 488
Osgoode v. Nelson, L. R. 5 H. L. 636 561
Oakey v. Kingston, 7 O. W. N. 251 90
Osler v. Muter, 19 A. R. 94 471
Ostler v. Bower, 14 Dowl. 605 538
Otis v. Rossin, 2 P. R. 48 194
Overend Gurney & Co., Re, Barron's Case, L. R. 3 Ch. 784 326
Overend Gurney & Co. v. Oriental Financial Co., 7 H. L. 348, 361 32, 205, 206
Overseers of Everton, Ex parte, L. R. 6 C. P. 245 80
Overton v. Banister, 3 Hare, 503 292
Owen v. Hurd, 2 T. R. 643 437
Owen v. Sprung, 28 O. R. 607 .....35, 360, 361
Owen v. Wolley, B. N. P. 148 286
Owens v. Shield, 1 O. & E. 356 400
Oxley v. Link (1914), 2 K. B. 734 .....10, 18

P.

Pacaud v. McEwan, 31 U. C. Q. B. 328 .....121, 590
Pacquette, Re, 11 P. R. 463 .....14, 66
Padget v. Priest, 12 T. R. 97; 1 R. R. 440 333
Page, Re (1893), 1 Ch. 304 290
Page v. Austin, 7 A. R. 1 255
Page v. Newman, 9 B. & C. 378 324
Pahkada v. Hannukode, 20 Can. Cr. Cas. 247 376
Paine v. Layten, Ex parte, L. R. 4 Ch. 215 296
Paine v. Pritchard, 2 C. & P. 558 327
Paladina v. Gustin, 17 P. R. 553 321
Palgrave v. McMillan, 31 N. S. R. 488 407
Palliser v. Gurney, 19 Q. B. D. 519 426
Palmer v. Bate, 2 Brod. & Bing. 673 405
Palmer v. Caledonian Ry. Co. (1892), 1 Q. B. 823 160
Palmer v. Fabnestock, 9 C. P. 172; 20 U. C. R. 307 108
Palmer v. Forsyth, 4 B. & C. 401 146
Palmer v. Gould Mfg. Co., W. N. (1884), 65 161
Palmer v. Lovett, 14 P. R. 415 .....406, 433
Palmer v. Mallett, 36 Ch. D. 411 58
Palmer v. Temple, 9 A. & E. 508 7
Palmer v. Wick (1894), A. C. 318 205
Pappa v. Rose, L. R. 7 C. P. 525 74
Pardo v. Bingham, L. R. 4 Ch. 735 280
Parisian, The, 13 P. D. 16 304
Paris Manufacturing Co. v. Walls, 10 P. R. 138 539
Park v. Fletcher, cited 28 O. L. R. 633 77

	PAGE
Park v. Willcock, Feb. 16th, 1893 (not reported)	445
Parke, Re, Ex parte Kostar, 14 Q. B. D. 597	507
Parke v. Clarke, Re, 14 C. L. T. 32	55, 82, 83
Parke v. Davis, 10 C. P. 229	65
Parker v. B. & E. Ry. Co., 6 Ex. 184	145
Parker v. Brand, 7 T. L. R. 462	234, 246
Parker v. Danforth, 16 Mass. 299	399
Parker v. Gorsage, 2 C. M. & R. 617	38
Parker v. Great Western Ry., 7 M. & G. 253	8, 530
Parker v. Howe, 12 P. R. 351	396, 401, 405
Parker v. Kett, 1 Salk. 95	28
Parker v. Mellwain, 17 P. R. 84	400, 408, 415
Parker v. McKenna, L. R. 10 Ch. 90	398
Parker v. Odette, 16 P. R. 69	167, 202, 406
Park Gate Iron Co. v. Coates, L. R. 5 C. P. 634	240
Parkes v. Baker, 17 P. R. 345	321
Parkes v. Riley, 3 E. & A. 215	487
Parkins v. Hawkshaw, 2 Stark. 239	297
Parks v. Davis, 10 C. P. 229	21, 34, 35, 176
Parnell v. Wood (1892), P. 137	297
Parr v. Montgomery, 27 Gr. 521	490, 491
Parsons v. Crabbe, 31 C. P. 151	26, 561
Parsons v. Gooding, 33 U. C. R. 499	492
Parsons v. Sovereign Bank (1913), A. C. 160	153
Partington v. Butcher, 6 Esp. 66	283
Parton v. Williams, 3 B. & Ald. 330	566
Partridge v. Elkington, L. R. 6 Q. B. 82	563
Pater, Ex parte, 5 B. & S. 299	555, 556, 558
Patten v. Wood, 51 J. P. 549; 36 Alb. L. J. 399	136
Patterson v. Fuller, 31 U. C. R. 323; 32 U. C. R. 240	121, 123, 493, 590
Patterson v. Central Canada S. & Loan Co., 17 P. R. 470	274
Patterson v. King, 27 O. R. 56	400
Patterson v. McKellar, 4 O. R. 407	469
Patterson v. McLean, 21 O. R. 221	231, 243
Patterson v. Richmond, 17 L. J. 324	400, 403
Patterson v. Todd, 24 U. C. R. 296	488, 489, 494
Pattison v. Guardians of Belford union, 1 H. & N. (n.s.) 523	30
Pattison v. Mills, 1 Dow. & Clarke 342	157
Patullo and Orangeville, Re, 31 O. R. 192	30
Pattyplece v. Mayville, 21 C. P. 316	348
Paul v. Joel, 4 H. & N. 3551	175
Paul v. Rutledge, 16 P. R. 140	360, 361
Pawson v. Hall, 1 P. R. 204	173
Paxton v. Smith, 18 O. R. 178	289
Payani v. Lookpas (1890), W. N. 100	242
Payne, Re, 23 Ch. D. 288	571
Payne, Ex parte, 5 D. & L. 679	69
Payne v. Newberry, 13 P. R. 392	238
Peacock v. The Queen, 14 C. B. N. S. 264	447
Pearce v. Chaplin, 9 Q. B. 802	363
Pearce v. Foster, 17 Q. B. D. 536	135
Pearce v. Morris, L. R. 5 Ch. 231	266
Pearse v. Rogers, 2 F. & F. 137	388
Pearson v. Carpenter, 35 S. C. R. 380	94
Pearson v. C. P. Ry. Co., 1 West L. T. 47	163

PAGE
Pearson v. Essery, 12 P. R. 466 571
Pearson v. Glasebrook, L. R. 3 Ex. 27 .....82, 85
Pearson v. Huttan, 15 C. P. 70 .....32, 34, 35, 565
Pearson v. York, 41 U. C. R. 378 276
Pease v. Chaytor, 3 B. & S. 620 77
Peck, Ex parte, 31 N. B. R. 623 402
Peck and Peterborough (Corp.), Re, 31 U. C. R. 129 81
Peck v. McDougall, 27 U. C. R. 300 502
Peckham v. Depotty, 17 A. R. 273 137
Pedley v. Davis, 19 C. B. N. S. 492 .....512, 565
Peebles v. Oswaldtwistle (1897), 1 Q. B. 625 81
Peers v. Allen, 19 Gr. 98 265
Peers v. Carroll, 19 U. C. R. 229 472
Peer v. N. W. Transportation Co., 14 P. R. 381..... 541
Pegg v. Howlett, 28 O. R. 473 .....65, 72, 74, 103, 107, 183, 222
Pelrse v. Bowles, 1 Stark 323 266
Pelee Island Navigation Co. v. Doty, 23 O. L. R. 402 .....130, 131
Pell v. Coombes, 2 A. & E. 450 9
Pell v. Daubeny, 5 Ex. 955 294
Pender v. Toddel (1898), 1 Q. B. 798 .....151, 151
Peninsular and Oriental S. S. Co. v. Tsune Kyima (1895), A. C. 661 108
Penny v. Brice, 18 C. B. N. S. 393 48
Peoples Loan v. Grant, 18 S. C. R. 262 331
Peppercorn v. Hoffman, 9 M. & W. 618 566
Percival v. Dunn, 20 Ch. D. 128 188
Pering v. Keymer, 3 A. & E. 245 16
Perkins v. Fry, 10 O. W. R. 954 259
Perlet v. Perlet, 15 U. C. R. 165 133
Perrus v. Keefer, Re, 22 O. R. 672 432
Perren v. Monmouthshire Ry. & Canal Co., 11 C. B. 855 270
Perrin v. Bowes, 15 U. C. L. J. 138 467
Perry v. Dickerson, 85 N. Y. 345 140
Perry v. Gibson, 1 A. & E. 48 296
Perry v. Newcastle, 8 U. C. R. 363 419
Peruvian Tran. Co. v. Dreyfus (1892), A. C. 166 327
Peterborough Hydraulic Power Co. v. McAllister, 17 O. L. R. 145 480
Perkin v. McFarlane, 19 A. R. 429 183
Peters v. Beers, 14 Beav. 101 316
Petit v. Ambrose, 6 M. & S. 274 192
Peto v. Blades, 5 Taunt. 65 465
Petre v. Duncombe, 2 L. M. & P. 107 .....34, 324
Petrie v. Maclean, 28 O. R. 642 .....104, 350
Petty v. Daniel, 34 Ch. D. 180 .....224, 572
Pewtress v. Harvey, 1 B. & Ad. 154 80
Pfeiffer v. Midland Ry. Co., 18 Q. B. D. 243 362
Phair v. Phair, 19 P. R. 67 518
Phelps v. St. Catharines & N. C. Ry. Co., 19 O. R. 501 407
Phillips v. Austin, 13 C. L. T. 316 404
Phillips v. Benle, 32 Beav. 27 285
Phillips v. Canterbury, 11 M. & W. 619 495
Phillips v. Dickson, S. C. N. S. 391 .....33, 206
Phillips v. Foxall, L. R. 7 Q. B. 680 135
Phillips v. Hanna, 3 O. L. R. 558 141
Phillips v. Henson, 3 C. P. D. 26 410
Phillips v. Homfray, 24 Ch. D. 439 210
Phillips v. London & S. W. Ry. Co., 5 Q. B. D. 78 343

	PAGE
Phillips v. Jones, 15 Q. B. 859	267
Phillips v. Martin, 15 A. C. 193	342
Phillips v. Phillips, 5 Q. B. D. 60	281, 364
Phillips v. Stevenson, 1 O. W. N. 940	242
Phillipson v. Emmanuel, 56 L. T. 858	192
Philpott v. Jones, 2 A. & E. 41	96
Philpott v. Letain, 35 L. T. N. S. 855	9
Phipps v. Ingram, 3 Dowl. 689	440
Phœnix Ins. Co. v. McGee, 18 S. C. R. 61	352
Pickard v. Banks, 13 East. 20	94
Pickering v. Ailis, 28 U. C. R. 187	137
Pickering v. Toronto Ry. Co., 16 P. R. 144	356
Pieton The, 4 S. C. R. 107	353
Pidsley, Re, Ex parte Luxoo, 20 Ch. D. 701	171
Pigeoo v. Bruce, 8 Taunt. 410	16
Pigg v. Clarke, 3 Ch. D. 674	41
Piggott v. Birtles, 1 M. & W. 440	72
Pike v. Keene, 35 L. T. R. 341; 24 W. R. 22	212
Pilgrim v. Koatchbull, 18 C. B. N. S. 708	150
Pilley v. Robinsoo, 20 Q. B. D. 155	220
Pinm v. Greville, 6 Esp. 95	209
Pinhorn v. Tulkington, 3 Cmnp. 408	125
Piper v. Kings Dyspepsia Cure Co., 30 N. S. R. 420	231
Pirie v. Wild, 11 O. R. 322	32
Pitcher v. King, 2 D. & L. 755	203
Pitt v. Coomes, 2 C. P. 390	530
Platt v. G. T. Ry. Co., 12 P. R. 380	351
Plaunt v. Gillies Brothers, Limited, 3 O. W. N. 921	442
Playfair v. Musgrave, 14 M. & W. 239	479
Plenderleith v. Parsons, 13 O. L. R. 619	325
Plumoier v. Price, 39 L. T. 657	530
Polak v. Everett, 1 Q. B. D. 673	205, 206
Pole v. Bright (1892), 1 Q. B. 602	350
Polglass v. Oliver, 2 C. & G. 17	263, 264
Pollol v. Gray, 12 Ch. 411; 5 App. Cas. 623	317
Pollard, Re, L. R. 2 C. P. 106	196, 301, 420
Pollexfen v. Sibson, 16 Q. B. D. 702	211
Pommerania, The, 4 P. D. 195	198
Pond v. Dimes, 3 M. & Sc. 161	312
Ponsford v. O'Connor, 5 M. & W. 673	307
Pontifex v. Midland Ry. Co., 3 Q. B. D. 23	101
Poole v. Gould, 1 H. & N. 90	194, 294
Poole v. Tumbridge, 2 M. & W. 223; 1 Wms. Sound 33c (2)	296
Poor v. Hudson Ins. Co., 2 Fed. R. 438	411
Popperton, Ex parte, Re Locke, 62 L. T. 942; 63 L. T. 320	566
Popple v. Sylvester, 22 Ch. D. 98	332
Porter, Ex parte, 5 B. & S. 299	558
Porter v. Flintoft, 6 C. P. 337	538
Porter v. Poulton, 15 P. R. 318	32
Porterfield v. Hodgins, 29 O. L. R. 409	189
Portman v. Patterson, 21 U. C. R. 237	85
Postlethwaite, Re, 35 Ch. D. 722	298
Postlethwaite v. Gibson, 3 Esp. 226	565
Pott v. Flather, 10 L. J. Q. B. 306	398
Pott v. Clegg, 16 M. & W. 321	280
Potter v. Horne, 2 Q. B. D. 615	262

PAGE

Potter v. G. W. Collier Co., 19 T. L. R. 380 144
Potter v. Koapp, 5 P. R. 197 440
Potter v. Pickle, 2 P. R. 391 .....230, 233, 444
Potts v. Leask, 36 U. C. R. 476 .....34, 207
Poulett v. Hill (1893), 1 Ch. 277 226
Pousett and the Q. S. of Lambton, 22 U. C. R. 412 17
Powell v. Apollo Candle Co., 10 A. C. 282 569
Powell v. Daaeyger, 1 O. W. R. 63 147
Powell v. Peck, 12 O. R. 492; 15 A. R. 138 331
Powers, Re, 30 Ch. D. 291 275
Powley v. Whitehead, 16 U. C. R. 589 .....73, 447
Poyser v. Minors, 7 Q. B. D. 329 508
Praed v. Graham, 24 Q. B. D. 53 343
Prance v. Sympson, Ksy 678 283
Prstt v. Rutledge, 1 Salk. 95 119
Preble and Robinson, Re, (1892), 2 Q. B. 602 441
Prentice v. Consolidated Bank, 13 A. R. 69 353
Prentice v. Harrison, 4 Q. B. 852 466
Prescott Election Case, Re, 32 U. C. R. 303 .....300, 384
Preston v. Wilmot, 23 U. C. R. 348 .....30, 479
Price v. Bailey, 6 P. R. 256 303
Price v. Harwood, 13 Camp. 108 182
Price v. Msaniag, 42 Ch. D. 372 206
Price v. Messenger, 2 B. & P. 158: 5 R. R. 559 .....565, 566
Price v. Plummer, 26 W. R. 45 530
Price v. Thomas, 11 C. B. 543 .....193, 240, 465
Price v. Tarrington, 1 Sm. L. C. (Edson ed.), 566 317
Price v. Wade, 14 P. R. 351 .....10, 276
Prichard's Claim, 2 D. F. & J. 354 40
Priddee v. Cooper, 1 Bing. 66 193
Prideaux v. Warne, Sir T. Raym 132 112
Priestman v. Bradstreet, 15 O. R. 558 135
Prince v. Lewis, 21 C. P. 63 483
Prince v. Same, 4 Dowl. 5 316
Princess of Thurn v. Moffitt (1914), W. N. 379 99
Pringle v. McIsaac, 11 Price 445 468
Pringle v. Hutsen, 19 O. L. R. 652 331
Pritchett v. English and Colonial Syndicate (1899), 2 Q. B. 428.. 417
Prittle v. Connecticut Fire Ins. Co., 23 A. R. 449 .....180, 222
Proctor v. Jarvis, 15 U. C. R. 187 464
Proctor v. Parker, 12 Man. L. R. 528 354
Proctor v. Williams, 8 C. B. N. S. 386 440
Protector Loan Co. v. Grice, 5 Q. B. D. 592 130
Prout v. Gregory, 24 Q. B. D. 281 403
Provincial Ins. Co. v. Shaw, 19 U. C. R. 360 194
Provisional Cor. of Bruce v. Cromer, 22 U. C. R. 321 34
Prudhal, Ex parte, Re Broster (1897), 2 Q. B. 429 .....554, 555
Prudhomme v. Lazure, 3 P. R. 355 .....144, 145
Pryor v. City Offices Co., 19 Q. B. D. 504 .....207, 240, 252, 345, 571
Public Works Commissioner v. Hills (1906), A. C. 368 .....130, 131
Pugh v. Kerr, 6 M. & W. 17 202
Pudsey v. Manufacturer's Accidt. Ass. Co., 29 N. S. R. 124.... 354
Purdy, Ex parte, 9 C. R. 201 508
Purser v. Bradburne, 7 P. R. 18 87
Pyhus v. Gibb, 6 E. & B. 902 32
Pye v. British Automobile Syndicate (1906), 1 K. B. 425 131
Pyke, Ex parte, Re Lister, 8 Ch. D. 754 93
Pyne v. Kenna, 11 Ir. R. C. L. 40 405

Q.

	PAGE
Quackenbush v. Salder, 13 C. P. 196	520, 521
Quard v. Klag, 1 O. L. R. 51	195
Quartz Gold Mine Hill Co. v. Beall, 20 Ch. D. 501	597
Quebec Bank v. Taggert, 27 O. R. 162	190
Quick v. South Colchester, 3 O. R. 614	189
Quinacey v. Sharpe, 1 Ex. D. 72	282

R.

Race v. Anderson, 14 A. R. 213	438
Rackham v. Blowers, 15 Jur. 758	350
Radcliffe v. Crescent Mill, Re, 1 O. L. R. 331	67, 74, 82
Radcliffe v. Bartholomew (1892), 1 Q. B. 161	38, 171, 339, 349, 370
Radford v. Merchants Bank, 3 O. R. 529	5
Rae v. Port Arthur, 7 O. L. R. 737	362
Ralph v. G. W. Ry. Co., 14 C. L. J. 172	159
Railway Sleepers Supply Co., Re, 29 Ch. D. 204	179, 191
Ralnsville v. G. T. Ry. Co., 25 O. R. 242; 29 S. C. R. 201	353
Raleigh v. Goschen (1898), 1 Ch. 73	222
Ramsay v. Margett (1894), 2 Q. B. 18	541
Ramskill v. Edwards, 31 Ch. D. 100	205
Randall v. Brigham, 7 Wallace 520	74
Randall v. Burton, 4 P. R. 9	121
Randall v. Lithgow, 12 Q. B. D. 525	402, 415, 418, 428
Ranstall v. Atty.-General, 18 Gr. 138	36
Rapelje v. Finch, 14 U. C. R. 249	530
Rapier v. Wright, 14 Ch. D. 638	400
Ratcliffe v. Burton, 3 B. & P. 229	116
Ratcliffe v. Evans, 1892, 2 Q. B. 524	224
Rathbone v. Michael, 20 O. L. R. 503	10, 323, 357
Rathbone v. Mann, 18 L. T. 856	361
Rathbun v. Culbertson, 22 Gr. 465	490
Ravenge v. MacKintosh, 2 B. & C. 693	531
Ravenscroft v. Wise, 1 C. M. & R. 203	269
Rawlins v. Ellis, 16 M. & W. 172	513
Rawstone v. Preston Corp., 30 Ch. D. 116	298
Ray v. Barker, 4 Ex. D. 279, at 283	242, 247
Ray v. Ishister, 22 A. R. 12; 26 S. C. R. 79	205, 212, 214
Read v. Anderson, 19 Q. B. D. 100	93
Read v. Brown, 22 Q. B. D. 128	75, 137, 156, 158
Read v. Coker, 17 Jur. 990	91
Read v. Price (1909), 2 K. B. 724	285
Read v. Wedge, 20 U. C. R. 456	102
Real Estate Loan Co. v. Gardhouse, Re, 29 O. R. 602	139, 149
Receipts, Re, The, 1893, p. 255	323, 340
Redhead v. Mid. Ry. Co., L. R. 4 Q. B. 379	398
Reading v. London School Bd., 16 Q. B. D. 181	33, 435
Reddick v. Traders' Bank, 20 O. R. 449	104, 228
Redding, Re, 14 Jur. 1052	197
Redfeora, Re, 12 L. T. 783	362
Redford v. McDonald, 14 C. P. 191	309
Redford v. McDonald, 18 A. R. 107	333
Redmond v. Redmond, 27 U. C. R. 220	137
Redpath v. William, 3 Bing. 443	192

PAGE
Reece v. Miller, 8 Q. B. D. 626 .....84, 86
Reed v. Fairless, 3 F. & F. 958 294
Reed v. Golding, 2 M. & S. 86 262
Reed v. Graham, 25 O. R. 573 75
Reed v. King, 30 L. T. 290 295
Rees v. Watts, 11 Exch. 410 .....147, 148
Rees v. Williams, 7 Exch. 51 144
Reeves v. Butcher, 1892, 2 Q. R. 509 275
Regan v. McGreevy, P. R. 94 509
Reichel v. Magrath, 14 A. C. 667 151
Reid v. Auld, 5 O. W. N. 964 4
Reid v. Barnes, 25 O. R. 223 394
Reid v. Dickens, 5 R. & Ad. 499 269
Reid v. Drake, 4 P. R. 141 24
Reid v. Gould, 13 O. L. R. 51 220
Reid v. Gowans, 13 A. R. 501 .....477, 544
Reid v. Graham Bros., 26 O. R. 126 .....214, 500, 501, 507
Reid v. McDonald, 26 C. P. 147 .....111, 356, 539, 540
Reid v. McLeod, 20 Ala. 576 390
Reid v. Murphy, 12 P. R. 338 544
Reid v. Powers, 28 Sol. Jour. 653 319
Reiffenstein v. Hooper, 26 U. C. R. 295 186
R. v. Aberdare Canal Co., 14 Q. R. D. 854 179
R. v. Ah Yin, 6 Can. Cr. Cas. 63; 9 B. C. R. 319 389
R. v. Allen, 4 B. & S. 915 171
A. v. All Saints, Southampton, 7 R. & C. 785 65
R. v. Amyot, 11 Can. Cr. Cas. 232 71
R. v. Arkwright, 12 Q. R. 900 .....73, 77
R. v. Arnoldi, 23 O. R. 201 26
R. v. Assessment Com. of St. Mary Abbotts (1891), 1 Q. B. 373. 200
R. v. Badger, 6 E. & R. 137 510
R. v. Baird, 13 Can. Cr. Cas. 240 377
R. v. Barker, 21 Can. Cr. Cas. 207 377
R. v. Baley 671
R. v. Beard, 13 O. R. 608 96
R. v. Bellamy (1899), 1 Ch. 800 377
R. v. Bembridge, 3 Doug. 327 26
R. v. Benson, 2 P. R. 350 408
R. v. Berkshire (Justices), 4 Q. B. D. 469 .....174, 179
R. v. Boardman, 39 U. C. R. 553 40
R. v. Bittle, 22 O. R. 605 387
R. v. Bombadier, 11 Can. Cr. Cas. 217 370
R. v. Borron, 3 B. & Ald. 434 26
R. v. Bowman, 2 Can. Cr. Cas. 89 366
R. v. Boultbee, 4 A. & E. 498 360
R. v. Brimmacombe, 10 Can. Cr. Cas. 169 379
R. v. Brompton Co. Ct. Judge, 18 Q. B. D. 213; 13 A. C. 20, 41 389, 512, 556
R. v. Brooke, 7 Can. Cr. Cas. 216 366
R. v. Bryson, 10 Can. Cr. Cas. 398 368
R. v. Burah 509
R. v. Cambridge (Recorder), 8 E. & B. 637 22
R. v. Canterbury (Archbishop), 1 E. & E. 545 40
R. v. Carley, 18 C. L. T. 26 .....468, 469, 559
R. v. Carter, 24 L. J. M. C. 72 373
R. v. Caswell, 3 U. C. R. 303 370

PAGE

R. v. Chapman, 1 O. R. 582 .....
R. v. Cheshire Lines Co., L. R. 8 Q. B. 344 .....74, 566
R. v. Chilton, 15 Q. B. 220 .....13, 40
R. v. College of Physicians and Surgeons, 44 U. C. R. 146 543
R. v. Collins, 2 Q. B. D. 35 .....13, 40
R. v. Connolly, 22 Q. B. 220 .....13, 74, 519
R. v. Cook, 14 Can. Cr. Cas. 495 82
R. v. Cooper, 24 Q. B. D. 60 145
R. v. Cornwall (Court of Revision), 25 U. C. R. 286 84
R. v. Cotham (1898), 1 Q. B. 802 15
R. v. Coulson, 24 O. R. 246 82
R. v. County Court Judge of Essex, 18 Q. B. D. 706 .....9, 127, 328, 368
R. v. Court of Revision Cornwall, 25 U. C. R. 286 15
R. v. Cowper, 24 Q. B. D. 60, 533 .....
R. v. Cox, 14 Q. B. D. 153 .....107, 494
R. v. Crouch, 35 U. C. R. 433 .....277, 298
R. v. Cummings, 4 U. C. L. J. 182 .....241, 372
R. v. Cunerty, 26 O. R. 51 520
R. v. Curran, 22 Can. Cr. Cas. 388 76
R. v. Davidson, 21 U. C. R. 41 .....376, 377
R. v. Davis, Sayer 133 .....85, 519
R. v. Davitt, 7 Can. Cr. Cas. 514 26
R. v. Day, 3 E. & B. 859 .....368, 369
R. v. D'Eon, 1 Wm. Bl. 515 34
R. v. Derbyshire (Justices), 7 Q. B. 193 258
R. v. Dolliver, 10 Can. Cr. Cas. 405 371
R. v. Doroner, 14 Cox Cr. Cas. 486 .....348, 371
R. v. Doty, 13 U. C. R. 397 297
R. v. Dowling, 17 O. R. 698 .....256, 540, 545
R. v. Drummond, 10 O. L. R. 546 145
R. v. Dubuc, 22 Can. Cr. Cas. 426 42
R. v. Dunlap, 22 Can. Cr. Cas. 51 367
R. v. Edmonson, 13 Can. Cr. Cas. 202 377
R. v. Ell, 10 O. R. 727 377
R. v. Ellis, 20 O. L. R. 218 75
R. v. Ellis, 6 Q. B. 506 96
R. v. Essex (County Court Judgs), 18 Q. B. D. 704 .....518, 533
R. v. Essex (Justices) (1892), 1 Q. B. 490 .....9, 127, 328
R. v. Everett, 1 E. & B. 273 368
R. v. Farrant, 20 Q. B. D. 58 .....84, 8
R. v. Farrell, 21 O. L. R. 540 74
R. v. Fee, 3 O. R. 107 377
R. v. Fenn, 3 Dowl. 546 .....16, 24
R. v. Fick, 16 C. P. 379 295
R. v. Fitzgerald, 1 Can. Cr. Cas. 420 342
R. v. Fletcher, 1 E. & B. 279 367
R. v. Frost, 9 C. & P. 129 .....40, 43, 79, 83, 174, 468
R. v. Garland, L. R. 5 Q. B. 269 388
R. v. Gibson, 16 O. R. 704 81
R. v. Gillespie, 16 P. R. 155 .....255, 565
R. v. Gordon, Dears C. C. 586 373
R. v. Gregg, 22 Can. Cr. Cas. 51 173
R. v. G. T. Ry. Co., 2 Ex. C. R. 132 377
R. v. G. W. Ry. Co., 32 U. C. R. 506 331
R. v. Green, 22 Can. Cr. Cas. 155 .....82, 170, 257
R. v. Greenwich (C. C. Judge), 37 W. R. 132 370
.....75, 341

PAGE
R. v. Hnlifax (County Court Judge) (1801), 2 Q. B. 263....88, 319
R. v. Hall, 12 P. R. 142 240
R. v. Hallday, 21 A. R. 42 27
R. v. Hamlak, Re, 26 O. L. R. 199, 382 .....66, 78, 378
R. v. Hammond, 17 Q. B. 772 159
R. v. Hnmpshire (Justices), 3 Dowl. 47 88
R. v. Handsley, 8 Q. B. D. 383 74
R. v. Hnnson, 4 R. & Ald. 521 348
R. v. Harden, 2 E. & B. 187 85
R. v. Hart, 45 U. C. R. 1 259
R. v. Hawbolt, 4 Can. Cr. Cns. 220 378
R. v. Heffernan, 13 O. R. 616 240
R. v. Helling, 1 Strange 8 65
R. v. Henry, 21 O. R. 113 507
R. v. Hodge, 46 U. C. R. 141 .....27, 49
R. v. Hodges, Moo. & M. 341 180
R. v. Holmes, 12 Q. R. D. 23 157
R. ex rel. Hornn v. Evans, 31 O. R. 448 34
R. v. Horning, 8 O. L. R. 215 .....50, 145
R. v. Howard, 1 M. & Rob. 187 16
R. v. Howarth, 24 O. R. 561 26
R. v. Huddersville (Inhabitnnts), 7 E & B. 794 312
R. v. Hughes, 4 Q. B. D. 614 .....241, 253, 521
R. v. Huntingdonshire (Justices), 10 L. J. M. C. 127 355
R. v. Hutchings, 6 Q. B. D. 300 6
R. v. Ipswich (Recorder), 8 Dowl. 103 348
R. v. Johnson, 34 L. J. M. C. 24 519
R. v. Johnston, 13 Can. Cr. Cas. 170 .....370, 372
R. v. Joint Stock Companies Registrar, 21 Q. R. D. 131 81
R. v. Jones, 23 Q. B. D. 20 494
R. v. Jordan, 5 Can. Cr. Cns. 438 .....367. 514. 557. 558
R. v. Joseph, 11 Que. R. 211 .....348, 371, 372
R. v. Jukes, 8 T. R. 542 145
R. v. Kemp, 10 O. R. 143 74
R. v. Kent (Justices), L. R. 8 Q. B. 305 .....66, 107, 362, 368
R. v. Kenyon, 6 B. & C. 640 146
R. v. Law, 27 U. C. R. 260 .....13. 174
R. v. Lambeth, C. C. Judge, 36 W. R. 475 .....509, 513
R. v. Lancashire (Justices), 11 A. & E. 144 376
R. v. Langford, 15 O. R. 52 74
R. v. Langridge, 24 L. J. Q. B. 73 174
R. v. Lee, 4 Can. Cr. Cns. 416 .....26, 74
R. v. Leeds (County Court), 16 Q. R. D. 691 191
R. v. Leicester (1899), 2 Q. B. 632 82
R. v. Leeming, 7 U. C. R. 306 34
R. v. Lefroy, L. R. 8 Q. B. 134 .....389, 556
R. v. Leominster, 2 B. & S. 391 .....240, 294
R. v. Lewisham Union (1897), 1 Q. B. 408 81
R. v. Lightfoot, 6 E. & B. 822 200
R. v. Lincolnshire (Judge), 20 Q. R. D. 167 .....77, 404
R. v. Lincolnshire (Justices), 3 B. & C. 548 355
R. v. Liverpool 568
R. v. Lizothe, 10 Can. Cr. Cas. 316 377
R. v. Local Govt. Board, 10 Q. B. D. 321 .....66, 73
R. v. London (Bishop), 24 Q. R. D. 213 410
R. v. London (Judge), 70 L. T. 505 361

PAGE

R. v. London (Justices), 25 Q. B. D. 381 ..... 80, 348
R. v. London (Mayor), 69 Q. T. 721 ..... 66, 75
R. v. London (Mayor) and Stock, 62 L. J. Q. B. 589 75
R. v. London, Chatham & Dover Ry. Co., L. R. 3 Q. B. 170 55
R. v. Lord Mayor, 8 T. L. R. 298 79
R. v. Lords of the Treasury, 16 Q. B. 357 83
R. v. Lyon, 9 C. L. T. 6 373
R. v. Mallory, 4 Can. Cr. Cas. 121 377
R. v. Malthy, 2 E. & B. 712 47
R. v. Marylebone (Judge of County Court), 34 Sol. Jour. 459 ..... 44, 53, 82, 237, 238, 261, 410
R. v. Maylett, 15 O. L. R. 348 95
R. v. Meyer, 11 P. R. 477 ..... 22, 351
R. v. Middlesex (Justices), 1 L. M. & P. 621 ..... 38, 362, 371
R. v. Millidge, 4 Q. B. D. 332 74
R. v. Mitchell, 13 Can. Cr. Cas. 344 367
R. v. Murray, 27 U. C. R. 134 ..... 171, 257
R. v. McDermott, 23 Can. Cr. Cas. 252 371
R. v. McDonald, 12 O. R. 381 85
R. v. McFarlane, 7 S. C. R. 216 405
R. v. McIntosh, 2 Can. Cr. Cas. 114 ..... 76, 365, 378
R. v. McLean, 35 C. L. J. 241 96
R. v. McLeod, 6 Can. Cr. Cas. 23 348
R. v. Nelson, 1 O. R. 500 377
R. v. Neuberger, 6 Can. Cr. Cas. 142 367
R. v. Newcastle-on-Tyne (Justices), 1 B. & Ad. 033 362
R. v. Nichol, 40 U. C. R. 76 ..... 355, 362, 368
R. v. North Curry, 4 B. & C. 959 ..... 34, 159
R. v. North Riding of Yorkshire (Justice), 7 Q. B. 154 239
R. v. Norwood, L. R. 2 Q. B. 457 34
R. v. Nottingham Old Waterworks Co., 6 A. & E. 355 81
R. v. Nottingham Water Co., 6 A. & E. 355 81
R. v. Ouimet, 14 Can. Cr. Cas. 141 ..... 348, 377
R. v. Oxford, L. R. 7 Q. B. 471 509
R. v. Oxford (Bishop), 4 Q. B. D. 245, 525; 5 App. Cas. 214 ..... 74, 170, 234, 302
R. v. Oxfordshire (Justices) (1893), 2 Q. B. 140 369
R. v. Pah-Mah-Gay, 20 U. C. R. 105 301
R. v. Palmer, 46 U. C. R. 262 96
R. v. Pawlett, L. R. 8 Q. B. 401 568
R. v. Petrie, 20 O. R. 317 442
R. v. Plymouth and Dartmouth Ry. Co., 37 W. R. 334 78
R. v. Plympton, 37 W. R. 343 195
R. v. Pontypool C. C. Judge, 71 L. T. 17 81
R. v. Poirier, 10 C. L. T. 378 ..... 354, 366
R. v. Potter, 10 C. P. 39 475
R. v. Priest, W. N. (1887), 65 86
R. v. Rainy Lake Lumber Co., 11 P. R. 314 320
R. v. Ramsden, 2 C. & P. 603 317
R. v. Rapay, 7 Can. Cr. Cas. 170 42
R. v. Reason, 23 L. J. M. C. 13 409
R. v. Riall, 11 Ir. C. L. R. 280 145
R. v. Richards, 2 L. M. & P. 35 ..... 83, 542, 543
R. v. Richardson, 20 O. R. 514 ..... 75, 351
R. v. Roberts, 38 L. T. 690 ..... 24, 42
R. v. Robinet, 16 P. R. 49 372

PAGE

R. v. Rogers, 3 Q. B. D. 28 157
R. v. Rondeau, 9 Can. Cr. Cas. 523 373,
R. v. Rose, 27 O. R. 195 568
R. v. Rowland, 1 F. & F. 72 .....18, 41, 421
R. v. Ryan, 27 O. R. 181 66
R. v. Sadlers Co., 10 H. L. C. 404 38
R. v. Sainsbury, 4 T. R. 451 26
R. v. Sainp (Justices) (4 B. & Ald. 626) 355, 371
R. v. Sandford, 30 L. T. 601 85
R. v. Savage, 1 Moo. C. C. 51 388
R. v. Severn, 2 S. C. R. 70 27
R. v. Shaw, 12 L. T. 470 240
R. v. Sheffield (Judge of County Court), 5 T. L. R. 303 358
R. v. Sherlock, L. R. 1 C. C. 20 515
R. v. Shrewsbury (Justices), 11 A. & E. 159 376
R. v. Shropshire (Judge), 20 Q. B. D. 242 .....179, 498, 563
R. v. Shropshire (Justices), 8 A. & E. 173 .....573, 593
R. v. Simpson Co., 28 O. R. 321 379
R. v. Skiptnorth, 12 Cox. C. C. 371 557
R. v. Slavin, 28 U. C. R. 557 373
R. v. Smith, L. R. 2 C. C. 110 .....28, 40, 96, 240, 388
R. v. Southampton (Judge of County Court), 65 L. T. 320 82
R. v. Stapleton, 15 Jur. 1177; 21 L. J. Q. B. 8 542
R. v. S. E. Ry. Co., 4 H. L. Cas. 471 237
R. v. Stanton, 2 C. P. 18 30
R. v. Stimpson, 4 B. & S. 301 77
R. v. Stock, 8 A. & E. 405 348
R. v. Stone, 1 East. 640 240
R. v. Stonor, 59 L. T. 669; 57 L. J. Q. B. 510 500
R. v. Stretch, 3 A. & E. 503 204
R. v. Stubbs, 1 Jur. N. S. 1115 355
R. v. St. Albans (Bishop), 9 Q. B. D. 454 19
R. v. St. Pancras, 28 Q. B. D. 371 82
R. v. St. Pierre, 4 O. L. R. 76 145
R. v. St. Giles, Camberwell, Vestry, 45 W. R. 335 81
R. v. Suffolk (Justices), 18 Q. B. 416 23
R. v. Surrey C. C., 21 L. J. Q. B. 310 .....43, 83
R. v. Surrey (Justices), 6 Q. B. D. 100 179
R. v. Surrey (Justices) (1892), 2 Q. B. 721 .....376, 377
R. v. Surrey (Justices), 5 B. & Ald. 539 355
R. v. Surrey (Sheriff), 8 Dowl. 570 172
R. v. Sussex, 4 B. & S. 966 179
R. v. Sutton, 8 B. & C. 417 388
R. v. Sweeney, 2 Ir. L. R. 278 359
R. v. Taylor, 8 U. C. R. 257 85
R. v. Thornton, 11 Can. Cr. Cas. 71 371
R. v. Tisdale, 20 U. C. R. 272 .....26, 561
R. v. Tomb, 4 U. C. R. 177 233
R. v. Totners, 11 Q. B. 80 65
R. v. Townsend, 5 Can. Cr. Cas. 143 .....366, 367
R. v. Treasury (Lords of), 16 Q. B. 357 83
R. v. Trottier, 22 Can. Cr. Cas. 102 .....370, 373
R. v. Tucker, 10 Can. Cr. Cas. 217 .....367, 373
R. v. Tugwill, L. R. 3 Q. B. 704 172
R. v. Twiss, L. R. 4 Q. B. 407 72
R. v. Verelst, 3 Camp. 432 16

PAGE

R. v. Vreones (1891), 1 Q. B. 360 443
R. v. Walsh, 22 Can. Cr. Cas. 145 372
R. v. Washington, 46 U. C. R. 221 377
R. v. Wason, 17 A. R. 221, 249 .....49, 387
R. v. Wellings, 3 Q. B. D. 426 312
R. v. West Houghton, 5 Q. B. D. 300 362
R. v. Westmoreland (County Ct. Judge), 58 L. T. 417 72
R. v. Wheelan, 4 Can. Cr. Cas. 277 26
R. v. White, 19 Can. Cr. Cas. 150 371
R. v. Widdop, L. R. 1 C. C. 3 240
R. v. Wigan, 1 App. Cas. 622 .....82, 174
R. v. Williamson, 13 Can. Cr. Cas. 195 373
R. v. Winsor, 10 Cox. C. C. 270, 305, 322 .....251, 513
R. v. Wintersett, Cald. 298 136
R. v. Wong On, 2 Can. Cr. Cas. 343 315
R. v. Worcestershire (Justices), 3 E. & B. 477 83
R. v. Wobten, 33 C. L. J. 740 96
R. v. Worthanbury (Inhabitants), 7 Q. B. 555 182
R. v. Wrightman, 5 Esp. 5 368
R. v. Wynt, 1 Salk. 380 26
R. v. Yaldon, 17 O. L. R. 179 42
R. v. Yorkshire (W. R. Justices), 3 T. R. 778 361
Renaud v. Thebert, 27 O. L. R. 57 106
Rennie v. Block, 26 S. C. R. 556 180
Rennie v. Quebec Bank, 1 O. L. R. 303; 3 O. L. R. 541..187, 473, 474
Rennie v. Ratcliffe, 35 L. T. 833 .....157, 158
Renton v. Gallagher, 19 Man. R. 502 531
Republic of Costa Rica v. Strousberg, L. R. 16 Ch. D. 8 .....502, 506
Rettinger v. Macdougall, 9 C. P. 485 134
Revett v. Brown, 5 Bing. 7 253
Reynolds v. Allan, 10 U. C. R. 350 264
Reynolds v. Barford, 7 M. & G. 449 551
Reynolds v. Gallilar Gold Mining Co., 8 C. L. T. 17 231
Reynolds v. Streeter, 3 P. R. 315 .....405, 489
Rhoades v. Selsey, 2 Beav. 359 326
Rhodes v. Liverpool Com. Inv. Co., 4 C. P. D. 425 .....351, 361
Rhodes v. Rhodes, Johns. 653 324
Rhodes v. Smethurst, 6 M. & W. 351 280
Rhodes v. Swithenbank, 22 Ch. D. 577 133
Rhymney Ry. Co. v. Rhymney Iron Co., 25 Q. B. D. 146 326
Ribble v. Croston Urban Council (1897), 1 Q. B. 251 5
Rice v. Fletcher, 13 P. R. 46 518
Rice v. Howard, 16 Q. B. D. 681 .....295, 312
Rice v. Jarvis, 49 J. P. 264 402
Rice v. Shute, 2 W. Bl. 697 204
Rich v. Stark, 8 C. L. T. 191 312
Richards v. Cullerne, 7 Q. B. D. 623 .....126, 128, 132, 312
Richards v. James, 2 Ex. 471 148
Richards v. Jenkins, 18 Q. B. D. 451 539
Richards v. Joynt, 1 O. W. N. 1066 394
Richards v. Martin, 23 W. R. 93 140
Richardson v. Barry, 20 Beav. 22 284
Richardson v. Boswell, 10 Metc. 507 470
Richardson v. Can. West Farmers' Ins. Co., 17 C. P. 341 388
Richardson v. Davies, 5 Q. B. D. 26 312
Richardson v. Elmit, 2 C. P. D. 9 403

PAGE
Richardson v. Howell, 88 T. L. R. 445 ..... 231, 232
Richardson v. Jackson, 8 M. & W. 298 265
Richardson v. Jenkin, 10 P. R. 202 86
Richardson v. McMillan, 18 Man. R. 359 310
Richardson v. Shaw, 6 P. R. 296 ..... 69, 70, 259
Richardson v. Silvester, 29 L. T. 395 ..... 361, 362
Richardson v. Stormont (1900), 1 Q. B. 701 148
Richardson v. Willis, L. R. 8 Ex. 69 14
Richardson v. Wright, L. R. 10 Ex. 367 543
Richmond v. Proctor, 3 U. C. L. J. 202 444
Rickey and Township of Marlborough, Re, 9 O. W. R. 930 15
Riding v. Hawkins, 14 P. D. 500 343
Ridley v. Sutton, 1 H. & C. 741 ..... 316, 314
Ridley v. Tullock, 3 U. C. L. J. 14 144
Ridpath v. Zacker, 9 T. L. R. 538 318
Rielle v. Reid, 28 O. R. 497 480
Right of Way Mining Co. v. La Rose Mining Co., 14 O. L. R. 80. 506
Riley, Re, 15 Q. B. 329 500
Riley v. Hirst, 2 Penn. 346 406
Riley v. Warden, 2 Ex. 59 409
Rishton v. Grissell, L. R. 10 Eq. 393 324
Risley v. Ryle, 10 M. & W. 101; 11 M. & W. 16 550
Ritchie v. Malcolm (1902), 2 Ir. R. 403 5
Ritchie v. Smith, 6 C. R. 462 96
Ritchie, Re, Sewery v. Ritchie, 23 Gr. 66 137
Rivers v. Griffiths, 5 B. & Ald. 630 266
Ritz v. Schmidt, 12 Man. L. R. 138 ..... 193, 231
Rix v. Elliott, 1 N. H. 184 390
Robarts v. Robarts, 3 C. & P. 206 287
Robb v. Murray, 13 P. R. 397 ..... 106, 220
Roberts v. Corporation of Toronto, 16 Gr. 236 403
Roberts v. Death, 18 C. L. J. 101 408
Roberts v. G. N. Ry. Co. (1891), 2 Q. R. 194 542
Roberts v. Humbly, 3 M. & W. 120 67
Roberts v. Jones, 61 L. J. Q. B. 523 402
Roberts v. Lucas, 11 P. R. 3 7
Roberts v. Nodwift, 8 Ind. 339 225
Roberts v. Orchard, 2 H. & C. 769 91
Roberts v. Roberts, 2 B. & Ald. 367 521
Robertson, Re, 5 P. R. 132 173
Robertson v. Burrill, 22 A. R. 356 284
Robertson and Chatham, Re, 19 C. L. T. 380 76
Robertson v. Cornwell, 7 P. R. 297 70
Robertson v. Coulton, 9 P. R. 16 519
Robertson v. Fortune, 9 C. P. 427 ..... 469, 553
Robertson v. Jenner, 15 L. T. N. S. 514 134
Robertson v. Mers, 9 P. R. 510 197
Robertson v. McKerrigan, 29 N. S. R. 315 228
Robins v. Bridge, 3 M. & W. 114 394
Robins v. Coffee, 19 O. R. 332 113
Robins v. Empire Ptg. Co., 14 P. R. 488 ..... 303, 304, 305
Robinson, Re, 27 Ch. D. 160, 186 404
Robinson, In re (1911), 1 Ch. 502 291
Robinson v. Cook, 6 Taunt. 336 265
Robinson v. Curry, 7 Q. B. 465 366
Robinson v. Davidson, L. R. 6 Eq. 269; 24 L. T. 75 136

	PAGE
Robinson v. Davison, L. R. 6 Ex. 269	506
Robinson v. Davies, 5 Q. B. D. 26	300, 439
Robinson v. Drakes, 23 Ch. D. 98	363
Robinson v. Emanuel, L. R. 9 C. P. 415	397
Robinson v. Emerson, 4 H. & C. 352	508
Robinson v. Geisel (1894), 2 Q. B. 685	204, 220
Robinson v. Gell, 12 C. B. 191	339, 464
Robinson v. G. T. Ry. Co., 27 O. L. R. 200	101
Robinson v. Harken (1896), 2 Ch. 415	290
Robinson v. Hindman, 3 Esp. 235	135
Robinson v. Lenagban, 3 Ex. 333	194
Robinson v. Morris, 15 O. L. R. 640	321, 597
Robinson v. Nesbitt, L. R. 3 C. P. 264	406, 420
Robinson v. Perren, 7 O. W. N. 605	345
Robinson v. Piece, 7 Dowl. 93	475
Robinson v. Shistel, 23 C. P. 114	137
Robinson v. Waddington, 13 Q. B. 753	171
Roblin v. McMahon, 18 O. R. 219	282, 284
Roblin v. Rankin, 11 S. C. R. 137	401
Robson v. Worswick, 38 Ch. D. 370	208
Rochon, Re, 31 O. R. 122	70, 71, 74, 350
Rochon v. Wellington, Re, 5 O. L. R. 102	77, 412
Roddan v. Morley, 1 DeG. & J. 1	280
Rodger v. Comptoir D'Escompte De Paris, L. R. 2 C. P. 393	476
Rodman v. Munson, 13 Barb. 107	225
Rodway v. Lucas, 10 Ex. 670	192
Rodwell v. Phillips, 9 M. & W. 505	472, 473
Roe v. Roper, 23 C. P. 76	539
Rogers v. Cavanagh, 27 C. P. 537	366
Rogers v. Can. Loan & Agency Co., Ltd., 18 O. L. R. 11	430
Rogers v. Dutt, 13 Moo. P. C. 209	176
Rogers v. Highland, Iowa Sup. Ct. 34 Alb. L. J. 397	473
Rogers v. Hunt, 10 Ex. 474	226
Rogers v. Kennay, 9 Q. B. 592	537
Rogers v. London C. & D. Ry. Co., 26 W. R. 192	81
Rogers v. Manning, 8 P. R. 2	307
Rogers v. McFarlane, Re, 10 O. L. R. 622	360, 367
Rogers v. Ontario Bank, 21 O. R. 416	472
Rogers v. Quinn, 26 L. R. Ir. 136	284
Rogers v. Whiteley, 23 Q. B. D. 236	401, 415
Rogers v. Wood, 3 O. W. N. 1241	237, 245
Roland v. Gundy, 5 Ohio 202	111
Rolfe v. Learmouth, 14 Q. B. 196	162
Rollason, Re, 34 Ch. D. 495	473
Rolt v. Gravesend (Mayor, etc.), 7 C. B. 777	464
Romann v. Brodrecht, 9 P. R. 2	151
Rondot v. Monetary Times Printing Co., 18 P. R. 141	316
Roode v. Gun & Shot & Griffin's Wharves Co., 25 L. T. 635	546
Rooke's Case, 5 Rep. 100 (a)	11
Root v. Woodward, 1 U. C. R. 311	344
Rorke v. Errington, 7 H. L. C. 617	6, 77
Rose v. Zimmerman, 3 Gr. 598	491
Rosier, Re, Jones v. Bartholomew, 49 L. T. 442	241
Ross, Re, 20 Gr. 385	508
Ross, Re, 3 P. R. 394	469, 497
Ross v. Farewill, 5 C. P. 101	55

PAGE
Ross v. Gandell, 7 C. B. 766 183
Ross v. Grange, 25 U. C. R. 396 .....200, 466, 494
Ross v. Hamilton, E. T. 3 Vic. 469
Ross v. Malone, 7 O. R. 215 .....397, 488
Ross v. Perrault, 13 Gr. 206 327
Ross v. Robertson, 7 O. L. R. 494 362
Ross v. Woodford, 1 Ch. 38 .....304, 306
Rotherham v. Priest, 49 L. J. C. P. 104 .....246, 247
Rourke v. Short, 5 E. & B. 904 93
Rouse v. Bradford Banking Co. (1894) A. C. 586 .....205, 206
Routledge v. Ramsay, 8 A. & E. 221 287
Rawan v. McDanell, H. T. 3 Vic; R. & J. 1024 515
Rowbotham v. Dupree, 5 Dowl. 557 231
Howe v. G. T. Ry. Co., 16 C. P. 500 343
Rowe v. Hopwood, L. R. 4 Q. B. 1 291
Rowe v. Jarvis, 13 C. P. 495 .....466, 469
Howland v. Vitzetelly, 6 M. & G. 723 240
Howlett v. Lane, 43 Tex. 274 425
Howley v. Biglow, 12 Pick. 307 111
Hownson, Re, 29 Ch. D. 358 334
Hoxburghe v. Cox, 17 Ch. D. 520 .....148, 190
Royal Bank v. Matheson, 6 C. L. J. 11 518
Royston Park, Re, 28 O. L. R. 629 .....66, 75, 77
Rucker v. Hannay, 3 T. R. 124 274
Rudd v. Frank, 17 O. R. 758 .....206, 208
Rumbelow v. Whalley, 16 Q. B. 307 270
Rumoh v. Marx, 18 C. L. J. 444; 3 C. L. T. 31 .....475, 533, 574, 593
Ruffman v. Tharnwell, 2 W. W. & H. 51 145
Runnacles v. Mesquita, 1 Q. B. D. 416 .....238, 242, 245, 247
Runtz v. Longbourne, 8 T. L. R. 568 402
Rush v. Hobenygen, 44 U. C. R. 199 378
Rush v. Smith, 1 C. M. & R. 94 206
Rushton v. Grand Trunk Ry., 6 O. L. R. 425 343
Russell v. Cambefort, 23 Q. B. D. 526 .....201, 209, 216
Russell v. G. W. Ry., 3 U. C. L. J. 116 305
Russell v. Robertson, 1 U. C. R. 235 278
Russell v. Waterford & Limerick Ry. Co., 16 L. R. Ir. 314 138
Rutherford v. Walls, 12 C. L. T. 205 81
Ruttan v. Levisconte, 16 U. C. R. 495 488
Rutan v. Short, 12 U. C. R. 485 123
Ryan v. Devereux, 26 U. C. R. 100 313
Ryan v. McKerral, 15 O. R. 460 206
Ryan v. Ryan, 5 S. C. R. 406 353
Ryan v. Simonton, 13 P. R. 209 359
Ryan v. Sutherland, 17 P. R. 331 172
Ryckman v. Randolph, 20 O. L. R. 1 .....163, 201, 211
Ryder v. Townsend, 7 D. & R. 119 265
Ryder v. Wombwell, L. R. 4 Ex. 32 252
Ryer v. Plows, Re, 46 U. C. R. 206 373
Rymill v. Wandsworth Dist. Bd., 1 C. & E. 92 422

S.

Sacks v. Henderson (1902), 1 K. B. 612 191
Sadler v. G. W. Ry. Co. (1895), 2 Q. B. 688; 1896, A. C. 450 108, 219

	PAGE
Salaman v. Donovan, 10 Ir. C. L. R. Ap. xiii	401
Salford (Mayor of) v. Lever, 25 Q. B. D. 303; (1891), 1 Q. B. 168	406
Salisbury v. Sweetheart, 5 Dowl. 243	240
Salisbury (Marquis of) v. Ray, 8 C. B. N. S. 193	407
Salter v. St. Lawrence Lumber Co., 28 N. S. R. 335	102
Salybia, The (1910), P. 25	152
Samis v. Ireland, 4 A. R. 141	400, 400
Sample v. McLaughlin, 17 O. R. 490	201
Sampson v. Seaton & Beer Ry. Co., L. R. 10 Q. B. 28	423
Sams and City of Toronto, Re, 9 U. C. R. 181	170
Samwell v. Howarth, 3 Mer. 272	205
Sandbank v. Staffordshire Ry. Co.	348
Sanders v. Hamilton (1907), 97 L. T. 679	298
Sanderson v. Bell, 2 C. & M. 304	203
Sandiman v. Breach, 7 B. & C. 99	347
Sander v. Jervis, E. B. & E. 935	514
Sands v. Fisher, 30 N. S. R. 185	231
Sangster v. Kay, 15 Ex. 386	162
Sansom v. Sansom, 4 P. D. 69	405
Sargant v. City of Toronto, 12 C. P. 185	111, 113
Sarjeant v. Dale, 2 Q. B. D. 558	65
Saskatchewan v. Leadlay, 1 O. W. N. 228	382
Sato v. Hubbard, 6 A. R. 546	364, 401, 413, 433, 503
Saunders v. Graham, Gow. 111	260
Saunders v. Hamilton, 23 T. L. R. 389	232
Saunders v. Pitman, 1 B. & P. 33	258
Saunders v. Stuart, 1 C. P. D. 326	308
Saunders v. The King, 38 S. C. R. 387	95
Sawyer-Massey v. Parkin, Re, 28 O. R. 662	83, 105
Saxon v. Castle, 6 A. & E. 652	464
Scales v. Jacoba, 3 Bing. 638	283
Scales v. Sargeson, 3 Dowl. 707	545
Schamehorn v. Traske, 30 U. C. R. 543	542
Scalfe, Re, 5 B. C. R. 153	557, 562
Scane v. Coffey, 15 P. R. 112; 22 A. R. 269	518
Scanlon v. Usher, 8 Cl. & F. 561	364
Scarf v. Jardine, 7 App. Cas. 345	7, 214
Scarth, Re, L. R. 16 Ch. 234	402
Schafer v. Dumble, 5 O. R. 716	113
Schibsley v. Westenholtz, L. R. 6 Q. B. 155	166
Schneider v. Agnew, 6 P. R. 338	50, 506, 511
Schneider v. Norris, 2 M. & S. 286	107
Schofield v. Bull, 3 U. C. L. J. 204	252
Schules v. Hilton, 10 M. & W. 15	203, 204
Scholey v. Walton, 12 M. & W. 510	285
School Trustees, Hamilton v. Nell, 28 Gr. 408	16
Schrader v. Lillis, 10 O. R. 358	130
Schreger v. Carden, 11 C. B. 851	270
Schroeder v. Central Bank, 24 W. R. 710	186
Schroeder v. Hemrott, 28 L. T. 704	537
Schultz v. Wood, 6 S. C. R. 585	258
Schumacher v. Town of Chesley, 21 O. L. R. 528	323
Schwersenski v. Vineberg, 19 S. C. R. 243	351
Scott v. Allen, 26 O. L. R. 571	100
Scott v. Avery, 5 H. L. C. 811	68

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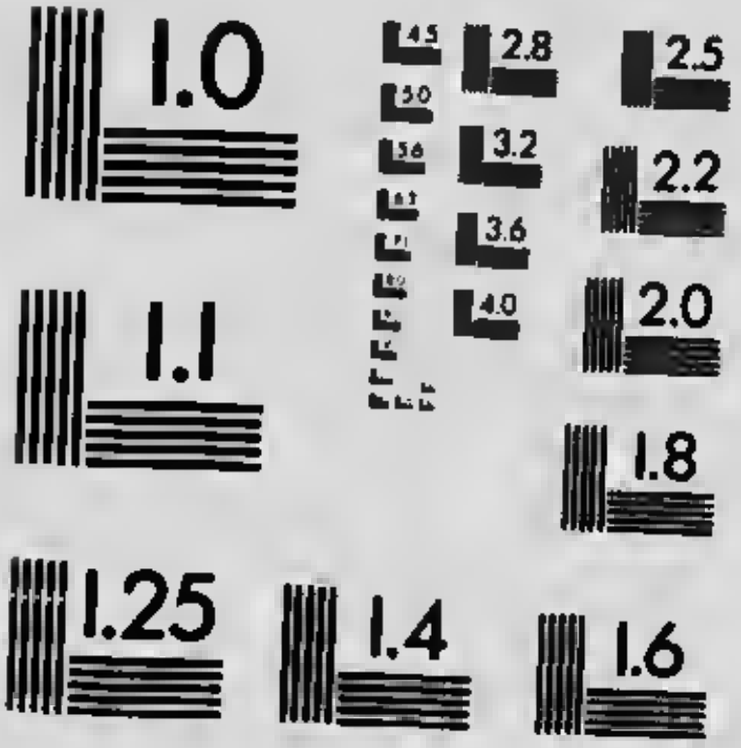

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PAGE
Scott v. Jones, 11 Russ. & Myl. 255; 4 Cl. & F. 382 285
Scott v. Lewis, 2 C. M. & R. 289 540
Scott v. McRae, 3 P. R. 16 113
Scott v. Mercantile Accident and Guarantee Co., 66 L. T. 811.... 68
Scott v. Mitchell, 8 P. R. 518 322
Scott v. Morley, 20 Q. B. D. 129 .....230, 426, 500
Scott v. Scott (1913), A. C. 417 4
Scott v. Shephard, 2 Bl. 892 .....99, 574
Scott v. Stansfield, L. R. 3 Ex. 229 22
Scott v. Uxbridge and Rickmansworth Ry. Co., L. R. 1 C. P. 596. 265
Scott v. Wye, 11 P. R. 93 569
Seabrook v. Young, 14 P. R. 97 .....70, 85
Sear v. Webb, 49 L. T. 64 241
Searle v. Choate, 25 Ch. D. 723 407
Sears v. Meyers, 15 P. R. 381 166
Seaton v. Fenwick, 7 P. R. 149 231
Seaton v. Sheridan, 12 T. L. R. 285 252
Seaton v. Taylor, 3 U. C. R. 302 492
Seaward v. Williams, 1 Dowl. 528 545
Sebert v. Hodgson, In re, 32 O. R. 157 .....65, 74, 95, 103, 142
Secor v. Gray, 3 O. L. R. 34 333
Secor v. Sturges, 16 N. Y. 554 140
Segsworth v. Meridan S. Plating Co., 3 O. R. 413 545
Seymayne's Case, 1 Sm. L. C. 228 116
Serjeant v. Dale, 2 Q. B. D. 558 .....19, 73, 80, 171
Scivewright v. Lees, 9 P. R. 200 259
Sewell v. Jones, 15 Jur. 153 .....70, 85
Sewery v. Burk, 16 C. L. T. 322 137
Sewery v. Ritchie, Re Ritchie, 23 Gr. 66 .....202, 407, 417
Seymour v. Cooper, 26 Kansas 539 411
Seymour v. Coulson, 5 Q. B. D. 359 358
Shanley v. Moore, 9 U. C. L. J. 264 .....400, 403, 404
Sharpe v. Matthews, 5 P. R. 19 519
Sharpe v. Wakefield (1891), A. C. 173 11
Sharpe, Re, 2 Ch. Cham. 67 322
Sharpe v. Brown, 38 Ch. D. 427 172
Sharpe v. Fortune, 9 C. P. 523 .....551, 553
Sharpe v. Leitch, 2 C. L. J. 132 474
Shaver v. Hart, Re, 31 U. C. R. 609 363
Shaw v. McCreary, 19 O. R. 39 398
Shaw v. MacKenzie, 6 S. C. R. 181 .....519, 531
Shaw v. Nickerson, Gillespie v. Nickerson, 7 U. C. R. 541 260
Shaw v. Shaw, 18 L. T. 420 397
Shaw v. Smith, 18 Q. B. D. 193 .....596, 318
Shaw v. The Corp. of Manvers, 19 U. C. R. 288 15
Shaw v. Tims, 19 Gr. 496 490
Sheba Gold Mining Co. v. Trubshawe (1892), 1 Q. B. 674 227
Sheehan v. G. E. Ry. Co., 16 Ch. D. 59 221
Shelford v. South & E. C. Ry. Co., 4 Ex. D. 319 .....234, 242
Shepherd v. Cooper, Re, 25 O. R. 558 105
Shepley v. Hurd, 3 A. R. 549 32
Shepperd v. Hirsch, 45 Ch. D. 231 211
Sheppard, Re Atkins v. Sheppard, 43 Ch. D. 131 210
Sheppard v. Wilkinson, 6 T. L. R. 13 .....238, 244
Shepphard v. Shepphard, 12 O. W. R. 186 498
Sherburne v. Middleton, 9 Cl. & F. 72 364

PAGE
Sherk v. Evans, 22 A. R. 242 143
Sherlock v. Powell, 26 A. R. 407 134
Sherwood v. Cline, 17 O. R. 30 .....67, 73, 74
Sherwood v. Balch, 30 O. R. 1 .....438, 439
Shields v. G. N. Ry. Co., 7 Jur. N. S. 631; 8 U. C. L. J. 195..160, 163
Shingle v. Holt, 7 H. & N. 65 .....537, 538
Shippey v. Grey, 42 L. T. 673 407
Shoe Machinery v. Cutlan (1896), 1 Ch. 667 6
Shoppee v. Natham & Co. (1892) 1 Q. B. 245 561
Shoreberry v. Asmasten, 37 L. T. 792 531
Shorey v. Thasher, In re, 30 U. C. R. 504 15
Short v. Field, 32 O. L. R. 398 279
Short v. McCarthy, 3 B. & Ald. 626; 22 R. R. 503 281
Shropshire v. Glascock and Garner, 4 Mo. 536 95
Shultz v. Reddick, 43 U. C. R. 155 494
Shupe v. Young, 10 O. W. R. 185 .....262, 165
Shurmur v. Young, 33 Sol. Jour. 155 244
Shuttleworth v. Clews (1910), 1 Ch. 176 131
Sibbald v. Roderick, 11 A. & E. 38 112
Sibree v. Tripp, 15 M. & W. 23 .....37, 480
Sichel v. Boret, 2 H. & C. 954 157
Sickles v. Asseltine, 10 U. C. R. 203 492
Sidwell v. Mason, 2 H. & N. 306 .....283, 285
Siddall, Re, 29 Ch. D. 1 162
Siddall v. Gibson, 17 U. C. R. 98 .....75, 76, 78
Silber Light Co. v. Silber, 12 Ch. D. 717 223
Silence, Re, 7 Ch. D. 238 557
Silla v. Hunt, 10 U. C. R. 521 .....110, 120
Simcoe (County) v. Burton, 25 A. R. 478 32
Simmons v. Storer, 14 Ch. D. 154 44
Simmons v. The Corp. of Chatham, Re, 21 U. C. R. 75 15
Simmons v. Woodward (1892), A. C. 100 172
Simms v. Henderson, 11 Q. B. 1015 307
Simpson, Re, Ex parte Morgan, 2 Ch. D. 72 384
Simpson v. Chase, 14 P. R. 280 .....201, 397, 402, 414, 415, 420
Simpson and Clafferty, Re, 18 P. R. 402 .....66, 349
Simpson v. Ingham, 2 B. & C. 72 96
Simpson v. London & N. W. Ry. Co., 1 Q. B. D. 274 398
Simpson v. Ross, 5 Terr. L. R. 485 321
Sima v. Kelly, 20 O. R. 291 76
Sims v. Prosser, 15 M. & W. 151 172
Sinclair v. Baby, 2 P. R. 117 33
Sinclair v. Bell, Re, 28 O. R. 483 .....162, 164, 208
Sinclair v. Preston, 31 S. C. R. 408 .....325, 326
Singer v. Williams Mfg. Co., 8 P. R. 483 304
Singleton v. Williams, 7 H. & N. 410 115
Singleton v. Roberts, 70 L. T. 687 201
Sisdell v. Cunningham, 4 H. & N. 871 429
Sisted v. Lee, 1 Salk. 402 232
Six Carpenters' Case, 8 Coke 146a; 1 Sm. L. C. 261 564
Skeet v. Lindsay, 2 Ex. D. 314 282
Skegg v. Simpson, 2 DeG. & Sm. 454 197
Skelton, Re, Ex parte Contes, 5 Ch. D. 979; 6 L. C. G. 17 519
Skirving v. Ross, 31 C. P. 423 272
Slade, Re, 30 W. R. 28 198
Sleight v. West, 25 U. C. R. 391 470

PAGE
Slater v. Cathcart, 8 T. L. R. 1 244
Slater v. Laboree, 0 O. L. R. 545 .....76, 106
Slater v. Mosgrave, 20 Gr. 392 280
Slater v. Pender, 1 L. R. 7 Eq. 95 467
Slattery v. Hearn, 1 O. W. N. 938 222
Sleeman v. Barrett, 2 H. & C. 934 400
Sleath v. Hurlbirt, 25 S. C. R. 620 120
Sloan v. Creasor, 22 U. C. R. 127 .....7, 31, 32
Slocum v. Sims, 5 Cranch. 363 74
Sloman v. New Zealand (Govt.), 1 C. P. D. 563 198
Sly v. Stevenson, 2 C. & P. 464 506
Small v. Henderson, 10 C. L. T. 267 222
Small v. Nairn, 13 Q. B. 840 307
Small and St. Lawrence Fdry. Co., Re, 23 O. R. 543 459
Smalley v. Gallagher, 26 C. P. 531 .....110, 113
Smallpage v. Tongue, 17 Q. B. D. 644 .....195, 465
Smart v. Hutton, 8 A. & E. 568 31
Smart v. Miller, Re, 3 P. R. 385 .....401, 406, 413
Small v. Niagara & Detroit Ry. Co., 12 C. P. 404 ..192, 227, 234, 325
Smart and O'Reilly, Re, 7 P. R. 364 69
Smith v. Allen, Re Harrison (1891), 2 Ch. 349 220
Smith v. Anderson, 15 Ch. D. 247 162
Smith v. Anhray, 7 U. C. R. 90 120
Smith v. Babcock, 9 P. R. 175 305
Smith v. Baker (1891), A. C. 325 .....351, 398
Smith v. Barnham, 1 Ex. D. 419 .....389, 510
Smith v. Bernie, 10 C. P. 243 464
Smith v. Betty (1903), 2 K. B. 317 148
Smith v. Blackley, Q. B. 2 Q. B. 326 317
Smith v. Blundell, 1 Chitty 226 232
Smith v. Boothman, 4 O. W. N. 801 358
Smith v. Boyd, 18 P. R. 76 .....184, 259
Smith v. Campbell, 19 Ves. 400 163
Smith v. Cheese, 1 C. P. D. 60 172
Smith v. Chorly Dist. Council (1897), 1 Q. B. 532, 678..... 83
Smith v. Clarke, 0 Iowa 241 .....405, 422
Smith v. Cobourg & Peterborough Ry. Co., 3 P. R. 113 474
Smith v. Compton, 3 B. & Ad. 407 34
Smith v. Critchfield, 14 Q. B. D. 873.....356, 530, 538, 539, 540, 547
Smith v. Dart, 14 Q. B. D. 105..... 342
Smith v. Douglas, 16 C. B. 31 352
Smith v. Durant, 0 H. L. Cas. 102..... 364
Smith v. Edwardes, 22 Q. B. D. 10..... 246
Smith v. Enright, 69 L. T. 724 .....110, 120
Smith v. Everett, 4 Bro. C. C. 64..... 189
Smith v. Fleming, 12 P. R. 520 441
Smith v. Frame, 41 N. S. R. 28..... 508
Smith v. Gill (1896), 2 Q. B. 166 356
Smith v. Goff, 3 D. & L. 47..... 443
Smith v. Gold Coast (1903), 1 K. B. 285, 538 136
Smith v. Greey, 10 P. R. 531.....303, 310
Smith v. Hallen, 2 F. & F. 678..... 316
Smith v. Huseltine, W. N. (1875) 250..... 223
Smith v. Hay, 35 C. L. J. 421.....351, 360
Smith v. Hunt, 1 O. L. R. 334 296
Smith v. Jones, 22 Q. B. D. 501..... 255

PAGE
Smith v. Kent, 0 Q. B. D. 340 ..... 470, 540
Smith v. Logan, 17 P. R. 219 ..... 248, 249, 420
Smith v. Low, 1 Atk. 480 292
Smith v. Mason, 17 P. R. 444 133
Smith v. O'Reilly, 7 P. R. 364 361
Smith v. Poole, 12 Sim. 17 ..... 282, 285
Smith v. Port Colborne B. C. Trustees, 1 O. L. R. 195 362
Smith v. Redford, 10 Gr. 316 10
Smith v. Russell, 1 Chamb. Re, 193 3
Smith v. Silverthorn, 15 P. R. 197 320
Smith v. St. John's Ry. Co., 28 S. C. R. 603 351
Smith v. Smith, 9 P. R. 511 ..... 133, 519
Smith v. Spurr, 2 Dowl. 231 240
Smith v. Thompson, 8 C. B. 44 135
Smith v. Truscott, 6 M. & G. 267 293
Smith v. Union Bank, 15 C. L. T. 15 472
Smith v. Winter, 4 M. & W. 454 ..... 192, 206
Smith v. Wintle, Barnes 405 ..... 192, 193
Smyth, Ex parte, 3 A. & E. 710 96
Smyth v. Nicholls, 1 P. R. 355 145
Smurthwaite v. Hannay (1894), A. C. 949 ..... 108, 219
Snarr v. Badenoch, 10 O. R. 131 326
Snart v. G. T. R., 1 O. L. R. 200 320
Sneary v. Abdy, 1 Ex. D. 297 497
Snelgrove v. Stevens, Car. & M. 508 296
Snider v. Snider, 2 O. W. N. 1434 266
Société Générale de Paris v. Tramways Union Co. 14 Q. B. D. 424. 240
Solicitor, Re, 14 Ch. D. 152 230
Solomon v. Bitton, 8 Q. B. D. 176 342
Solomon v. Howard, 12 C. B. 463 258
Soloman v. London C. & D. Ry. Co., . R. 50 ..... 143, 144
Solme v. Stafford, 16 P. R. 78, 264 228
Somerset, Re (1894), 1 Ch. 231 200
Sorenson v. Smart, 5 O. R. 678 9
Sornberger v. The C. P. Ry. Co., 24 A. R. 263 ..... 343, 344
Soules v. Little, 12 P. R. 533 ..... 67, 71, 340
Soules v. Soules, 35 U. C. R. 334 226
South American and Mexican Co., Re, Ex parte Bank of England (1895), 1 Ch. 37 ..... 5, 232, 459
Southam, Re, Ex parte Lambe, 19 Ch. D. 169 ..... 45, 174
South Norfolk v. Warren, 12 C. L. T. 512 ..... 85, 86
South Australia Ins. Co. v. Randall, L. R. 3 C. P. 109 472
Southwark & Vauxhall Water Co. v. Quick, 3 Q. B. D. 315 297
Southwick v. Hare, 15 P. R. 222 ..... 232, 321
Sovereign Bank v. International, 14 O. L. R. 514 ..... 185, 188
Sovereign Bank v. Parsons, 18 O. L. R. 665; 24 O. L. R. 387 152
Spain v. Arnott, 2 Stark. 250 135
Spalding v. Parker, 3 U. C. R. 66 287
Sparks v. Barrett, 5 Scott. 402 304
Sparks v. Young, 8 Ir. C. L. R. 251 398
Spatuli v. Constantinide, 20 W. R. 823 328
Spears v. Fleming, 36 C. L. J. 166 247
Speck v. Phillips, 5 M. & W. 279 269
Speeding v. Young, 16 C. B. N. S. 824 311
Speers v. G. W. Ry. Co., 6 P. R. 170 258
Spellman v. Spellman, 10 C. L. T. 20 295

PAGE
Spence v. Coleman (1901), 2 K. B. 199 404
Spence v. Hector, 24 U. C. R. 277 325
Spencer v. Jones, 13 T. L. R. 174 252
Spencer v. Wright, 37 C. L. J. 245 177
Spickernell v. Hotham, Kay 669 285
Spooner v. Browning (1808), 1 Q. B. 528 108
Spong v. Wright, 9 M. & W. 629 286
Sprague, Ex parte, 8 Can. Cr. Cas. 109 373
Sprague v. Nickerson, 1 U. C. R. 284 137
Spry v. McKenzie, 18 U. C. R. 161 111
Spurr v. Hall, 2 Q. B. D. 615 262
Spurrier v. La Cloche (1902), A. C. 446 5
Spyhey v. Hyde, 1 Camp. 181 266
Squair v. Fortune, 18 U. C. R. 547 474
Squire v. Mooney, 30 U. C. R. 531 112
Squire v. Wheeler, 16 L. T. 93 510
Stacey v. Stayner, 7 O. L. R. 684 205
Stackwood v. Dunn, 3 Q. B. 822 .....153, 204
Stafford v. Clark, 2 Bing. 377 .....7, 270
Stalxlschmidt v. Lett, 1 Sm. & G. 415 334
Staley v. Bodwell, 19 A. & E. 145 545
Stamford Banking Co. v. Smith (1892), 1 Q. B. 765 ..283, 284, 288
Standard Bank v. Frind, 15 P. R. 438 214
Standard Drain Pipe Co. v. Fort William, 16 P. R. 404 542
Stanley v. Hayes, 8 O. L. R. 81 100
Stanley v. Stanley, 7 Ch. D. 589 404
Stannard v. St. Giles, Camberwell, 20 Ch. D. 190 71
Stansfield v. Hellawell, 7 Ex. 273 120
Staples v. Accidental Death Ins. Co., 10 W. R. 59 144
Staples v. Staples, 4 Maine 532 406
Star Life Assce. Socy. v. Southgate, 18 P. R. 151 226
Starr, In re, Starr v. Starr, 2 O. L. R. 759 334
State v. Bishel, 39 Iowa 42 94
Stavert v. Holderoft, 2 O. W. N. 153 .....502, 506, 507, 511, 512
St. Catharines Improvement Co. v. Rutherford, 31 O. L. R. 574.. 131
St. Charles v. Caldwell, 12 O. W. R. 1185 165
St. Dennis v. Baxter, 13 O. R. 41 .....344, 393
St. Denis v. Shoultz, 25 A. R. 131 531
St. Gobain v. Hoyermann's Agency (1893), 2 Q. B. 96 216
St. Henri (City) v. St. Laurent, 26 S. C. R. 176 354
St. John v. Rykert, 4 A. R. 213; 10 S. C. R. 278 .....331, 332
St. Nazaire Land Co., Re, 12 Ch. D. 88 323
Steele v. Savory, W. N. (1891), 195; 8 T. L. R. 94 250
Steele v. Williams, 8 Exch. 625 ..... 8, 9
Steinkeller v. Newton, 9 C. & P. 313 314
Steljes v. Ingram, 19 T. L. R. 535 101
Stephen v. Dennie, 3 U. C. L. J. 69 197
Stephens v. Beatty, 27 O. R. 75 290
Stephens v. Chausse, 15 S. C. R. 379 353
Stephens v. Cousins, 16 U. C. R. 329 116
Stephens v. Laplante, 8 P. R. 52 76
Stephenson v. Dallas, 13 P. R. 450 .....246, 247, 311
Stephenson v. Rains, 2 E. & B. 744 87
Stevens v. Clark, 2 M. & Rob. 435 521
Stevens v. Asling, 2 F. & F. 136 258
Stevens v. Hounslow Burial Bd., 61 L. T. 839 269

PAGE

Stevens v. Pennock, 30 U. C. R. 51 470
Stevens v. Phillips, L. R. 10 Ch. 417 400
Stevenson v. Berwick Corporation, 1 Q. B. 151 270
Stevenson v. Hodder, 15 Gr. 570 290
Stevenson v. Rae, 5 C. P. 406 300
Stevenson v. Watson, 4 C. P. D. 148 74
Stewart v. North Metrop. Tram Co., 16 Q. B. D. 556 181
Stewart v. Young, L. R. 5 C. P. 122 253
Stewart v. Cowan, 46 U. C. R. 340 565
Stewart v. Edwards, Re, 11 O. L. R. 378 ..... 500, 571
Stewart v. Ferguson, 31 O. R. 112 ..... 332, 419
Stewart v. Gage, 13 O. R. 458 288
Stewart v. Gladstone, 7 Ch. D. 394 ..... 258, 259, 306
Stewart v. Gurbord, 6 O. L. R. 262 ..... 276, 279
Stewart v. Jones, 1 O. L. R. 34 ..... 402, 403
Stewart v. Macdonald, 11 C. L. J. 10 ..... 58, 447, 496
Stewart v. Moore, 9 U. C. L. J. 82 218
Stewart v. Richard, 3 Man. L. R. 010 246
Stewart v. Synder, 30 O. R. 110 ..... 290, 335, 337
Stewart v. Woolman, 26 O. R. 714 344
Stewartstoun Loan Co. v. Daly, 12 L. R. Ir. 418 239
Stikeman v. Dawson, 16 L. J. Ch. 205 29
Stiles v. Ecclestone (1903), 1 K. B. 544 129
Still v. Booth, 1 L. M. & P. 446; 15 Jur. 577 75
Still v. Hastings, 13 O. L. R. 322 531
Stimson v. Block, 11 O. R. 96 119
Stimson v. Farnham, L. R. 7 Q. B. 175 31
Stimson v. Hamilton, 1 W. L. R. 20 ..... 226, 228
Stimson v. Stimson, 6 Gr. 370 199
Stinson v. Scollick, 2 O. S. 217 344
Stirling v. Burdett (1911), 2 Ch. 418 33
Stirling v. Maitland, 5 B. & S. 840 135
Stoeser v. Springer, 7 A. R. 407 ..... 112, 113, 117
Stockton v. Mallenble Iron Co., Re, 2 Ch. D. 101 368
Stogdale v. Wilson, 8 P. R. 5 103
Stokes v. Latham, 4 T. L. R. 305 261
Stokes v. Reynolds, 1 O. W. N. 1051, 1099 ..... 227, 244
Stolce v Cowan, 30 L. J. Ch. 882 475
Stolworthy v. Powell, 54 L. T. 705 85
Stoneman v. Lake, 40 U. C. R. 320 241
Stoness v. Lake, 40 U. C. R. 320 40
Stonar v. Fowle, 13 A. C. 20 ..... 500, 512
Stooke v. Taylor, 5 Q. B. D. 576 ..... 272, 446
Storey v. Robinson, 6 T. R. 138 115
Story, Ex parte, 12 C. B. 767 ..... 65, 73
Story v. Finnis, 6 Ex. 123 270
Story v. Johnston, 2 Y. & C. 586 292
Stourbridge Canal Co. v. Wheeley, 2 B. & Ad. 702 88
Stratton v. Johnston, 7 L. C. G. 141 421
Strauss v. Francis, L. R. 1 Q. B. 379 260
Street v. Glover, 2 Q. B. D. 498 153
Strekert v. East Saginaw, 22 Mich. 104 74
Strelley v. Pearson, 15 Ch. D. 113 318
Strickland doe d. v. Strickland, 8 C. B. 725 342
Strickland v. Williams (1809), 1 Q. B. 382 227
Stringer v. Huddersfield, 33 L. T. 568 96

PAGE
Stringham v. Supervisors, 24 Wis. 600 225
Strong v. Foster, 17 C. B. 201 206
Strong v. Harvey, 3 Bing. 304 268
Struttoa v. Hawkes, 3 Dowl. 25 240
Strutton v. Johnson, 7 L. C. G. 141 18
Stuart v. Bronton, 9 P. R. 566 259
Stuart v. Grough, 15 A. R. 290 .....399, 401, 407, 418, 419
Stuart v. Mott, 23 S. C. R. 153, 384 8
Studham v. Staubridge (1805), 1 Q. B. 879 548
Stumore v. Campbell (1892), 1 Q. B. 314..148, 150, 151, 390, 405, 422
Sturch v. Clarke, 4 B. & Ald. 113 566
Sturgess v. Claude, 1 Dowl. 505 537
Sturgis v. Joy, 2 E. & B. 730 83
Sturmer v. Beaverton, 24 O. L. R. 65 .....160, 161
Sugg v. Silber, 1 Q. B. D. 362 385
Sullivan v. Corp. of Barrie, 45 U. C. R. 12 278
Sullivan v. Francis, 18 A. R. 121 .....255, 356, 358, 359, 361, 475
Sulte v. Three Rivers, 11 S. C. R. 25 27
Summerfeldt v. Worts, In re, 12 O. R. 48 .....67, 93, 97
Summers, Ex parte, 18 Jur. 522 .....75, 142, 540
Summers v. Morphew, 61 L. T. Jour. 140 404
Sunbalf v. Alford, 3 M. & W. 248 475
Sunderland Local Marine Bd. v. Frankland, L. R. 8 Q. B. 18 400
Superintendent of Schools v. Sylvester, Re, 18 U. C. R. 538 79
Superior v. Montreal, 3 Can. Cr. Cas. 381 348
Supervisors v. United States, 4 Wallace 446 392
Surr v. Walmesley, L. R. 2 Eq. 439 312
Surtees v. Hubbard, 4 Esp. 204; 6 R. R. 853 189
Sutherland v. Dumbie, 14 C. P. 156 194
Sutton v. Sutton, 22 Ch. D. 511 275
Sutton v. Coldfield Gram. School, Re, 7 A. C. 91 435
Suttons Trust, Re, 12 Ch. D. 175 186
Swain, Re, Swain v. Bringeman (1891), 3 Ch. 233 290
Swain v. Stoddard, 12 P. R. 490 546
Swaizie v. Swaizie, 31 O. R. 81 194
Sweetland v. Turkish Cigarette Co., 47 W. R. 511 350
Sweetman v. Gosfield, 13 P. R. 293 171
Sweetnam v. Lemon, 13 C. P. 534 417
Sweney v. Smith, L. R. 7 Eq. 324 265
Swift v. Jousbury, L. R. 9 Q. B. 301 398
Swift v. Jones, 19 U. C. L. J. 63 322
Swindell v. Birmingham, 3 Ch. D. 127 352
Switzer v. Brown, 20 C. P. 193 50
Sykes Brewery v. Chadwick, 7 T. L. R. 258 238
Sykes v. Brockville & Ottawa Ry. Co., 22 U. C. R. 459 .....416, 418
Sykes v. Socerdati, 15 Q. B. D. 423 .....150, 151, 321, 322
Sylvester v. Brown, 8 O. W. R. 984 165
Symmington v. Symmington, L. R. 2 Sc. App. 424 353
Symonds, Ex parte, 16 Q. B. D. 308 9
Symonds v. Dimsdale, 2 Ex. 533 144
Symonds v. Palmer (1911), 1 K. B. 259 238
Symons v. Rees, 1 Ex. D. 416 .....74, 81, 85
Synod v. De Blaquiere, 16 P. R. 11 343

T.

	PAGE
Tabernacle Per. Bldg. Soc. v. Knight (1892), A. C. 301	430
Taff-Vale Ry. v. Amalgamated Socy. of Ry. Servants (1901), 1 K. B. 170; (1901), A. C. 426	210
Tallby v. Official Receiver, 13 A. C. 534	187
Talt v. Harrison, 17 Gr. 458	233
Talbot v. Poole, 15 P. R. 90	87, 88
Talbot v. Canadian Colored Cotton Co., 17 C. L. T. 336	328
Tancred v. Delagoa Bay Co., 23 Q. B. D. 239	185
Tancred v. Leyland, 16 Q. B. 669	464
Tanner, Ex parte, 19 L. J. Q. B. 318	543
Tanner v. Smart, 6 B. & C. 603	283, 284
Tapp v. Jones, L. R. 10 Q. B. 591	398, 400, 423
Tartar v. Roe, 68 L. T. 213	50
Tasker v. Shepherd, 6 H. & N. 575	135
Tate v. Rodfield, 3 Dowl. 218	231
Tate v. Corp. of Toronto, 10 U. C. L. J. 66	402, 405, 415, 416, 417
Tate v. Natural Gas Co., 18 P. R. 82	220
Tatham, Re, 2 O. L. R. 343	471
Tatham v. Atkinson, Re, 1 O. W. R. 183	230, 384
Tattersall v. People's Life Ass. Co., 10 O. L. R. 537	360, 446
Taylor, Re, W. N. (1881), 81	11, 133
Taylor v. Addyman, 13 C. B. N. S. 309	65, 100
Taylor v. Ainslie, 19 C. P. 78	483
Taylor v. Ashton, 11 M. & W. 401	342
Taylor v. Bowers, 1 Q. R. D. 291	521
Taylor v. Brodie, 21 Gr. 610	335
Taylor v. Crowland Gas. Co., 11 Ex. 1	160
Taylor v. Delaney, 3 O. L. R. 380	362
Taylor v. Eckersley, 2 Ch. D. 302	319
Taylor v. Forrester, 2 C. & P. 105	297
Taylor v. G. N. Ry. Co., L. R. 1 C. P. 430	364
Taylor v. Holland (1902), 1 K. R. 676	288, 333
Taylor v. Holman, Buller's N. P. 169	337
Taylor v. Holt, 3 H. & C. 452	326
Taylor v. Jones, 1 C. P. D. 87	157
Taylor v. Laird, 1 H. & N. 266	134
Taylor v. Lanyon, 6 Bing. 536	551
Taylor v. Manchester, S. & L. Ry. Co. (1895), 1 Q. B. 135	101
Taylor v. Nichols, 1 C. P. D. 242	157
Taylor v. Parnell, 43 U. C. R. 230	133, 270
Taylor v. Phillips, 3 East. 155	193
Taylor v. Reid, 13 O. L. R. 205	159, 165
Taylor v. Smith (1893), 2 Q. B. 65	252
Taylor v. Steele, 16 M. & W. 665	283
Taylor v. Taylor, 6 O. L. R. 356, 545	198
Taylor v. Wood, 14 P. R. 449	133
Teal v. Clarkson, 4 O. S. 372	126
Teasdall v. Brady, Re, 18 P. R. 104	241, 500, 571
Temperance Col. Soc. v. Evans, 7 C. L. T. 46	304, 306
Temperance Ins. Co. v. Combes, 28 C. L. J. 88	471
Temple v. Toronto Stock Exchange, 8 O. R. 705	19, 37
Templeman v. Reed, Re, 9 Dow. 962	16, 20
Tennant v. Rawlings, 4 C. P. D. 133	384
Teskey v. Nell, 15 P. R. 546	364

PAGE

Tessier v. Desnoyes, 17 Que. S. C. R. 35 71
Tew v. Toronto S. & L. Co., 30 O. R. 76 553
Thackoorseydass v. Dhoudmull, 0 Moo. P. C. 300 93
Tharsis Sulphur Co. v. Loftus, L. R. 8 C. P. 1 74
Thayer v. Sherman, 12 Mass. 441 406
Theilusson v. Rendlesham, 7 H. L. Cas. 429 .....23, 353
Theiwall v. Yeiverton, 16 C. B. N. S. 813 200
Theobald v. Ry. Passengers Ass. Co., 10 Ex. 45 398
Theys, Ex parte, Re Milan Tramways Co., 25 Ch. D. 587 100
Thibodeau v. Cheff, 24 O. L. R. 214 100
Third National Bank of Chicago v. Cosby, 41 U. C. R. 402; 43 U. C. R. 58 108
Thom v. McQuiity, Re, 8 O. L. R. 705 .....105, 106
Thomas, Re, 14 Q. B. D. 379 .....162, 497
Thomas v. Evans, 10 East. 101 264
Thomas v. Exeter, Etc., Co., 18 Q. B. D. 822 .....341, 394
Thomas v. Girvair, 1 N. B. Eq. 257 332
Thomas v. Harrop, 1 S. & S. 524 10
Thomas v. Hilmer, 4 U. C. R. 527 .....74, 348
Thomas v. Hudson, 14 M. & W. 353; 10 M. & W. 885 21
Thomas v. Pearce, 2 B. & C. 761 192
Thomas v. Storey, 11 P. R. 417 .....306, 310
Thompson, Re, 17 P. R. 109 416
Thompson v. Big Cities Ry. & Ag. Co., 1 O. W. N. 033 151
Thompson v. Coulter, 34 S. C. R. 261 333
Thompson v. Ade, 22 A. R. 105 .....106, 108
Thompson v. Gibson, 8 M. & W. 281 40
Thompson v. Hay, Re, 20 A. R. 382 .....68, 71, 177, 178
Thompson v. Henderson, 0 B. C. R. 540 .....303, 306
Thompson v. Hudson, L. R. 4 B. L. 1 130
Thompson v. Ingham, 14 Q. B. D. 710 .....77, 86
Thompson v. Kaye, 13 C. P. 251 122
Thompson v. Lack, 3 C. B. 540 29
Thompson v. McCrea, 31 O. R. 674 340
Thompson v. McLean, 17 U. C. R. 405 32
Thompson v. Macdonell, 13 O. L. R. 653 188
Thompson v. Marshall, 28 W. R. 220..... 244
Thompson v. Morley, 5 C. & P. 501..... 296
Thompson v. Parish, 6 C. B. N. S. 685..... 347
Thompson v. Pearson, 18 P. R. 420.....104, 192
Thompson v. Pheney, 1 Dowl. 443 193
Thompson v. Rose, 16 Conn. 71..... 111
Thompson v. Thompson, 4 O. L. R. 442..... 333
Thompson v. Waithman, 3 Dr. 628..... 287
Thompson v. Ward, L. R. 6 C. P. 360..... 410
Thompson v. Wright, 13 Q. B. D. 632..... 536
Thomson v. Harding, 2 E. & B. 630..... 333
Thomson v. S. E. Ry. Co., 9 Q. B. D. 320..... 150
Thorburn v. Barnes, L. R. 2 C. P. 284.....40, 174, 196, 202, 420
Thorne v. Heard (1895), A. C. 495.....290, 291
Thornwell v. Wigner, L. R. 6 Ex. 87..... 361
Thorpe v. Brown, L. R. 2 H. L. 220..... 500
Thorpe v. Burgess, 8 Dowl. 602 265
Thorpe v. Gisborne, 11 Moo. 55 293
Thorpe v. Stallwood, 1 D. & L. 34 343
Throckmortor v. Crawley, L. R. 3 Eq. 196 478

PAGE
Thurgood v. Richardson, 7 Bing. 428 551
Thurlow v. Sidney, 20 Gr. 49 440
Thurn (Princess) v. Moffett (1904), W. N. 379 90
Thwartes v. Wilding, 11 Q. B. D. 421; 12 Q. B. D. 4 542
Thynne v. St. Maur, 34 Ch. D. 465 133
Tibbs v. Wilkes, 23 Gr. 439 134
Tidd, Re, Tidd v. Overell (1893), 3 Ch. 154 279
Tidswell, Re, 33 Beav. 213 440
Tiffany v. Bullen, 18 C. P. 91 ..... 399, 502
Tiffany v. McKee, 24 O. R. 551 344
Tildesley v. Harper, 3 Ch. D. 277 ..... 220, 223
Tiley v. Courtier, 2 C. & J. 16 (note (c)) 263
Tilt v. Jarvis, 7 C. P. 145 470
Tillett v. Ward, 10 Q. B. D. 17 115
Times v. Lowther (1911), 2 K. B. 100 151
Tindall, Ex parte, 6 DeG. M. & G. 741 572
Tinker v. Hilder, 4 Ex. 187 ..... 71, 540
Tinning v. Bingham, 16 P. R. 110 221
Tinsley v. Porter, 2 M. & W. 822 295
Tipling v. Cole, Re, 21 O. R. 276 324
Titmarsh v. McConnell, 1 O. W. N. 208 321
Tobey v. Wilson, 43 U. C. R. 230 265
Tobin v. Connolly, 12 Ir. L. T. 138 240
Todd v. Phœnix & United Fire Ins. Co., 3 B. C. R. 302 ..... 187, 407
Todd v. Robinson, 14 Q. B. D. 739 58
Toft v. Raynor, 5 C. B. 162 75
Tolhurst v. Association of Portland Cement Mfgrs. (1903), A. C. 414 186
Tollemarche v. Hobson, 5 B. C. R. 223 ..... 305, 363
Tomkins v. Brockville Rink Co., 31 O. R. 124 387
Tomkins v. Jones, 22 Q. B. D. 599 87
Tomlinson v. Goatley, L. R. 1 C. P. 230 ..... 195, 377, 414
Tomlinson v. Jarvis, 11 U. C. R. 60 ..... 551, 553
Tomlinson v. Land & Fin. Corp., 14 Q. B. D. 539 ..... 321, 546
Toms v. Cumming, 7 M. & G. 88 509
Tome v. Wilson, 4 B. & S. 455 557
Toomer v. London C. & D. Ry. Co., 2 Ex. D. 458 80
Topies v. Grane, 5 Bing. N. C. 636 ..... 153, 214
Topping, Ex parte, 34 L. J. Bky. 44 ..... 286, 288
Toppin v. Buckerfield, 1 C. & E. 157 539
Toronto v. Toronto Electric Light Co., 10 O. L. R. 621 132
Toronto v. Toronto Ry. Co., 7 O. L. R. 78 ..... 6, 324
Toronto v. Grand Trunk Ry. Co., 13 O. L. R. 12 446
Toronto Dental Mfg. Co. v. McLaren, 14 P. R. 89 ..... 7, 205
Toronto Ind. Aes. v. Hamilton, 5 O. W. R. 349 ..... 304, 307
Toronto Junction v. Christie, 25 S. C. R. 551 353
Toronto Savings Bank v. Canada Life Ass. Co., 14 Gr. 508 327
Torrence v. McPherson, 11 U. C. R. 200 362
Torkington v. McGee (1902), 2 K. B. 427 186
Tottenham v. Barry, 12 Ch. D. 797 198
Toulmer v. Bowditch, 11 Jur. 45 183
Toulmer v. Miller, 12 A. C. 746 ..... 352, 353
Toward, Re, Ex parte Moss, 14 Q. B. D. 310 188
Townley v. Jones, 29 L. J. C. P. 299 343
Townsend, Re, Ex parte Holt, 14 Ch. D. 132 466
Townsend v. Creridy, 8 C. B. N. S. 477 419

	PAGE
Townsend v. Hunter, 3 C. L. T. 310	247
Townsend v. Rumball, 19 O. L. R. 435	131
Townsend v Toronto, H. & B. Ry. Co., 28 O. R 195	131
Towsley v. Wythes, 16 U. C. R. 139	325
Traders Bank v. Kean, 13 P. R. 60	247
Traders Bank v. McConnell, 42 C. L. J. 87	400
Trainor v. Holcombe, 7 U. C. R. 548	82, 84
Trainor v. Phoenix F. Ins. Co., 65 L. T. 825	68
Travis v. Hales, 6 O. L. R. 574	100
Treasury (Solicitor) v. White, 55 L. J. P. 79	311
Trebelcock v. Walsh, 21 A. R. 55; 23 S. C. R. 695	94
Trehearne, Re, Ex parte Ealing Local Board, 63 L. T. 323; 39 W. R. 116	433
Trent v. Hunt, 9 Ex. 14	494
Trent Cycle Co. v. Beattie, 15 T. L. R. 176	109
Trevor v. Wilkinson, 31 L. T. 731	157
Trice v. Robinson, 16 O. R. 433	290
Triggs v. Newnham, 1 C. & P. 631	282
Trimble v. Hill, 5 A. C. 342	94
Trimble v. Miller, Re, 22 O. R. 500	72, 74, 103
Trinidad v. Erlche (1803), A. C. 518	6
Tronson v. Dent, 8 Moo. P. C. 420	303
Trotter v. Corp. of Toronto, 29 C. P. 365	278
Troutmnn v. Fiskin, 13 P. R. 153	501, 501
Truax v. Dixon, 17 O. R. 306	431
Trufort, Re, 34 W. R. 56	183
Trumble v. Horton, 22 A. R. 51	343, 344
Trunkfield v. Proctor, 2 O. L. R. 326	188, 401, 406
Trust & Inv. Corp. of South Africa, Re (1802), 3 Ch. 332	164
Trust & Loan Co. v. Cuthbert, 13 Gr. 412	469
Trust & Loan Co. v. Gorsline, 12 P. R. 654	403
Trust & Loan Co. v. Jones, 8 P. R. 65	230
Trust & Loan Co. v. Lawrason, 10 S. C. R. 679	551
Trust & Loan Co. v. Stevenson, 21 O. R. 571; 20 A. R. 66	288, 333
Trust Cor. of Ontario v. Rider, 24 A. R. 157	187, 407
Trust Cor. of Ontario and Boehmer, Re, 20 O. R. 191	487, 492
Trythall, Re, 5 B. C. R. 50	438, 442
Tubby v. Stanhope, 5 C. B. 790	18, 42, 421
Tucker, Ex parte; In re Tucker, 12 Ch. D. 308	13, 172
Tucker v. Collinson, 16 Q. B. D. 562	40
Tucker v. Young, 30 S. C. R. 185	143
Tuckett v. Eaton, 6 O. R. 486	464, 479
Tuffts v. Mottashed, 29 C. P. 539	112, 113
Tullock v. Dunn, Ry. & Mood. 416; 27 R. R. 765	285
Tully v. Glass, 3 O. S. 149	143
Tumm v. Hedensford Gas Co., 3 Ex. D. 151	149
Tummons v. Ogle, 6 E. & B. 571	121
Tunbridge Wells Local Bd. v. Ackroyd, 5 Ex. D. 201	13
Turcan, Re, 40 Ch. D. 5	187
Turcott v. Dansereau, 26 S. C. R. 578	56
Turley v. Williamson, 15 C. P. 538	278
Turnbull v. Foreman, 15 Q. R. D. 238	569
Turnbull v. Robertson, 38 L. T. 389	406, 415
Turner, Re, (1897), 1 Ch. 536	377
Turner v. Bridgett, 9 Q. B. D. 55	75
Turner v. Barkinshaw, L. R. 2 Ch. 488	325

PAGE

Turner v. Burns, 24 O. R. 28 ..... 342, 394
Turner v. Evans, 2 E. & B. 512 58
Turner v. Goldsmith (1891), 1 Q. B. 544 133
Turner v. Imperial Bank, 9 P. R. 19 355
Turner v. Jones, 1 H. & N. 878 ..... 416, 423
Turner v. Lucas, 1 O. R. 623 260
Turner v. Muson, Re Muson, W. N. (1883), 134, 135 220
Turner v. Merryweather, 7 C. B. 251 258
Turner v. Patterson, 13 C. P. 412 ..... 404, 405
Turner v. Robinson, 15 B. & Ad. 780 134
Turner v. Smart, 8 B. & C. 603; 30 R. R. 461 281
Turner v. Stallibrus (1898), 1 Q. B. 56 100
Turner v. Tourangeau, 8 O. L. R. 221 485
Turner v. Wilson, 23 C. P. 87 483
Turney v. Barnum, 88 L. T. 65 400
Turney v. Dodwell, 3 E. & B. 136 288
Turtle v. Euphemia, 31 O. R. 401 16
Turquand v. Dawson, 1 C. M. & R. 709 257
Turquand v. Fenton, 4 Q. B. D. 280 ....216, 221, 222, 223
Tuton v. Sanover, 3 H. & N. 280 172
Tyler, Re (1907), 1 K. B. 865 9
Tyler v. Carlisle, 1 Amer. St. R. 301 (U.S.) 91
Tyrrell v. Murphy, 30 O. L. R. 243 .....180, 187
Tytler v. C. P. Ry. Co., 29 O. R. 654; 26 A. R. 447 ....161, 162, 201

U.

Udney v. Udney, L. R. 1 Sc. App. 451 102
Uffner v. Lewis, 27 A. R. 242 ..... 180, 335
Ulbrick v. Doan, 2 N. W. T. Rep. 328 370
Union Bank v. Aymer, 3 O. W. N. 773 238
Union Bank v. Cunningham, 1 O. W. R. 432 170
Union Bank v. O'Gara, 22 S. C. R. 404 32
Union Fire Ins. Co. v. Fitzsimmons, 32 C. P. 602 27
Union Trusts v. Gamon, 6 O. L. R. 481 333
United Club v. Hotel Co., W. N. (1889) 67 400
United Eng. & Scot. Ins. Co., Re, L. R. 5 Eq. 300 401
United Founders v. Fitzgeorge, 7 T. L. R. 620 241
United Gutta Percha Co. v. Webb, 14 T. L. R. 154 .....214, 240
U. S. v. Lancaster, 5 Wheaton 431 74
Upton v. MacKenzie, 1 D. & R. 172 194
Upton v. Phelan, 18 N. B. R. 192 252
Urquhart, Re, 24 Q. B. D. 723 .....196, 199

V.

Vallance v. Nuish, 2 H. & N. 712 518
Vallance v. Birmingham Land Co., 2 Ch. D. 369 220
Van Valkenburg v. Bank of B. N. A., 5 B. C. R. 4 297
Valpy v. Manley, 1 C. B. 596 530
Vance v. Ruttan, 12 P. C. R. 632 551
Vanderlinden, Ex parte, 20 Ch. D. 289 572
Vanderlip v. Smith, 32 C. P. 60 .....239, 483
Vanderwaters v. Horton, 9 O. R. 548 107
Van Every v. Grant, 21 U. C. R. 542 112
Van Every v. Ross, 11 C. P. 133 541

PAGE

Vand Gelder v. Sowerby Bridge Soc., 44 Ch. D. 374 219
Van Natter v. Buffalo & L. H. Ry. Co., 27 U. C. R. 581 567
Van Norman v. McCarty, 20 C. P. 47 490
Vnno v. Canadian C. C. Co., 13 O. L. R. 421 133
Van Staden v. Van Staden, 10 P. R. 428 546
Vnn Wart v. Critchley, 17 C. L. T. 316 214
Vardon v. Vardon, 6 O. R. 736 260
Vashon v. East Hnwkesbury, Re, 30 C. P. 194 74
Vaughan v. Neldon, L. R. 10 C. P. 47 157
Vavasseur v. Krupp, 15 Ch. D. 474 152
Velati v. Brnham, 46 L. J. C. P. 415 .....318, 590
Velay v. Burder, 12 A. & E. 313, 314 71
Ventriss v. Brown, 22 C. P. 345 450
Verlander v. Eddolls, 45 L. T. 543 261
Vernott v. Balley, 4 W. R. 608 83
Verratt v. McAulay, 5 O. R. 313 .....27, 30
Vespra v. Cook, 26 U. C. C. P. 182 205
Vezina v. Will H. Newsome Co., 14 O. L. R. 658 7
Victoria Corporation v. Patterson (1899), A. C. 615 ....253, 345, 354
Vletoria Mutual v. Bethune, 1 A. R. 398 .....402, 425, 428, 432
Victoria Mutual v. Davidson, 3 O. R. 378 .....32, 37
Vlctoria Mutual v. Thompson, 9 A. R. 620 112
Vllleneuve v. Wait, 12 P. R. 505 234
Vlnall v. De Pass (1802), A. C. 90 413
Vindin v. Wallace, 24 U. C. R. 9 548
Vlneberg v. Gnardian F. & L. Assce. Co., 19 A. R. 293.....74, 443
Vlnes v. Arnold, 8 C. B. 632 .....103, 141
Viney v. Blgnold, 20 Q. B. D. 172 68
Virtue v. Beasley, 1 Moo. & R. 21 115
Vlrtue v. Hayes, 0 C. L. T. 207 351
Vivien v. Mitchell, 13 C. L. J. 198 303
Vogel v. G. T. Ry. Co., 10 A. R. 162 390
Vyse v. Brown, 13 Q. B. D. 199 .....406, 433

W.

Waddel v. Blockey, 10 Ch. D. 419 353
Waddell v. McGinty, 2 Ch. Ch. 442 312
Wade v. Dowlling, 4 E. & B. 44 20
Wade v. Simeon, 13 M. & W. 647 232
Wadsworth v. Spain (Queen), 17 Q. B. 101 78
Wagner v. Mason, 6 P. R. 187 389
Wagstaff v. Jacohourtz, W. N. (1884) 17 238
Wainman v. Kynman, 1 Ex. 118 288
Wainwright v. Villetard, 6 Terr. L. R. 193 531
Wait v. Sager, 14 P. R. 437 477
Wakefield v. Bruce, 5 P. R. 77 .....519, 521
Wakefield (Corp.) v. Cooke (1904), A. C. 31 5
Walcott v. Lyons, 29 Ch. D. 584 222
Walden, Re, 10 Ch. D. 76 466
Walker v. Bradford Old Bank, 12 Q. B. D. 511 .....186, 187
Walker v. Butler, 6 E. & B. 506 288
Walker v. Clements, 15 Q. B. 1046 148
Walker v. Gann, 7 D. & R. 769 143
Walker v. Gurney-Tilden Co., 18 P. R. 274, 471 408
Walker v. Hyman, 1 A. R. 345 112

PAGE

Walker v. McMillan, 9 S. C. R. 241 260
Walker v. Oldring, 1 H. & C. 621 .....540, 544
Walker v. Parkins, 2 D. & L. 982 182
Walker v. Rawson, 5 C. & P. 486 269
Walker v. Rooke, 6 Q. B. D. 631 .....214, 399
Walker v. S. E. Ry. Co., L. R. 5 C. P. 649 531
Walker v. Wilson, 5 O. W. N. 802 66
Wallace v. Allen, L. R. 19 C. P. 607 .....72, 80
Wallace v. Bath, 7 O. L. R. 542 361
Wallace v. People's Life, 39 O. R. 438 151
Wallace v. Smith, 21 Ch. D. 243 131
Wallace v. Soutter, 19 S. C. R. 717 182
Wallace v. Stevenson, 2 O. W. N. 166 .....244, 245
Wallace v. Virtue, 24 O. R. 558 105
Wallace v. Wbalan, Circuit Reports in Ireland 582 138
Waller v. Andrews, 3 M. & W. 312 431
Waller v. Joy, 16 M. & W. 60 258
Waller v. Lacy, M. & G. 54 .....283, 288
Walley v. M'Connell, 13 Q. B. 903 .....194, 502
Wallingford v. Mutual Society, 5 A. C. 685 .....130, 242, 246, 247
Wallis v. Smith, 46 L. T. 473 .....130, 131, 218
Walls v. Sault Ste. Marie Paper & Pulp Co., 18 C. L. T. 117.. 222
Walsh, Re, 1 E. & B. 383 157
Walsh v. Elliott, 11 P. R. 520 107
Walsh and Ionides, Re, 1 E. & B. 383 .....72, 74
Walsh v. Trebilcock, 23 S. C. R. 698 94
Walsh v. Walley, L. R. 9 Q. B. 367 135
Walsh v. Walper, 3 O. L. R. 158 473
Walton v. Apjohn, 5 O. R. 65 309
Walton v. Jarvis, 14 U. C. R. 640 468
Wambold v. Foote, 2 A. R. 579 363
Wamsley v. Smallwood, 11 A. R. 439..... 352
Waat v. Campain, 9 T. L. R. 254 200
Wanzer v. Woods, 13 P. R. 511..... 161
Warburton v. Heyworth, 9 Q. B. D. 1..... 134
Ward, Re, 52 N. Y. 397 180
Ward v. Archer, 24 O. R. 650..... 491
Ward v. Ducker, 5 M. & Gr. 377 258
Ward v. Freeman, 2 Ir. C. L. R. 460..... 22
Ward v. Morse, 23 Ch. D. 377 154
Ward v. Nat. Bk. of New Zealand, 8 A. C. 755.....20, 32, 206
Ward v. Plumbley, 6 T. L. R. 198.....238, 245
Ward v. Raw, L. R. 15 Eq. 83..... 241
Ward v. Vance, 9 U. C. L. J. 214 .....174, 239, 414
Ward v. Wilkinson, 2 F. & F. 173 258
Ward v. Wyld, 5 Ch. D. 779 143
Warden v. Sewell (1893), 2 Q. B. 254 149
Wardrope v. C. P. Ry. Co., 7 O. R. 321.....417, 426
Waring v. Picton (Town), 2 O. W. R. 92..... 89
Warner v. Biggs, 2 C. & K. 31..... 114
Warner v. Mosses, 16 Ch. D. 100 311
Warner v. Riddiford, 4 C. B. N. S. 180 358
Warre v. Calvert, 7 A. & E. 154..... 30
Warren v. Deslippes, 33 U. C. R. 59 37
Warren v. Suckerman, 3 Bulstr. 120 66
Warriner v. Kingsmill, 8 U. C. R. 107..... 166

PAGE

Warwick v. Bacon, 7 M. & G. 961 240
Warwick v. Foulkes, 12 M. & W. 507 398
Waterloo Bridge Co. v. Cull, 1 E. & E. 213 24
Waters, Re, L. R. 18 Eq. 701 558
Waters, Ex parte, L. R. 18 Eq. 701 558
Waters v. Handley, 6 D. & L. 88 194
Waters v. Thanet, 2 Q. B. 757 284
Waters v. Waters, 24 W. R. 190 198
Watkins v. Scottish Imp. Ins. Co., 23 Q. B. D. 285 160
Watkins v. Vince, 2 Stark 368 202
Watson v. Ambergate, etc., Ry. Co., 15 Jur. 448 361
Watson v. Bodell, 14 M. & W. 57 21
Watson v. Hetherington, 1 C. & K. 36 263
Watson v. Henderson, 25 C. P. 562 ..... 474, 540
Watson v. Lindsay, 6 A. R. 609; 27 Gr. 253 278
Watson v. Midwales Ry. Co., L. R. 2 C. P. 593 476
Watson v. McDonald, 8 P. R. 354 307
Watson v. Severn, 6 A. R. 559 102
Watson v. White (1896), 2 Q. B. 9 ..... 180 563
Watson v. Wolverton, 9 C. L. T. 480 177
Watson v. Woodman, L. R. 20 Eq. 730 287
Watt, Re, Ex parte Joselyne, 8 Ch. D. 327 416
Watt v. Barnett, 3 Q. B. D. 183 ..... 196, 198, 199, 232
Watt v. Clark, 18 O. L. R. 602 260
Watt v. Ligertwood, L. R. 2 Scotch App. 367 (n) 347, 557
Watt v. Mackay, 5 O. W. R. 170 304
Watt v. VanEvery, 23 U. C. R. 196 157
Watt v. Watt (1905), A. C. 115 343
Watterson v. Wolverton, 22 O. R. 586 (n) 68
Watts v. Anderson, 5 Man. L. R. 291 ..... 307, 308, 309
Watts v. Beemer, 8 C. L. J. 255 192
Watts v. Howell, 21 U. C. R. 255 ..... 465, 541
Watts v. Jefferyes, 3 Mac. & G. 422 475
Waugh v. Conway, 4 L. J. N. S. 228 102
Waugh v. Cope, 6 M. & W. 824 288
Weall v. James, 68 L. T. 54 204
Weatherfield v. Nelson, L. R. 4 C. P. 571 568
Weatherly, Re, 4 P. R. 28 50
Weatherly v. Calder, 61 L. T. 508 162
Weaver v. Sawyer, 16 A. R. 422 446
Webb v. Page, 1 C. & K. 23 294
Webb v. Smith, 30 Ch. D. 199 190
Webb v. Stenton, 11 Q. B. D. 578 ..... 397, 399, 400, 401, 403, 404
Webber, Re, 18 Q. B. D. 111 405
Webber v. McLeod, 16 O. R. 609 531
Webber v. Wedgewood, W. N. (1883), 8 184
Webster v. Armstrong, 34 L. J. Q. B. 236 451
Webster v. British Empire M. L. Ass. Co. 327
Webster v. Freideberg, 17 Q. B. D. 736 ..... 252, 342, 343
Webster v. Huggart, 19 O. R. 27 439
Webster v. Lays, 3 C. L. T. 504 574
Webster v. Leive, 2 C. L. T. 504 506
Webster v. McDougall, 26 C. L. J. 85 177
Webster v. Overseers, Ashton-under-Lyne, L. R. 8 C. P. 281 306
Webster v. Webster, 31 Beav. 393 ..... 397, 399
Weeks v. Lalor, 8 C. P. 237 112

PAGE
Weeks v. Wray, L. R. 3 Q. B. 212 199
Wegg-Prosser v. Evans (1894), 2 Q. B. 101 .....204, 220
Welch v. O'Brien, 28 U. C. R. 405 500
Weldon v. Neal, 19 Q. B. D. 394 .....184, 251
Weller v. Wullnee, R. & J.'s Dig. 2872 192
Wells and Croft, Re, 68 L. T. 231 497
Wellesley v. Withers, 4 E. & B. 759 181
Wellington v. Chard, 22 C. P. 5, 8 189
Wellington v. Fraser, 19 O. L. R. 88 151
Wellington (County) v. Wilmot (Tp.), 17 U. C. R. 82 324
Wellington v. Whitechurch, 4 B. & S. 106 160
Welsh v. O'Brien, 28 U. C. R. 405 121
Wembley v. Poorlaw, 17 T. L. R. 516 .....30, 32
Wenham, Re Hunt v. Wenham (1892), 3 Ch. D. 59 289
Wenham, In re, Ex parte Battams (1900), 2 Q. B. 698..208, 211, 289
Wenlock v. River Dee Co., 19 Q. B. D. 155 60
Wentworth (County) v. Smith, 15 P. R. 372 .....167, 201, 414, 421
West, Re, Ex parte Clough (1892), 2 Q. B. 102 431
Westacott v. Bevan (1891), 1 Q. B. 774 154
Westbury v. Twigg (1892), 1 Q. B. 77 495
Westby v. Day, 2 E. & E. 605 406
Western Assce Co. v. McLean, 29 U. C. R. 57 264
Western Bank of New York v. Koppel, 8 T. L. R. 36 .....286, 307
Western Fair Assn. v. Hutchinson, 12 P. R. 40 75
Western Nat. Bank v. Perez (1891), 1 Q. B. 304 .....208, 209
Western of Canada Oil Lands, etc., Co., Re, 6 Ch. D. 109 312
Western Wagon, etc., Co. v. West (1892), 1 Ch. 271 103
Westlake v. Abbott, 4 L. J. 6 .....226, 232
Westley v. Jones, 5 Moore 162 .....192, 203
West Jewell Tin Mining Co., Re, Ditte's Case, 8 Ch. D. 806.... 362
Westlot v. Brown, 43 U. C. R. 402 483
Westmoreland v. Huggins, 1 Dowl. N. S. 800 304
West of England and S. W. Dist. Bank, Re, Ex parte Branwhite, 40 L. T. 652 153
West of England Banking Co. v. Batchelor, W. N. (1882), 11.. 190
Weston v. Rodwell, 3 Ch. D. 380 352
Weston v. Sneyd, 1 H. & N. 703 .....90, 92, 144
Weston v. Thomas, 6 U. C. L. J. 181 483
Westover v. Turner, 26 C. P. 510 .....160, 162, 200
Westwood v. Coune, 1 Stark. 172 524
Whalen v. United Telephone, 13 Q. B. D. 607 262
Whalen v. Wattie, 16 O. L. R. 249 .....360, 364
Wharton v. Naylor, 12 Q. B. 673 551
Wheatcroft v. Matlock, 52 L. T. 356 92
Wheatley v. Williams, 1 M. & W. 533 284
Wheeler v. Atkins, 5 Esp. 246 307
Wheeler v. Gibbs, 3 S. C. R. 374 351
Wheeler v. United Telephone Co., 13 Q. B. D. 612 266
Whetham v. Davey, 30 Ch. D. 574 473
Whidden v. Jackson, 18 A. R. 439 .....99, 129, 143, 574
Whiffen v. Bligh (1892), 1 Q. B. 362 376
Whiley v. Whiley, 4 C. B. N. S. 653 .....230, 231
Whimsell v. Giffard, 3 O. R. 1 .....410, 493
Whipple v. Manley, 1 M. & W. 432 278
Whistler v. Hancock, 3 Q. B. D. 83 384
Whitaker & Mason, Re, 18 O. R. 63 81

PAGE
White, Ex parte, L. R. 6 Ch. 397 472
White v. Galbraith, Re. 12 P. R. 513 .....73, 83, 103, 108, 525, 571
White v. Garden, 10 C. B. 19 112
White v. Milne, W. N. (1897) 256; 58 L. T. 225 .....355, 548
White v. Sharp, 12 M. & W. 712 16
White v. Smith, 28 N. S. R. 5 .....256, 353
White v. Steele, 12 C. B. N. S. 410 .....71, 81
White v. White, 30 Vermont 338 408
Whitehead v. Burt, 7 T. L. R. 609 154
Whitehead v. Fothergill, Dra. 200 190
Whitehead v. Howard, 2 Brod. & Bing. 372 281
Whitehead v. Proctor, 2 H. & N. 352 543
White Sewing Machine Co. v. Beifry, 10 P. R. 64.....106, 107
Whitehouse, Ex parte, Re General Horticultural Co., 32 Ch. D. 512 415
Whitehouse v. Wolverhampton Ry. Co., L. R. 5 Ex. 6 435
Whitelock v. Cook, 20 C. L. T. 171 521
Whitely v. MacMahon, 32 C. P. 453 438
Whitley Partners, Re. 32 Ch. D. 337 107
Whitfield v. Merchants Bank, 27 S. C. R. 94 .....33, 34, 205
Whiting v. Hovey, 9 O. R. 314; 12 A. R. 119; 13 A. R. 7; 14 S. C. R. 515 364
Whiting v. Sharples, 9 C. L. T. 141 85
Whitley v. Honeywell, 24 W. R. 851 .....197, 198
Whitly, Re, 32 Ch. D. 337 107
Whitton, Ex parte; Re Greaves, 13 Ch. D. 881 28
Whyte-Melville v. Whyte-Melville, 85 L. T. Jour. 7 198
Wickham v. Lee, 12 Q. B. 521 .....85, 139
Wicks v. Wood, 26 W. R. 680 541
Wiesner v. Rockow, 76 L. T. 448 (C.A.) 185
Wigens v. Cook, 6 C. B. N. S. 784 271
Wigle v. Stewart, 28 U. C. R. 427 280
Wigle v. Williams, 24 S. C. R. 743 214
Wilberforce v. Sowton, 39 L. T. 474 361
Wilby v. Elgee, L. R. 10 C. P. 497 282
Wilcock v. Terrell, 3 Ex. D. 323 405
Wilcox v. Howell, 5 O. R. 360 .....205, 343
Wilde v. Sherridan, 16 Jur. 456 158
Wilding v. Bean (1891), 1 Q. B. 100 .....198, 199
Wilding v. Sanderson (1897), 2 Ch. 534 260
Wiley v. Crawford, 1 B. & S. 253 398
Wilhelmi v. Hofner, 52 Ill. 222 401
Wilkes v. Buffalo B. & G. Ry. Co., 2 U. C. L. J. 230 234
Wilkes v. Home Life Ass., 8 O. L. R. 91 .....76, 77
Wilkes v. Kennedy, 16 P. R. 204 245
Wilkins v. Wood (1892), 1 Q. B. 684 227
Wilkins v. Corey, 7 T. R. 713 431
Wilkins v. Peatmnn, 7 P. R. 84 546
Wilklason v. Canadian Express Co., 27 O. L. R. 283 .....470, 540
Wilkinson v. Hamilton Spectator, 2 O. W. N. 644 259
Wilkinson v. Harvey, 15 O. R. 346 .....470, 540
Williams, Ex parte, 1 Rose 399 334
Williams, Re, 27 O. R. 405 334
Williams v. Bryant, 5 M. & W. 447 182
Williams v. Burgess, 12 A. & E. 635 171
Williams v. Clorigh, 1 A. & E. 326 597

PAGE

Williams v. Crow, 10 A. R. 301 ..... 120, 590
Williams v. Evans, L. R. 10 Eq. 547 ..... 255, 361
Williams v. Grey, 23 C. P. 561 ..... 496, 539
Williams v. Griffith, 3 Ex. 335 286
Williams v. G. W. Ry. Co., 3 H. & N. 869 388
Williams v. Jones, 34 Ch. D. 120 351
Williams v. Kehr, 1 O. W. N. 210 246
Williams v. Leonard, 16 P. R. 544; 17 P. R. 73; 30 S. C. R. 406 ..... 251, 272
Williams v. Mostyn, 4 M. & W. 145 398
Williams v. McDonald, 7 U. C. R. 381 466
Williams v. Quebeada Ry. (1895), 2 Ch. 151 296
Williams v. Reeves, 12 Ir. Ch. R. 173 ..... 401, 404
Williams v. Richardson, 30 L. T. 505 545
Williams v. Sibley, 4 Giff. 142 153
Williams Hamilton Mfg. Co., Re, 10 W. N. 421 187
Williaman v. McCrary, 33 Ark. 470 48
Willing v. Elliott, In re, 37 U. C. R. 320 ..... 130, 570
Willinski v. Anderson, 10 O. L. R. 437 531
Willis v. Bull, 1 Dowl. N. S. 303 193
Willis v. Gripps, 5 Moo. P. C. 379 13
Willis v. MacLachlan, 1 Ex. D. 370 74
Willis v. Willis, 19 Gr. 573 492
Willoughby v. Willoughby, 0 Q. B. 023 16
Wills v. Hopkins, 3 Dow. 346 545
Wills v. McSherry (1893), 1 K. B. 20 ..... 369, 372, 376
Wilmot v. Smith, 3 C. & P. 453 263
Wilson, Re, 5 R. 455 400
Wilson, Ex parte, Mont. D. & D. 586 283
Wilson v. Boulted, 26 A. R. 184 133
Wilson v. Balcarres (1893), 1 Q. B. 422 ..... 204, 219, 220
Wilson v. Brett, 11 M. & W. 113 312
Wilson v. Brown, 6 A. R. 87 206
Wilson v. Campbell, 15 P. R. 254 518
Wilson v. Corp. of Huron and Bruce, 8 U. C. L. J. 136 ..260, 404, 437
Wilson v. Detroit & Milwaukee, 3 P. R. 37 201
Wilson v. Dundas, W. N. (1875) 232 404
Wilson v. Durham, Re, 18 O. L. R. 328 ..... 512, 516
Wilson v. Fleming, 1 O. L. R. 601 ..... 398, 403, 406
Wilson v. Gabriel, 4 B. & S. 243 470
Wilson and Hunter, Re, 0 U. C. L. J. 133 174
Wilson v. Hulton, 23 O. R. 29 324
Wilson v. Love (1896), 1 Q. B. 620 130
Wilson v. Middlesex (Corp.), 18 U. C. R. 348 113
Wilson v. McDonald, 13 P. R. 0 306
Wilson v. McGuire, 2 O. R. 118 21
Wilson v. McGinnis, In re, 10 O. L. R. 98 40
Wilson v. Manes, 26 A. R. 398 ..... 389, 510
Wilson v. Mun. Council of Port Hope, 10 U. C. R. 405 ..... 231, 232
Wilson v. Postle, 2 O. L. R. 203 ..... 425, 426
Wilson v. Rnstall, 4 T. R. 753 ..... 297, 533
Wilson v. Roger McLary & Co., 10 P. R. 357 ..... 208, 209
Wilson v. Rykert, 14 O. R. 188 288
Wilson v. Wallani, 5 Ex. D. 155 35
Windatt nnd Georgian Bay and Seaboard Ry. Co., 4 O. W. N. 295. 442
Wiltsie v. Ward, 8 A. R. 549 ..... 71, 105, 143

PAGE
Winfield v. Boothroy, 54 L. T. 574 100
Winfield v. Fowlie, 14 C. R. 102 .....538, 541
Wing v. Thurlow, 10 T. L. R. 53 .....151, 243
Winson v. Dunford, 12 Q. B. 603 71
Winger v. Sibbald, 2 A. R. 610 .....103, 141, 229, 363
Wingrove, Re, 15 Jur. 91 107
Winks v. Holder, 1 C. L. J. 100 507
Winn v. Ingilby, 5 B. & Ad. 625 472
Winsor v. Dunford, 12 Q. B. 603 75
Winter v. Garlick, 1 Salk. 75 441
Wintermute v. Brotherhood of Ry. Trainmen, 19 P. R. 6 405
Wintle v. Williams, 3 H. & N. 288 428
Wirth v. Austin, L. R. 10 C. P. 689 158
Wismer v. Wismer, 23 U. C. R. 519 137
Winthrow, Re, 10 C. L. J. 114 401
Wohlgemuthe v. Coste (1899), 1 Q. B. 501 358
Wolfe, Ex rel. v. Butler, 99 Pa. 542 400
Wolmershausen, Re, 62 L. T. 540 .....32, 287
Wolmershausen v. Wolmershausen, 62 L. T. 541 33
Wolmershausen v. Gullick (1893), 2 Ch. 514 278
Wolten v. Gavin, 16 Q. B. 48 16
Woltz v. Blakely, Re, 11 P. R. 430 .....50, 79
Wolverhampton, etc., Co. v. Bond, 29 W. R. 599 198
Wood v. Dunn, L. R. 2 Q. B. 73 .....416, 428, 429, 431
Wood v. Gold, 3 B. C. R. 281 .....438, 442
Wood v. Jones, 61 L. T. 551 278
Wood v. Joselin, 18 A. R. 60 .....416, 430
Wood v. Leetham, 61 L. J. Q. B. 215 .....130, 487
Wood v. Perry, 3 Ex. 442 138
Wood v. Tromanhauser, 32 O. L. R. 370 287
Wood v. Weightman, L. R. 13 Eq. 434 337
Wood v. Woad, L. R. 9 Ex. 110 13
Wood v. Wood, 16 Gr. 471 .....474, 475, 490
Woodall, Re, 8 O. L. R. 284 .....480, 488
Woodgate v. Godfrey, 5 Ex. D. 24 466
Woodham v. Hollis, 3 L. J. (K. B.) 70 284
Woodhouse v. Neuman, 7 C. B. 654 103
Woodruff v. McLennan, 11 P. R. 22 239
Woods v. Snider, 10 O. L. R. 643 203
Wood v. McFadden, 10 O. L. R. 613 192
Woods v. Bennett, Re, 12 U. C. R. 167 82
Woodward v. Shields, 32 C. P. 282 .....221, 222
Woollen v. Wright, 1 H. & C. 551 470
Woolf v. Pemberton, 6 Ch. D. 19 133
Woolfords Estate (Trustee of) v. Levy (1892), 1 Q. B. 772.... 495
Wooster Coal Co. v. Nelson, 4 P. R. 343 .....231, 232
Worcester Banking Co. v. Firbank (1894), 1 Q. B. 784..198, 201
211, 212
Working Men's Mut. Socy. Re, 21 Ch. D. 831 .....293, 301
Worman v. Brady, 12 P. R. 618 87
Workman v. Robb, 7 A. R. 389 62
Worley v. Glover, 2 Str. 877 192
Worthington v. Jeffries, L. R. 10 C. P. 379 .....65, 78, 80
Worthington v. Peck, 24 C. R. 535 82
Worts v. Worts, 18 O. R. 332 19
Wrathwell v. Bates, 15 U. C. R. 391 492

PAGE

Wright v. Arnold, 6 Man. L. R. 1 .....67, 137
Wright v. Hale, 6 H. & N. 227 569
Wright v. Hollingshead, 23 A. R. 1 471
Wright v. McCabe, 30 O. R. 390 133
Wright v. M'Guffie, 4 C. B. N. S. 441 258
Wright v. Mills, 60 L. T. 887 232
Wright v. Reid, 3 T. R. 554 283
Wright v. Shaddock, 36 C. L. J. 143 .....304, 305
Wright v. Toronto Ry. Co., 6 O. W. N. 119 442
Wright v. Wilkin, 4 Jur. N. S. 804 312
Wulf v. Jay, L. R. 7 Q. B. 765 205
Wurzburg v. Andrews, 28 N. S. R. 387 309
Wyke v. Rogers, 1 DeG. M. & G. 408 32
Wylson v. Dunn, 34 Ch. D. 575 108

Y.

Yates v. Palmer, 6 D. & L. 283 67
Yates v. Rutledge, 5 H. & N. 249 550
Yates v. Terry (1902), 1 K. B. 527 416
Yea v. Lethbridge, 4 T. R. 433; 2 R. R. 425 31
Yentman v. Dempsey, 9 C. B. N. S. 881 .....295, 398
Yorke v. Smith, 21 L. J. Q. B. 53 361
Yorkshire Banking Co. v. Beaton, 5 C. P. D. 127 .....247, 353
Youldon v. London Guarantee, 2 O. W. N. 1135 258
Young, re, Ex parte, 19 Ch. D. 124 209
Young, Re, 19 Ch. D. 124 .....13, 56, 66, 209, 214, 50
Young, In re (1900), 2 Ch. 753 237
Young v. Brasey, 1 Ch. D. 277 172
Young v. Dominion Construction Co., 19 P. R. 139 192
Young v. Hurston, Re, 31 Ch. D. 174 .....389, 510, 557
Young v. Buchanan, 6 C. P. 218, 465 465
Young v. Bulman, 13 C. B. 623 16
Young v. Higgon, 6 M. & W. 49 .....28, 346, 389, 530
Young v. Holloway, 12 P. D. 167 297
Young v. Kitchen, 3 Ex. D. 127 153
Young v. Moore, 23 U. C. R. 15 286
Young v. Morden, Re, 10 P. R. 276 .....73, 107
Young v. Parker, Re, 12 P. R. 646 .....214, 501
Young v. Purvis, 11 O. R. 597 .....133, 333
Young v. Saylor, 23 O. R. 513; 20 A. R. 645 .....4, 55, 558
Young v. Young (1900), 2 Ch. 753 .....231, 237
Young Mfg. Co., Re J. L. Young v. Young (1900), 2 Ch. 753.. 231, 237, 597

Z.

Zaritz v. Mann, 16 C. L. J. 144 .....73, 191
Zilliax v. Dennis, 20 O. R. 539 486
Zimmer v. G. T. Ry. Co., 19 A. R. 693; 21 O. R. 628 396
Zohrab v. Smith, 5 D. & R. 639 .....75, 194
Zouch v. Empsey, 4 B. & Ald. 522 179
Zuber and Hollinger, Re, 25 O. L. R. 252 442

AN ACT RESPECTING

THE DIVISION COURTS

REVISED STATUTES OF ONTARIO, 1914

CHAPTER 63.

As amended by 4 Geo. V., c. 2, Sched. (19), and 4 Geo. V., c. 21, s. 17.

HIS MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:— Secs. 1, 2.

SHORT TITLE.

1. This Act may be cited as *The Division Courts Act*. Short title
10 Edw. VII. c. 32, s. 1.

The Division Courts Act.—The Act came into force on 1st March, 1914, by Proclamation of the Lieut-Governor (*q.v.*, R.S.O. 1914, 3rd Vol., p. cxxxix), passed under R.S.O. 1914, c. 2, s. 4; confirmed by Ontario Statute, 4 Geo. V., c. 2, s. 1. "Division"

The Division Courts.—Division Courts were established in 1840, by the Statute 4 and 5 Vic. c. 23, and the Court of Requests, which had theretofore been the tribunal for collecting small debts, was abolished. The procedure of the Superior Courts rests partly on tradition and partly on an inherent right to control their own procedure while the procedure of the Division Courts is entirely the creation of statute. See the effect of this difference in origin discussed by Fletcher Moulton, L.J., in Dean v. Brown, 1909, 2 K. B. 579.

INTERPRETATION.

2. (1) In this Act:— Interpretation.

(*a*) "Action" shall include a proceeding, suit, matter and cause; "Action."

(*b*) "County" shall include Provisional County and Provisional Judicial District; "County."

It also includes two or more counties united for judicial purposes: Interpretation Act, R.S.O. 1914, c. 1, s. 29 (e). "County" means a

Sec. 3. portion of territory set apart for municipal, not electoral, purposes: R. v. Shavelear, 11 O. R. 727. Where a union of counties is dissolved, see section 18, *post*.

"County Court."
"Defendant."
"Division"
"Inspector."
Judge."

(*c*) "County Court" shall include District Court;

(*d*) "Defendant" shall include primary debtor;

(*e*) "Division" shall mean the territory in and for which a Division Court is established;

(*f*) "Inspector" shall mean the Inspector of Division Courts;

(*g*) "Judge" shall mean and include the Judge and a Junior Judge of the County Court of the County in which the division for which a Division Court is constituted is situate;

See sub-sec. (2) of this section.

"Judgment creditor."
"Judgment debtor"
"Plaintiff."
"Prescribed Form."

(*h*) "Judgment creditor" shall include a creditor who has obtained judgment against a garnishee;

(*i*) "Judgment debtor" shall include a garnishee against whom judgment has been recovered;

(*j*) "Plaintiff" shall include primary creditor;

(*k*) "Prescribed form" shall mean the form prescribed by this Act or by the general rules or orders relating to Division Courts.

Exclusive Powers of County Judge.

(2) Where in this Act any power or authority is conferred or any duty is imposed upon the Judge of the County Court, it shall be exercised or performed by him and not by a Junior Judge. 10 Edw. VII. c. 32, s. 2.

Territorial application of Parts of Act.

3. Part I., except where otherwise therein provided, shall apply to every County and Provisional Judicial District in Ontario. Part II. shall be applicable only to Provisional Judicial Districts. 10 Edw. VII. c. 32, s. 3.

Interpretation.—The Interpretation Act of Ontario, R.S.O. 1914, c. 1, the interpretative clauses of The Judicature Act, R.S.O. 1914, c. 56, and the Consolidated Rules of Practice of the Supreme Court of Ontario, also apply: Rule 2 (7).

Secs. 4-7.

PART I.

APPLICABLE BOTH TO COUNTIES AND DISTRICTS.

THE COURTS.

Courts continued.

4. The Division Courts, as existing at the time this Act takes effect, shall continue. 10 Edw. VII. c. 32, s. 4.

As to change of limits of courts, see s. 15, *post*.

Number of courts in each county.

5. There shall be not less than three nor more than twelve Division Courts in each county, of which there shall be at least one in each city and county town. 10 Edw. VII. c. 32, s. 5.

In Each County.—There cannot be less than three or more than twelve divisions in each county, even under section 15; nor in a union of counties; the word "county" in this section including a union of counties, by the Ontario Interpretation Act, R.S.O. 1914, c. 1, s. 20 (e).

Designation of court.

6. The court in each division shall be called "The First (*or as the case may be*) Division Court of the County of ." 10 Edw. VII. c. 32, s. 6.

The courts are usually numbered consecutively, commencing with that in the county town as number one: 7 U. C. L. J. 147.

Each court to have a seal.

7. Every court shall have a seal, with which all process shall be sealed or stamped, and which shall be paid for out of the Consolidated Revenue Fund. 10 Edw. VII. c. 32, s. 7.

Under Seal.—Rule 3 provides that all actions shall be commenced by summons under the seal of the Court. The seal of a Court with the words, "Sealed with the seal of the Court," proves itself and will be taken judicial notice of: *Doe d.* Duncan v. Edwards, 9 A. & E. 554. The seals adopted by division court clerks, showing the number of the court and the county in which it is, without wax or other foreign substance, are valid within this clause: Ontario Salt Co. v. Merchants Salt Co., 18 Gr. 551. A printed circle with the words "Place for Seal" is not a seal: Re Balkis, 36 W. R. 392.

Process.—Under rule 2 (8), "process" includes any summons, writ or warrant issued under the seal of the court. Without a seal the process would be irregular and liable to be set aside: Smith v. Russell, 1 Chmn. R. 193, unless an amendment were allowed, but such amendment would be allowed as a matter of course, the mistake being a misprision of the clerk: Cheese v. Scales, 10 M. & W. 488. See also *post* s. 104, and "amendments."

Consolidated Revenue Fund.—Application for seals should be made to the Inspector of Division Courts, by whom accounts are certified and sent to the Provincial Treasury for payment under this section.

Sec. 8.

8. The court shall be a Court of Record. 10 Edw. VII. c. 32, s. 8.

To be Courts of Record.

As a general principle all courts are open to the public. It is said that a court has inherent jurisdiction, if justice cannot otherwise be done, to order any case to be heard in camera: D. v. D., 1903, P. 144; *Re* Martindale, 1894, 3 Ch. 193, *per* North, J., at p. 200. But the discretion to exclude the public should be exercised with very great care, for the reasons stated in Scott v. Scott, 1913, A. C. 417; Reid v. Auil, 5 O. W. N. 964.

And it is submitted that there is no authority to order that any case shall be tried *in camera* in the division court. The openness and publicity of our courts "admits of exception only in the rare cases of such a character that public morality requires that the proceedings should be *in camera*": *per* Lord Fitzgerald in Macdougall v. Knight, 14 A. C. p. 200.

Such exceptions are provided by section 645 of the Code in criminal trials; and other exceptions arise in cases of wards of court, in lunacy proceedings and actions regarding secret processes. These appear to be the only exceptions, and as they are not within the purview of the division court, no order can be made for the exclusion of any person (other than witnesses) from the trials of cases in the division court: see Reid v. Auil, 5 O. W. N. 964, and cases therein cited; unless it be for improper conduct or contempt of court, in which case the court undoubtedly has inherent jurisdiction, in common with all functionaries performing judicial acts, to order the removal and exclusion of all persons who interrupt or obstruct the proceedings, such authority being indispensable for the proper exercise of the officer's judicial functions: Young v. Saylor, 23 O. R. 513; 20 A. R. 645.

Section 217 contains express provisions in that behalf.

Court of Record.—Courts of record are defined to be those "where the judicial acts or proceedings are enrolled for a perpetual memorial and testimony; which rolls are called records of the court, and are of such high and super-eminent authority that their truth is not to be called in question": Wharton, 620.

If power to fine and imprison, whether for contempt of itself or for other substantive offences, was conferred on a court, that apparently made it a "court of record." "Courts of record are such as have been expressly made so by statute, or by implication of statute, that is by having statutory power to fine and imprison, and courts of record at common law": Halsbury, vol. 9, pp. 9 and 10. Judged by this standard Division Courts were always courts of record but the previous D. C. Act: R.S.O. 1897, c. 60, s. 7, declared that "the division court" shall "not be held to constitute courts of record, but the judgments in the said courts shall have the same force and effect as judgments of courts of record." This contradiction has now, however, been removed by the above section though the somewhat anomalous result is to create a court of record which, properly speaking, has no records, as only a note of an order or judgment is entered. Suitors obtaining judgments are in no better position than under the provision of the previous Act, and the powers of the court in dealing with contempt are not increased: see s. 218 and notes thereto.

But a court of record may be an inferior court: Halsbury, ibid. p. 11, and a division court is an inferior court. An important distinction between superior and inferior courts is that no matter is deemed to be

beyond the jurisdiction of a superior court unless it is expressly shown Sec. 8.
to be so, while nothing is within the jurisdiction of an inferior court unless it is expressly shown on the face of the proceedings that the particular matter is within the cognisance of the particular court: Halsbury, Ibid. p. 12, citing Spurrier v. La Cloche, 1902, A. C. 446.

EFFECT OF JUDGMENT.

Estoppel by Matter of Record.—Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case actually decided by the court and appearing from the judgment itself to be the ground on which it was based, unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action in which that judgment is intended to be proved: Stephen's Dig. Ev. Art. 41. All that was essential to the decision may be taken to be conclusively determined: Concha v. Concha, 11 App. Cas. 541. It is not competent for the court in the case of the same question arising between the same parties, to review a previous decision not open to appeal: Badar Bee v. Habib, 1900, A. C. 615. To constitute a good plea of *res judicata* it must be shown that the former suit was one in which the plaintiff might have recovered precisely what he seeks in the second suit: Midland Ry. v. Martin, 1893, 2 Q. B. 172; Davidson v. Belleville, 5 A. R. 315. See also Radford v. Merchants Bank, 3 O. R. 529. A judgment by consent is as effective as an estoppel as a judgment given in a contested case: *Re* South American and Mexican Co., *Ex parte* Bank of England, 1895, 1 Ch. 37; and cannot be collaterally attacked upon an allegation that on the actual facts the court had no jurisdiction, the consent amounting in effect to an admission of facts upon which the court would have jurisdiction: Ribbie v. Croston, 1897, 1 Q. B. 251. But the parties cannot by consent give jurisdiction to a court if a condition which goes to the jurisdiction has not been performed or fulfilled: British Wagon Company v. Gray, 1896, 1 Q. B. 35, and Halsbury, vol. 9, pp. 13 and 14. A consent judgment does not create an estoppel against a person cited to see proceedings who was not a party to and did not know of the compromise: Ritchie v. Malcolm, 1902, 2 Ir. R. 403. In the case of a consent judgment the court may look outside the judgment and the pleadings to ascertain what was decided: *Re* Ontario Sugar Co., McKinnon's case, 24 O. L. R. 332; and the reported reasons for judgment may be looked at: Barber v. McCuaig (2), 31 O. R. 593; but in the case of a judgment by default the ground and extent of the estoppel must be found on the face of the judgment itself and cannot be inferred or deduced from the pleadings of the party obtaining judgment where the defendant has said nothing: Irish Land Commission v. Ryan, 1900, 2 Ir. R. 565.

A judgment of an inferior court, *e.g.*, a division court, is a bar to an action on the same subject matter in any other court: Austin v. Mills, 9 Ex. 288; Flitters v. Allfrey, L. R. 10 C. P. 29; Fraser v. Orbendorfer, 36 C. L. J. 101. An action dismissed as incompetent is a bar to an action brought after a law has been passed making it competent: Lemm v. Mitchell, 1912, A. C. 400. The determination of a court of summary jurisdiction that a street is a highway repairable by the inhabitants at large, is a judgment in rem and conclusive as to the status of the street in any future proceedings under the same sections of the statute although in respect to other proposed works: Wakefield Corporation v. Cooke, 1904, A. C. 31. But where the character of the highway comes up only incidentally in a proceeding against a frontager for his proportion of the expense of improvements, the decision does not create an estoppel in

Sec. 8. subsequent proceedings against the same frontager in respect of other works: Reg. v. Hutchings, 6 Q. B. D. 300. To create an estoppel the causes of action must be the same: as, if a judgment be recovered for personal injuries, it is no bar to an action for injury to property, real or personal, arising out of the same act: Brunsden v. Humphrey, 14 Q. B. D. 141; Daley v. Dublin, 1892, 30 L. R. Ir. 514. But a plaintiff recovers according to the right which he has at the time of bringing the action and new damage may give a new cause of action though resulting from the same act. But distinguish between new damage and new manifestation of old damage: Bonomi v. Backhouse, 9 H. L. Cas. 503; Darley Main v. Mitchell, 11 A. C. 127; Crumbie v. Wallsend, 1891, 1 Q. B. 503. Where a plaintiff by his solicitor's mistake claims too small an amount in his claim and, leave to amend being refused, his action is dismissed after he has taken out of court moneys paid in by the defendant to the full amount claimed, he is estopped from bringing a new action for the balance: Sanders v. Hamilton, 1907, 97 L. T. 679.

The discovery of new facts not before the court in the previous action will not prevent it being a bar: Shoe Machinery Co. v. Cutlan, 1896, 1 Ch. 667; but facts which have subsequently happened may give a right to bring another action in respect of matters previously decided: Heath v. Weaverham, 1894, 2 Q. B. 108. The former action is not a bar if the court had no jurisdiction: Trinidad v. Eriche, 1893, App. Cas. 518; Toronto v. Toronto Railway, 1904 A. C. 809; Beck v. Valin, 16 O. L. R., per Garrow, J.A., p. 27; Forbes v. Central Ry. Co., 20 O. R. 584; Keating v. Graham, 26 O. R. 360; The Board of Education of Windsor v. Essex, 10 O. L. R. 60, in which case an award was made by a county judge assuming jurisdiction under the Ontario High Schools Act; the subject matter, however, being beyond his authority, the award was held not to be a bar. A court of inferior jurisdiction cannot give itself jurisdiction by finding facts without evidence; Rorke v. Errington, 7 H. L. C. 617, p. 632; *Re* McKenzie & Ryan, 6 Pr. 323, but it has power when it has authority to enter upon an inquiry to find facts essential to give itself jurisdiction to render a decision: Commercial Bank of Australasia v. Willan, L. R. 5 P. C., and see notes to section 61 *post*. In an action upon an order bad upon its face for want of jurisdiction a party is not estopped from showing invalidity by an unsuccessful application to quash on *certiorari*: O'Grady v. Syman, 1900, 2 Ir. R. 602. And a party is not estopped from showing the invalidity of an award by reason of having proceeded in an arbitration and appealed from the award in ignorance of facts disqualifying the arbitrator: Jungheim Hopkins & Co. v. Foukelman, 1909, 2 K. B. 948. Where in an action for payments due under an order of a board of commissioners judgment is given against the party asserting the invalidity of the order he is estopped from denying liability for further payments due thereunder though the order be subsequently declared invalid in a suit between other parties: G. T. Ry. Co. v. Toronto, 9 O. W. R. 671. If the subject matter was not necessary to be decided in the former action, it is not a bar: Concha v. Coacha, 11 App. Cas. 541.

Where judgment has been obtained for payments due under an agreement, a defendant cannot in a second action for further payments which have accrued due under the same agreement, dispute the validity of the agreement by pleading no consideration, or the Statute of Frauds, or any other plea "inconsistent with a traversable allegation in the former action," i.e., a plea which if raised in the former action would have necessitated proof, not by the defendant, but by the plaintiff:

Howlett v. Tarte, 10 C. B. (N.S) 813; Humphries v. Humphries, 1910, 2 K. B. 531; Cooke v. Rickman, 1911, 2 K. B. 1125. Sec. 8.

A judgment of a foreign court having the force of *res judicata* in the foreign country has like force in Canada: Law v. Hansen, 25 S. C. R. 69; but a judgment of a court of a foreign country, in a personal action, the grounds of which did not arise there, against a non-resident of the foreign country who does not appear and submit himself to its jurisdiction, is a nullity there and cannot be enforced by action in Ontario: Vézina v. Will H. Newsome Co., 14 O. L. R. 658; Brennan v. Cameron, 1 O. W. N. 430, and the authorities mentioned in those cases; and in this connection the other provinces of Canada are to be treated by Ontario courts as foreign countries; but as to Quebec, see R.S.O. 1914, ch. 56, s. 50.

A judgment against one of two or more debtors or joint contractors is, though unsatisfied, a bar to any action brought against others upon the joint contract or for the joint debt: King v. Hoare, 13 M. & W. 494; Kendall v. Hamilton, 4 App. Cas. 504; Cambeport v. Chapman, 19 Q. B. D. 229; Hammond v. Schofield, 1891, 1 Q. B. 453; Kreh v. Bishop, 17 C. L. T. 278; and this is so even though one of the contractors is a married woman liable only in respect of her separate estate: Hoare v. Niblett, 1891, 1 Q. B. 781. A judgment by consent against one of two co-defendants who were joint debtors where each entered an appearance is a bar to further proceedings against the other: McLeod v. Power, 1899, 2 Ch. 295; and a judgment against an agent would be a bar to an action against the principal in respect to the same debt: Scarf v. Jardine, 7 App. Cas. 345; Curtis v. Williamson, L. R. 10 Q. B. 57, and in such a case the court will not allow the plaintiff to vacate his judgment even if it appears that the judgment was taken against one debtor in ignorance of the fact of the other's liability: Toronto Dental Mfg. Co. v. McLaren, 14 P. R. 89; and see Hammond v. Schofield, *supra*.

A judgment against a division court bailiff for wrongful seizure of plaintiff's goods is a bar to an action against his sureties on their covenant: McArthur v. McCool, 19 U. C. R. 476; Slonn v. Creasor, 22 U. C. R. 127; Miller v. Corbett, 26 U. C. R. 478.

But if one joint debtor was out of the province at the time the right of action accrued against two or more joint debtors, a judgment against the debtor who was then within the province does not bar the right of action against the absent debtor after his return to the province: R.S.O. 1914, c. 75, s. 53 (2).

But if a judgment be given for the defendant in whole or in part, the right to succeed in a new action depends upon the course of the former action. If that action was discontinued or dismissed for want of prosecution, it would form no bar: Roberts v. Lucas, 11 P. R. 3. If the plaintiff offered no evidence in the prior action on a particular part of his claim, then a new action may be brought for such part: Deacon v. G. W. R., 6 U. C. C. P. 241; Kennedy v. Kennedy, 1914, A. C. 215, 220; but if he does offer evidence and fails, he is prevented from bringing a fresh action: Stafford v. Clark, 2 Bing. 377; Hadley v. Green, 2 Cromp. & J. 376; Elliott v. Elliott, 20 O. R. 134. If the action failed because prematurely brought: Adamson v. Adamson, 28 Gr. 221; or for want of privity, it forms no bar to recovery in the second action: Chisholm v. Morse, 11 C. P. 589; Heming v. Wilton, 5 C. & P. 52, Palmer v. Temple, 9 A. & E. 508; *Re* Donovan, Wilson v. Beatty, 29 Gr. 280. Where judgment in the first action was given against the plaintiff on the ground that the agreement relied on was within the Statute of Frauds and void for not being signed, a subsequent

Sec. 8.

action for the plaintiff's share of the proceeds realized under the agreement was held not to be barred: Stuart v. Mott, 23 S. C. R. 153, 384; and where in an action as to the construction of a deed plaintiff claimed the benefit of a reservation contained in a prior agreement, but judgment was given against him, on the ground that the agreement was superseded by the deed, it was held that a subsequent action to re-form the deed was not *res judicata* by the previous judgment: Cooper v. Erie Co. Nat. Gas and Fuel Co., 29 S. C. R. 591; but, subject to exceptions, the general rule is that where the cause of action is the same and the plaintiff has an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action: Nelson v. Couch, 15 C. B. N. S. 108; Davidson v. Belleville & North Hastings Ry. Co., 5 A. R. 315; if it is *eadem quaestio inter easdem partes*, it is *res judicata*: Badar Bee v. Habib Merican Noordin, 1909, A. C. 615.

A set-off or counterclaim which might have been, but was not, raised by a defendant in a former action, is not barred: Davis v. Hughes, L. R. 6 Q. B. 687; Caird v. Moss, 33 Ch. D. 22.

A defendant against whom a judgment is recovered is estopped from denying the indebtedness found to be due by the judgment: Boileau v. Rutlin, 2 Ex. 665. The defendant must take every defence open to him in the action, and if he omits to do so before judgment, he cannot do so afterwards: Howlett v. Tarte, 16 C. B. N. S. 813; Cochrane v. Hamilton Prov. & Loan Socy., 15 O. R. 128; Gibson v. Le Temps, 6 O. L. R. 690.

But if the judgment has been obtained by an untrue statement of facts, *i.e.*, by fraud, it is not a valid judgment: Magurn v. Magurn, 11 A. R. 178; see 6 C. L. T. 157, "Fraudulent and Collusive Judgments."

In exercise of its power to relieve against mistakes, slips, blunders and even stupidity of parties in the course of litigation the court may grant relief in case of default under a judgment honestly misunderstood though the judgment be made by consent and be unambiguous in terms: Lovejoy v. Mercer, 23 O. L. R. 29.

If money be paid under compulsion of legal process (even before judgment), it cannot be recovered back, even if not justly owing, provided it was obtained *bona fide*, without fraud, imposition or duress: Marriott v. Hampton, 2 Smith's L. C. 421, 445; Caldwell v. Cockshutt Plow Co., 5 O. W. N. 591; and money so paid under a claim of right, voluntarily and without legal proceedings having been taken, is not recoverable: Langley v. Van Allen, 3 O. L. R. 13; 32 S. C. R. 174; Halsbury, vol. 7, p. 477. The common principle is that if a man chooses to give away his money, or to take his chance whether he is doing so or not, he cannot afterwards change his mind: Pollock on Contracts, 8th ed. 483,485; Cushen v. Hamilton, 4 O. L. R. 267; Hamlet v. Richardson, 9 Bing. 643; C. P. R. v. Quebec, 30 S. C. R. 73, per Strong, C.J., at p. 79.

Money paid either in ignorance of fact, or because the party paying had no choice, is recoverable: Hamlet v. Richardson, 9 Bing. 643, and cases cited in Halsbury, vol. 7, p. 478. Thus money paid for excessive fees demanded by a public officer, or on an illegal demand *colore officii*, may be recovered back; *e.g.*, money paid to an officer as a fee illegally demanded for issuing a liquor license: Morgan v. Palmer, 2 B. & C. 729; or to a sheriff or bailiff for fees to which he is not entitled: Dew v. Parsons, 2 B. & Ald. 562; or a fee illegally demanded for permitting the plaintiff to search a register: Steele v. Williams, 8 Exch. 625; or money paid to induce a person or company—such as a public carrier—to do what the latter was bound to do without it: Parker v. Great Western Ry., 7 M.

& G. 253; or to permit the plaintiff to do what he was entitled to do without payment: Steele v. Williams, 8 Exch. 625; or to prevent an imminent and wrongful seizure of the plaintiff's property: Hooper v. Exeter, 56 L. J. Q. B. 457; 2 Smith's Leading Cas. 432; Kennedy v. Macdonnell, 1 O. L. R. 250; or to recover one's liberty improperly restrained: Pell v. Coombes, 2 A. & E. 459; 2 Smith's L. C. 427; or to emancipate the person or property from any actual and existing duress imposed upon it by the person to whom the money is paid, or some actual or threatened exercise of power, possessed or believed to be possessed by the party exacting the payment, over the person or property of the party paying, from which he has no other means of immediate relief: Cushen v. Hamilton, 4 O. L. R. p. 269. Sec. 8.

Money paid in ignorance or forgetfulness of a material fact, is recoverable, even if there has been laches by the party paying, but not as to amount to a waiver of all enquiry: 2 Smith's L. C. 439, 444; Imperial Bank v. Bank of Hamilton, 1903, A. C. 49, 56; but if he chooses to pay a claim without enquiry, and so it happens that an item, for which he was entitled to be credited, was omitted, he cannot recover it back: Sorenson v. Smart, 5 O. R. 678; nor can money paid under a by-law, assumed to be valid but which was afterwards found to be invalid, be recovered: Cushen v. Hamilton, 4 O. L. R. 265, in which case the authorities are fully discussed.

In the case of its own officers, such as trustees in bankruptcy, the court will not give effect to a defence raised by such an officer that money has been paid to him voluntarily and cannot be recovered back, unless not to do so would prejudice the rights of third parties: *Re* Tyler, 1907, 1 K. B. 865; *Ex parte* James, L. R. 9 Ch. 609; *Ex parte* Symonds, 16 Q. B. D. 308; Dixon v. Brown, 32 Ch. D. 597.

Interest.—Unless otherwise ordered by the court, a judgment of a court of record bears interest from the time of giving judgment, notwithstanding an appeal or other proceeding suspending the entry of judgment: R.S.O., 1914, c. 50, s. 35 (4); and, therefore, a judgment of a division court, under this section, also bears interest. The decision in R. v. Cy. Ct. Judge of Essex, 18 Q. B. D. 704, deciding that county court judgments in England do not bear interest, is, therefore, inapplicable in this province.

The legal rate of interest is 5 per cent. per annum: R. S. C. (1906) c. 120, s. 3; Adams v. Cox, 10 O. L. R. 96.

Action on Judgment.—A judgment creates a specialty debt, and is enforceable by action: Hodsoll v. Baxter, E. B. & E. 884; Grant v. Easton, 13 Q. B. D. 302; Carlyle v. Oxford, 30 O. L. R. 413; and a judgment of a higher court might formerly be enforced by action in the Division Court: Eberts v. Brooke, 11 P. R. 296; Aldrich v. Aldrich, 23 O. R. 374, 24 O. R. 124; but not a mere order of the court: *Re* Kerr v. Smith, 24 O. R. 473. But by sec. 61 (*e*) of this Act, a division court has now no jurisdiction in "an action upon a judgment or order of the Supreme Court or a county court, where execution may issue upon or in respect thereof:" see notes to s. 61 (*e*), *post*.

It is now definitely settled that no action can be brought in the High Court or a county court upon a division court judgment: Crowe v. Graham, 22 O. L. R. 145; see *post* notes to s. 61.

Actions on judgments are not favored as there is another remedy for enforcing them; Biddleson v. Whitel, 1 W. Bl. 507; and costs will not be allowed: Philpott v. Lehain, 35 L. T. N. S. 855; unless other and distinct causes of action are added: Jackson v. Everett, 1 B. & S. 857.

Secs. 9, 10.

Limitation.—An action is not maintainable upon a judgment over twenty years old without a payment or acknowledgment in the meantime: R. S. O. 1914, c. 75, ss. 49 (b) and 54; Chard v. Rae, 18 O. R. 371; but the rights of the plaintiff are not barred until twenty years have elapsed: Allan v. McTavish, 2 A. R. 278; Boice v. O'Loane, 3 A. R. 167; and a revivor gives a new starting point to the statute: McCullough v. Sykes, 11 P. R. 337. A judgment of a Court of Record (see s. 8), remains in force twenty years: Mason v. Johnston, 20 A. R. 412; Butler v. McMicken, 32 O. R. 422; Boyce v. O'Loane, 3 A. R. 167; and see cases cited in Snider's Annotations, pp. 236, 254, *et seq.*, where the cases on the Statute of Limitations are exhaustively recorded.

During the lives of the parties execution may be issued on the judgment within six years: Rule 31; but in other cases an application to the judge is necessary for leave: Rule 32. Such leave will not be given unless the application be made within twenty years: McMahon v. Spencer, 13 A. R. 430; even though an execution may in the meantime have been issued thereon: Price v. Wade, 14 P. R. 351.

A foreign judgment constitutes only a simple contract debt, and an action upon it must be brought within six years from the time the cause of action arose: North v. Fisher, 6 O. R. 206.

A decision may be recalled and a term imposed or a change made at any time before a judgment found is entered: Canadian Land & Emigration Co. v. Dysart, 9 O. R. 495, 512; Rutbbone v. Michael, 29 O. L. R. 503; unless it has been acted on or the parties have changed their position: McNiven v. Pigott, 31 O. L. R. 365. The court, in the exercise of its inherent powers over its records, can correct an error arising from an accidental slip or omission in its order: Cousins v. Cronk, 17 P. R. 348; Mitchell v. Sparling, 1 O. W. N. 297; North Am. Life v. Collins, 9 O. L. R. 579; but cannot substitute one form of judgment for another: Oxley v. Link, 1914, 2 K. B. 734.

Death of Parties, etc.—As to reviving judgment on death of parties, see s. 179, and notes.

Place of office of Clerk.

9. The Lieutenant-Governor in Council may designate the place within the division where the office of the clerk shall be situated. 10 Edw. VII. c. 32, s. 9.

See section 11 as to cities in which two division courts are established.

Time and place of holding courts.

10.—(1) A sittings of the court shall be held in each division once in every two months, or oftener in the discretion of the Judge who presides over the Division Courts of the County, and the Judge may appoint and from time to time alter the times and places for holding such courts, and shall notify the clerk thereof.

Each Division.—Except in cities where there are two divisions, the clerk's office must be within the division: ss. 10 (1) and 9. The sittings of the court must also be within the division, and the judge has no power except as provided in section 13 (2), to sit outside of it: Serjeant v. Dale, 2 Q. B. D. 558; Hudson v. Took, 3 Q. B. D. 46.

Sec. 11.

Every Two Months.—A substantial compliance with this provision would be the holding of a sitting in each division six times during the year, as nearly as possible at regular intervals: see section 10 (2).

"**Discretion**" means "according to the rules of reason and justice, not private opinion:" Lee v. Bude Ry. Co., L. R. 6 C. P. 576; Rooke's Case, 5 Rep. 100 (a); Sharp v. Wakefield, 1891, A. C. 173; "not capriciously but on judicial grounds and for substantial reasons:" *per* Jessel, M.R., *Re* Taylor, 4 Ch. D. 100; *Re* Patullo and Ormageville, 31 O. R. 192; Denn v. Brown, 1900, 2 K. B. 573. See notes to sec. 118, *post*, "In the opinion of the Judge."

Questions of jurisdiction frequently arise which have to be determined by the place of sitting, and the place of holding the court should be changed as seldom as possible. No general rule can be proposed as to the place where the sittings of a court should be held; the question, as it arises in each case, must be settled with reference to the particular circumstances involved: 7 U. C. L. J. 312.

The Lieut.-Governor may, in certain cases, regulate holding of courts.

(2) If the Judge of the County Court, the sheriff and the inspector, or any two of them, certify to the Lieutenant-Governor that, in any division of the county, it is expedient that the court should not be held so often as once in every two months, the Lieutenant-Governor in Council may order the court to be held at such periods as to him seems meet, but a court shall be held in the division at least once on every six months. 10 Edw. VII. c. 32, s. 10.

Inspector.—See sec. 53 *post*.

Grounds of Expediency. — The corresponding section in the former D. C. Act restricted the reasons for the change to the amount of business, remoteness or inaccessibility of the court. These, or any other good reasons showing the expediency will now suffice.

The circumstances justifying the intervention of the board and of the Lieutenant-Governor in Council are commented upon in 7 U. C. L. J. pp. 177, 178. These circumstances should be fully set out in the certificate to enable the Lieutenant-Governor in Council to exercise his discretion in the matter.

Holding of courts in cities, offices of clerks therein.

11. In any city in which two Division Courts are established, all or any of the sittings of both such courts may be held in either of such divisions, and the clerks of both courts may, with the approval of the Lieutenant-Governor in Council, keep their offices in the same division. 10 Edw. VII. c. 32, s. 11.

The Same Division.—The court house in a city is the most convenient place for the sittings of the courts, hence this provision for holding both courts in the same division. It is not compulsory. The clerks in cities may also, with the approval of the Lieutenant-Governor in Council, have their offices in the same division.

Secs. 12, 13.

Sittings in Toronto.

12. Each of the courts for divisions within the City of Toronto shall, except during the month of August, hold sittings as follows:—

(*a*) At least weekly for the trial of actions;

(*b*) At least monthly for the hearing of judgment summonses; and

(*c*) At least once in every two months for the trial of actions where juries have been demanded. 10 Edw. VII. c. 32, s. 12.

Division Courts accommodation.

13.—(1) The local municipality in which a Division Court is held shall provide a court room, not in or connected with an hotel, and other necessary accommodation for holding the court.

If there be no proper court room, etc., the Judge may hold court in any suitable place. Expenses for rent.

(2) If a proper court-room and other necessary accommodation are not furnished by the municipality, the Judge may hold the court in any suitable place in the division, or in any other division of the county in which suitable accommodation is provided, and the owner, lessee or tenant of the building in which the court is held shall be entitled to receive from the municipality whose duty it was to provide proper accommodation for the court, the sum of $5 for every day on which the court is held in the building.

Judge to apportion costs in certain cases.

(3) Where a municipality, not being a city or town, furnishes a court room and other necessary accommodation, or pays for the use of any building, the municipality shall be entitled to recover from any other municipality the whole or part of which is within the division for which the court is held, such reasonable share of the cost as shall be ordered by the Judge of the court to be paid and contributed by the last mentioned municipality and in every such case the total cost shall be deemed to be $5 for every day on which the court is held. 10 Edw. VII. c. 32, s. 13.

Necessary Accommodation. — What is "necessary accommodation" cannot be particularly defined, for in a city better accommodation would be expected than in a thinly-settled part of the country, but it might be said to be such proper and becoming provision for the comfort and convenience of those attending court, as, under the particular circumstances of a municipality, its council would be expected to provide for that purpose. It includes heating and lighting, and suitable accommodation for seating the officers of the court, professional gentlemen, litigants and others attending court.

An Hotel.—The propriety of this provision is evident. Probably a judge would feel warranted in holding that not only does the section prohibit the holding of courts at licensed houses, but at all taverns, inns, or houses of public entertainment. Sec. 13.

In which the Court is Held.—Where one division comprises more than one municipality there was originally no provision for making any other than that "in which the court is held" contribute a share of the expenses. But sub-section 3 now makes provision for such a case.

Accommodation is Provided.—This is an exception to the rule requiring courts to be held within their division, according to section 10. Sub-section 3 provides for payment by any municipality, wholly or partly *within* the division for which the court is held, of its share of the cost of providing accommodation for holding the court. Without this provision, the only course to compel a delinquent municipality to fulfil its duty in this respect would be by mandamus: Dark v. Municipal Council of Huron and Bruce, 7 C. P. 378. Where a statute required a municipality to provide suitable accommodation for a County Attorney and Clerk of the Peace, it was held that an action was maintainable by him for the expenses he incurred in consequence of the default of the Municipal Council: Lees v. The Corporation of the County of Carleton, 33 U. C. R. 409; and see Newsome v. County of Oxford, 28 O. R. 442.

$5 For Every Day.—The right being statutory this sum would be recoverable independent of any contract: 33 U. C. R. p. 419.

A debt payable by virtue of a statute is a specialty debt and not barred until after 20 years: Cork & Bandon Ry. Co. v. Goode, 13 C. B. 826; Carlyle v. Oxford, 30 O. L. R. 413.

Sub-section 3.—Provision is here made by which each municipality forming part of a division may be compelled to bear a fair and proper share of the expense of furnishing the requisite accommodation for holding the sittings of the court in the division. The section does not apply to city or town municipalities. Before the municipality seeking contribution under the statute for money disbursed by it, sues to recover such contribution, from the other or others, the expenses should be first paid. Anything short of that would not give the right of action. The payment, too, must be made to the owner, lessee, or tenant of the building in which the court is held.

What a "reasonable share" of the cost of providing the accommodation is, must depend on circumstances. The judge of the court is to determine this, and to make his order accordingly. It could not be done *ex parte*. The municipality which is called upon to contribute would have the right to be heard, and to show cause why it should not pay the claim preferred: see notes to section 124. Reference may also be made to Willis v. Gripps, 5 Moo. P. C. 379; R. v. Cheshire Lines Committee, L. R. 8 Q. B. 344; Wood v. Woad, L. R. 9 Ex. 110; R. v. Collins, 2 Q. B. D. 9, 36; Fisher v. Keane, 11 Ch. D. 353; *Ex p.* Tucker, *In re* Tucker, 12 Ch. D. 308; R. v. College of Physicians and Surgeons, 44 U. C. R. 146; Tunbridge Wells Local Board v. Akroyd, 5 Ex. D. pp. 201, 204, 211; Briggs v. Briggs, 5 P. D. 163; R. v. Law, 27 U. C. R. 260.

The outside limit which *all* of the municipalities would be called upon to pay as the total cost is $5 per day, but part of a day would count as one, no provision being made for a fractional part of a day. The population and assessed value of the whole or parts of the respective

Secs. 14, 15.

municipalities within the division might be taken as a fair basis on which to estimate the reasonable share of each.

No particular mode of collecting the amount due by the delinquent municipality is prescribed, and in the absence of such, it would seem that the proper proceedings would be an action in the Division Court: Lees v. Corp. of Carleton, 33 U. C. R. 409, and authorities there cited; Richardson v. Willis, L. R. 8 Ex. 69, or by proceedings under R. S. O. 1914, c. 79. The order of the judge is not the order of the court; he is merely *persona designata*: *Re* Pnequette, 11 P. R. 463; *Re* Young, 14 P. R. 303; *Re* Bush, 10 C. L. T. 184; *Re* King, 18 P. R. 305; and as such he has authority to award the costs of the proceeding: R. S. O. 1914, c. 79, s. 2.

Use of Court House.

14. The sittings of the court in a county town may be held in the Court House. 10 Edw. VII. c. 32, s. 14.

Court House.—The right to hold sittings in the court house could not be held to warrant interference with the sittings of courts of higher jurisdiction.

Board for determining the number and limits of divisions.

15.—(1) In a county the Judge of the county court, the Sheriff, the Warden and the Inspector, and in a Provisional Judicial District the Judge of the District Court, the Sheriff and the Inspector shall be a board who may appoint and alter the number and limits of the divisions and shall number the divisions beginning at number 1.

Judge of the County Court.—This does not include the junior judge, see s. 2 (2), *ante*. A majority of the above mentioned functionaries may perform this duty: R.S.O. 1914, c. 1, s. 28 (c); but all of them must be notified and have the opportunity to act.

Appoint and Alter.—This may be done from time to time as occasion requires: R.S.O. 1914, c. 1, s. 28 (e).

Board in provisional county.

(2) In a provisional county the Judge of the County Court and the sheriff of the county of which the provisional county forms a part for judicial purposes, the Inspector and the Warden of the provisional county shall constitute the board.

Meeting of Board.

(3) No resolution or order altering the number or limits of the divisions or any of them shall be made, except at a meeting called for that purpose, of which four weeks' notice shall be given by publication in a newspaper published in the division affected, or if no newspaper is published there, then in a newspaper published in the county or district town of the county or district in which the division affected is situate.

Four Weeks' Notice.—The Rules under the Ontario Judicature Act, in reference to computation of time, do not apply to division

courts: *Re* McKay & Talbot, 3 O. L. R. 256. A period of time means a time that runs continuously: Strouds' Judicial Dictionary, *sub.* title "Period." "Four weeks' Notice," i.e., twenty-eight days. Sec. 15.

"Week" must be taken in its ordinary acceptance and includes Sundays and holidays: *In re* Armour and Township of Onondaga, 14 O. L. R. 606; *In re* Duncan and the Town of Midland, 16 O. L. R. 132.

Resolution or order cannot therefore be made within 28 days after first publication of notice. If first publication on Jan. 12th, the fourth week ends Feb. 8th; *Re* Coe and Township of Pickering, 24 U. C. R. 439; *Re* Miles and Township of Richmond, 28 U. C. R. 333; *Re* Brophy and Village of Gananoque, 23 C. P. 290; *Re* Mace and County of Frontenac, 42 U. C. R. 70; *Re* Rickey and Township of Marlborough, 9 O. W. R. 930. In computing the time, the day on which the notice first given should be excluded: *Re* Ostrom and Township of Sidney, 15 A. R. 372. The number of insertions is not prescribed but at least one publication in each of four successive weeks is necessary. Cf. *Re* Chambers and Township of Burford, 25 O. R. 276.

Notice of Intention to Change Limits.—No action can be taken to alter the number, limits and extent of a division without the notice being given as required by this section. The absence of such notice would invalidate the whole proceeding: *Re* Birdsall v. The Corp. of Asphodel, 45 U. C. R. 149; R. v. Court of Revision of Cornwall, 25 U. C. R. 286; *Re* McGregor v. Norton, 13 P. R. 223. The publication of the notice is a condition precedent to the making of any resolution or order affecting the limits and extent of any division: *Re* Meyers and Woonacott, 23 U. C. R. 311; Griffiths v. Municipality of Grantham, 6 C. P. 274; Shaw v. The Corp. of Manvers, 19 U. C. R. 288; Askew v. Maanlag, 38 U. C. R. 349.

The notice should set out particularly the changes proposed, and the "limits" of each division to be affected by it: Haacke v. Municipality of Markham, 17 U. C. R. 562; *Re* Simmons v. Corporation of Chatham, 21 U. C. R. 75; The Chief Superintendent, *In re* Shorey v. Thrasher, 30 U. C. R. 504, and the time and place of meeting: *Re* Birdsall v. Asphodel, 45 U. C. R. 149.

The order making the change need not recite the statute: *Re* Ness and The Municipality of Saltfleet, 13 U. C. R. 408, but it would be better to do so; and the order should follow the notice in defining the "limits" of the divisions affected by it.

(4) No such resolution or order shall take effect until approved by the Lieutenant-Governor in Council nor until notice of such approval has been published in the *Ontario Gazette*. When order of Board to take effect.

(5) An application to alter the limits of any division, or to establish a new division, may be made to the Judge of the County Court in writing signed by the reeve or other head of any municipality in the county, authorized by a resolution of the council in that behalf, or by a petition signed by at least twenty-five ratepayers of the municipality affected. Application for change of boundaries.

Reeve or Other Head.—The application to the judge is to be signed by the reeve or other head of the municipality and should recite the resolution of council or petition of ratepayers authorizing it.

Secs. 15, 16.

Procedure upon application.

(6) Upon receiving the application the Judge shall notify the other members of the board, and upon receiving notice the Inspector shall appoint a time and place for considering the application, of which four weeks' notice shall be given as provided by sub-section 3, and at the meeting persons supporting or opposing the proposed change shall be heard if they so desire, and the board shall consider and dispose of the whole matter.

The Board Shall Dispose.—The decision of a majority of the members of the tribunal would be good: R. S. O. 1914, c. 1, s. 28 (c): *Re* Ontario and Quebec, 6 L. J. N. S. 212. But in order to justify a decision by less than the whole number there should first be an opportunity for a full discussion and a final refusal to agree: Goodman v. Sayers, 2 J. & W. 249; Dilling v. Matchett, Willes, 215; *Re* Morphett, 2 D. & L. 967; Young v. Bulman, 13 C. B. 623; White v. Sharp, 12 M. & W. 712; Thomas v. Harrop, 1 S. & S. 524; *Re* Pering v. Keymer, 3 A. & E. 245; *Re* Templeman and Reed, 9 Dow. 962; Hawley v. North Staffordshire Ry. Co., 2 De G. & S. 33; Willoughby v. Willoughby, 9 Q. B. 923. Neither one could delegate his authority: Harrington v. Edison, 11 U. C. R. 114; Haskins v. St. Louis and S. E. Ry. Co, 109, U. S. Sup. Ct. 923.

If any member of this tribunal should have omitted to take the oath of office or do some necessary act or thing before entering upon his official duties, or should the warden be subsequently declared unduly elected, or become otherwise disqualified, yet the action of the tribunal, being of a judicial nature, would not be illegal: The Margate Pier Co. v. Hannam, 3 B. & Ald. 266. The law raises a presumption in favor of the regular appointment or election and qualification of an officer from his having acted in an official capacity, and would do so in this case: R. v. Verelst, 3 Camp. 432; Berryman v. Wise, 4 T. R. 366; *Doe d.* Davy v. Haddon, 3 Doug. 310; Marshall v. Lamb, 5 Q. B. 115; Wolton v. Gavin, 16 Q. B. 48; Butler v. Ford, 1 Cromp. & M. 662; R. v. Howard, 1 M. & Rob. 187, and other cases cited in Taylor on Evidence, 8th ed., p. 187; Holt v. Jarvis, Drs. 190; Smith v. Redford, 12 Gr. 310; School Trustees, Tp. of Hamilton v. Nell, 28 Gr. 408; R. v. Fee, 3 O. R. 107; O'Neill v. Atty.-Gen., 26 S. C. R. 122; but see Turtle v. Euphemia, 31 O. R. 404.

Record of proceedings.

(7) The inspector shall keep a record of the proceedings of the board and shall send a copy of it to the Clerk of the Peace after each meeting. 10 Edw. VII. c. 32, s. 15.

The Judge Shall Notify.—All notices required by this Act must be in writing: s. 82.

Actions and judgments continued when transferred.

16. Actions and judgments in any court, the number or limits of which are changed, shall continue to be actions and judgments therein, but the Judge may transfer any such action or judgment to any other court, and when so transferred the same shall be an action or judgment of such other court. 10 Edw. VII. c. 32, s. 16.

Actions.—Actions "include a proceeding, suit, matter and cause:" Secs. s. 2 (1) (a). 17, 18.

Judgments.—See notes to s. 18.

17. The Clerk of the Peace, in a book to be kept by him, shall record the divisions declared and appointed, and the times and places of holding the courts, and the alterations made therein, and he shall transmit to the Inspector a copy of the record. 10 Edw. VII. c. 32, s. 17. Clerks of the Peace to record time and place for holding Courts.

The Clerk of the Peace.—See R.S.O. 1914, c. 76, s. 11. The entries in the book are to be taken from the copy of the record of the proceedings sent to the Clerk of the Peace by the Inspector: s. 15 (7), *ante*.

"The entries in this book are of such a public nature, that an examined copy, or extracts therefrom, certified as such, and signed by the clerk of the peace, would be admissible in any court of justice, or before any person having by law, or consent of parties, authority to hear, receive or examine evidence:" 7 U. C. L. J. 177; R.S.O. 1914, c. 76, s. 29.

Transmit.—The Clerk of the Peace is not bound to notify the Inspector of anything but the acts of the board as to the limits of the different divisions, and the orders of the judge as to the times and places of holding courts; nothing can be allowed the Clerk of the Peace for it: Poussett and the Quarter Sessions of Lambton, 22 U. C. R. 412.

18.—(1) Where a union of counties is dissolved or a county is separated from a union of counties:— Actions where united counties are dissolved

(*a*) The courts of divisions which were wholly within the senior county or remaining counties and those which were wholly within the junior or separated county shall continue to be courts of the senior county or remaining counties and of the junior or separated county respectively, and all actions and judgments therein shall continue to be actions and judgments in such courts until altered by the board.

(*b*) Actions and judgments in courts or divisions the limits of which were partly within the senior county or remaining counties and partly within the junior or separated county, shall continue to be actions and judgments of such courts until transferred to some other court in accordance with this Act.

Dissolution.—The provision made by The Municipal Amendment Act, 1906, (6 Edw. VII. c. 34, s. 2) for the dissolution of united

Sec. 18.

counties was not continued in The Municipal Act, 1913, or R. S. O. 1914, c. 192, on the ground that such dissolution, like the formation of a new county, was more properly a matter for special legislation.

A Senior County.—Senior county was defined in section 39 of The Municipal Act of 1903 as "the county in which the court-house is situate." This section having, however, been repealed the term "senior county," now stands undefined.

Judgments.—The decision of the judge if not pronounced in court only becomes a judgment when duly entered in the procedure book by the clerk: Struttou v. Johnson, 7 L. C. G. 141; Holtby v. Hodgson, 24 Q. B. D. 103; see section 121. The proceedings of the court can only be proved by such entries: R. v. Rowland, 1 F. & F. 72, per Bramwell, B.; or a certified copy under section 35, and cannot be contradicted even by the evidence of the judge: Dews v. Riley, 11 C. B. per Jervis, C.J., at p. 433; but a mere slip or clerical error may be corrected: North American Life v. Collins, 9 O. L. R. 579; McCaughey v. Stringer, 1914, 1 I. R. 73; but one form of judgment cannot be substituted for another, e.g. a judgment against separate estate for a personal judgment against a married woman: Oxley v. Link, 1914, 2 K. B. 734. An entry "struck out for want of jurisdiction, a disputed title having been sworn to," is not a judgment: Tubby v. Stanhope, 5 C. B. 709. If pronounced in court the decision becomes a judgment *instanter*: section 121; Holtby v. Hodgson, 24 Q. B. D. 103.

Fixing number and limits of courts in a new county.

(2) The Lieutenant-Governor in Council may in the proclamation establishing a new county, or in a subsequent proclamation, to take effect in either case from a day to be named therein, fix and determine the number and limits of the courts for the new county, subject to be thereafter altered by the board, and may by the proclamation direct that actions and judgments in any court shall become actions and judgments in any other court and thereupon the same shall become actions and judgments of and shall be continued in such last mentioned court.

Proclamation Establishing a New County.—These words, continued from the Act of 1910, had reference to the provisions of 6 Edw. VII. c. 34, since repealed. The establishment of a new county is now matter for special legislation. Cf. notes to (1) above.

Writs and documents to be delivered up.

(3) Where an action or judgment in any court is transferred to another court the clerk or other officer of the court who holds any writ or document appertaining to such court or the business thereof shall deliver up the same to such person as the Judge directs.

Judgment Transferred.—The transfer here referred to is that resulting from a dissolution of counties and not one "upon the application of a person having an unsatisfied judgment," provided for by s. 188 (1) *post*.

The penalty for not doing so is provided by R.S.O. 1914, c. 15, Sec. 18, s. 17.

See, also, s. 44, as to disposal of books and papers on vacancy in office of clerk or bailiff.

Power of Board as to regulation of limits on separation of a county.

(4) If the Lieutenant-Governor does not by proclamation fix and determine the number and limits of the divisions for the new county, the board shall, within three months after the issuing of the proclamation for establishing the new county, at a meeting to be called for the purpose or at an adjourned meeting, appoint the number and limits of the divisions for the county and the time when such appointment shall take effect. 10 Edw. VII. c. 32, s. 18.

By Proclamation.—Since new counties have now to be created by special Act, the application of this section is not apparent. See notes to sub-section (1) above.

No provision is made here for calling the meeting, as in sub-section 6 of section 15. No doubt the judge would do so; but no procedure is prescribed in case of his failure to call the meeting.

A full opportunity should be afforded each member of the board to attend and discuss the question, otherwise the proceedings would be irregular, and any order or resolution made by those present would be bad: *Re* Potter v. Knapp, 5 P. R. 197; Cannon v. Toronto Corn Exchange, 5 A. R. 208; Labouchere v. Wharncliffe, 13 Ch. D. 346; Fisher v. Keane, 11 Ch. D. 353; Temple v. Toronto Stock Exchange, 8 O. R. 705; notes to section 15.

Shall within Three Months.—The direction is imperative: R.S.O. 1914, c. 1, s. 29 (ee). But whenever the thing required by a statute to be done has reference to "the time or formality of completing any public act, not being a step in a litigation or accusation," as in this case, the enactment will generally be regarded as merely directory, unless there be words making the thing done void if not done in accordance with the prescribed requirements: Stroud, 2nd ed. p. 1851. The board might not, therefore, be concluded from acting, if it neglected to do so at the proper time, but it is obvious that neglect to perform a duty enjoined by statute would be unjustifiable.

The notice required by the statute should be in writing: s. 82.

A majority of the members present could make a valid decision, if all had due notice of the meeting and full opportunity of discussion: see cases cited in notes to section 15: *Re* Ontario and Quebec, 6 L. J. N. S. 212; Worts v. Worts, 22 L. J. N. S. 282.

If the said officers exercised their judgment honestly and fairly, and consistently with legal principles, the resolution or order, if good on its face, could not be reviewed: Baggalay v. Borthwick, 10 C. B. N. S. 61.

It would not be so if made corruptly, or in disregard of the plain principles of law or justice: Morgan v. Mather, 2 Ves. Jr. 15; or if any one of them were personally interested in the subject matter: Earle v. Stoker, 2 Vern. 251, for he could not be judge in his own cause: R. v. Bishop of St. Albans, 9 Q. B. D. 454.

Should any member of the board, the warden, for instance, if a division court clerk, be interested in extending the limits of his own

Sec. 19.

division, be would be incapable of acting: see notes to section 19 for authorities as to the question of disqualifying interest.

The resolution or order should not be made separately, but while all are together: Wade v. Dowling, 4 E. & B. 44, and if one were excluded from the meeting by force or fraud the action of the rest would be illegal: *Re* Templeman & Reed, 9 Dowl. 962.

THE JUDGE.

Who to preside.

19.—(1) The courts shall be presided over by the Judge or the Junior Judge or by the Deputy Judge.

The "Judge."—Includes the Senior and Junior Judge: s. 2 (g), *ante*. As to the appointments, qualification and tenure of office of senior and junior county court judges, see R.S.C. 1906, c. 138, ss. 30-32; R.S.O. 1914, c. 58.

Junior Judge to hold Division Courts.

(2) The Junior Judge shall preside over the Courts of the county, subject to any other arrangements from time to time made with the Judge of the county court or, in the County of York, by a majority of the Judges.

The Junior Judge.—The use of the definite article "The" points to the fact that there is, outside of the County of York, not more than one Junior Judge in each county. In the County of York, there may be a second and a third Junior Judge: R.S.O. 1914, c. 58, ss. 5, 7.

Senior Judge to hold Division Courts when expedient.

(3) The appointment of a Junior Judge shall not prevent or excuse the Judge from presiding at any of the courts within his county when the public interests require it. 10 Edw. VII. c. 32, s. 19.

Judges' Territorial Jurisdiction.—By R.S.C. c. 138, ss. 30, 31, it is provided that—"30. The jurisdiction of every county court judge shall extend and shall be deemed to have always extended to any additional territory annexed by the provincial legislature to the county or district for which he was or is appointed, to the same extent as if he were originally appointed for a county or district including such additional territory." and

"31. It shall be competent for any county court judge to hold any of the courts in any county or district in the province in which he is appointed, or to perform any other duty as a county court judge in such county or district, upon being required so to do by an order of the Governor-in-Council, made at the request of the Lieutenant-Governor of such province;" and he is authorized, without any such order, to "perform any judicial duties in any county or district in the province, on being requested so to do by the county court judge, to whom the duty for any reason belongs," and that "while acting in pursuance of such requisition or request" he shall "be deemed to be a judge of the county court of the county or district in which he is so required or requested to act, and shall have all the powers of such judge."

The Ontario Legislature by the statute R.S.O. 1914, c. 58, s. 15, has enacted similar legislation to that contained in the above Dominion Statute; and includes junior as well as senior judges. Sec. 19.

It was contended in Wilson v. McGuire, 2 O. R. 118, that an authority thus given was *ultra vires* of the Provincial Legislature, but the contention was not sustained, and it was held that the Legislature had complete power over division courts.

It was also held by the Supreme Court that provisions in an Act passed by the Legislature of British Columbia similar to those contained in the Ontario Act above mentioned, were *intra vires* of the Provincial Legislature, irrespective of 54-55 Vict. c. 28, from which the provisions of R.S.C. c. 138, are taken, and that section 92 (14) of the British North America Act, giving power to the Provincial Legislature to provide for the institution, maintenance and organization of provincial courts includes power to define the jurisdiction of such courts territorially, as well as in other respects, and that necessarily involves the jurisdiction of the judges who constitute such courts: *Re* County Courts of British Columbia, 21 S. C. R. 446.

A retired judge may act as county judge and hold any court in any county or district in the province, on an order of the Governor-General, made at the request of the Lieutenant-Governor: R.S.C. c. 138, s. 32; R.S.O. 1914, c. 58, s. 15 (3)

Liability of Judge.—By the common law of England, no action lies against a Judge of a Court of Record, for doing anything within his jurisdiction, even though done maliciously and contrary to good faith: Anderson v. Gorrie, 1895, 1 Q. B. 668, C. A.; Bottomly v. Broughara, 1908, 1 K. B. 584. A county judge is, therefore, not answerable in an action of trespass for an erroneous judgment. Neither is he answerable for the wrongful act of his officer, done, not in pursuance of, though under color of, a judgment: but he is responsible for an act done by his command and authority, when he has no jurisdiction: Houlden v. Smith, 14 Q. B. 841. If an order of commitment were made under the judgment summons clauses to any but the gaol of the county in which the party summoned resided or carried on his business, trespass would lie against the judge if the warrant issued by his authority. So, also, it would be a want of jurisdiction to summon a person under such circumstances: *Ib.* 853. See, also, *Re* Dulmage v. Judge of Leeds and Grenville, 12 U. C. R. 32. But the protection does not extend to ministerial acts. Thus the act of hearing and determining an action being a merely ministerial act, a refusal by the Judge to try a case is actionable: Ferguson v. Kinnoul, 9 Cl. & Fin. 251, cf. Parks v. Davis, 10 C. P. 229. He was formerly entitled to notice of action if he acted honestly, believing that his duty as a judge called upon him to do as he did: Booth v. Clive, 10 C. B. 827; but notice of action is now unnecessary: R.S.O. 1914, c. 89, s. 13; although a successful plaintiff may have to pay the costs if he has not given the defendant a sufficient opportunity of tendering amends: *Ibid.* sub-section (3). Want of jurisdiction must be made to appear to the judge, and if there is no evidence of that either on the face of the proceedings (Houlden v. Smith, 14 Q. B. 851, *per* Patteson, J.), or given before the judge, he is not liable in trespass: Graham v. Smart, 18 U. C. R. 482; nor are the officers of the court acting in execution of the order: *Ib.*; Andrews v. Marris, 1 Q. B. 3; Watson v. Bodell, 14 M. & W. 57; Thomas v. Hudson, 14 M. & W. 353; 16 M. & W. 885. "The judge of the Division Court," said Robinson, C.J., at p. 487 of 18 U. C. R., "was bound to act upon what appeared before him, and cannot be made a trespasser by proof of facts given at any other time or in any other court."

Sec. 19.

At p. 489 of the same report, Burns, J., said: "It appears to me the plaintiff, by suffering judgment by default against him, is not in a position to dispute the jurisdiction of the court. If the want of jurisdiction was apparent upon the proceedings, then of course it would be open for him to question the right upon any steps taken upon a proceeding in that manner, as *coram non judice;* but I do not think he can question the jurisdiction, by bringing evidence to dispute the place where the cause of action arose in whole or in part, after he has acquiesced in it in whole by suffering judgment by default; and in an action against the judge, the judge of the county court would be in a serious predicament if he were obliged to be prepared with evidence to sustain his judgments against persons simply because it be shown that the parties sued do not reside within his county. The effect of what the plaintiff contends for in this case would compel the judge to do that, if such a proposition be established. The plaintiff should have appeared to the summons, and have raised the question, and the judge would then have tried the question of jurisdiction; or if he did not wish the judge of the county court to have determined the point, he might have applied to one of the superior courts for a prohibition.".

As regards judges and judicial officers, the general rule is that if they do any act beyond the limit of their authority, causing injury to another, they are liable for it: The Marshalsea Case, 10 Rep. 76; Nichols v. Walker, Cro. Car. 394; McCreadie v. Thomson, 1907, S. C. 1176; but if the act be done within that limit through an erroneous or mistaken judgment, they are not liable: Dowsell v. Impey, 1 B. & C. 163; Garner v. Colman, 19 C. P. 106. Trespass will not lie for a judical act done without jurisdiction, unless the judge knew or had the means of knowing of it: Calder v. Halkett, 3 Moo. P. C. 28; Garner v. Coleman, 19 C. P., at p. 109; Kemp v. Neville, 10 C. B. N. S. 545, and cases there cited. Judicial functions cannot be delegated: Audrews v. Marris, 1 Q. B. 3. In the case of an inferior court, jurisdiction must be affirmatively proved: Carratt v. Morley, 1 Q. B. 18; Halsbury, vol. 23, s. 673. Cf. notes to s. 8 *ante*. A superior court can order a county judge to proceed with the hearing of a case, but cannot deal with any order which he may make; Churchward v. Coleman, L. R. 2 Q. B. 18; Coolican v. Hunter, 7 P. R. 237; *Re* Jackson v. Clark, 36 C. L. J. 68. The signature to a judge's order need not be by *the hand* of the judge himself. If impressed with a stamp by the clerk in his presence it is good: Blades v. Lawrence, L. R. 9 Q. B. 374. Words spoken by a county judge or a magistrate sitting on the trial of a cause, though irrelevant to that matter, are not actionable, even if spoken after a charge has been withdrawn, provided it is all part of the same hearing: Scott v. Stansfield, L. R. 3 Ex. 220; Munster v. Lamb, 11 Q. B. D. 588; Law v. Llewellyn, 1906, 1 K. B. 487. No action lies against the judge of a superior court for a judicial act, though alleged to have been done maliciously and corruptly: Floyd v. Barker, 12 R. 23; Groenvelt v. Burwell, 1 Ld. Raym. 454; Fray v. Blackburn, 3 B. & S. 576; Ward v. Freeman, 2 Ir. C. L. R. 460; Hind v. Brett, W. N. 1883, p. 37. A judge cannot try a cause in which he is interested: R. v. Meyer, 1 Q. B. D. 173. But even in a case of imputed interest he is not incapacitated from making an order if refusing to do so would be a denial of justice: Grand Junction Canal Co. v. Dimes, 18 L. J. Ch. 365; 19 L. J. Ch. 345. The Lord Chancellor was held disqualified to hear a case in which a company were plaintiffs, owing to the fact that he had an interest as a shareholder: Dimes v. Grand Junction Canal Co., 3 H. L. C. 759; see also London & North Western Railway Company v. Lindsay, 3 MacQueen H. L. Cas. 99; *Ex parte* Medwin, 1 E. & B. 609; R. v. Cambridge

(Recorder), 8 E. & B. 637; R. v. The Justices of Suffolk, 18 Q. B. 416; R. v. Raud, L. R. 1 Q. B. 230; Hayman v. The Governors of Rugby School, L. R. 18 Eq. 28; Bigelow v. Bigelow, 6 P. R. 124. A counsel in a cause, who is afterwards raised to the Bench, is not precluded from taking part in the hearing and discussion of that cause, but he may properly decline: Thellusson v. Rendlesham, 7 H. L. C. 429. Private communications to a judge upon a matter publicly before him are highly improper, and amount to contempt of court: *Re* Dyee Sombre, 1 Mac. & G. 116. Sec. 20.

An attachment will not lie against a county court judge for not obeying a *certiorari*, unless it clearly appears that he acted contumaciously: *Re* Judge of Niagara District, 3 O. S. 437. Nor can he be arrested on mesne or final process: Adams v. Ackland, 7 P. C. R. 211. A county court judge cannot refuse to attend under a subpœna *duces tecum* to produce a deed, on the ground of private business, or that he obtained the deed or became possessed of his information as an attorney, or that he had a lien on the deed or was entitled to witness fees as an attorney: Deadman v. Ewen, 27 U. C. R. 176. He cannot directly or indirectly practice as a counsel, attorney or solicitor, notary public or conveyancer, under penalty of forfeiture of office and a further penalty of $400: R.S.O. 1914, c. 58, s. 9; but a Deputy Judge is not so prohibited: *Ibid.*, s. 12; see also Allen *qui tam* v. Jarvis, 32 U. C. R. 56. Change of venue was ordered in ejectment where a county court judge was defendant, where plaintiff might otherwise have proceeded under Overholding Tenants' Act: Anon, 4 P. R. 310.

As to the effect of the death of the judge in cases pending, see Leslie v. Emmons, 25 U. C. R. 243; Hoey v. McFarlane, 4 C. B. N. S. 718; Applebe v. Baker, 27 U. C. R. 486. The case would have to go down for trial again: Clarke v. Trask, 1 O. L. R. 207.

Should the junior judge be sick, absent or otherwise unable to hold the division court, it would be the duty of the senior judge, under this sub-section, to hold the court.

By R.S.O. 1914, c. 58, s. 14 (1), it is provided that, "At any sittings of the County or District Court held at the same time as the sittings of the Court of General Sessions of the Peace, or of a Division Court in any county or district, or of any two of the Courts at the same time, either the Judge or the Junior Judge, or both of them, may, if the Judge thinks fit, preside in any of the said courts, or each of them in one of such Courts at the same time, so that two of the Courts may sit and the business therein be proceeded with simultaneously," and by sub-section 2 of the same statute in the County of York, the county court, general sessions, and division courts or any of such courts, may be held simultaneously.

20.—(1) The Judge may appoint a barrister to act as his deputy; and the barrister so appointed shall have all the powers and privileges vested in and be subject to all the duties imposed by law upon the Judge. Who to preside in case of illness or absence of Judge.

(2) The Judge shall forthwith send to the Provincial Secretary notice of the appointment, specifying the name and residence of the barrister so appointed and the cause of his appointment. Provincial Secretary to be notified of appointment of Deputy.

Sec. 20.

Duration of appointment.

(3) No such appointment shall be continued for more than one month, and in case the Lieutenant-Governor in Council disapproves of the appointment, he may annul the same. 10 Edw. VII. c. 32, s. 20.

The above section omits the words "in case of illness or absence of the judge," which were contained in the corresponding section of the former Act. An order made by the barrister appointed need not show the reason for such appointment. The maxim, "All acts are presumed to be rightly done," applies: *Re* Hawkins, 3 P. R. 239. The general presumption of law, namely, that a person acting in a public capacity was properly appointed and duly authorized to act prevails in all such cases until the contrary is shown by the person disputing it: R. v. Fee, 3 O. R. 239; McKenzie v. Dancey, 12 A. R. 317.

Deputy Judge.—The appointment under the above section is only for the purposes of this Act; but R.S.O. 1914, c. 58, s. 10, also authorizes the appointment of a deputy judge, who holds office during the pleasure of the Governor-General in Council (the appointing authority under the B. N. A. Act), and has all the jurisdiction and powers of a county court judge, but only within the county or district for which he is appointed, and in the case of the death, illness or absence of the judge: s. 11. The absence of the judge need not be unavoidable, nor out of the county: R. v. Fee, 3 O. R. 239; R. v. Roberts, 38 L. T. 690.

The following rules are deducible from the case of *Re* Leibes v. Ward, 45 U. C. R. 375: (1) that the word "judge" in this section includes the junior judge (s. 2 (g) now so expressly provides); (2) that a deputy judge so appointed had power to appoint a subsequent time and place in the county, though not in the division of the court, for subsequent delivery of judgment; (3) that the deputation itself clothed the deputy judge so appointed with all the powers, within the county of junior judge. See also Gibson v. McDonald, 7 O. R. 401; Baker v. Cave, 1 H. & N. 674; Margate Pier Co. v. Hannam, 3 B. & Ald. 266; Waterloo Bridge Co. v. Cull, 1 E. & E. 213; Applebe v. Baker, 27 U. C. R. 489; Hoey v. McFarlane, 4 C. B. N. S. 718 and 732.

The Judge.—The word "judge," both in the above section 20, and also in the County Judges Act respecting the appointment of a deputy judge by the Government, includes juniors as well as senior judge: s. 2 (g), *ante*; R.S.O. 1914, c. 58, s. 15 (5); *Re* Leibes v. Ward, *supra*.

A Deputy Judge is not precluded from practising his profession: s. 12 of statute last mentioned; Reid v. Drake, 4 P. R. 141. Unlike the senior or junior judge, he is not an *ex officio* justice of the peace: R.S.O. 1914, c. 87, s. 3; R. v. Fee, 3 O. R. 107.

A deputy judge cannot give judgment after the expiration of the period for which he is appointed: Hoey v. McFarlane, 4 C. B. N. S. 718.

Where a deputy judge is appointed by Government, the law presumes that the necessary facts exist to warrant such appointment, and on the party disputing the validity of the appointment rests the *onus* of establishing its invalidity: McKenzie v. Dancy, 12 A. R. 317; R. v. Fee, 3 O. R. 107. The authority of the deputy judge, when appointed by the Government, does not terminate with the termination of the judge's authority through death or resignation, and the appointment may be made notwithstanding the office of the judge is vacant by death or resignation, or that the judge is ill or absent at the time of the appoint-

ment: R.S.O. 1914, c. 58, s. 10 (2). In Hoey v. McFarlane, 4 C. B. N. S. 718, it was held that the deputy's functions ceased on the death of the judge, and that neither he nor the new judge had power to deliver judgment after the death, and that the proper course was for the new judge to rehear the case. But by section 11 of the above Act, the deputy judge, when duly appointed, is expressly authorized to act "in case of the death, illness or absence of the judge." But *quære*, whether the deputy judge does not, on the appointment of a new judge become *functus officio*. Secs. 21, 22.

Forthwith.—The word "forthwith" in matters of procedure means within twenty-four hours: Morton v. Bank of Montreal, 18 C. L. T. 157. The term has sometimes received a free construction and sometimes a strict one according to circumstances. An act has sometimes been held to have been done "forthwith" when done within a reasonable time and sometimes only when done with the least possible delay: per Armour, C.J., Maxwell v. Searfe, 18 O. R. 531. The notice under this section should be sent by the judge making the appointment, with as little delay as possible, and should state the cause of the appointment.

One Month.—This is a calendar month: R.S.O. 1914, c. 1, s. 29 (u); exclusive of the day on which the appointment was made: Lester v. Garland, 15 Ves. 248; Manns v. Johnston, 3 O. R. 100.

Adjournment of Court if Judge does not arrive in time.

21. If the Judge does not open court on the day appointed for that purpose, the clerk shall, after four o'clock in the afternoon, adjourn the court to an hour on the following day to be named by him, and so from day to day, adjourning over any Sunday or holiday, until the Judge arrives to open court, or until other directions are received from him. 10 Edw. VII., c. 32, s. 21.

Holiday.—This includes Sunday, New Year's Day, Good Friday, Easter Monday, Christmas Day, the birthday, or the day appointed for the celebration of the birthday of the reigning Sovereign, Victoria Day, Dominion Day, Labor Day, and any day appointed by proclamation of the Governor-General or Lieutenant-Governor as a public holiday or for a general Fast or Thanksgiving: R.S.O. 1914, c. 1, s. 29 (l).

Whenever any other holiday falls on a Sunday, the next following day is a holiday in lieu thereof: *Ibid.*

As to what acts may be done or proceedings taken on a holiday, see notes to ss. 98 and 121, *post*.

CLERKS AND BAILIFFS, ETC.

Every Court to have clerk and bailiffs. Tenure of office of Division Court officials.

22. For every court there shall be a clerk and a bailiff or bailiffs, who shall be appointed by the Lieutenant-Governor, and all clerks and bailiffs heretofore or hereafter appointed shall hold office during the pleasure of the Lieutenant-Governor. 10 Edw. VII. c. 32, s. 22.

Sec. 23.

Clerks and Bailiffs.—These are the executive officers of the court. As a general rule all sane persons are capable of holding office: 2 U. C. L. J. 63. A clerk and bailiff could not be the same person: 2 U. C. L. J. 64. Persons under 21 years of age are deemed by law incapable of the skill necessary in such an office: 2 U. C. L. J. 64. If there is more than one bailiff each should work independently of the other: 2 U. C. L. J. 64 and cases there cited. No person can be employed in any public office in Ontario who is not a British subject by birth or naturalization: R. S. O. 1914, c. 15, s. 2. It is not necessary for the clerk or bailiff to take any oath of office or allegiance, there being no statutory requirement that he shall do so; and those oaths being required to be taken only by officials under His Majesty's commission.

Duties.—A refusal to perform the duties of his office without color of right would be a misdemeanor, punishable with fine or imprisonment or both: Roscoe's Crim. Evi., 11th ed., 783. So also would acts totally illegal committed by a bailiff under color of his office: R. v. Wyat, 1 Salk. 380; R. v. Bembridge, 3 Doug. 327; R. v. Borron, 3 B. & Ald. 434; R. v. Tisdale, 20 U. C. R. 272; Parsons v. Crabbe, 31 C. P. 151.

During Pleasure.—The words authorizing the appointment of any public officer include the power of removing him or appointing another in his stead in the discretion of the authority in whom the power of appointment is vested: R.S.O. 1914, c. 1, s. 28 (k).

Clerk not to practice as barrister, etc.

23. A clerk shall not practise as a barrister or solicitor. 10 Edw. VII. c. 32, s. 23.

Practice as a Barrister or Solicitor.—If a practising barrister or solicitor be appointed he must cease practice immediately. He could not even continue a suit in which he might be engaged. A clerk who directly or indirectly practises as a barrister or solicitor in contravention of this provision would be liable to a penalty of $2,000 and the forfeiture of his office: R.S.O. 1914, c. 159, s. 30.

The appointee would also be liable to indictment for his disobedience: R. v. Sainsbury, 4 T. R. 451; 2 R. R. 433; R. v. Davis, Sayer, 133; R. v. Arnold, 23 O. R. 201; Russell on Crimes, 5th ed. 193; Burbidge's Crim. Dig. 109-114; Roscoe's Crim. Evi. 782. There would appear to be nothing to prevent a clerk from acting as a conveyancer or notary public.

The question as to what is practising as a barrister or solicitor is discussed in Law Socy. v. Macdougall, 13 O. R. 204; 15 A. R. 150; 18 S. C. R. 203. Strong, J., said at p. 212, "The only way in which I can conceive a solicitor can be said to practise as such in the courts is by exercising the functions of a solicitor, by taking on behalf of a client some of the regular steps of procedure in an action or some other judicial proceeding;" see also Law Society v. Waterlow, 8 App. Cas. 407; *Re* Horton, 8 Q. B. D. 434; Allen *qui tam* v. Jarvis, 32 U. C. R. 56. In Apothecaries Co. v. Jones, 1891, 1 Q. B. 89, it was held that the words "act and practice" were directed against an habitual or continuous course of conduct: Clark v. Reg., 14 Q. B. D. 92; R. v. Howarth, 24 O. R. 561; R. v. Coulson, 24 O. R. 246; R. v. Wheelan, 4 Can. Cr. Cas. 277; R. v. Lee, 4 Can. Cr. Cas. 416; but the evidence, although dealing with one concrete case, may indicate that it was a part of a continued course of conduct, and so within the meaning of the word "practice:" Apothecaries Co. v. Jones, 8 Q. B. D. 434; Clark v. Reg., 14 Q. B. D. 92; Apothecaries Co. v. Nottingham, 34 L. T. N. S. 76.

A person does not act as a solicitor by merely settling an affidavit for a person in his employ: *Re* Louis. *Ex parte* Incorporated Law Society, 1891, 1 Q. B. 649. Secs. 24, 25.

24.—(1) It shall be the duty of the Judge to see that the officers of his courts perform their duties, and to examine into complaints against them. Duty of judges as to officers.

(2) The Judge may for any cause suspend a clerk or bailiff, and in case of suspension shall forthwith report the same and the cause thereof to the Inspector, and if a vacancy occurs in the office of clerk or bailiff, the Judge shall forthwith notify the Inspector. 10 Edw. VII. c. 32, s. 24. Suspension of clerk or bailiff by judge.

Suspend for any Cause.—That is, for some misconduct or incompetency in his office. The suspension must be reported "forthwith" to the Provincial Secretary: see notes to section 20; Jenkins v. Cook, 1 P. D. 80.

Misconduct or Incompetency.—As to "misconduct," see sec. 219 and notes thereto. What amounts to "incompetency" must be determined with reference to each particular case. That which might be considered "incompetency" in a clerk or bailiff of a city office where a large amount of business is done, might not be so in a country office where suits are few.

25.—(1) Leave of absence for a period not exceeding two months may be granted by the Inspector to a clerk or bailiff. Leave of absence to clerks or bailiffs.

(2) With the approval of the Judge, when prevented from acting by illness or accident, and with the approval of the Inspector, during absence on leave the clerk or bailiff may appoint a deputy to act for him, with all his powers and privileges and subject to like duties, and the clerk and his sureties shall be jointly and severally responsible for all the acts and omissions of his deputy, and the bailiff and his sureties shall be jointly and severally responsible for all the acts and omissions of his deputy. 10 Edw. VII. c. 32, s. 25; 4 Geo. V. c. 21, s. 17. When clerk may appoint deputy.

Leave of Absence.—The power of the legislature to delegate its authority in this way was at one time subject to doubt: R. v. Hodge, 46 U. C. R. 141; R. v. Severn, 2 S. C. R. 70. But it is now settled that such enactments are not *ultra vires* of the provincial legislature: Hodge v. The Queen, 9 App. Cas. 117; Sulte, v. Three Rivers, 11 S. C. R. 25; *Re* The Liquor License Act, 1883, 5 C. L. T. 66; Citizens Ins. Co. v. Parsons, 7 App. Cas. 96; Cope v. Scottish Union Co., 5 B. C. R. 329; R. v. Halliday, 21 A. R. 42; Verratt v. McAulay, 5 O. R. 313.

The time mentioned would begin from the posting of the Inspector's letter granting leave: Dunlop v. Higgins, 1 H. L. C. 381; Household Fire Ins. Co. v. Grant, 4 Ex. D. 216; Union Fire Ins. Co. v. Fitzsimmons, 32 C. P. 602; O'Donohue v. Wiley, 43 U. C. R. at p. 363; Frey v. Wellington

Sec. 26. M. Ins. Co., 4 A. R. 203. The day of posting the letter would be excluded: Young v. Higgon, 6 M. & W. 49; see also McCrea v. Waterloo M. Fire Ins. Co., 26 C. P. 437; 1 A. R. 218; *Ex parte* Whitton, *Re* Greaves, 13 Ch. D. 881.

Appointment of Deputy Clerk or Bailiff.—The officer may have as many assistants as he thinks necessary, but he cannot appoint more than one deputy at a time: and the authority to appoint a deputy under this section is limited to the causes stated: *i.e.*, illness or accident, or absence on leave.

The authority of the clerk or bailiff to appoint a deputy, includes authority to remove and make another appointment: R.S.O. 1914, c. 1, s. 28 (k).

The deputy's authority ends with the expiration of the clerk's tenure of office, and on the death or removal of the clerk his authority would cease. The fees pertaining to the office would belong to the clerk, and any rights therefor would be in the name of the clerk. The deputy cannot have more or less power than the principal, and all duties which the clerk could perform should be performed by him: Parker v. Kett, 1 Salk. 95: Godolphin v. Tutor, 2 Salk. 468; *Re* Hoey v. McFarlane, 4 C. R. N. S. 718.

Any assistant clerks which may be employed by the clerk would be held in law to be the principal's agent when doing any particular act under his direction. But it is doubtful if they would have power to sign process, take affidavits, approve instruments, take confessions, record judgments, or do such things as the Legislature evidently trusted to be done by the clerk himself. The term "deputy" applies only to one who has all the authority which the principal has by virtue of his office. He is one who acts by the rights, in the name of and for the benefit of someone else; he is a mere servant of his principal, though he has the power, by operation of law, to do any act which his principal might do: 1 Salk. 95; and by making a deputy the whole power of the principal passes to him: 2 Salk. 468; see 1 Salk. 96; R. v. Smith, Farr. 78; 9 U. C. L. J. 32, 33.

Words empowering a public officer to do any act or thing, or otherwise applying to him by his name of office, include his successors in such office, and his and their deputies: R.S.O. 1914, c. 1, s. 28 (1). The deputy's clerk or bailiff may, therefore, perform in his own name as "deputy clerk" or "deputy bailiff" any and all duties which the clerk or bailiff could do.

Clerks and bailiffs to give security. 9 Rev. Stat., c. 15.

26. Subject to the provisions of *The Public Officers Act*, and of section 33 of this Act, every clerk and bailiff shall give security by a covenant, Form 1, with such and as many sureties, being freeholders and residents within the county, and in such sums as the Judge directs and under his hand approves and declares sufficient, but the Lieutenant-Governor in Council may increase or diminish the sum or sums for which any clerk or bailiff heretofore, or who may hereafter be appointed, shall be required to give security. 10 Edw. VII. c. 32, s. 26.

The Public Officers Act.—See R.S.O. 1914, c. 15, ss. 8-13.

Form 1.—Form of covenant by clerk or bailiff is given as No. 1 in the schedule to the Act; it is also given in the Forms appended to the Rules: *post*, Form 8. Section 33 provides for bonds by Guarantee Companies, approved by the Lieutenant-Governor in Council. In the place of individual sureties. Sec. 26.

Affidavits of Execution and of Justification by sureties are required: see Forms 8 (a) and 8 (b); except in the case of a bond by a surety company who need not justify: R.S.O. 1914, c. 100, s. 5.

The Inspector of division courts will, upon application, furnish forms of covenants with affidavits, when personal security is to be given, and information regarding guarantee bonds by companies. As to security by Guarantee Companies: see R.S.O. 1914, c. 100.

Report to Judge.—By rule 72, the clerk is required to report in writing to the judge at every sitting of the court as to the several sureties of himself and the bailiff or bailiffs of his court showing whether any of them have died, become insolvent, or left the county since his last report, or if bonded by a guarantee company, the date of the renewal of the bond, and mention any facts connected therewith which ought to be made known to the judge.

The clerk or bailiff is required, within five days after his appointment, to inform the Inspector of his sureties: s. 56; and also when he has given new sureties: s. 57.

Covenant.—It is a joint and several covenant and enures to the benefit of "any person suffering damages by the default, breach of duty or misconduct of the clerk or bailiff;" section 28; see also R.S.O. 1914, c. 15, ss. 12, 13. When sued on in the division court, the particulars must be according to Form 12 to Rules: *post*.

The joint suretyship of the other surety is part of the consideration for the contract of each, and any release of one would be a release of the other: Bonser v. Cox, 4 Beav. 379; Ward v. National Bank of New Zealand, 8 App. Cas. 764; Mercantile Bank of Sydney v. Taylor, 1893, A. C. 317; unless consented to by him: Bogart v. Robertson, 11 O. L. R. 295; but if the rights against the other surety are reserved he is not discharged: Thompson v. Lack, 3 C. B. 540; Kearsley v. Cole, 16 M. & W. 128; Dewar v. Sparling, 18 Gr. 637.

Sureties.—The word "sureties" means sufficient sureties: R.S.O. 1914, c. 1, s. 31 (bb); and this section also declares that under this word, one surety may suffice; but that would be subject to the judge approving and declaring it sufficient.

An infant cannot be a party to the bond: Fisher v. Mowbray, 8 East, 330; Baylis v. Dinely, 3 M. & S. 477; Stikeman v. Dawson, 16 L. J. Ch. 205; 1 DeG. & Sm. 113; nor would he be bound even if he fraudulently represented himself to be of age: Bartlett v. Wells, 1 B. & S. 836. A married woman may be one of the sureties: R.S.O. 1914, c. 149, s. 4; but such a bond would probably not be approved by the judge.

A person is not incapable of being elected a member of the Legislature by reason of his being surety for a clerk or bailiff: R.S.O. 1914, c. 11, s. 12 (j); but he cannot take his seat as a member until he has been relieved from his suretyship: same statute, s. 12 (2).

As a general rule, the sureties on an official bond are liable for the faithful performance of all duties, imposed upon such officer whether by laws enacted previous or subsequent to the execution of the bond, which

Sec. 26. properly belong to and come within the scope of the particular office. They are not, however, liable for after imposed duties which cannot be presumed to have entered into the contemplation of the parties at the time the bond was executed: Brandt on Suretyship, sec. 469; Green v. Pontou, 8 O. R. 471; Gray v. Ingersoll, 10 O. R. 194; Middlesex v. Smallman, 19 O. R. 349; 20 O. R. 487.

A clerk or bailiff and his sureties are liable for the acts of all deputies, and assistants and clerks: s. 25 (2), *supra*; R. v. Stanton, 2 C. P. 18; Verratt v. McAulay, 5 O. R. 313; and by R.S.O. 1914, c. 15, s. 8 (2), (3), the sureties are liable for the acts of the deputies whether appointed before or after the security is given.

THE SCOPE OF THE COVENANT.

The liability attaches only if a legal appointment has been made and the sureties are not estopped from showing that no legal appointment has been made: Kepp v. Wiggett, 10 C. B. 35. The default or misconduct charged must be such as is contracted against and within the scope of the officer's duties: Warre v. Calvert, 7 A. & E. 154; King v. Norman, 4 C. B. 884; McIntosh v. Jarvis, 8 U. C. R. 532; Wembley Urban Council v. Poor Law Guarantee Association, 17 T. L. R. 516; Casford Union v. Poor Law Guarantee Association, 103 L. T. 463.

Default in Paying over Money.—Any moneys received by virtue of his office are within the covenant; *e.g.*, bailiffs' fees received by a clerk and not paid over: Cool v. Switzer, 19 U. C. R. 199, and the covenant so provides. The state of the account between the plaintiff and the officer is binding on the sureties; where, therefore, a clerk has been credited with fees on an account for goods sold him by plaintiff, it was held that the sureties were not entitled to credit therefor against moneys not paid over: Franklin v. Gream, 20 U. C. R. 84; see Rule 70. If moneys have been received by an officer which he was not by law entitled to demand, and which he could not be compelled to accept, *e.g.*, as an indemnity, the sureties will not be liable therefor: Kero v. Powell, 25 C. P. 448; Preston v. Wilmot, 23 U. C. R. 348. Money received "by virtue of his office" (see Form 1) is such as is received for the purpose of being paid over to a party in a legal proceeding, and which money, at the time of its being received by the officer, was so received to the use of such party: *per* Gwynne, J., 25 C. P. 453. The moneys must be actually received: Canada West F. M. & S. Ins. Co. v. Merritt, 20 U. C. R. 444; Corp. of Rawdon v. Ward, 27 U. C. R. 609; Montefiore v. Lloyd, 15 C. B. N. S. 203. Payment otherwise than in money will not, as a rule, discharge a debtor, and a personal set-off against the officer, though agreed to by him, would not, of itself, render the sureties responsible; though, if the debt were lost, they might be liable for the officer's neglect: see Fraser v. Gore District M. F. Ins. Co., 2 O. R. 416. And if the money was *in effect* paid, the sureties are liable: Pattison v. The Guardians of Bedford Union, 1 H. & N. (n.s) 523. The sureties would be liable for interest; Ackermann v. Ehrensperger, 16 M. & W. 99. Though money may not in the first instance, be received "by virtue of the office," it may afterwards become so, as where a bailiff seized and sold a stranger's goods, and then took interpleader proceedings concerning the proceeds, which resulted in an order of the court to pay the money to the stranger: McArthur v. Cool, 19 U. C. R. 476. A receipt of money by a deputy would render the sureties responsible: section 25 (2); Verratt v. McAulay, 5 O. R. 313. Where a clerk directed money to be remitted to him by a banker's draft, and gave a receipt therefor, it was held to

amount to a payment to him, though the banker failed before presentment; but *quære*, whether it would have been a receipt within the covenant had his sureties been sued: McLeish v. Howard, 3 A. R. 503. Sec. 26.

Non-Performance of Duties.—Wherever by the Act or Rules a duty is imposed upon a clerk or bailiff and he neglects that duty, and the person to whom he owes the duty is damaged without any want of care on his part, the sureties will be liable. As a general rule damage is the essence of the action, and if the evidence shows that had the duty been performed the plaintiff would have derived no benefit, the action must fail: Hobson v. Thelluson, L. R. 2 Q. B. 642; Brown v. Wright, 35 U. C. R. 378; Nerlich v. Mulloy, 4 A. R. at p. 435. But a person guilty of negligence cannot escape liability merely by showing that the damage would have resulted anyway through another and unavoidable cause: Nitro-Phosphate v. London & St. Catharine Docks, 9 Ch. D. 503.

A bailiff is not liable for not seizing goods, of the presence of which in his bailiwick, he has no notice: Yourrell v. Proby, 2 Ir. R. C. L. 460. In an action against a bailiff for not seizing goods, he may prove that the goods were covered by a chattel mortgage and he will not then be liable: Stimson v. Farnham, L. R. 7 Q. B. 175. He is not bound to use extraordinary exertion or provide against an unexpected or unforeseen contingency: Hodgson v. Lynch, 5 Ir. R. C. L. 353.

When the bailiff fails to execute a warrant of committment, or allows the debtor to escape, not only the debtor's own resources but all reasonable probabilities formed upon his position in life and surrounding circumstances, that the debt, or any portion of it, would have been discharged if he had been taken or remained in custody, may be taken into account: McRae v. Clarke, L. R. 1 C. P. 403; but where the debtor was insolvent, nominal damages only were given: Brown v. Paxton, 19 U. C. R. 420. There must be proof of negligence: Nelson v. Baby, 14 U. C. R. 235. If the bailiff take insufficient sureties on a replevin bond he will be liable to all damages naturally flowing therefrom, not exceeding the penalty of the replevin bond: Norman v. Hope, 13 O. R. 556; 14 O. R. 287; see Yea v. Lethbridge, 4 T. R. 433; 2 R. R. 425, where the value of the goods was held to be the limit of recovery: see note in 2 R. R. 426. If a bailiff does not exact payment of his fees in advance his sureties are, nevertheless, liable: Bank of Ottawa v. Smith, 16 L. J. N. S. 223.

Misconduct.—By the express terms of the covenant, damage is of the essence of an action for misconduct. Selling a debtor's goods contrary to orders from the creditor would be misconduct: Sloan v. Creasor, 22 U. C. R. 127. The misconduct must be in the exercise of the duties of his office. The exaction of illegal fees, assuming to do more than the process justified, as by breaking open the door of a dwelling house, making false return to process, are instances of misconduct: Smart v. Hutton, 8 A. & E. 568. The sureties are not responsible for the seizure of the goods of a stranger: McArthur v. Cool, 19 U. C. R. 476. See notes to sections 219, 220.

Demand.—No demand is necessary upon the bailiff. A clerk is not permitted to transmit by post any moneys, nor to procure and transmit post-office orders therefor, except upon the written request and at the expense of the party entitled thereto. Without such direction and request, all moneys are payable at the office of the clerk: Rule 89; McLeish v. Howard, 3 A. R. 506. Except by compliance with this Rule no demand is necessary: Gibbs v. Southam, 5 B. & Ad. 911. See notes to section 41.

Sec. 26.

Parties.—A recovery against the officer will be a bar to any action against the sureties: McArthur v. Cool, 19 U. C. R. 476; Sloan v. Creasor, 22 U. C. R. 127; Miller v. Corbett, 26 U. C. R. 478; Pearson v. Ruttan, 15 C. P. 79. To any action against the sureties the officer should be a party: Exchange Bank v. Springer, 20 Gr. 270; and if the action fails against the officer, it will also fail against the sureties: Pearson v. Ruttan, 15 C. P. 79; R. v. McPherson, 15 C. P. 17.

Release.—On the subject generally see Grant on Banking, Canadian Edition (1910), p. 323, *et seq.* Any material increase in the duties of the officer will release the sureties: Pybus v. Gibb, 6 E. & B. 902; Victoria M. F. Ins. Co. v. Davidson, 3 O. R. at p. 381; Wembley v. Poor Law, 17 T. L. R. 516; or where the officer undertakes to the plaintiff additional liability: Bonar v. Macdonald, 3 H. C. L. 226: but where the duties are lessened the sureties will not be discharged: Frank v. Edwards, 8 Ex. 214; Holme v. Brunskill, 3 Q. B. D. 495. Where the limits of the court are changed it would be advisable to obtain new covenants: Thompson v. McLean, 17 U. C. R. 495; Corp. of Ontario v. Paxton, 27 C. P. 104. Where the amount or mode of payment by the officer is altered by agreement with the creditors, the sureties may be released: see London & N. W. Ry. Co. v. Whinray, 10 Ex. 77; Bank of Toronto v. Wilmott, 10 U. C. R. 73. See Bristol and West of Eng. L. M. & Inv. Co. v. Taylor, 24 O. R. 286; Union Bank v. O'Gara, 22 S. C. R. 404; Worthington v. Peck, 24 O. R. 535; Holliday v. Hogan, 22 O. R. 235; 20 A. R. 298; 22 S. C. R. 479; Farmers' Loan v. Patchett, 8 O. L. R. 569. If the creditor, by arrangement with the officer, in consideration of some responsibility incurred by him, delays his right to immediate payment of money collected, the sureties are discharged: Victoria M. F. Ins. Co. v. Davidson, 3 O. R. 378; but mere acquiescence in irregularities will not in itself effect a release: Mayor of Durham v. Fowler, 22 Q. B. D. 394; Shepley v. Hurd, 3 A. R. 540; Pirie v. Wyld, 11 O. R. 422; see County of Simcoe v. Burton, 25 A. R. 478; but any extension of time to the debtor, after judgment against the surety, will not release the latter; nor will such a release be effected if the debtor agree to obtain the sureties' consent: Duff v. Barnett, 17 Gr. 187; nor if the creditor reserves his rights against the surety: Hall v. Thompson, 9 C. P. 257; Bell v. Manning, 11 Gr. 142; but reservation of rights is only effective in regard to extension of time and not to a change in the character of the liability, as for example, increasing the rate of interest: Bristol v. Taylor, 24 O. R. 286. Such reservation may be shown by oral evidence: Currie v. Hodgins, 42 U. C. R. 601; Bank of Montreal v. McFaul, 17 Gr. 234; Gorman v. Dixon, 26 S. C. R. 87; following Wyke v. Rogers, 1 De. G. M. & G. 408; see also *Ex parte* Harvey, 4 De. G. M. & G. 881; the note to Lewis v. Jones, 4 B. & C., pp. 515, 516, and *Re* Wolmershausen, 62 L. T., at p. 546; but cf. *Ex parte* Glendinning Buck, 517, at p. 519; Overend Gurney & Co. v. Oriental Financial Corporation, 7 H. L. 348, 361; Muir v. Crawford, L. R. 2 H. L. (Sc.) 456; Boultbee v. Stubbs, 18 Ves. Jb.; Clarke v. Birley, 41 Ch. D., at p. 433. A discharge of the debtor with a reservation of remedies against the debtor's surety, operates merely as a covenant not to sue, and not as a release of the surety: Donaldson v. Wherry, 29 O. R. 552; Duck v. Mayeu, 1892, 2 Q. B. 511, at p. 514. If one of the sureties be released the other will not be liable having been deprived of his right to contribution: Evans v. Bremridge, 2 Jur. N. S. 134; Ward v. National Bank of New Zealand, 8 A. C. 755, unless he has consented thereto: Bogart v. Robertson, 11 O. L. R. 295.

But the court would endeavor to construe such release as a covenant not to sue: Dewar v. Sparling, 18 Gr. 633; the effect of which is not to release the other: Duck v. Mayeu, 1892, 2 Q. B. 511; see Wolmershausen v. Wolmershausen, 62 L. T. 541. And where a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to the claims they might have against the surety so released, by reason of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties: Macdonald v. Whitfield, Whitfield v. The Merchants' Bank, 27 S. C. R. 94. Sec. 36.

Several Actions.—The liability of each surety is limited to the amount specified in the covenant. The court will not, however, restrain proceedings instituted against the surety, notwithstanding several actions had been brought against him, and the aggregate amount sought to be recovered greatly exceeds the amount of his liability: Craig v. Milne, 25 Gr. 259; Canada Guarantee Co. v. Milne, 25 Gr. 261. Where several executions have been obtained, an order may be made in Chambers that upon payment to the sheriff of the amount of the sureties' total liability and the costs, further proceedings will be stayed: Sinclair v. Bixby, 2 P. R. 117. Relief probably could be obtained by a surety admitting his liability in whole or in part under the Rules respecting Interpleader: see Consolidated Rule 625, 648; McElheran v. London Masonic Ben. Assn., 11 P. R. 181; Reading v. School Board of London, 16 Q. B. D. 686; Anderson v. Barber, 13 P. R. 21; Leah v. Order of Chosen Friends, 27 C. L. J. 94; notes to section 215.

Contribution.—Every surety who pays more than his share of the common liability is entitled to contribution from every other surety: DeColyar on Guarantees, 3rd Ed. 338-362; Berridge v. Berridge, 44 Ch. D. 168; *Re* Macdonald, *Ex parte* Grant, W. N., 1888, p. 130; Stirling v. Burdett, 1911, 2 Ch. 418; and is entitled by action to compel an assignment of the judgment against the other, but cannot reserve thereon more than his just proportion: R.S.O. 1914, c. 133, ss. 3, 4; Phillips v. Dickson, S. C. B. N. S. 391. By s. 3 (1) of that Act he is entitled on payment of the debt, to have assigned to him or to a trustee for him, every judgment or security held by the creditor. By s. 3 (2) he is entitled to stand in the place of the creditor and use all his remedies, but he is not (s. 3 (3)) to recover more than his just proportion from a co-surety. Any action begun by the creditor may be continued in his name on proper indemnity: *ib.* s. 3 (2); and the word "recover" in section 3 (3) will not prevent the action being continued and judgment therein being obtained for the full amount of the bond, but such judgment when obtained can only be enforced for the proper proportion: Bank of Hamilton v. Kramer, 3 O. W. N. 73. Where the principal debtor gives to his sureties counter-security by mortgage of real estate, any of the sureties is entitled to enforce the security, after default, without the consent or concurrence of the others, and it is not an answer to a claim for contribution by one surety who has paid the whole debt that the security has depreciated in value and that the paying surety has refused to take any step to enforce it: Moorehouse v. Kidd, 28 O. R. 35; 25 A. R. 221.

When one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety

Sec. 26. to pay the same to the creditor or to the co-surety, if the creditor has already been paid by him: Macdonald v. Whitfield; Whitfield v. The Merchants' Bank, 27 S. C. R. 94.

Rights of Surety Against Officer.—The surety will be entitled to complete indemnification by the officer, and to all securities held by the creditor, including any judgment against the officer, though obtained in the same action: R.S.O. 1914, c. 133, s. 3. The surety will be entitled to the benefit of the judgment without obtaining an assignment of it: *Re* McMyn, Lightbown v. McMyn, 33 Ch. D. 575, but may not issue execution thereon: Potts v. Lensk, 36 W. C. R. 476. The surety is entitled to interest: Petre v. Duncombe, 2 L. M. & P. 107; but cannot recover the costs of defence unless authorized by the officer to defend: Gillett v. Rippon, Moo. & M. 406; unless his defence was reasonable: LeBlanche v. Wilson, 21 W. R. 109. The Millwall, 1905, P. 155, when his solicitor and client costs may be allowed: Smith v. Compton, 3 B. & Ad. 407: Born v. Turner, 1900, 2 Ch. 211; Barnett v. Eccles, 1900, 2 Q. B. 423.

Death of Surety.—Upon the death of a surety, the officer must give anew a like security within one month from notification by the county judge: see section 31. Until the new appointment, the personal representatives of the deceased surety will be liable: R. v. Leeming, 7 U. C. R. 306; Provisional Corp. of Bruce v. Cromar, 22 U. C. R. 321; Balfour v. Crace, 1902, 1 Ch. 733; see, however, DeColyar on Guarantees, 3rd Ed. 348.

Statute of Limitations.—If the action against the officer be barred, no action can be maintained against the sureties: Pearson v. Ruttan, 15 C. P. 79. If any action is brought upon the covenant no damages shall be recovered in the action against the surety except as to matters and causes of action which have arisen within ten years: R.S.O. 1914, c. 15, s. 13.

Freeholders.—The sureties must be freeholders: s. 26; but may be either legal or equitable freeholders. An overdue mortgage on a man's land would be no bar if the equity of redemption should be worth the amount prescribed. A freeholder is one who is seised of an estate or interest in lands or tenements which may endure forever or is limited to endure for life or lives, or for some uncertain period that may last for his life or for some other person's without being confined to a limited number of years: Smith's Real and Personal Prop., 6th Ed., section 360. Persons in possession of land, under contracts for the acquisition of the freehold thereof upon the fulfilment of certain conditions, are not freeholders: *Re* Flatt and Prescott, 18 A. R. 1; *Re* Dale and Blanchard, 21 O. L. R. 497: see also R. v. Day, 3 E. & B. 859. As to what is an equitable freeholder see, *per* Osler, J.A., 18 A. R. 18. Although not freeholders of the county the sureties would be liable: Parks v. Davis, 10 C. P. 229. They are also liable although their principal has neglected to execute the covenant: Miller v. Tunis, 10 C. P. 423; so, also, if the covenant has not been filed: Parks v. Davis, *supra*.

Residents.—Where there is nothing to show that the word is used in a more extensive sense, "resides" denotes where a person "eats, drinks and sleeps, or where his family or his servants eat, drink and sleep:" R. v. North Curry, 4 B. & C. 959, *per* Bayley, J.; the general maxim is *ubi uxor, ibi domus*: R. v. Norwood, L. R. 2 Q. B. 457; R. *ex rel.* Horan v. Evans, 31 O. R. 448. "Residence is quite distinct from

domicili, which means much more than even a place of permanent resi- Sec. 27.
dence. . . . Residence in strictness means the place where a man lives, *i.e.*, where he sleeps or is at home:" Wharton, 10th Ed. 1902, *sub voce* "abode." Cf. Foote, Foreign and Domestic Law, 3rd Ed., 1904, pp. 52, 58. It has a variety of meanings, according to the statutes in which it is used: see notes to section 72, *post*.

"The term '*resident*' does not necessarily import permanence, nor yet any definite stay": *per* Draper, C.J., La Pointe v. The G. T. Ry. Co., 26 U. C. R. 487; but it is submitted that it here means permanently resident.

If the sureties are not resident, they are nevertheless liable: Pearson v. Ruttan, 15 C. P. 79.

Within the County.—*i.e.*, county or union of counties as the case may be: the word "county" includes a union of counties: R.S.O. 1914, c. 1, s. 29 (e).

In Such Sums.—Formerly it was held to be the duty of the judge to fix the amount for which the sureties became bound, before the clerk or bailiff entered on his duties, and if the judge should fail to perform his duty under this section, an action was maintainable against him, but not unless there was actual damage: Parks v. Davis, 10 C. P. 229. But the Act has since been amended (see ss. 26 and 33 (2), *post*) so that the responsibility which formerly attached to the judge is now "judicial," and not "administrative," and, therefore, is not actionable if he fixes too small a sum. But it may be otherwise if he refuses or neglects to fix any sum: see note to s. 19 (3) on Liability of Judge, *ante*.

The sums in which the sureties are bound, should be regulated by the probable amount of business in the particular court. The usual practice is to require two sureties, but when the amount is large, it is not unusual to have three of four: 8 U. C. L. J. 121. Due regard should also be had to the increased jurisdiction of the court.

Under His Hand.—The approval must be in writing: Wilson v. Wallsni, 5 Ex. D. 155. The judge usually approves and declares the covenant sufficient in his own handwriting, but it could be done in his name by the hand of another in his presence: Bisdes v. Lawrence, L. R. 9 Q. B. 374.

Sufficient.—The judge should carefully examine the covenant, to see that it is a substantial compliance with the statutory form, and he may require affidavits of execution of the covenant and of justification by individual sureties: See Forms 8 (a) and 8 (b). If the name of some proposed surety should have been struck out and another substituted, the judge should reject the covenant; for if the other surety signed before the change, he would be released: Hansard v. Lethridge, 8 T. L. R. 346; Banque Provinciale v. Arnoldi, 2 O. L. R. 624; and the public are entitled to a covenant free from possible objections: Jones v. Macdonald, 14 P. R. 535.

Before clerk or bailiff enters on his duties, covenant to be filed with Clerk of the Peace.

27.—(1) Before a clerk or bailiff enters upon the duties of his office, the covenant of himself and his sureties, approved as aforesaid, shall be filed in the office of the Clerk of the Peace of the county in which the division is situate; and for filing the same, and granting a certificate thereof, the Clerk of the Peace shall be entitled to receive from the clerk or bailiff a fee of $1.

Sec. 28.

Renewal of clerks' and bailiffs' covenants.

(2) Where a covenant requires periodical renewal, the renewal receipt shall be filed with the Clerk of the Peace in whose office the covenant has been filed, and shall be attached to the covenant.

Fee for filing.

(3) The Clerk of the Peace for receiving and filing the receipt, shall be entitled to receive from the clerk or bailiff a fee of fifty cents. 10 Edw. VII. c. 32, s. 27.

Filing the Covenant.—The clerk or bailiff must be particular not to do anything of an official nature until his covenant, duly approved and declared sufficient, has been filed with the clerk of the peace. Pending the completion of the covenant the clerk of the peace takes possession of the office and is *ex officio* clerk of the Court: ss. 44, 45. The covenant should be executed by the clerk or bailiff; but his omission to do so would not invalidate the security or discharge the sureties who have executed it: Ranstall v. The Attorney-General, 18 Gr. 138. The filing is not complete until the covenant is marked "filed" by the proper officer: Campbell v. Madden, Dra. R. 2. But see R. v. Gould, 6 O. S. 26.

Covenant requiring periodical renewal.—A covenant requiring periodical renewal is a bond or a policy of guarantee of any incorporated or joint stock company empowered to grant guarantees, bonds, covenants or policies for the integrity and faithful accounting of public officers or other like purposes. Such a guarantee, bond, covenant or policy may be accepted for a division court clerk under R.S.O. 1914, c. 15, s. 9, and under s. 33, *post*. See section 26 and note.

The inspector of division courts exercises a watchful supervision over all covenants, and clerks and bailiffs who take out policies in guarantee companies must be careful to see that the renewal receipt is punctually filed as required by this section.

Under section 33, *post*, the Government may enter into agreements with fidelity companies to insure or guarantee clerks and bailiffs, in which event the clerk or bailiff will only require to remit to the Provincial Treasurer or the division court inspector annually the premium required, and the inspector will send the certificate to the clerk or bailiff to be filed in the office of the Clerk of the Peace. No arrangements to carry this out have yet been made.

Covenant to be available to suitors, etc.

28. The covenant shall enure to the benefit of and may be sued upon in any court of competent jurisdiction by any person suffering damages by the default, breach of duty or misconduct of the clerk or bailiff. 10 Edw. VII. c. 32, s. 28.

The Public Officers Act, R.S.O. 1914, c. 15, s. 12, which applies to and includes D. C. clerks and bailiffs, is as follows:—

"12. The security hereafter furnished on behalf of any public officer in pursuance of this or any other Act requiring security shall enure as well for the benefit of His Majesty as for that of the persons for whose benefit it is provided by the Act requiring the security or otherwise that it shall enure."

May be Sued Upon—See the provisions contained in *The Public Authorities Protection Act*, R.S.O. 1914, c. 89, s. 12.

Any Court of Competent Jurisdiction.—This will depend on the amount claimed, and the nature of the action; and if in the Division Court, also the place where the cause of action arose or where the defendants reside. See notes to section 26. Secs. 29-31.

29. A copy of the covenant, certified by the Clerk of the Peace, shall be received in all courts as sufficient evidence of the due execution, and of the contents thereof, without further proof. 10 Edw. VII. c. 32, s. 29. Certified copy of covenant to be received as evidence.

Sufficient Evidence.—This applies to criminal as well as civil courts. See B. N. A. Act, sec. 129.

Without Further Proof.—This mode of proving the covenant is only cumulative, not substitutionary: Taylor on Evi., 8th ed., 1319; see also Lynch v. O'Hara, 6 C. P. 259; Grahnm v. McArthur, 25 U. C. R. 478; Warren v. Deslippes, 33 U. C. R. 59.

30.—(1) In an action against a surety of a clerk or bailiff, the entries in the books kept by such clerk or bailiff shall be *prima facie* evidence against the surety. Entries of clerk or bailiff evidence against surety.

(2) For the purpose of this section the words "clerk or bailiff" shall include a person who has ceased to be a clerk or a bailiff, as the case may be. 10 Edw. VII. c. 32, s. 30. Interpretation of "clerk or bailiff."

Prima Facie Evidence.—This evidence may be contradicted, if untrue. Prior to the introduction of this section, the admissibility of entries in the books kept by a clerk or bailiff as evidence in an action against his sureties was doubted. It was held admissible in Middlefield v. Gould, 10 C. P. 9, but this decision was questioned in Victoria M. Fire Ins. Co. v. Davidson, 3 O. R. 378. The authority of the former case was, however, recognized in The Corp. of Welland v. Brown, 4 O. R. 217, in which the entries made by a town collector of taxes in his roll were admitted as evidence against his sureties. It was also held in a case before the Irish courts that the entries made by a rate collector in the accounts kept by him were admissible as evidence in an action against his sureties: Abbeyleix Guardians v. Sutcliffe, 26 L. R. Ir. 332.

31. If a surety dies, becomes resident out of Ontario, or insolvent, the clerk or bailiff shall, within one month after such death, departure or insolvency, give a new security, in the manner hereinbefore provided, under penalty of forfeiture of his office. 10 Edw. VII., c. 32, s. 31. If surety dies, etc., a new surety to be furnished.

Death of Surety.—See notes to section 28.

Resident Out of Ontario.—See notes to section 26 and section 72.

Insolvent.—No provision is made for ascertaining the fact of insolvency, and difficulties may be occasioned in acting upon this section: see Temple v. Stock Exchange, 8 O. R. 705. An assignment for the

Sec. 32.

benefit of creditors under The Assignments and Preferences Act, R.S.O. 1914, c. 134, would be an act of insolvency. When a contract was to terminate in the event of the insolvency of the vendee, it was held that insolvency meant a general inability to pay debts: Parker v. Gossage, 2 C. M. & R. 617; Biddlecombe v. Bond, 4 A. & E. 332. Where the office of a director was to become *ipso facto* vacated if he became insolvent, and he wrote to his creditors, asking them to accept a composition of their claims, it was held that he had become insolvent and ceased to be a director: James v. Rockwood Company, 1912, 28 T. L. R. 215. See also Queen v. Saddlers' Company, 10 H. L. C. 404.

Time for Filing Bond.—The month would not commence to run until the day after the day of such death, departure or ascertainment of insolvency: R. v. Justice of Middlesex, 7 Jur. 396; McLean v. Pinkerton, 7 A. R. 490; Ratcliffe v. Bartholomew, 1892 1 Q. B. 161; Dingor v. Matthews, 65 L. T. 748. See notes to section 43.

Judge to be Kept Informed as to Sureties.—The clerk in the case of courts held at cities and towns is required at least once in three months, and in all other cases at every sitting of the court to report to the judge in writing as to the several sureties of himself and bailiff, showing whether any of them have died, become insolvent, or left the county since his last report, or if bonded by a guarantee company, the date of the renewal of the bond, and mentioning any facts connected therewith which ought to be made known to the judge: Rule 72.

Proceedure where sureties of clerk or bailiff discontinue suretyship.

32.—(1) A surety who intends to withdraw from his suretyship may give notice in writing of his intention to the clerk or bailiff, as the case may be, and to the Judge, which may be served personally or left with a grown up person at the office or place of residence of the person to whom it is addressed, or mailed by registered post to such person at his usual post office address.

Judge to notify clerk or bailiff.

(2) The Judge receiving the notice shall forthwith notify the clerk or bailiff who shall under penalty of forfeiture of his office, in addition to the suspension hereinafter mentioned, furnish the covenant of a new surety in lieu of the surety so giving notice, and shall procure the new covenant to be approved by such Judge and filed within one month after the notices have been given to him and to the Judge.

If security not renewed Judge to suspend clerk or bailiff.

(3) If the covenant is not so approved and filed, the Judge shall forthwith suspend the clerk or bailiff and report the suspension and the cause thereof to the Inspector, and all accruing responsibility of the surety giving the notice shall cease from and after the expiration of five weeks from the day on which the last of such notices was given.

Former sureties not released.

(4) Nothing done under the provisions of this section shall discharge or exonerate any of the parties to the former covenant from liability on account of any matter done or omitted prior

to the approval and filing of the new covenant or the expiration of five weeks. 10 Edw. VII. c. 32, s. 32. Secs. 33, 34.

A Surety.—See notes to section 26.

Notice in Writing.—See notes to section 82.

Service of Notice.—See notes to section 87.

Office or Place of Residence.—See notes to sections 36 and 84.

Within One Month.—See notes to section 31.

Expiration of Five Weeks.—The liability, except as to all past transactions and matters, ceases at the expiration of five weeks from the time of giving notice.

Sub section (4), it is submitted, is only declaratory of the common law: R. *ex rel.* Flanagan v. McMahon, 7 U. C. L. J. 155; see also 9 U. C. L. J. 10. The taking of a fresh covenant could not discharge any liability on the former one.

Guaranty companies as security for Division Court clerks and bailiffs.

33.—(1) Subject to the approval of the Lieutenant-Governor in Council and to any regulations made by him, the Inspector may from time to time enter into agreements with any company or corporation empowered to make such agreements for insuring or guaranteeing the integrity and faithful accounting and performance of the duty of any clerk or bailiff named in the agreement or in any schedule thereto or whose name is subsequently added to the schedule under the terms of any Order-in-Council and agreement, and every such agreement shall enure to the benefit of the same persons, and shall be enforceable in the same manner as a covenant entered into under section 26.

Amount of security.

(2) The amount of the security to be furnished shall be determined by the Judge.

Certificate to be filed in office of clerk of the peace.

(3) Where security is furnished under the provisions of this section, the Inspector shall give to the clerk or bailiff a certificate thereof, which the clerk or bailiff shall file in the office of the Clerk of the Peace, and the filing of the certificate shall have the same effect as the filing of a covenant as provided by subsection 1 of section 27. 10 Edw. VII. c. 32, s. 33.

CLERK'S DUTIES.

Clerk to issue summonses and furnish copies, etc.

34. The clerk shall issue all summonses and shall make copies thereof with the notices thereon, according to the prescribed form, and, except as otherwise provided by this Act,

Sec. 34. shall deliver the same to the bailiff for service. 10 Edw. VII. c. 32, s. 34.

Form of Summonses, with Notices: see Form 32 *post*.

Issue all Summonses.—See notes to section 83 as to what constitutes issuing the summons. The summons is the commencement of the action; Rule 3; and no valid decision or judgment can be given unless a summons is issued and served: Thorburn v. Barnes, L. R. 2 C. P. 401; or waived by the defendant's appearance: Merchants Bank v. Van Allen, 10 P. R. 338; R. v. Smith, L. R. 1 C. C. 110; Blake v. Beech, 1 Ex. D. 320; Stoness v. Lake, 40 U. C. R. 320, at p. 327, "A man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless, indeed, the legislature has expressly or impliedly given an authority to act without that necessary preliminary." *per* Parke, B., Bonaker v. Evans, 16 Q. B. 171. The rule is of *universal application*, and founded upon the plainest principles of justice, which requires the tribunal invested with power to affect the property of the subject to give that subject an opportunity of being heard: *Per* Willes, J., Cooper v. Board of Works, 14 C. B. N. S. 180, at p. 190. See also Bullen v. Moodie, 13 C. P. 126, 2 E. & A. 379; Nichols v. Cumming, 1 S. C. R. 395; R. v. Cheshire Lines Com., L. R. 8 Q. B. 344; R. v. Archbishop of Canterbury, 1 E. & E. 545; Tucker v. Collinson, 16 Q. R. D. 562; R. v. College of Physicians, 44 U. C. R. 146; Marshall v. McRae, 17 A. R. 130, reversed on the construction of the agreement, 10 S. C. R. 10.

A summons should not be issued by the clerk where clearly the court has no jurisdiction or where the process of the court is intended to be used for improper purposes, or in an illegal manner; but it would be no part of his duty to enter into nice questions of law.

Suits to be Numbered.—Every claim (as well as the summons) must be numbered by the clerk in the order in which it is received by him: s. 83.

The issue of a summons with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions, is a mere matter of practice to be dealt with by the judge, and does not affect the jurisdiction of the court: *Re* Cerow v. Hoyle, 28 O. R. 405. But it is submitted that the summons, when delivered to the officer for service, should be a perfect process, and he is bound to perform this at the risk of a mandamus: R. v. Fletcher, 1 E. & B. 279; *Re* Linden v. Buchanan, 29 U. C. R. 1, and cases cited *post*, title "*Mandamus*."

As to further duties of clerks respecting summonses, see sections 35 and 83 and Rule 3.

Bailiff for Service.—See section 46 and notes. No one other than the bailiff or his deputy can lawfully serve a summons, except in the few special cases provided for by the Act, as to which, see notes to s. 46: *Re* Wilson v. McGinnes, 10 O. L. R. 98.

Fraud by Debt Collectors.—Section 2 of *The Debt Collectors' Act*, R.S.O. 1914, c. 227, is as follows:—

"(2) Every person, whether principal or agent, who prints or publishes any notice or form which is an imitation or a colourable imitation of any of the forms appended to *The Division Courts Act*, and which is calculated to deceive the public by inducing the belief that such notice or

form is a notice or form from the said Court, or is part of the process of a Division Court, or who issues or makes use of any such notice or form in connection with any collection agency or otherwise, shall incur a penalty not exceeding $20, for every day on which any such offence is committed, recoverable under *The Ontario Summary Convictions Act*." Sec. 35.

35. The clerk shall cause a note of all summonses, notices, orders, judgments, warrants, executions and returns thereto, to be entered in a book to be kept in his office, and shall sign his name on every page of the book; and the signed entries, or a copy thereof certified as a true copy by the clerk, shall be sufficient evidence of such entries and of the proceedings referred to therein, without further proof. 10 Edw. VII. c. 32, s. 35. Clerk to keep a record of process.

Enter in a Book.—This is what is known as the "Procedure Book:" Rule 66 (1) and sec. 36. As to the form of Procedure Book, see section 36 and Forms 2 and 3. Rule 66 enumerates the books which shall be kept by the clerks, and sums up the duties of clerks and bailiffs with reference to the Procedure Book and Fee Book, and makes provision for an Index to the Procedure Book and the form of such index. The Fee Book is also provided for in section 60. A Debt Attachment Book was formerly required by section 164 of the D. C. Act of 1910. But this section was repealed by 3-4 Geo. V. c. 18, s. 14 (3), and does not appear in this Act.

Shall Sign His Name.—This is imperative. If omitted, perhaps neither the original entries, certainly not copies, could be given in evidence. The statute says, "*signed entries*": see R. v. Rowland, 1 F. & F. 72.

The object is to have a complete record of everything done in each suit or proceeding before the court. Rule 66 requires that a note shall be made of all process issued, and of all orders, judgments, transcripts received, warrants, executions and returns thereto, and of *all other proceedings*. The entries should include all notices given and received, instructions received from the parties to the suit, and the names and addresses of the plaintiff and defendant, and of their solicitors or agents.

Each page of the book should be signed by the clerk as soon as an entry is made on it. Every clerk should make himself familiar with the section and the rules applicable thereto.

Certified Copy to be Evidence.—For form of certificate, see form No. 78.

This section is a pretty close transcript of section 111 of the English statute, 9 & 10 Vic. c. 95, continued by section 28 of *The County Courts Act*, 1888, 51 & 52 Vic. c. 43. It has been decided under that Act that a minute of the proceedings made by the clerk, pursuant to this provision, is conclusive evidence of them, even though the judge gives evidence to the contrary: Dews v. Riley, 11 C. B. 434. The clerk's book, or a certified copy of entries from it, is the best, and therefore the only evidence of proceedings: R. v. Rowland, 1 F. & F. 72, *per* Bramwell, B., Roscoe's Crim. Evi., 13th ed., pp. 2 and 143. But see R. v. Brompton C. C., 18 Q. B. D. 213; 13 App. Cas. 20, in which the above decisions do not seem to have been followed. An entry in the Procedure Book, "struck out for want of jurisdiction, on the ground of a disputed title having

Sec. 35. been sworn to," is not evidence of a judgment in replevin: Tuhhy v. Stanhope, 5 C. B. 790. The entries made hy a clerk in pursuance of this section are evidence against the sureties of such clerk: Middlefield v. Gould, 10 C. P., at p. 14; see Carmarthen and Cardigan Ry. Co. v. The Manchester and Milford Ry. Co., L. R. 8 C. P., at p. 69; section 30 and notes.

A certified copy of minutes expressed to be of proceedings before a deputy of the county court judge, was held to be sufficient evidence of the regularity of his appointment on an indictment for perjury: R. v. Roberts, 38 L. T. 690.

The Ontario Evidence Act, R.S.O. 1914, c. 76, s. 26, provides that where the original record (*e.g.*, the "signed entries" mentioned in the above section) could be received in evidence, a copy of any official or public document in Ontario, purporting to be certified under the hand of the proper officer or the person in whose custody such official or public document is placed, shall be receivable in evidence without proof of the official character of the person or persons appearing to have signed the same, and without further proof thereof.

The Canada Evidence Act, R.S.C. c. 145, s. 23, also provides that evidence of any proceeding or record in any court in any province of Canada, may be made by a certified copy under the seal of such court, without proof of the authenticity of such seal, or other proof whatever; see also s. 24 of the same statute.

Section 35 of that statute also provides that in all proceedings over which the Parliament of Canada has legislative authority, the laws of evidence in force in the province in which the proceedings are taken shall apply to such proceedings.

The evidence which is sufficient in civil proceedings in the province to prove a material fact, is also sufficient to prove that fact in a criminal proceeding, and a certified copy of the signed entries in the division court procedure book, is receivable as evidence in any case civil or criminal: R. v. Rapay, 7 Can. Cr. Cas. 179; O'Neil v. Atty.-Gen., 26 S. C. R. 122.

But in perjury cases, evidence of the previous proceedings in which the perjury is alleged to have taken place, can only be given in the mode prescribed by s. 979 of the Criminal Code: R. v. Drummond, 10 O. L. R. 546; unless it is shewn that no record of such previous proceedings had been kept, the matter having been tried orally, or that the record had been lost or destroyed; and in such case oral evidence of the proceedings may be given: R. v. Yaldon, 17 O. L. R. 179; and see notes in 14 Can. Cr. Cas. 168.

Books to be kept by Clerks.

36.—(1) A Procedure Book, Form 2, and a Foreign Procedure Book, Form 3, shall be kept by the clerk.

Form 2 and 3.—(See same Forms 5 and 6 to Rules). These forms are imperative.

Procedure Book.—See notes to section 35. Every clerk of a division court for a division embracing a city or part of a city shall keep a separate book, in which he shall enter from day to day all fees, charges and emoluments received by him by virtue of his office, shewing the sums received by him for fees, charges and emoluments of all kinds whatsoever: R.S.O. 1914, c. 15, s. 15; section 60 *post* also contains a similar provision, applicable to all division court clerks.

See notes to s. 53, for a full list of books required to be kept by the clerk and bailiff. Sec. 37, 38.

Form of Clerk's certificate of entries in Procedure Book, No. 78.

(2) Where the fees and emoluments earned by him are less than $500 a year the costs of all forms and books required by this Act to be kept by the clerk or bailiff shall be repaid to him by the treasurer of the county. 10 Edw. VII. c. 32, s. 36; 3-4 Geo. V. c. 18, s. 14 (1). When county to provide books and forms.

By the County, or union of counties, as the case may be: R.S.O. 1914, c. 1, s. 29 (e).

Earned.—Whether paid or not.

37. The clerk, when required, shall forward the summons and copies for service to the clerk of any other court who shall receive and deliver them to the bailiff for service, and when returned shall send the summons to the clerk from whom it was received, and shall enter the proceedings in the Foreign Procedure Book. 10 Edw. VII. c. 32, s. 37. Forwarding summonses for service in other divisions.

Shall Receive any Summonses.—The clerk may, under section 40, insist on prepayment of his own and bailiff's fees: see notes to that section.

Rule 76 requires the Clerk to give a detailed statement of the charges for fees and disbursements, and in case of overcharge it is the duty of the Clerk of the Home Court to report the same to the Inspector.

38. The clerk shall issue all warrants and executions; and shall tax costs, subject to revision by the Judge, and shall keep an account of all fines payable or paid into court, and of all suitors' money paid into and out of court, and shall enter an account of all such fines and money in a book to be kept by him for that purpose, which shall be open to all persons desirous of searching the same, and shall at all times be accessible to the Judge and the Inspector. 10 Edw. VII. c. 32, s. 38. Clerks to issue executions, tax costs and keep account of fines, etc.

Warrants and Writs of Execution.—All summonses, executions and warrants are to be printed on half sheets of foolscap paper: Rule 38. A mandamus will lie to compel a clerk to issue execution: R. v. Fletcher, 2 E. & B. 279; R. v. Surrey, C. C., 21 L. J. Q. B. 197.

Taxation of Costs.—Where practicable, costs are to be taxed on the day on which the action is tried and heard, and every taxation is subject to the revision of the Judge: Rule 75. It is intended that the Judge's decision on the question of the amount of costs should be obtained at the trial; and it is submitted that judges should, in all cases where the court is held out of the county town, revise the costs in each action on the day of trial.

Sec. 39.

On payment of a fee of ten cents, and necessary postage, the clerk must furnish the party paying costs with a statement in writing, giving the items, including bailiff's fees in detail: Rule 73.

As to the question of costs, see section 170, and notes thereto.

For form of affidavit of disbursements to witnesses, see Form 20. The affidavit may be sworn before the clerk or deputy clerk of any division court or before a justice of the peace, notary or commissioner: s. 120 (1); but not before the agent of the party on whose behalf it was made nor before the clerk or partner of such agent: s. 120 (2); it may be made by the party or his agent, and should be in the hands of the clerk at the latest on the day before the execution is due: 1 U. C. L. J. 81. Where execution is "forthwith," a reasonable time should be allowed the successful party to put in his affidavit, and, in the case of a nonsuit or judgment for defendant, the latter is not, it is submitted, restricted as to time.

Revision of Taxation.—It is submitted that the proper practice for revision of taxation is for the party dissatisfied to give notice to the opposite party and the clerk of the court of his intention to have the judge revise the taxation of costs on a certain day and hour. A reasonable time should be allowed. The papers in the case should be laid before the judge; and in the event of the parties not appearing, an affidavit of service of the notice of revision. Payment of costs, even *without* protest, does not prevent a revision: Kormann v. Tookey, 6 P. R. 112. If an affidavit of payment of witness fees should be filed, and it should appear on revision that they had not been paid, they would be disallowed: Hornick v. Tp. of Romney, 11 C. L. T. 329; Harding v. Knust, 15 P. R. 80.

Of course the judge could revise the costs on summons or appointment made by him. The clerk should exercise his best judgment on taxation, and not leave for the judge on revision that which he should properly do himself: Simmons v. Storer, 14 Ch. D. 154; Hargreaves v. Scott, 4 C. P. D. 21.

The judge cannot lay down a general practice that only costs of such witnesses as are called shall be allowed, except on an application to him: The Cashmere, 62 L. T. 814.

No general rule laid down by the judge is of any validity, and merely to act in obedience to such rule is not an exercise of discretion: R. v. Marylebone C. C., 34 Sol. J. 459.

Fines.—See notes to section 222.

Suitor's Moneys.—Provision is made for the account here referred to in Rule 66 (2), by which it is provided that these entries are to be made *from day to day* in a cash book (Form 1 to Rules), to be kept by the clerk.

As to disposal of suitors' moneys, see s. 42; Rules 71, 89, 90, 91, and notes thereto.

Fines and penalties to be paid to Clerk of Peace.

39. The money arising from any penalty, forfeiture or fine imposed by or under authority of this Act, not directed to be otherwise applied, shall be paid to the clerk and shall be paid by him to the Clerk of the Peace, to be paid over to the Treasurer of Ontario. 10 Edw. VII. c. 32, s. 39.

Secs. 40-42.

40. The clerk shall, at least once in every three months and oftener if required by the Clerk of the Peace, deliver to him a full account in writing verified by affidavit of all fines levied, accounting for and deducting the reasonable expenses of levying the same, and any allowance which the Judge may make out of such fines in pursuance of the power hereinafter given. 10 Edw. VII. c. 32, s. 40.

Clerks to deliver to Clerk of Peace a verified account of fines.

Arising from any Penalty.—See sections 110 (disobeying subpœna); 138 (jurors disobeying summons); 139 (neglect of clerk of municipality); 217 (contempt of court); 218 (resisting officer). An action would lie against the clerk's sureties for non-payment.

Verified by Affidavit.—See Form of Account and Affidavit, No. 80, which may be adapted to suit the circumstances.

41. The clerk when required by the Judge shall furnish him with a full account in writing, verified by affidavit, of the money paid into or out of the court under orders, judgments or process of the court, and of the balance in court belonging to suitors or others. 10 Edw. VII. c. 32, s. 41.

And furnish Judge with a verified account of moneys paid in and out of Court.

Moneys Received. — This refers to moneys received from all sources as well as fines and forfeitures.

42.—(1) Immediately after the receipt of any sum of money for any person, the clerk shall forward a notice thereof by registered post, to the person entitled to receive the same; and shall obtain and file among the papers in the action the post office certificate of the registration, and shall deduct the postage from the money in his hands, but shall charge no fee for the notice.

Clerk to mail notice of payment of money. Registration certificate to be with papers.

(2) The absence of the certificate of registration from among the papers in the action shall be *prima facie* evidence against the clerk that the notice has not been forwarded. 10 Edw. VII. c. 32, s. 42.

Effect of absence of certificate.

Immediately After the Receipt.—The word "immediately" here used, denotes both an imperative and peremptory command. It implies "prompt, vigorous action, without any delay." When the act is one which is capable of being done without delay no delay can be permitted: per Jessel, M. R., *Re* Southam, *Ex parte* Lamb, 19 Ch. D. 169; see also Forbes v. Cohh, 18 Q. B. D. 494, at p. 504; Lowe v. Fox, 15 Q. B. D. 679, per Bowen, L. J.; Stroud, 301; Barker v. Lewis & Peat, 1913, 3 Ch. 34. It will be observed that the words here employed are "*any sum.*" Whether the sum be large or small the notice is required to be given by the clerk. The party entitled to the notice could waive the giving of it; but in order to justify the clerk in omitting to give it, he should, for his own protection, take the waiver in writing. Should the

Sec. 42. inspector find that such notice had not been given in any case where not dispensed with, he would probably reprimand the officer, and if such practices became general, it would be his duty to report such conduct to the Government, under section 53 (*g*) of this Act. Should the provisions of the section not be complied with the executive has, under section 22, and R.S.O. 1914, c. 1, s. 28 (k), the power to exercise a summary remedy. No particular form of notice is necessary so long as it gives the necessary information. It may be in the following form or to the like effect:

In the Division Court of the county of , A. B., Plaintiff v. C. D., Defendant. Take notice that the sum of $ has this day been paid into court to your credit in this cause.

Dated this day of , 19 .

(Clerk.

To A. B., the Plaintiff (or *as the case may be*).

On entering a claim for suit or a notice of defence, the parties are required to leave their addresses, or that of their solicitors or agents, and the delivery of any notice to them or the mailing thereof to such address by the clerk is sufficient service; Rule 84. The notice to be given under this section must be sent by mail and registered, and the registration receipt kept with the papers as evidence of compliance with the requirements of the section: see also Rule 78.

Clerk to Pay over Moneys on Demand.—By Rule 89, all money is payable to the parties at the clerk's office without payment of any fee; but if the party entitled to it desires money sent to him, written directions as to the mode of transmission are to be given, and the money so transmitted will be at the risk of the party giving directions and sent at his expense, which may be deducted by the clerk from the moneys in his hands: Rule 89. An action is not maintainable against the clerk, or his sureties for failure to pay money in his hands without demand at his office or the written directions above mentioned: McLeish v. Howard, 3 A. R. 509.

Rule 89 is incomplete, as it does not expressly impose upon the clerk the duty of transmitting the money in the manner requested by the person entitled to it. The old rule (159) required the clerk to transmit the money by post, or to procure and transmit a post office order for it. Under the present rule a question may arise as to the liability of the clerk for non-payment, without a demand being made at his office or an express refusal by him to pay the money, sufficient to waive any such demand.

See Rules 70, 72, and 81.

Claim Entered by a Solicitor or Agent.—When money is received by a clerk in a suit entered by a solicitor or agent who has paid the deposit or is responsible for the costs, such money shall not be paid out to the person beneficially interested therein, without notice to the solicitor or agent, unless upon the order of the judge: Rule 71. This practically gives the solicitor or agent entering the claim a lien for any deposit made by him and for costs which he may have paid to the clerk or for which he is responsible.

Clerk not to Take Money Except in Actions in His Own Court.—The clerk and bailiff must not receive money in any suit where the summons is merely forwarded for service. No clerk shall be allowed

to receive any money from any defendant or party to a suit in settlement or on account of any debt or costs, unless a suit has been commenced for the recovery thereof in his own court, or the claim is actually in his hands for suit, or a transcript of judgment has been sent to him from some other court: Rule 81. Sec. 43.

Transcript of Judgment from Another Court.—The clerk of the foreign court must not transmit the money, when collected, to the clerk of the home court nor to any person without a written order signed by the party entitled to it: Rule 80.

Moneys Cannot be Withheld on any Pretence.—The clerk and bailiff cannot on any pretence whatever withhold suitors' moneys. It is the property of the suitor and no deduction can be made therefrom except for unpaid costs in the action in which such moneys are recovered: Rule 70.

Clerk annually to make list of suitors' money in court for 6 years.

43.—(1) The clerk shall annually, in the month of January, make out a correct statement of all sums of money belonging to suitors or others which have been paid into court and have remained unclaimed for six years before the last day of the month of December then last past, specifying the names of the persons for whom or on whose account the same were so paid.

List to be put up in court-room and Clerk's office and sent to Provincial Treasurer and Inspector.

(2) The clerk shall keep one copy of the statement posted up in his office and another copy in some conspicuous part of the Court House or place where the court is held, and copies shall also be sent to the Treasurer of Ontario and the Inspector.

Unclaimed moneys to be paid over to Clerk of Peace and by him to Treasurer of Ontario.

(3) All such sums shall form part of the Consolidated Revenue Fund, and shall be forthwith paid over by the clerk or officer holding the same to the Clerk of the Peace of his county, to be paid over to the Treasurer of Ontario; and, except by leave of the Lieutenant-Governor in Council, no person shall be entitled to claim any such sum which has remained unclaimed for six years.

Claims of persons under disability not to be prejudiced.

(4) The time during which the person entitled to claim the money was an infant or of unsound mind, or out of Ontario, shall not be taken into account in computing the six years 10 Edw. VII. c. 32, s. 43.

Returns of Fees, etc.—For the various returns to be made by Division Court clerks, see note to s. 59 *post*.

In the Month of January.—That is *during* that month, and properly not before it commences nor after it expires: Beaty v. Fowler, 10 U. C. R. 382.

Return to be Made Under Oath.—The list of unclaimed moneys required by this section must be made under oath: see Form 80. And the moneys (if any) therein mentioned are to be paid to the clerk of the

Secs. 44, 45.

pence, and if no money remains unclaimed, the fact shall be stated in the affidavit: See Form 80.

Keep Posted Up.—That is to keep it posted up during all the year, until the following year's statement is posted up. It is to be noticed that the present statute requires copies of the statements to be transmitted to the Hon. The Provincial Treasurer (Parliament Buildings, Toronto), and also to the Inspector (same address); see also Rule 90 to the same effect.

Unclaimed for the Period of Six Years.—This is virtually a Statute of Limitation upon the rights of the party for whom or to whose use the money was paid in: see Williamson v. McCrary, 33 Ark. 470.

But it is submitted that the forfeiture here declared can only come into operation where the party entitled has either notice of it, under the next preceding section, or otherwise. It might be that a clerk would fail to give notice of the money having been paid in, or he might deny that he received it, so that, under these circumstances, it would not be "unclaimed" money within the meaning of this section: Gibbs v. Guild, 9 Q. B. D. 59; see also Buili Coal Company v. Osborne, 1899, A. C. 351.

The wrong of another should not operate as a confiscation of the property of an innocent party: see Atty.-Gen. v. O'Reilly, 6 A. R. 570. In this view the six years would only commence to run when the party entitled knew, or should but for his own neglect have known, that it was in court for him.

Infant or Person of Unsound Mind.—The time would cease to run while any of these disabilities continued: contrast Penny v. Brice, 18 C. B. N. S. 393. The section is, as regards mental disability, somewhat different from the Ontario Statute of Limitations, R.S.O. 1914, c. 75, s. 51.

DISPOSAL OF BOOKS AND PAPERS WHEN CLERK OR BAILIFF CHANGED.

Upon resignation, removal or death of clerk, Clerk of Peace to become possessed of papers.

44. All accounts, money, books, papers, documents, and other things in the possession of a clerk or bailiff by virtue of or appertaining to his office, shall, upon his death, resignation, or removal, immediately become the property of the Clerk of the Peace, who shall hold the same until the appointment of another clerk or bailiff, to whom he shall deliver over the same, when security has been furnished on behalf of such clerk or bailiff. 10 Edw. VII. c. 32, s. 44.

Clerk of Peace to act as clerk when office of clerk is vacant.

45. Upon the death, resignation, suspension or removal of the clerk, the Clerk of the Peace shall be the clerk until a successor is appointed or the suspension is removed; and the Clerk of the Peace shall be paid by the corporation of the county for his services in taking over the office the sum of $5 together with actual disbursements. 10 Edw. VII. c. 32, s. 45; 2 Geo. V. c. 17, s. 14 (1).

See Also section 18 (3) *ante*, as to delivery of papers to the clerk of the court to which an action has been transferred. Sec. 45.

Resignation, Removal or Death of Clerk. — See sections 28-33 and notes thereto.

Immediately.—It is submitted that from the object and contents of this section "immediately" must be read *instantly*: See notes to sections 24, 42; Thompson v. Gibson, 8 M. & W. 281; Forsdyke v. Stone, L. R. 3 C. P. 607; Stroud, 365.

Wrongfully Withholding Moneys, Books or Papers.—Section 17 of R.S.O. 1914, c. 15, as amended by 4 Geo. V. c. 2, s. 4 (Sch. 19), applies to all public officers including division court clerks and bailiffs, and is as follows:

"17. Where a person who has been, but has ceased to be, a public officer, retains possession of any accounts, moneys, books, papers, matters or things which have been in his possession as such officer, a Judge of the Supreme Court, or the Judge of any county or district court, upon application of the successor in the office of such person or of the Attorney-General or of some person by his authority, and on notice to the person affected, may order that such accounts, moneys, books, papers, matters and things be forthwith delivered to such successor in office or to such person as the Judge may direct, and in default that such person be committed to the common gaol of the county or district in which he resides for such period as the Judge may direct, or until he complies with the directions of the order, and may authorize the sheriff of any county or district in which the same may be found to forthwith seize and take such accounts, money, books, papers, matters and things, and deliver the same to the persons to whom they have been directed to be delivered."

This section is restricted to the case of a person who has ceased to be a public officer, and does not cover or provide any remedy against an officer who has not ceased to be such but illegally or wrongfully withholds any moneys, papers or books; nor the case under section 18 (3) of a clerk who refuses to deliver up papers which belong to another division on the dissolution of a union of counties and re-arrangement of the courts; nor does it cover, as the former section did, the case of a person other than the officer who retains papers which may have come into his hands upon the death of the officer or otherwise. But section 391 of the Criminal Code, makes it a criminal offence for a public officer in the service of the Government of any province of Canada to refuse to deliver up to any one authorized to demand the same, any money, book or paper which has been entrusted to his keeping: section 164 of the Criminal Code also makes it a criminal offence for any one to disobey any Act of any legislature of Canada by wilfully omitting to do any act which it requires to be done, unless some other mode of punishment is expressly provided by law.

Thus the remedy provided by the above s. 17 is quasi-criminal. It is submitted that it is within the powers of the Provincial Legislature under the B. N. A. Act, s. 92 (15), authorizing the legislature to exclusively make laws for the "imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects" over which the province has jurisdiction: see R. v. Hodge, 9 App. Cas. 117; R. v. Wason, 17 A. R. 221, 240; R. v. Boardman, 30 U. C. R. 553. If *ultra vires* the original section 48 of the Division Courts Act, chapter 19 of

Sec. 46. the Consolidated Statutes of Upper Canada, would remain in force: Atty.-Gen. for Ontario v. Atty.-Gen. for Dominion, 1896, A. C. 348; Rex v. Horning, 8 O. L. R. 215.

The statute is peremptory and the mere default of the person disobeying the judge's order makes him liable to imprisonment.

On Notice.—In writing: s. 82; and must be served personally on the "person affected," personal service being necessary in all cases involving the liberty of the subject: McKeown v. Joint Stock Inst., 1899, 1 Ch. 671; *Re* Cunningham, 55 L. T. 766; Crysler v. Campbell, 1 U. C. R. 416; Morphy v. Feehan, 2 Ch. Ch. 53; McAvilla v. McAvilla, 6 P. R. 311; Tartar v. Roe, 68 L. T. 213; and a reasonable time in which to obey the order should be allowed before the commitment to gaol, is awarded: Berry v. Donovan, 21 A. R. 14.

Order of a Judge.—It must not be conditional: Chichester v. Gordon, 25 U. C. R. 527; Woitz v. Blakely, 11 P. R. 430.

Common Gaol of the County.—It must not be to the gaol of any other county than that in which the person arrested resides: Switzer v. Brown, 20 C. P. 193; *Re* Weatherly, 4 P. R. 28; Schnelder v. Agnew, 6 P. R. 338.

The person charged must either disprove the charge in the way pointed out by this section, or stand his trial, or be discharged on *habeas corpus*.

The Clerk of the Peace.—See R.S.O. 1914, c. 60, s. 11. The clerk of the peace while acting as clerk of a division court is not required to give security. The duties imposed upon him would be enforceable by mandamus.

DUTIES OF BAILIFFS.

Bailiffs to serve process.

46. The bailiff shall promptly serve and execute all summonses, orders, warrants, and executions delivered to him by the clerk, and shall so soon as served or executed return the same to the clerk; but, subject to the provisions of section 72, he shall not be required to travel beyond the limits of his division, or be allowed to charge mileage for any distance beyond the limits of the county in which is situated the division for the court of which he is bailiff. 10 Edw. VII. c. 32, s. 46.

Service of Summons.—By section 34 it is made the duty of the clerk to deliver all summonses to the bailiff or his deputy, or acting bailiff for service; and no one else has a right to serve them: *Re* Wilson & McGinnis, 10 O. L. R. 98; except under the circumstances mentioned in s. 91. See also, s. 84 and notes thereto.

Duties of Bailiffs.—The word "bailiff" applies to the deputy or acting bailiff: R.S.O. 1914, c. 1, s. 28 (i); also s. 25 (2) *ante*. Besides the provisions of the statute as set out in this and the following sections, there are various other duties which the bailiff is required to perform and which are designated in the sections of the Act and the rules applicable to the proceedings to which such duties refer. The first

thing a bailiff should do is to make himself familiar with these sections Sec. 46.
and rules and with the decisions of the courts in respect to them, so that in the performance of his duties he will be enabled to act intelligently and in the confidence that what he is doing is the proper thing to do in the circumstances in which he is placed.

The bailiff should attend at the clerk's office regularly to receive instructions from the clerk as to matters which may require his attention and to receive summonses and other process for service. He is required to keep such book or books, and in such form, as the Inspector may direct: Rule 92. A book entitled "The Bailiff's Book" is given in Form 7 to the Rules. He is required to give full information at all reasonable times to any party interested as to the execution or non-execution of process: Rule 93. He is also required to keep a "Fee book" and enter therein from day to day all fees, charges and emoluments received by him by virtue of his office: s. 60, and to make a return under oath to the Inspector on the 15th January in each year of the aggregate amount of fees, &c., up to the end of the previous year, which he has become entitled to receive: section 60. He is not now required to keep a cash book, the book in Form 7 shewing particulars of all payments of moneys received by him. A bailiff may doubtless call in assistance, when necessary, in the execution of his duty, and every assistant acting under his direction will be within the protection of the statute. Such assistants are also referred to in section 218; see 2 U. C. L. J. 85; 9 U. C. L. J. 68, 69.

The bailiff will best consult the interests of suitors and observe his duty who quietly but firmly performs his unpleasant work, not with an oppressive hand but in a kindly and becoming manner, neither courting the favor of the creditor nor exciting the ill-will of the unfortunate debtor. Reasonable forbearance may frequently be the means of obtaining a debt, while harshness and severity will often produce a fruitless execution. But there should be no temporizing or unnecessary laxity allowed in carrying out the provisions of the law with respect to the process of the court. Complaints are frequently made that bailiffs do not use due diligence in the service of summonses, and it is thought by many that no remedy exists for such neglect. This is wrong. Every bailiff receiving a summons for service must *promptly* serve the same and *immediately* after service make a return to the clerk: s. 46. This contemplates that there must be no delay either in the service or the return.

If the proceedings in a suit are hindered or delayed by the neglect or misconduct of a clerk or bailiff, such clerk or bailiff forfeits his fees in the suit and must in addition pay any loss or damage resulting from the delay: s. 221; Rule 80. Delay in the service or return of the summons will, therefore, not only subject the bailiff to loss of his fees, but he and his sureties are liable to any damages resulting from such delay. Executions should also be promptly returned: s. 46; or renewed: s. 180, as required by the statute and rules (85, 86) and clerks should see that the strict letter of the law is carried out in this respect. The practice of renewing executions without instructions from the execution creditor is a dangerous one and may involve unpleasant consequences to the clerk and bailiff as well as their sureties. The provisions of sections 46 and 180 should, therefore, be carefully followed.

It is highly improper for bailiffs to canvas parties for their votes in political elections: *per* Morrison, J., North Victoria Election Case, 1 Hodgins' E.C. 612.

Sec. 47.

Service of Process.—The bailiff is made responsible for the service and execution of all process, but he is not bound to travel out of his own division: s. 46. If he intends to refuse to serve or execute any process on this ground he should notify the clerk and refuse to receive the same. He has no rights in any other county unless the case falls within section 72. He may effect service in another county but cannot charge mileage for any distance travelled beyond his county: s. 46.

If the time for service has expired before service is effected the summons must be returned to the clerk with a statement of the reason for non-service in writing endorsed upon it: Rule 105; in which case the clerk must add a new notice of the sittings of the court at the foot of the summons and return the summons to the bailiff at once: *ibid*: Rules 190, 191.

All process of execution and warrants must be executed by the bailiff personally: 9 U. C. L. J. 69; see *Re* Hendry, 27 O. R. 297. See notes to section 194.

Bailiff to Report at Every Sitting of the Court.—Bailiffs are required—those of courts in cities and towns at least once in every half year, those of other courts at every sitting of the court, and at such other times as the judge shall require—to deliver to the clerk a statement, under oath, (Form 91) of every warrant and writ of execution in his hands, and of what shall have been done since his last return under every warrant and writ of execution, which he shall have been required to execute: Rule 101. This statement is for submission to the Judge, and should be laid before him at the opening of every court: Rules 101, 102; and the clerk must file it in his office, where it may be inspected by any person interested: Rule 102. Within ten days after the receipt of such statement the clerk is required to endorse thereon a memorandum in the form given in the Rule, if the statement be found correct, and if incorrect he must forthwith give notice thereof to the Judge, and if no return be made he shall notify the Judge: *Ib.*

Bailiff's Functions at Sittings.—The bailiff must attend every sitting of the court and see that all suitable preparations are made for the proper accommodation of the court. He must make all necessary proclamations, preserve order, call the parties and witnesses, and perform such other duties as may be imposed by the judge: Rule 94.

Service if no Bailiff.—By section 91 if there is no bailiff or he is under suspension the Judge may appoint a bailiff *pro tempore*.

Service on Sunday.—Would be void: see notes to s. 21 on "Sunday and Holidays."

Return the Same.—See Forms of Returns under s. 173.

FEES OF CLERKS AND BAILIFFS, ETC.

Clerk and Bailiffs to be paid by fees.

47.—(1) The clerk and the bailiff shall be paid by fees, as provided and allowed by the general rules or orders heretofore in force or hereafter to be made by the Board of County Judges, and approved under the provisions of this Act.

(2) A table of the fees shall be kept posted up in some conspicuous place in the office of the clerk. Sec. 48. Table of fees to be posted up in clerk's office.

(3) Until otherwise provided by general rule or order, the fees to be taken and received by appraisers shall be as follows:— Fees of appraisers.

To each Appraiser, during the time actually employed in appraising goods *(to be paid in first instance by the plaintiff and allowed as costs in the cause)*.....*One dollor per day.*

10 Edw. VII. c. 32, s. 47.

(4) Where the fees and emoluments earned by a clerk or bailiff are less than $500 a year, the local municipality in which the Division Court is held shall pay to the clerk and bailiff respectively the sum of $2 for attending each sitting of the Court.

This sub-section was inserted by Ont. Stat. 4 Geo. V., c. 2, Schedule, Item, 19; and is declared by same statute, s. 4 (2), to be in force on and from 1st March, 1914. The Division Courts Act, R.S.O. c. 1914, came into force by Proclamation of the Lieutenant-Governor on the 1st March, 1914: see R.S.O. c. 2, s. 4, and Proclamation, dated 12th Feb., 1914 (R.S.O. 1914, 3rd vol., p. cxli.).

Fees.—The tariff of fees, marked "Clerk's Fees" and "Bailiff's Fees," contains all the services for which these officers are entitled to charge: Rule 55. No local tariff or user in any particular county can give any additional right: *Re* Dartnell and the Quarter Sessions of Prescott and Russell, 26 U. C. R. 430; see The Cashmere, 15 P. D. 121; R. v. Marylebona C. C., 34 Sol. J. 459. For Schedules of Fees see Forms at the end of the Rules, *post*; and for fees in suits under $10 see section 48. A clerk or bailiff who is guilty of extortion may be forever disqualified for holding any Division Court office: s. 220; and by s. 219 a summary method is provided for dealing with a bailiff or clerk guilty of extortion, or misconduct, or failing to pay over moneys.

48.—(1) Where the claim sued for, exclusive of interest and costs, does not exceed $10, the tariff of clerk's or bailiff's fees shall not apply, except the fees for mileage to a bailiff, the fees for enforcing the warrant of attachment, warrant against the body or summons in replevin, and the fee allowed to the clerk for receiving papers from another division for service, entering the same, handing the same to the bailiff and receiving and entering his return. Cases where amount involved not more than $10.

(2) The fees taxable to the clerk and bailiff in an action in which the sum sued for as aforesaid does not exceed $10 shall, except as hereinbefore provided, be as follows:— Fees of Clerks and Bailiffs.

To the clerk for any and all services rendered by him as such clerk from the time of entering the action or suing out an interpleader

Sec. 48.

summons up to and including the entering of final judgment or final order on any such judgment or summons, in case the action proceeds to judgment, or final order. $1.25

In case the action does not proceed to judgment or final order, the fees heretofore or that may hereafter be payable, but not exceeding in the whole the said sum.

For issuing writ of execution, warrant of attachment or warrant for arrest of delinquent and entering the return thereto ..... .50

To the bailiff for all services rendered by him as such bailiff in serving the summons and making his return thereof to the clerk of the court or any other service that may be necessary before judgment is entered by the clerk or pronounced by the Judge, mileage excepted 50

For enforcing writ of execution, schedule of property seized or attached, hond where necessary acts done by him after seizure, mileage excepted, if money made or case settled after levy 1.00

Necessary disbursements incurred in the care and removal of property shall be allowed, to be first allowed by the clerk subject to the approval of the Judge. 10 Edw. VII. c. 32, s. 48.

The Claim Sued For.—The amount of the claim, not the amount of the judgment or recovery, governs the scale of costs. Should the plaintiff claim more than $10, and succeed for $10 or less, the judge could compel the plaintiff to pay the additional costs; hut the clerk and bailiff would be entitled to collect from the plaintiff the usual fees for a claim of over $10, the amount of the "claim sued for."

Exclusive of Interest.—The net amount of the claim "exclusive of interest" is the criterion as to costs under this section.

Tariff not Applicable.—When a claim is for no greater sum than $10, the tariff of fees (Forms 1 and 2 at end of the Rules) applies only to the following items:

(*a*) Bailiff's fees: Form 2, Items 7, 8 and 9; Item 6, so far as it extends to summons in replevin, warrant of attachment, or warrant against the body.

(*b*) Clerk's fees: Item 26, which includes "receiving papers from another division for service; entering the same; handing to bailiff;

receiving and entering his return and transmitting the same (if return made promptly, not otherwise)," 30 cents.

Notice that no Defence Entered.—A notice to the plaintiff that no defence has been entered is now required under Rule 30 in suits under this section.

Fees Chargeable.—The fee of $1.25 would appear to be chargeable, first, for all proceedings to final judgments; secondly, if a seizure is made and the goods are claimed and an interpleader summons issues and proceeds to judgment, a similar fee of $1.25 would be taxable to the clerk; thirdly, if a judgment summons issues and proceeds to an order no further fee than the $1.25 would be taxable to the clerk.

The total fees chargeable in such actions would appear, therefore, to be as follows:

(1)	Proceedings up to and inclusive of judgment. Clerk	$1 25
	Bailiff serving summons, return, service of subpœna, calling case, etc.	50
	Mileage at 15 cents, one way (Tariff, Form 2, item 7)	
	Issuing writ of execution and entering of return thereto, Clerk's fee	50
	Bailiff's fees enforcing execution	1 00
	Mileage, 15 cents per mile, one way.	
	Possession, money, etc. Amount actually disbursed to be allowed by clerk subject to approval of judge.	
(2)	Judgment summons, clerk's fee	1 25
	Warrant for arrest and return	50
	Bailiff's fees	50
	Mileage, 15 cents per mile, one way.	
(3)	Interpleader, clerk's fees	1 25
	Bailiff's fees	50
	Mileage, 15 cents per mile, one way.	
	Keeping possession of goods, amount actually disbursed.	

Note.—The bailiff is entitled to charge 15 cents for each mile and fraction of a mile travelled: Rule 2 (9).

Sec. 49. By whom fees to be paid in first instance.

49.—(1) The fees upon every proceeding shall be paid in the first instance, and before it is taken, by the party on whose behalf the proceeding is taken.

Every Proceeding.—The officer is entitled to his fees before being required to take any proceeding: s. 49; *Re* Parke v. Clarke, 14 C. L. T. 32. The word "proceeding" should receive a liberal construction, and must be held to apply to every act for which a fee may be charged under the tariff. Taxing costs has been held to be a "proceeding" under a similar statute: R. v. London, Chatham and Dover Ry. Co., L. R. 3 Q. R. 170; Stroud, 2nd ed., 1562. This would apply to a "proceeding" as well before judgment as after: Ross v. Farewell, 5 C. P. 101. Taking steps to sell under an execution is a proceeding: Nell v. Almond, 29 O. R. 63. See Meloche v. Reaume, 34 U. C. R. 606; Caspar v.

Secs. 49, 50.

Keachie, 41 U. C. R. 599; Turcotte v. Dansereau, 26 S. C. R. 578; Caughell v. Brower, 17 P. R. 438.

Where the clerk is entitled to a fee which has not been paid to him, and which he has not given credit for, the judge would probably refuse to hear the matter: 4 U. C. L. J. 82. If the clerk gives credit for fees he trusts to the promise of the party and waives the benefit of the section; and he could not deduct such fees from any money coming into his hands except for fees owing by the suitor in the action in respect of which the money is paid: Rule 70.

A person entering a suit for another, and becoming responsible for costs, should receive the money when recovered independently of any claim the clerk might have against the suitor: see Rule 71. The clerk is not bound to pay a defendant his witness fees out of money deposited by plaintiff towards costs: 4 U. C. L. J. 178.

If a clerk is indebted to a bailiff for fees in other suits the bailiff has, on that account, no right to withhold moneys collected by him. The *whole* of the money realized by the bailiff must be paid over to the clerk, who is to forthwith pay the bailiff his fees: Rule 98. See notes to section 185.

How enforced.

(2) If the fees are not so paid, payment may, by summary order of the Judge, be enforced by execution in like manner as the judgment of the court. 10 Edw. VII. c. 32, s. 49.

By Order of the Judge.—This is a summary proceeding and must be strictly exercised: Fletcher v. Calthorp, 6 Q. B. 880-891. The defaulting party must have an opportunity of being heard: Beland v. L'Union, St. Thomas, 19 P. R. 747; see notes to section 34. Notice of the application should therefore be given to him: Bullen v. Moodie, 13 C. P. 126; 2 E. & A. 370.

If an order be made, execution may, after entry of such order in the Procedure Book, issue upon it in the same way as on an ordinary judgment: see notes to section 173.

The order need not be served. The provisions of section 80 do not appear to apply to this proceeding. It is not "suing in the court of which he is clerk" to take this statutory mode of collecting the costs.

Costs.—No express provision is made for costs of the proceedings under this section either in the Act or Rules; but by s. 170 the Judge has authority to order costs in all "actions;" and the word action includes a proceeding or matter: s. 2 (1). The right of a judge exercising jurisdiction as *persona designata* to impose costs is conferred by R.S.O. 1914, c. 70, s. 2. See *Re* Young, 14 P. R. 303; *Re* Cosmopolitan Life Assn., 15 P. R. 185.

Bailiff's fees to be paid to Clerk when execution issues.

50. At the time of the issue of any process or execution the bailiff's fees thereon shall be paid to the clerk and shall be paid over to the bailiff, upon the return of the execution, and not before; but if the bailiff does not become entitled to any part, or becomes entitled to a part only of such fees, the whole or the surplus, as the case may be, shall be repaid by the clerk to the person from whom the fees were received. 10 Edw. VII. c. 32, s. 50.

Secs. 51, 52.

Bailiff's Fees.—See notes to section 47. This section is for the protection of the bailiff. What the "bailiff's fees thereon" may be is a matter of uncertainty. It would seem, however, that the amount to be deposited should be such sum as the clerk could properly allow for mileage, in case the bailiff should be unable to find sufficient property to pay his fees.

In an action against a bailiff and his surety for not returning an execution within the proper time, it is no answer, after the bailiff received the execution, without exacting prepayment of his fees, to set up the non-payment of such fees in defence of the action: Bank of Ottawa v. Smith, 16 C. L. J. 223.

Attempts to Find Property.—Rule 50 provides that in cases where an attachment has issued against an absconding debtor, or an execution has issued against the property of a judgment debtor, and any person interested insists upon the bailiff making an attempt to find property, a deposit of the amount of the bailiff's fees and mileage must be made with the clerk, and if he makes a proper endeavor (although unsuccessful) to secure property he shall be entitled to such fees and mileage, subject to appeal to the judge.

The amount of fees to be deposited under the rule could, it is submitted, be fixed on the same basis as those provided for in the statute.

The allowance by the clerk to the bailiff when his exertions are fruitless is subject to appeal, and the judge may review the clerk's finding that a proper endeavor had been made to levy.

Bailiff to forfeit fees if he neglects to return process.

51. If the bailiff neglects to return any process or execution within the time required by law he shall for such neglect forfeit his fees thereon, and all fees so forfeited shall be held to have been received by the clerk, who shall keep a special account thereof, and account for and pay over the same to the Clerk of the Peace, to be paid to the Treasurer of Ontario, to form part of the Consolidated Revenue Fund. 10 Edw. VII. c. 32, s. 51.

Within the Time Required by Law.—That is, as to an execution, "as soon as executed": s. 46; if not executed, then within thirty days from the date thereof: section 180; unless renewed in the meantime, under s. 180, or unless the seizure has been so recent that the bailiff has been unable to realize: Rule 95. If a reasonable amount is not offered at a sale under execution, see Rules 96 and 97 for form of return required. Forms of Returns to executions: Forms 87, 88, 89.

As to a summons, it must be returned to the clerk "as soon as served": s. 46. If the bailiff fails to return a summons at once after the service of it, he forfeits his right to the fees: s. 51. As to service and return of summonses in foreign divisions, see Rule 106.

The bailiff should be vigilant in making returns to process or execution within the proper time, and where it is not done the forfeiture of fees should be exacted by the clerk. The latter may endanger his position by a disregard of his duty in that respect: see notes to section 46.

Clerk or Bailiff not to accept extra fees.

52. A clerk or bailiff shall not directly or indirectly take or receive any commission, charge, fee or reward for or in connection with the collection of any debt or claim which has been

Sec. 53.

or may or can be sued in the court for which he is clerk or bailiff, except such fees as are provided by a tariff of fees under this Act. 10 Edw. VII. c. 32, s. 52.

Directly or Indirectly. — These words are intended to prevent colorable evasions of the prohibition. Their precise effect cannot be defined. Similar words are to be found in many contracts in restraint of trade: see Dales v. Weaver, 18 W. R. 903; Jones v. Heavens, 4 Ch. D. 636; Palmer v. Mallett, 36 Ch. D. 411; Turner v. Evans, 2 E. & B. 512; Cook v. Shaw, 25 O. R. 124. The addition of the words in defining the offence of an officer of a corporation "interested" in a contract is immaterial: Todd v. Robinson, 14 Q. B. D. 739; but see Stewart v. Macdonald, 11 C. L. J. 19.

Officers Must be Disinterested.—The language of the section is strict and should be carefully observed. The clerk and bailiff are strictly forbidden by the section and rules from entering into any arrangement by which they are to receive a commission for the collection of any debt or claim which could possibly be the subject of a suit in their court. The clerk is prohibited from receiving any money from any person unless a suit has been commenced in his own court against such person or the claim is actually in his hands for suit, or a transcript of judgment has been received by him: Rule 81. The provisions of s. 52 and Rule 81 are in effect strictly prohibitive of the clerk or bailiff acting as agent for any party or having any interest in any matter which could be sued in their court.

The object is to ensure perfect impartiality on the part of the officers of the court, as it was found that such impartiality could not be depended upon in every case unless the clerks and bailiffs were strictly prohibited from having or acquiring interests in litigious matters beyond the due performance of their legitimate duties.

The execution of a landlord's warrant or a warrant under the power of sale contained in a chattel mortgage would not, it is submitted, be a contravention of these provisions: Maxwell on Statutes.

See also section 186 and notes thereto as to the purchase by these officers of goods sold under execution.

The duty of a bailiff prior to his receiving an execution is merely to serve papers entrusted to him for service; and the duty of a clerk is to collect no money unless a claim has been delivered to him for suit, or judgment has actually been recovered in another court and a transcript of it has been received by him.

INSPECTION.

Appointment of Inspector.

53. The Lieutenant-Governor in Council may appoint an Inspector of Division Courts, whose duty shall be:

Duties. Inspection of offices.

(*a*) To make a personal inspection of every Division Court and of the books and papers thereof;

Books, etc.

(*b*) To see that the proper books are provided, that they are in good order and condition, that the proper entries and records are made therein in a correct manner, at suitable times, and in proper form

and order, and that the papers and documents are properly classified and preserved; Secs. 53, 54.

(*c*) To see that the duties of the officers of the courts are efficiently performed and that the office is at all times duly attended by the clerk; Officers' duties.

(*d*) To see that lawful fees only are taxed or allowed as costs; Lawful fees.

(*e*) To see that proper security is furnished and maintained on behalf of every clerk and bailiff; Security by clerks and bailiffs.

(*f*) When authorized by the Lieutenant-Governor in Council so to do, to direct that any papers or documents which it is unnecessary to preserve be destroyed; Destruction of useless papers.

(*g*) To report upon all such matters to the Lieutenant-Governor. 10 Edw. VII. c. 32, s. 53. Report to Lieutenant-Governor.

The Inspector.—See R.S.O. 1914, c. 15, s. 14.

Proper Books.—The books to be kept by the clerk are:—(1) Procedure Book: s. 36, Form 5 to Rules, and Rule 66; (2) Foreign Procedure Book: s. 36 and Rule 66, Form 6 to Rules; (3) Cash Book: Rule 66, Form 1; (4) Clerk's Fee Book: s. 60 and Rule 66, Form 2 to Rules; as to cities, see R.S.O. 1914, c. 15, s. 15; (5) Judgment Debtor's Index: Rule 66, Form 3 to Rules; (6) Order Book: s. 35, Form 4 to Rules; (7) An index to the Procedure Book: Rule 66.

The books to be kept by the bailiff are:—(1) fee book: s. 60; (2) the bailiff's book: Form 7.

At all Times.—This means at all reasonable times. It is suggested that registrar's hours, from ten o'clock in the forenoon until four o'clock in the afternoon, would be reasonable.

The office should be kept open every day, except Sundays and legal holidays, for the transaction of business: see section 21 and notes as to what are legal holidays.

Lawful Fees.—The tariff and statute prescribe *all* lawful fees: see notes to section 47.

Proper Security.—See notes to section 26.

The inspector of divisional courts may be required to discharge the duties imposed upon any other inspector: R.S.O. 1914, c. 15, s. 14.

54. Where the Inspector considers it expedient to institute an inquiry into the conduct of a clerk or bailiff he may require him and any other person to give evidence on oath, and for that purpose shall have the same power as any court has in civil cases to summon such officer or other person to attend as a witness, to enforce his attendance and to compel him to produce Power of inspector in making inquiry into conduct of officers.

Secs. 55, 56.

books and documents and to give evidence. 10 Edw. VII. c. 32, s. 54.

Investigation by Inspector.—Very wide powers are here given to the Inspector. They should be carefully exercised, and only after he is satisfied that in the public interest an investigation is necessary. No preliminary requirement is necessary before the Inspector makes the inquiry. It must necessarily be after the officer has at least some general knowledge of what he is charged with having done or omitted to do, and he should have a fair opportunity of explaining his conduct or answering the charge by his own evidence or otherwise: Fisher v. Keane, 11 Ch. D. 353; Hands v. Law Society, 17 A. R. 41.

The inquiry should not, it is submitted, be *ex parte:* see notes to sections 34 and 49. Whenever the Inspector may deem it "expedient," the inquiry may be made by him, and all parties may be summoned to give evidence before him.

An "inquiry" is not limited to what a man can see with his own eyes: it signifies a judicial inquiry with witnesses: Wenlock v. River Dee. Co., 19 Q. B. D. 155.

Conduct of the Clerk or Bailiff.—The "inquiry" could only extend to the officer's "official duties or acts," and not to his private conduct, except in so far as the same might affect his official position.

Summon such Officer.—The Inspector has power to summon the clerk and bailiff and also to summon any "other person" as a witness. Should the officer desire any person summoned in his interest it should be done, for the inquiry should be full and complete on both sides. The Inspector would have to draw up and serve a summons answering the place of a subpœna in ordinary cases (Form 36), and have the same served on the persons required to attend. If "books and documents" were required to be produced, a *duces tecum* clause would have to be inserted. See notes to sections 114-117 as to summoning witnesses.

It is suggested that the Inspector should take notes of the evidence given before him to be reported to the Government.

Books, etc., to be produced for inspection.

55. Every clerk and bailiff shall, as often as required by the Inspector, produce at the clerk's office, for examination and inspection, all books and documents required to be kept by him, and shall report to the Inspector concerning such matters as the Inspector shall require. 10 Edw. VII. c. 32, s. 55.

As Often as Required.—The Inspector is entitled, as of *right*, to see all books and documents required to be kept by clerks and bailiffs. The refusal or neglect to produce such books and documents might prove a serious matter to the clerk or bailiff. The fullest information should, therefore, be given by the officers, and the production of "all books and documents" made to the Inspector by them.

Officers to inform Inspector of their appointment, etc.

56. Every clerk and bailiff, within five days after his appointment, shall inform the Inspector of his appointment, of his full name and post office address, and of the names of his sureties, their occupations, places of residence, and post office addresses. 10 Edw. VII. c. 32, s. 56.

Within Five Days.—The time would commence to run from the day the officer was notified of his appointment, either by the receipt of his commission or by seeing it in the *Ontario Gazette*, or by being so advised by the Provincial Secretary. The day on which such notification was received would not be included in the five days: see section 31 and notes thereto; also sections 27 and 32. Under R.S.O. 1914, c. 15, s. 8, every public officer is required to give security within the times there mentioned. Secs. 27-58.

Full Name.—This means the Christian name or names in full as well as the surname.

57. When a clerk or bailiff has given new sureties, he shall immediately inform the Inspector of the change, giving the names of the sureties, their occupations, places of residence, and post office addresses. 10 Edw. VII. c. 32, s. 57. Inspector to be informed of new sureties.

New Sureties.—See sections 31 and 32 and notes.

Immediately.—See notes to section 29 (2).

58. Every clerk and bailiff shall have and keep in his possession or custody the certificate of the Clerk of the Peace mentioned in section 27, and shall produce the same for the information of the Inspector when required so to do. 10 Edw. VII. c. 32, s. 58. Officers to produce certificate of filing covenant, etc.

Certificate of the Clerk of the Peace.—See notes to section 27. This requirement is imperative. The certificate should be kept in such a place that the clerk or bailiff may be able to produce it to the Inspector whenever required.

When Required.—A verbal request would be sufficient.

59. Every clerk shall, on or before the 15th day of January in each year, make a return, in such form and manner as the Lieutenant-Governor in Council shall prescribe, of the business of his office for the year which ended on the 31st day of December next preceding. 10 Edw. VII. c. 32, s. 59. Clerk to make returns to Lieutenant-Governor.

Make a Return.—This is imperative. The return should be mailed to the Inspector, as indicated below, not later than the 15th January in each year. Mailing it, postage paid, would be a compliance with the Act.

Clerks and bailiffs are kept well informed by the inspector as to their duties with respect to the returns to be made by them, otherwise they would doubtless experience some difficulty in determining the number of such returns they are required to make under the various statutes and rules.

The following is a list of the various returns required to be made by clerks and bailiffs under the Division Courts Act and other statutes:—

Sec. 59. CLERK'S RETURNS.

1. Return of Business of Office.—Section 59, *supra*, requires clerks to make, on or before 15th January in each year, a return of the business of the office for the next preceding year ending 31st December. This return is sent to the Inspector along with that mentioned below. Forms of all returns are sent to the clerks and bailiffs by the Inspectors to be filled out.

2. Return of Fees.—Section 60 requires clerks to transmit, on 15th January in each year, to the Inspector of Division Courts (Parliament Buildings, Toronto), a return *under oath* showing the aggregate amount of fees which he became entitled to receive during the year ending on the previous 31st December.

This return is required for the purpose of ascertaining the amount the clerks are entitled to retain for their own use.

Under Oath.—The oath may be taken by any of the persons mentioned in section 120; also R.S.O. 1914, c. 77, s. 9. The word "oath" may be construed as meaning a solemn affirmation or statutory declaration: Rule 2 (4).

R.S.O. 1914, c. 17, s. 7, is as follows:—

7.—(1) Every division court clerk shall be entitled to retain to his own use in each year all the fees and emoluments earned by him in that year up to $2,000.

(2) Of the fees and emoluments earned by any division court clerk in each year he shall pay to the Treasurer of Ontario a percentage of 20 per cent. on the excess over $2,000.

Fees and Emoluments Earned.—Under section 7 (1), the clerk is entitled to $2,000 for "his own use." This may mean net or gross earnings, and the question is whether it is intended that the clerk should first deduct from his gross receipts such necessary disbursements of his office as rent, fire, light, cost of office books, etc., or must make his return on gross receipts? The Government has taken the latter view, which seems to be correct. The following cases are referred to on the subject. McCargar v. McKinnon, 15 Gr. 361; Lawless v. Sullivan, 6 App. Cas. 373; Ashworth v. Outram, 5 Ch. D. 923; Lovell v. Newton, 4 C. P. D. 7; Workman v. Robb, 7 A. R. 389; Mersey Docks Board v. Lucas, 8 App. Cas. 891; Stroud, 379.

The fees "earned," although not paid, must be included in the return.

A literal compliance with section 60 would seem to require that the return should be mailed on the 15th day of January in each year (see Beaty v. Fowler, 10 U. C. R. 382), and neither before nor after that day. The necessity for promptness in making this return, and the payment to the Provincial Treasurer of the amount, if any payable, cannot be too strongly urged upon division court clerks.

3. Clerks in Cities.—The Statute, R.S.O. 1914, c. 15, s. 15, requires clerks whose divisions embrace a city or part of a city to transmit to the Provincial Secretary, on or before the 15th January in each year, a return under oath showing all fees received by them during the previous year ending 31st December; and by section 16 the particulars to be given in this return are stated, including the actual disbursements in connection with the office.

4. Return of Debtors Committed.—By section 198, *post*, clerks are required to transmit to the Inspector on or before the 15th January in each year, a return showing the number of judgment debtors who, during the 12 months ending 31st December next preceding, were ordered to be committed under each of the heads mentioned in section 192. [Note.—This is obviously a misprint for section 191.] Sec. 59.

5. Return of Unclaimed Moneys.—By section 43 (1), (2) clerks are required to send to the Treasurer of Ontario and to the Inspector, in the month of January, a correct statement of all sums of money belonging to suitors or others which have been paid into court, and have remained unclaimed for six years before the last day of December next preceding, specifying the names of the persons for whom or on whose account the same were paid; and by section 43 (3) the same are forthwith to be paid to the Clerk of the Peace.

One copy of the statement is to be posted up in the clerk's office and another copy in some conspicuous place in the court-house or place where the Court is held, and copies are also to be sent to the Treasurer of Ontario: s. 43 (2); Rule 90. Every clerk is also to send to the Inspector a statement in detail of all moneys in his hands: Rule 91; when required by the Judge the clerk is to furnish him with a full account in writing, verified by affidavit, of the money paid into or out of court, and the balance belonging to suitors or otherwise: s. 41.

6. Return of Fines, etc.—Sections 39 and 40 require clerks to pay all fines and penalties recovered in their courts and received by them, less any allowances ordered by the judge, to the Clerk of the Peace, every three months; and accompanied by a return of same verified by the clerk's affidavit: section 40.

7. Return of Fees for Jury Fund.—Section 145 (2), (3), require clerks to make returns under oath, on or before 15th January in each year, to the county treasurer, showing the particulars mentioned in that section, and to pay to the county treasurer therewith the fees for jury fund received under section 145 (1).

Clerks in cities are required to make a similar return and payment to the city treasurer: section 145 (4).

8. Returns as to Sureties.—Both of clerk and bailiff, are to be made by the clerk in writing to the judge in cities and towns at least every 3 months and in all other cases at every sitting of the court: the return to show all particulars and to state whether any of them have died, become insolvent, or left the county since the clerk's last report, and any other facts which ought to be made known to the judge: and if bonded by a guarantee company, the date of the renewal of the bond: Rule 72.

9. Further Return.—The clerk is also to examine and certify to the bailiff's return under Rule 101, mentioned below. Form of clerk's certificate to this return is given in Rule 102.

BAILIFF'S RETURNS.

1. Return of Fees.—A similar return to that of the clerk, above mentioned: section 60.

2. Return of Executions, etc.—A statement in writing and on oath must be made to the clerk in courts in cities and towns at least every

Secs. 60, 61.

half-year, or oftener if so directed by the Judge, and in other cases at each sitting of the court, or at such times as the Judge may require of all warrants and executions remaining in his hands, etc.: Rule 101.

Clerks' and bailiffs' returns to Inspector.

60. Every clerk and bailiff shall keep a separate book in which he shall enter from day to day all fees, charges and emoluments received by him by virtue of his office, and shall, on the 15th day of January, in every year, make a return under oath to the Inspector, showing the aggregate amount of fees, charges and emoluments which he became entitled to receive during the year which ended on the 31st day of December next preceding. 10 Edw. VII. c. 32, s. 60.

Shall Keep.—This is also imperative. See Form 2.

The book should be kept closely written up. The entries are to be made from day to day as the fees, etc., are received by the officer. The fees earned but not received, need not be entered. This applies to the Clerk's Fee Book as well as to the Bailiff's.

JURISDICTION.

Cases in which court has no jurisdiction.

61. The Court shall not have jurisdiction in

(*a*) An action for the recovery of land, or an action in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom or franchise comes in question;

(*b*) An action in which the validity of any devise, bequest, or limitation under any will or settlement is disputed;

(*c*) An action for malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage;

(*d*) An action against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto;

(*e*) An action upon a judgment, or order of the Supreme Court or a County Court where execution may issue, upon or in respect thereof. 10 Edw. VII. c. 32, s. 61.

Jurisdiction of the Court.—The Division Courts are, from their nature, courts of limited jurisdiction. They are creatures of the statute; they possess no common law authority, as the courts of the Sovereign, but on the contrary their authority is defined and restricted by the Act of Parliament to which they owe their existence. A judge may be entirely

wrong in his opinion of law on a question within his jurisdiction, and there is an entire immunity from consequences at the suit of the injured party; but, if he exceeds the authority which the legislature has conferred upon him, he is liable for any wrong committed if he knew or had the means of knowing the want of jurisdiction. The jurisdiction which he exercises is conferred and limited by statute, and if the conditions precedent to its exercise do not exist the whole proceeding is *coram non judice: Per* Lush, J., Sarjeant v. Dale, 2 Q. B. D. 558, at p. 566; Graham v. Smart, 18 U. C. R. 482; *Re* Cosmopolitan Life Association, 15 P. R. 185. The omission of a duty cast upon a judge renders him liable at the suit of a person injured: Parke v. Davis, 10 C. P. 220. The law makes no presumption in favor of inferior jurisdictions but it will intend nothing against them: Christie v. Unwin, 11 A. & E. 370, *per* Coleridge, J.; *Re* Clarke, 2 Q. B. 630, *per* Lord Denman: Bullen v. Moodie, 13 C. P. 126, at p. 138, *per* Draper, C.J. As a general rule every circumstance required by the statute to give jurisdiction to an inferior court *must*, in its proceedings, appear on the face of the proceedings or by reasonable intendment: R. v. All Saints, Southampton, 7 B. & C. 785, *per* Holroyd, J.; Gossett v. Howard, 10 Q. B. 411; R. v. Helling, 1 Strange 8; R. v. Totness, 11 Q. B. 80; Buccleugh v. Met. Board of Works, L. R. 5 Ex. 221. Sec. 61.

Generally, where the judge has no jurisdiction he can neither amend nor adjourn, nor do anything else; the proceeding is *coram non judice*: *Per* Maule, J., Taylor v. Addymau, 13 C. B. 310; but he may award costs: s. 170 (4).

But where a claim as sued in a division court is for an amount beyond the jurisdiction, the judge may, upon application in chambers or at trial, before judgment, permit the plaintiff to abandon the excess so as to bring the amount within the jurisdiction: Rule 4; Pegg v. Howlett, 28 O. R. 473; and in Sebert v. Hodgson, 32 O. R. 157, it was held that having regard to the powers of amendment in the Division Court, the judge had authority in an action to recover a wager or bet which the court could not entertain, to amend the claim by substituting one for the money deposited by the plaintiff in the defendant's hands. See also *post*, Amendment to give Jurisdiction.

And in any case within the provisions of s. 69, the judge may now, by that section, transfer it to the Supreme Court.

Should a Division Court assume jurisdiction where it has none the remedy is *prohibition*. Should the Judge refuse to consider or adjudicate on a matter within his jurisdiction, the remedy is *mandamus*.

Prohibition.—"All lawful jurisdiction is derived from and must be traced to royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorized is an usurpation of the prerogative and a resort to force unwarrantable by law. Upon both grounds, namely, the infringement of the prerogative and the unauthorized proceeding against the individual, prohibitions are by law to be granted, at any time, to restrain a court, to intermeddle with or execute anything which by law they ought not to hold plea of; and they are much mistaken that maintain the contrary": *Per* Willes, J., London (Mayor) v. Cox, L. R. 2 H. L. 239, citing *Articuli Cleri*, 3 Jac. 1; answer to 3rd objection, 2 Inst., 602; see Jordan v. Marr, 4 U. C. R. 53; Worthington v. Jeffries, L. R. 10 C. P. 379; Farquharson v. Morgan, 1894, 1 Q. B. 552; prohibition will be granted at the very latest stage so long as there is anything to prohibit: *Re* Holman and Rea, 27 O. L. R. 432.

Sec. 61.

Prohibition will not be granted where the court sought to be affected has clear jurisdiction: Re New Par Consols (Ltd.), No. 2, 1898, 1 Q. B. 669; unless it is proceeding contrary to the principles (not the rules) of the common law; *Ex parte* Story, 12 C. B. 767; nor to correct an error or even injustice, if done in the exercise of jurisdiction: Mackonochie v. Penzance, 6 App. Cas. 443; *Re* Cummings and the County of Carleton, 25 O. R. 607; see s. c. 26 O. R. 1; nor in the case of a mere irregularity in procedure: Regina v. Mayor of London, 69 L. T. R. 721; Reginn v. Justices of Kent, 24 Q. B. D. 181; Walker v. Wilson, 5 O. W. N. 802; nor if there is doubt in fact and law whether the inferior Court is exceeding its jurisdiction or is acting without jurisdiction: Rex v. Hamlink, 26 O. L. R. 381; upon an application for prohibition the question is not whether the judge reached a correct conclusion, but whether he had jurisdiction: *Re* Aurora Scrutiny, 28 O. L. R. 475; *Re* Royston Park, 28 O. L. R. 629.

The Supreme Court of Ontario has jurisdiction to award prohibition in all matters which concern the administration of justice within Ontario as a provincial unit, but this power operates only as to the laws enacted by or which are in force in Ontario, pertaining to matters of provincial cognizance under the B. N. A. Act: *Re* North Perth Election, 21 O. R. 538, *sed quære* see 24 A. R. 467, and there is no jurisdiction, therefore, to restrain a recount of the tribunal appointed by the Dominion Parliament: McLeod v. Noble, 24 A. R. 459. Prohibition will be granted to a court of appeal where it appears they have no jurisdiction over the subject matter, even after they have remitted it to the court below and awarded costs against the appellant and the party applying for prohibition appealed: Darby v. Cousins, 1 T. R. 552; and *semble*, that courts of common law have power to issue a writ of prohibition to the judicial committee of the Privy Council if it exceeds its jurisdiction: *Ex parte* Smyth, 3 A. & E. 719; but see Chesterton v. Farlar, 7 A. & E., p. 719; Warren v. Suckerman, 3 Buistr., p. 120; Martin v. Mackonochie, 3 Q. B. D. 747.

An order for prohibition cannot be granted against a tribunal on which the law confers no power of pronouncing a judgment or an order imposing a legal duty or obligation upon an individual: Godson v. City of Toronto, 16 A. R. 452; 18 S. C. R. 36; *Ex parte* Death, 18 Q. B. 647; Chabot v. Morpeth, 15 Q. B. 446, 459; R. v. Local Government Board, 16 Q. B. 321; *Re* Bell Telephone Co. and the Minister of Agriculture, 7 O. R. 605; *Ex parte* Kingstown Commissioners, 18 L. R. Ir. 509; see, however, *Re* Paquette, 11 P. R. 463; *Re* Young, 14 P. R. 303; *Re* Simpson and Clafferty, 18 P. R. 402.

An order for prohibition to restrain the issue of a distress warrant by a justice of the peace upon a conviction regular upon its face and within his jurisdiction was refused, such acts being ministerial and not judicial: R. v. Ryan, 27 O. R. 181.

Where the legislature intrusts to any body of persons, other than to superior courts, the power of imposing an obligation upon individuals, the superior courts ought to exercise as widely as they can the power of controlling those bodies of persons if they attempt to exceed the powers given them by Parliament: *Per* Brett, L.J., R. v. Local Government Board, 16 Q. B. D. 320.

There are five classes of cases in which prohibition may be applied for:—

1. Where the court has no jurisdiction over the cause, and want of jurisdiction appears on the face of the proceedings:

2. Where the defect does not appear on the face of the proceedings

3. Where there is jurisdiction over the subject matter, but no power to try a particular issue: Sec. 61.

4. Where there is jurisdiction on the subject matter, but the court acts in such a manner as to be a denial or perversion of right:

5. Where the judge is interested.

Where the Defect is Apparent.—Prohibition may, where the defect appears on the face of the proceedings, be granted at any time, either before or after judgment: London (Mayor) v. Cox, L. R. 2 H. L. 239; Roberts v. Humbly, 3 M. & W. 120; Nerlich v. Clifford, 6 P. R. 212; Summerfeldt v. Worts, 12 O. R. 48; *Re* Judge of Northumberland and Durham, 10 C. P. 299; Wright v. Arnold, 6 Man. L. R. 1; Bank of Montreal v. Payne, 7 Man. L. R. 270; Brazill v. Johns, 24 O. R. 209; *Re* Holman and Ren, 27 O. L. R. 432.

It is much better for the party to apply in the first stage than after expenses have been incurred: Francis v. Steward, 5 Q. B. 994. But not after the money has been paid over, as, no further step remaining to be considered, there would be nothing to prohibit: Kempton v. Willey, 9 C. B. 719; Denton v. Marshall, 1 H. & C. 654; Yates v. Palmer, 6 D. & L. 283; *Re* Beattie v. Holmes, 29 O. R. 264.

If a defect of jurisdiction is distinctly brought to the notice of the judge it is the same as if it appeared on the face of the proceedings: *per* Pollock, C.B., 1 H. & C. 659; see Sherwood v. Cline, 17 O. R. 30, at p. 39.

A total want of jurisdiction cannot be cured by assent of parties: Jones v. Owen, 5 D. & L. 669; De Haber v. Queen of Portugal, 17 Q. B. 213, 214; Knowles v. Holden, 24 L. J. Ex. 223; Farquharson v. Morgan 1894, 1 Q. B. 552; Lee v. Cohen, 71 L. T. 824.

Where a plaintiff had recovered judgment in an inferior court, which had no jurisdiction, though no prohibition had been obtained against its enforcement, it was held that he was entitled to judgment in a court having jurisdiction: Briscow v. Stephens, 2 Bing. 213; Keating v. Graham, 26 O. R. 361. The first judgment is a nullity: *Ib.* Where the defect is apparent the grant or refusal of the writ is not in the mere discretion of the court, but the court is bound to issue the writ *ex debito justitiæ*: London (Mayor) v. Cox, L. R. 2 H. L., at p. 279; Buggin v. Bennett, 4 Burr. 2035; Boderham v. Ricketts, 6 N. & M. 537; Yates v. Palmer, 6 D. & L. 283; and acquiescence in the proceedings of the inferior court will not defeat the right: Farquharson v. Morgan, 1894, 1 Q. B. 552. The court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior court from proceeding in matters in which it is apparent it has no jurisdiction: *Ib.*; see Gibbons v. Cannell, 4 O. W. N. 270.

Where the Defect is Not Apparent.—Where the defect is not apparent on the face of the proceedings and the applicant had an opportunity of raising the objection in the court below, and has allowed that court, without excuse, to proceed to judgment without setting up the objection and without moving for prohibition in the first instance, prohibition will be refused, except, perhaps, upon an irresistible case and an excuse for the delay, such as disability, malpractice or matter newly come to the knowledge of the applicant: Broad v. Perkins, 21 Q. B. D. 533; London (Mayor) v. Cox, L. R. 2 H. L., at p. 283; *Re* Soules v. Little, 12 P. R. 533; see *Re* Lott v. Cameron, 29 O. R. 70; Farquharson v. Morgan, 1894, 1 Q. B. 552, at p. 558; *Re* Clark v. Sylvester, noted in *Re* Radcliffe v. Crescent M. & T. Co., 1 O. L. R., p. 332; *Re* Hawkins

Sec. 61. v. Batzold, 2 O. L. R. 704; and even though the defendant has filed a notice disputing the jurisdiction, if he failed without good reason to appear at a trial to uphold his contentions and it is not made clearly to appear that an injustice will be done by allowing the judgment to stand: Canadian Oil Co. v. McConnell, 27 O. L. R. 549; *contra*, if he had a good excuse for being absent, and a defence of merit: Mitchell v. Doyle, 4 O. W. N. 725; or if there is a real case to try: Northern Hardwood v. Shields, 5 O. W. N. 757, and it will be assumed in the absence of anything to the contrary that there had been a proper finding on proper evidence of conditions justifying the proceeding moved against: *Re* Kay v. Storry, 8 O. L. R. 45.

The granting of prohibition in such cases is therefore discretionary as, for instance, when the question was only as to which particular county court should entertain the action: Elliott v. May, 11 Man. L. R. 306; Maxwell v. Clark, 10 Man. L. R. 406; Gibbs v. Chadwick, 8 Man. L. R. 200: see "Waiver," *post*.

Territorial Jurisdiction—Motion to Transfer.—When the objection is that the suit was brought in the wrong division court, objection must be by notice under section 78 and formerly an application had to be made to change the place of trial under section 79, otherwise an application for prohibition before trial would not be sustained: Watson v. Wolverton, 22 O. R. 586 (*n*); *Re* Hill v. Hicks, 28 O. R. 390; but see as to change in the law, Mitchell v. Doyle, 4 O. W. N. 725: the fact that the defendant does not apply for a transfer previously to the trial (or perhaps not at all) does not oust the right to prohibition if the court proceeds with the trial without jurisdiction: *Re* Thompson v. Hay, 22 O. R. 583; 20 A. R. 379.

In regard to prohibition in the case of actions for debts exceeding $100, see s. 77 and notes thereto.

Applying for Prohibition.—An application for prohibition must be made at the proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right: London (Mayor) v. Cox, L. R. 2, H. L. 279; Bank of Montreal v. Poyner, 11 C. L. T. 84.

In a garnishee case under s. 155 which has been brought in the division where the garnishee resides or carries on business, the primary debtor residing in another division and disputing the jurisdiction as against himself, the court may, nevertheless, give judgment against the primary debtor even where the action is dismissed against the garnishee: Lenten v. Coagdon, 1 O. R. 1, distinguished: *Re* Holland v. Wallace, 8 P. R. 186, and *Re* McCabe v. Middleton, 27 O. R. 170, in view of subsequent legislation.

Contracts Ousting Jurisdiction.—It is a principle of law that parties cannot by contract oust the courts of their jurisdiction, but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant: Scott v. Avery, 5 H. L. C. 811; Caledonian Insurance Co. v. Gilmour, 1893, A. C. 85; Trainor v. Phoenix Fire Insurance Co., 65 L. T. 825; Scott v. Mercantile Accident and Guarantee Co., 66 L. T. 811; Viney v. Bignold, 20 Q. B. D. 172. Where by an agreement legislatively confirmed, it is provided that all differences as to the meaning and effect of the agreement or as to the mode of carrying it out shall be settled by arbitration, the jurisdiction of the court is excluded: Caledonia Ry. v. Grennock and Wemyss Ry., L. R. 2 H. L. Sc. 347. No action lies upon an agreement by a tenant to pay for

dilapidations such sum as in the event of dispute shall be fixed by two valuers, until after the valuation is made: Babbage v. Coulburn, 9 Q. B. D. 235. Sec. 61.

Where a rule of a building society provides that all disputes by members shall be settled by arbitration, the right to bring an action is taken away: *Ex parte Payne*, 5 D. & L. 679.

Res Adjudicata.—If the subject matter has already been finally decided in another action or proceeding the court cannot entertain another action upon it: see notes to s. 3 "Effect of Judgment."

Waiver.—If the defendant takes any step in the suit before raising the question of jurisdiction, he waives his right to prohibition: *Re* Jones v. James, 19 L. J. Q. B. 257; Malsonneuve v. Roxborough (Tp.), 30 O. R. 127; Moufiet v. Washburn, 54 L. T. 16; see *Re* Cleghorn v. Munn, 2 C. L. J. 133.

Where leave to issue the summons was a condition precedent to jurisdiction, and the defendant appeared and raised no objection and judgment was given against him as to part of his claim, and the case adjourned to the following day, and he then objected to the jurisdiction, he lost his right to prohibition: Moore v. Gamgee, 25 Q. B. D. 224. See Chase v. Sing, 6 B. C. R. 454.

A defendant does not admit the jurisdiction of the court by appearing to object to the jurisdiction: Fearon v. Norvall, 4 D. & L. 439; Hamlyn v. Betteley, 6 Q. B. D. 65.

The appearance of the defendant on a judgment summons without taking objection to the proceedings on the ground that no sufficient affidavit had been filed as required by s. 190 (2), is a waiver of the objection if the defect is one not appearing on the face of the proceedings: *Re* Hawkins v. Batzold, 2 O. R. 704; but see McKay v. Storry, 8 O. L. R. 45. So if the defendant cross-examines witnesses and argues the case on the merits without objection to the jurisdiction, prohibition may be refused: *In re* Burrowes, 18 C. P. 493; Richardson v. Shaw, 6 P. R. 296.

If the want of jurisdiction appears on the face of the proceedings, prohibition is of right and cannot be refused on the ground of acquiescence or even of the consent of the applicant, to the jurisdiction; *contra*, if the want of jurisdiction is not apparent, and the applicant omitted to bring the facts on which the want of jurisdiction is alleged, to the attention of the court below: Farquharson v. Morgan, 1894, 1 Q. B. 552; McCabe v. Middleton, 27 O. R. 170; and see notes, *ante*, "Where Defect Apparent."

Delay.—Material delay may be a bar to the writ: Denton v. Marshall, 1 H. & C. 654. A delay of two months was held to be a bar: *Re* Smart v. O'Reilly, 7 P. R. 364; see Doidge v. Mimms, 19 C. L. T. 291. But where *the right to prohibition exists*, as where the defect of jurisdiction is apparent on the face of the proceedings, it is optional with the defendant to apply at the outset or wait until the latest stage and apply so long as there is anything to prohibit: *Re* Brazill v. Johns, 24 O. R. 209; see *Re* McIntosh, 17 C. L. T. 300; and in such case the defendant may wait until the latest stage of the proceedings before applying for prohibition: *In re* Brazill v. Johns, 24 O. R. 209; *Re* McMillan v. Fortier, 2 O. L. R. 231; *Re* Holman v. Rea, 27 O. L. R. 432.

Where the defendant applied for a new trial, which was granted on payment of costs, which were not paid, and he applied for prohibition

Sec. 61. after the day appointed for payment, prohibition was granted: Robertson v. Cornwell, 7 P. R. 297; *Re* Brazill v. Johns, 24 O. R. 209.

Where the defendant filed notice disputing the jurisdiction but did not attend the trial to uphold his contentions and there was unexplained delay in applying and no meritorious defence, prohibition was refused: *Re* Canadian Oil Companies v. McConnell, 27 O. L. R. 549; but *contra*, where there was a defence of merit or a case to try, even though defendant did not attend the trial: Mitchell v. Doyle, 4 O. W. N. 725; Northern Hardwood v. Shields, 5 O. W. N. 527.

Where the judge at the trial before a jury submitted questions to the jury and entered a verdict thereon, it was held the judge had no right to take this course at that time, but that the defendant had so acquiesced in the course taken as to debar him from obtaining prohibition: *Re* Jones v. Julian, 28 O. R. 601: but now by section 144 (2) the judge may direct the jury to answer any questions of fact and upon them the judge may enter such judgment as in his opinion may be proper; and he may also enter a nonsuit; s. 144 (1). So also where the applicant had cross-examined witnesses, argued the case and taken no exception to jurisdiction, prohibition was refused: *Re* Burrowes, 18 C. P. 493.

Where defendant disputed the jurisdiction but did not attend at the trial, and evidence was given sufficient *prima facie* to show jurisdiction, and a motion was made three weeks after the trial, the writ was refused; Friendly v. Needler, 10 P. R. 427. See also *Re* Canadian Oil Companies v. McConnell, 27 O. L. R. 549.

Where an erroneous order was made at the request of the applicant and was acted upon, prohibition was refused: Richardson v. Shaw, 6 P. R. 296.

But if the court has no jurisdiction over the subject matter of the suit, the right to prohibition is not lost by entering a dispute note and taking other steps in the cause: Lee v. Cohen, 71 L. T. 824.

And where the subject matter is within the jurisdiction, prohibition will not be granted until some issue is raised that the court is incompetent to try: Seabrook v. Young, 14 P. R. 97; but see Sewell v. Jones, 1 L. M. & P. 525. The motion in these cases is usually made after judgment, as the proceedings in division courts rarely show the matter in any formal way. The excess of jurisdiction may appear only in the course of the trial and judgment may follow almost as soon as the defence is understood. Under such circumstances there would be no opportunity of moving for a prohibition before judgment, and, unless the motion was allowed after judgment, the excess of jurisdiction would be without redress: Marsden v. Wardle, 3 E. & B. 695; Heyworth v. London, 1 C. & E. 312.

It is no objection to prohibition that the party moving has appealed to the court in which prohibition is to issue: Chesterton v. Farlar, 7 A. & E. 713; see Barker v. Palmer, 51 L. J. Q. B. 110. But where on an appeal to the High Court the appellant moved in the alternative for prohibition, the writ was refused on the ground that the latter application should have been made to a judge in chambers: Johnston v. Galbraith, 18 C. L. T. 58. But prohibition was granted in another case under similar circumstances: *Re* Rochon, 31 O. R. 122.

Where the applicant did not show that all the materials on which the order moved against was made were before the court, prohibition was refused for *prima facie* the judge had authority to make such order: *Re* Glass v. Allan, 26 U. C. R. 123.

Where the cause was referred by consent, without objection to juris- Sec. 61.
diction, but during the progress of the reference title to land came into question and one of the parties objected, prohibition was held to lie: Knowles v. Holden, 24 L. J. Ex. 223. Where a party takes the benefit of a judge's order he cannot afterwards object that it was made without jurisdiction: Tinkler v. Hilder, 4 Ex. 187; Buffalo & L. H. Ry. Co. v. Hemmingway, 22 U. C. R. 562; Harrison v. Wright, 13 M. & W. 816. Where a defendant sought prohibition on the ground that his co-defendant resided out of Ontario, but had not urged the objection in the division court and had been guilty of delay, prohibition was refused: *Re* Soules v. Little, 12 P. R. 593. But it may be granted although the objection was not raised in the court below: Nerlick v. Clifford, 6 P. R. 212: see "Waiver," *ante*.

Where defendants were resident out of Ontario, but appeared at the trial and after their objection was overruled proceeded with the defence and cross-examined witnesses, prohibition was refused: *Re* Guy v. The G. T. Ry. Co., 10 P. R. 572.

And where defendants moved to set aside the judgment and to be let in to defend they were held to have acquiesced in the jurisdiction: Gibson v. Chadwick, 12 C. L. T. 207.

Where a third party had not been served with process but appeared at the trial and took part in the proceedings, prohibition was refused: *Re* Merchants Bank v. Van Allen, 10 P. R. 348.

Where defendant did not negative the existence of such facts as would give the judge jurisdiction to make an order for substitutional service, prohibition was refused: *Re* Hibbitt v. Schilbroth, 18 O. R. 399.

A party does not lose his right to prohibition by obtaining from the judge a statement of the case for the opinion of a superior court: Jackson v. Beaumont, 11 Ex. 300.

An appeal does not necessarily prevent prohibition: Chesterton v. Fowler, 7 A. & E. 713; Veley v. Burder, 12 A. & E. 313, 314; White v. Steel, 12 C. B. N. S. 410; Harrington v. Ramsay, 8 Ex. 879; *per* Burton, J., *Re* Thompson v. Hay, 20 A. R. 382; *Re* Rochon, 31 O. R. 122; but in Comyn's Dig. *Title* "Prohibition (D.)" it is said, "but generally after an appeal a prohibition should not be allowed if the matter be not apparent, for by that the party affirms the jurisdiction." But while an appeal is pending prohibition will be refused: Wiltsie v. Ward, 9 P. R. 216; see also Devonshire v. Foote, Ir. R. 7 Eq. 365; Barker v. Palmer, 51 L. J. Q. B. 110; see also as to acquiescence in jurisdiction: Yates v. Palmer, 6 D. & L. 288; Winson v. Durnford, 12 Q. B. 603; *Ex parte* Cowan, 3 B. & A. 123; Bank of Ottawa v. Wade, 21 O. R. 486. It has been held in the Quebec courts that in cases where the granting of prohibition is discretionary, it will only be granted if no equally convenient and adequate remedy exists: Tessier v. Desmoyen, 17 Que. S. C. R. 35; and will not be granted if there is a complete remedy by appeal: R. v. Amyot, 11 Can. Cr. Cas. 232.

Injunction Instead of Prohibition.—The jurisdiction to grant prohibition is now conferred by the Judicature Act upon every judge of the Supreme Court; but inasmuch as one of the main objects of the Act is to enable the court to decide, if possible, in one proceeding, all questions in dispute in the same matter and between the same parties, and to grant an injunction in all cases in which it shall appear to the court "just and convenient" so to do, the court may, in any case in which it has power to grant prohibition, grant an injunction to restrain proceedings in the inferior court: Hedley v. Bates, 13 Ch. D. 498; Seaward v.

Sec. 61. St. Giles, Camberwell, 20 Ch. D. 190; see also G. W. Ry. Co. v. Waterford & L. Ry. Co., 17 Ch. D. 493.

Particular Issue.—Where the objection to jurisdiction extends only to a particular issue in the action, exception must first be taken in the court below.

When there is general jurisdiction over the subject matter, but a defence is raised which the court is incompetent to try, then the prohibition acts simply in aid of the special or inferior court, by trying what that court had no jurisdiction to try, and upon an affirmative decision, the prohibition is absolute: but upon a negative decision, there is a judgment of consultation, upon which the special or inferior court proceeds with the cause, unhampered by the objection: London (Mayor) v. Cox, L. R. 2 H. L. 239, 276.

Where a breach of contract was not within the jurisdiction, prohibition was granted as to that part of the cause of action, leaving it open to the plaintiff to proceed on amended particulars for a breach of the contract which was within the jurisdiction: Walsh v. Ionides, 1 E. & B. 383.

And where a plaint contains two claims, one of which is within the jurisdiction and the other without the jurisdiction, prohibition will be granted as to the one without the jurisdiction: R. v. Judge of Westmoreland C. C., 58 L. T. 417; see Mackonochie v. Penzance, 6 App. Cas. 463; Wallace v. Allen, L. R. 19 C. P. 607; Carsiake v. Mapledoram, 2 Term R. 473; Gould v. Gapper, 7 P. R. 766; Ellis v. Fleming, 1 C. P. D. 237.

Where the plaintiff's claim was in excess of the jurisdiction of the court and was made up of items of an unsettled account for $95, and interest amounting to $14.73, it was held that the claim for interest was clearly severable from the rest and prohibition was granted for that part of the claim which brought it up to an amount in excess of $100: *Re* Lott v. Cameron, 20 O. R. 79; *Re* Elliott v. Blette, 21 O. R. 595; *Re* Trimble v. Miller, 22 O. R. 500. But the plaintiff may amend by leave of the judge at the trial by abandoning the excess: Rule 4; Pegg v. Howlett, 28 O. R. 473. Interest is not to be included in determining the question of jurisdiction: *Ibid.*; s. 62 (*d*): see notes, *post*, "Amendment to give jurisdiction."

Prohibition was granted to restrain an action for the recovery of land so far as freehold, but not so far as leasehold: Kerkin v. Kerkin, 3 E. & B. 399.

A judge has power to strike out a count which ousts his jurisdiction, and if prohibition be applied for before trial it will only be granted as far as that count: Fitzsimmons v. McIntyre, 5 P. R. 119; see also Meek v. Scobell, 4 O. R. 533; Hallack v. Cambridge, 1 Q. B. 593; R. v. Twiss, L. R. 4 Q. B. 407.

Denial or Perversion of Right.—Prohibition may be granted where the proceedings are a denial or perversion of right. "Such, for instance, as a refusal of a copy of the libel, in which case the prohibition is only *quousque*, or refusal of a valid plea to a subject matter of complaint within the jurisdiction, in which case, although, if the plea had been received, it might have been tried in the court below, yet, if it be refused, upon its validity and truth being established in the court above, the prohibition is absolute:" London (Mayor) v. Cox, L. R. 2 H. L. 276; *Re* Elliott v. Blette, 21 O. R. 595; *Re* Trimble v. Miller, 22 O. R. 500.

If the defendant was served, the day before any sittings, with an ordinary summons, should the judge insist on proceeding with the hear-

ing at such sittings, prohibition would lie: *Ex parte* McEwe, 9 Ex. 311; *Ex parte* Story, 12 C. B. 767; James v. The S. W. Ry. Co., L. R. 7 Ex. 287; Serjeant v. Dale, 2 Q. B. D. 506; Zavitz v. Mann, 16 C. L. J. 144. Sec. 61.

Where a judge ordered a reference without the consent of parties in a matter in which such consent was a necessary condition, prohibition was granted: *Re* The London Scottish Per. Building Society, 61 L. J. Q. B. 112.

So also where a judge made an order unauthorized by the rules: Gould v. Hope, 20 A. R. 347. And where a court attempts to exercise judicial functions in respect of persons not before it, it is acting without jurisdiction and prohibition will lie: *Re* Hickson and Wilson, 17 C. L. T. 303; R. v. The Local Government Board, 10 Q. B. D. 321.

Where a judge granted a new trial after the expiration of 14 days, contrary to section 152 (now 123 (1) and see s. 123 (2) extending the time under certain circumstances), prohibition was granted: *Re* Foley v. Moran, 11 P. R. 316; Bland v. Rivers, 19 O. R. 407; but *quære* whether application should not first be made to the judge of the inferior court to set aside the order for a new trial: Jones' Trustees v. Gittins, 51 L. T. 590.

Where a judge withdrew the case from the jury so far as the defendant was concerned, and directed the jury to find for the plaintiff, the evidence being uncontradicted, it was held that he had exceeded his jurisdiction and assumed the functions of the jury, and prohibition was granted: *Re* Lewis v. Old, 17 O. R. 610; but by section 144 which was passed since the above decision, the judge has now the right to nonsuit the plaintiff, notwithstanding the jury's verdict for the plaintiff if he reserved his decision on the defendant's motion for non-suit, made before the verdict, on the ground that there was no evidence to go to the jury; but the rights of the defendant to have the case submitted to the jury is not interfered with by that section: *Re* Johnston v. Kayler, 18 O. L. R. 248. See Jones v. Julian, 28 O. R. 60; Cowan v. Affie, 24 O. R. 358.

Where notice in writing is a condition precedent to the continuance of the action, a court has no jurisdiction to proceed in its absence: *Re* McGregor v. Norton, 13 P. R. 223; R. v. Arkwright, 12 Q. B. 960; *Re* McLean v. Osgoode, 30 O. R. 430; and an insufficient notice cannot be amended: *Re* Coe v. Coe, 21 O. R. 400.

It is difficult to draw a sharp line between excess of jurisdiction and an improper exercise of it, and where the court has a discretion, prohibition will be refused: Jackson v. Copeland, 8 T. L. R. 259.

Amendment to Give Jurisdiction.—Generally, if the plaint is in regard to a subject matter over which the inferior court has no jurisdiction, it has no power to amend so as to bring it within the jurisdiction: Jordan v. Marr, 4 U. C. R. 53; Powley v. Whitehead, 16 U. C. R. 580 (title to land); Ferguson v. The Corp. of Howick, 25 U. C. R. 555 (suit in wrong court); Hodgson v. Graham, 26 U. C. R. 127; Young v. Mordon, 10 P. R. 276 (excessive claim); Insley v. Jones, 4 Ex. D. 16 (refusal to send to county court when claim £50 "and interest"); Hopper v. Warburton, 7 L. T. N. S. 722 (malicious prosecution, no power to change to false imprisonment); Avards v. Rhodes, 8 Ex. 312; 17 Jur. 71 (unadmitted set-off); Lawford v. Partridge, 1 H. & N. 621 (title to land); Sherwood v. Cline, 17 O. R. 726 (ascertainment of disputed account); Cleveland Press v. Fleming, 24 O. R. 335 (abandonment at trial of excess); but see now rule 4. In Greenlzen v. Burns, 13 A. R. 481, the claim in a county court action was $400 "and interest." Upon appeal from a verdict for plaintiff, it was held that the

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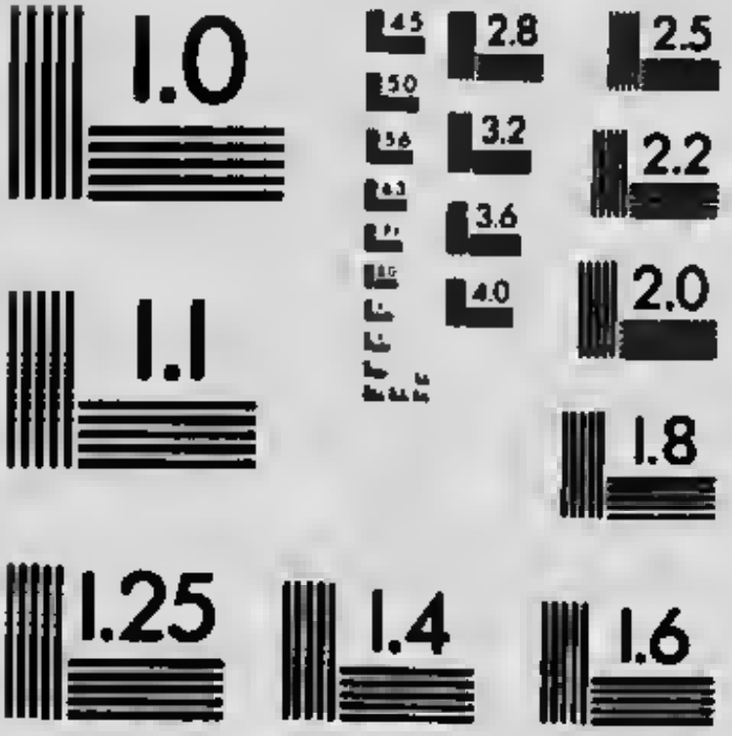

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Sec. 61. county court had power to strike out the words "and interest." The court referred to Thomas v. Hilmer, 4 U. C. R. 527, in which the verdict was for an amount beyond the jurisdiction. "It seems to me that a claim on a record beyond the jurisdiction is more serious than an assessment for the same amount: *per* Rose, J., Sherwood v. Cline. 17 O. R. 37." Where the plaintiff seeks to abandon the excess over the jurisdiction, the court has jurisdiction to permit the amendment: *Re* White v. Galbraith, 12 P. R. 513; at any time before judgment; rule 4; *e.g.*, by abandoning the charge for notarial fees, Pegg v. Howlett, 28 O. R. 473; Sebert v. Hodgson, 32 O. R. 157; and if the amendment is not made, prohibition will be granted only as to the excess, if severable: Elliott v. Bickle, 21 O. R. 595; *Re* Trimble v. Miller, 22 O. R. 500; *Re* Lott v. Cameron, 29 O. R. 70; *Re* Kerkin v. Kerkin, 3 E. & B. 399; *Re* Walsh and Ironsides, 1 E. & B. 383; Mackonochie v. Penzance, 6 App. Cas. 463. Now, however, the judge has almost unlimited power of amendment in the division court, and may change a claim entered for a wager to one for money received to the plaintiff's use: *In re* Sebert v. Hodgson, 31 O. R. 157; and see *Re* Ratcliffe v. Crescent Mill, 1 O. L. R. 331.

Where there is an appeal from the ruling of the judge, that is the defendant's proper remedy and an application by him for a prohibition against the issue of execution on the judgment will not be granted: Barker v. Palmer, 8 Q. B. D. 9; but see *Re* Rochon, 31 O. R. 122, and other cases cited under heading "Delay."

If the jurisdiction of the court is upheld the same objection cannot be again raised at the trial: Symons v. Rees, 1 Ex. D. 416.

Where Judge Interested.—Where a judge of an inferior court proceeds to try, by himself or his deputy, a cause in which he is himself interested, he will be restrained by prohibition: Bac. Abr. Prohibition, 16; Hutton v. Fowke, 1 Rep. 648; Anon., 1 Salk. 396; but there would seem to be no objection to an uninterested deputy judge hearing the cause: *Ex parte* Medwin, 1 E. & B. 609; 17 Jur. 1178.

The fact that the plaintiff is the judge's servant disqualifies him: Gallant v. Young, 11 C. L. J. 217.

Upon the subject of interest of persons occupying judicial or quasi judicial positions, the following authorities may be referred to: Vineberg v. Guardian Fire and Life Assu. Co., 19 A. R. 293; Christie v. Toronto Junction, 24 O. R. 443; Burford v. Chambers, 25 O. R. 663; R. v. Collins, 2 Q. B. D. 35; Bennitt v. Brumfit, L. R. 3 C. P. 28; *Re* Muskoka and Gravenhurst, 6 O. R. 352; R. v. Milledge, 4 Q. B. D. 332; Hill v. Manager Met. Asylum District, 4 Q. B. D. 433; R. v. Bishop of Oxford, 4 Q. B. D. 245, 525; 5 App. Cas. 214; R. v. Handaley, 8 Q. B. D. 383; R. v. Lee, 9 Q. B. D. 394; *Re* Vashon v. East Hawkesbury, 30 C. P. 194, 203; Borough of Freeport v. Marks, 59 Penn. 253-257; Strekert v. East Saginaw, 22 Mich. 104-112; Baird v. Almonte, 41 U. C. R. 415; Cannon v. Toronto Corn Exchange, 5 A. R. 268; Paley on Convictions, 6th ed., 40-48; Randall v. Brigham, 7 Wallace 520; Bradley v. Fisher, 13 Wallace 335; Bingham v. Cabbot, 3 Dallas 19; U. S. v. Lancaster, 5 Wheaton, 434; Slocum v. Sims, 5 Cranch 363; Life and Fire Insurance Co. v. Wilson, 8 Peters 291; Cooley on Torts, c. 14; Willis v. MacLachlan, 1 Ex. D. 376; Lowter v. Radnor (Earl of), 8 East 113-118; Frey v. Blackburn, 3 B. & S. 576; Pappa v. Rose, L. R. 7 C. P. 525; Tharsis Sulphur Co. v. Loftus, L. R. 8 C. P. 1; Stevenson v. Watson, 4 C. P. D. 148; R. v. Langford, 15 O. R. 52; R. v. Chapman, 1 O. R. 582; R. v. Kemp, 10 O. R. 143; Conmee v. C. P. R. Co., 16 O. R. 639; R. v.

Farrant, 20 Q. B. D. 58; R. v. Fii, 10 O. R. 727; R. v. Richardson, 20 O. R. 514, and cases cited in Senger's Magistrates' Manual, 2nd ed., p. 210, and in 14 Can. Cr. Cas. 435. Sec. 61.

Illustrations of Prohibition Refused.—Prohibition will not be granted in any of the following cases: Where the facts relied upon as ousting jurisdiction are not extrinsic to the adjudication which is impeached: Colonial Bank of Australasia v. Willan, L. R. 5 C. P. 417. Where the subject of the suit is within the jurisdiction, though matter is stated beyond the jurisdiction, unless the court is proceeding to try such matter: Dutens v. Robson, 1 H. Bl. 100; nor because in arriving at his decision he has incidentally to consider and adjudicate upon a claim, the amount of which exceeds the jurisdiction: Beattie v. McDonald, 34 C. L. J. 198; see Read v. Brown, 22 Q. B. D. 128. Where the matter is immaterial: Butterworth v. Walker, 3 Burr. 1689. For mistake of law: Toft v. Raynor, 5 C. B. 162; Lexden v. Southgate, 10 Ex. 201; Ellis v. Watt, 8 C. B. 614; *Re* Grass v. Allan, 26 U. C. R. 123; Norris v. Carrington, 16 C. B. N. S. 396; Meredith v. Whithingham, 1 C. B. N. S. 216; or for a mere irregularity in the proceedings: London (Mayor) v. Cox, L. R. 2 H. C. 276; Dougall v. Leggo, 1 West. L. T. 246; R. v. Mayor of London, 69 Q. T. 721; *Re* First D. C. Huron, 5 P. R. 467. Where the judgment is unwise or unjust: Zohrab v. Smith, 5 D. & L. 639. Upon a mere matter of practice: Foster v. Temple, 5 D. & L. 655; Carter v. Smith, 4 E. & B. 696; McLean v. McLeod, 5 P. R. 467; Fee v. McIlhargey, 9 P. R. 329; McKay v. Palmer, 12 P. R. 219; Backhouse v. Bright, 13 P. R. 117; Barker v. Palmer, 30 W. R. 59; *Re* Gerow v. Hoyle, 28 O. R. 405; R. v. London (Mayor) and Stock, 62 L. J. Q. B. 580. Where it is doubtful if the jurisdiction extends to a place where an alleged offence was committed: *Re* Birch, 15 C. B. 743. Where the judgment is against law and good conscience: Siddall v. Gibson, 17 U. C. R. 08. For improper reception or rejection of evidence: Winsor v. Dunford, 12 Q. B. 603; *Re* Reed v. Graham, 25 O. R. 573; *Ex parte* Higgins, 10 Jur. 838. Where an order of committal is made against a judgment debtor who claimed to be a discharged insolvent: Still v. Booth, 1 L. M. & P. 440; 15 Jur. 577. That a bailiff has seized too much property: *Ex parte* Summers, 18 Jur. 522. Where in an action for false imprisonment (within the jurisdiction) the judge has, in estimating damages, considered matters the subject of malicious prosecution (beyond the jurisdiction): Chivers v. Savage, 5 E. & B. 697; where a court erroneously held that a debt was attachable: Bland v. Andrews, 45 U. C. R. 431; see Macfie v. Hutchinson, 12 P. R. 167; *Re* the Grosvenor v. The West End Terminal Hotel Co., 76 L. T., p. 339; or that a debt was due: Field v. Rice, 20 O. R. 309; or misinterpreted a statute not going to the limits of jurisdiction: Long Point Co. v. Anderson, 18 A. R. 401; Ameliasburg v. Pitcher, 13 O. L. R. 417; *Re* Errington v. Court Douglas, C. D. F., 14 O. L. R. 75; *Re* Aurora Scrutiny, 28 O. L. R. 475; *Re* Royston Park, 28 O. L. R. 629. Where the judge refused an application for new trial, but afterwards granted a new trial for misconduct of jury without evidence to warrant such finding: Moxon v. London Tramways Co., 60 L. T. 248, *sub nom*, R. v. Judge of Greenwich County Ct.; that the plaintiff had no existence in fact or law, and no title to sue: Western Fair Association v. Hutchinson, 12 P. R. 40. "The misinterpretation of either the common or statute law in a proceeding confessedly within the jurisdiction of these (inferior) courts, and where they are bound to exercise their judgment upon the one or the other seems to be rather a matter of error to be reversed upon appeal (if any) than a ground for prohibition:" Home v. Camden, 2

Sec. 61. H. Bl. 536; *Re* Dyer v. Evans, 30 O. R. 637; *Re* Morgan v. Billings, 7 O. W. N. 138.

Where the Jurisdiction Depends upon Contested Facts.—Where the inferior court has jurisdiction to enter upon the inquiry but erroneously finds a fact, which though essential to its order, it is competent to try, the decision cannot be reviewed: Colonial Bank of Australasia v. Willan, L. R. 5 P. C. 417 at p. 443; R. v. Cunerty, 26 O. R. 51.

The inferior court has such jurisdiction when the action is *prima facie* within its jurisdiction, *e.g.*—an action of trespass to goods: Long Point Co. v. Anderson, 18 A. R. 401; or for balance of an account settled by a part payment in goods, although defendant denies that goods delivered in payment: Joseph v. Henry, 1 L. M. & P. 388; 15 Jur. 104; or for conversion of a chattel: Bushell v. Moss, 11 P. R. 252; or for rent: Crawford v. Seney, 17 O. R. 74; and in such a case prohibition will not be granted until the judge has inquired into the facts to ascertain if the action is within the jurisdiction: Dixon v. Snarr, 6 P. R. 336. When the facts as to want of jurisdiction are in dispute then it would be proper to relegate the whole matter to the division court judge, and for that purpose to enlarge the motion: *Re* Brazil v. Johns, 24 O. R. 214: and see Slater v. Laboree, 9 O. L. R. 545.

Nothing can be inferred to oust jurisdiction where in any aspect of the case there is jurisdiction: English v. Mulholland, 9 P. R. 145. See Stephens v. Laplante, 8 P. R. 52, where the judge had not decided the question on which jurisdiction depended, and prohibition was granted. Where the judge had decided that the parties had agreed to a set-off, prohibition was refused: Jenkins v. Miller, 10 P. R. 95. See also Fleming v. Livingstone, 6 P. R. 63.

If the judge finds the facts to be such as do not oust the jurisdiction, his finding is conclusive, and will not be reversed except upon strong grounds: *per* Cockburn, C.J., Elston v. Rose, L. R. 4 Q. B. 4; Brown v. Cocking, L. R. 3 Q. B. 672; Loppky v Hofley, 18 C. L. T. 369; 12 Man. L. R. 335; Joseph v. Henry, 4 Q. B. 369; but see Liverpool Gas Light Co. v. Overseers of Everton, L. R. 6 C. P. 414. But if there is no evidence upon which the judge can find he has jurisdiction, prohibition will be granted: Wilkes v. The Home Life Association of Canada, 8 O. L. R. R. 91.

When the finding of fact shows jurisdiction, any wrong construction, either of an Act of Parliament or document, will not be ground for prohibition. "Within his jurisdiction he may misconstrue a statute or document, or otherwise misdecide the law as freely and with as high an immunity from correction, except upon appeal, as any other judge;" *Re* Long Point Co. v. Anderson, 18 A. R. 401; *per* Osler, J.A., 18 A. R. 408; see R. v. McIntosh, 17 C. L. T. 407; *Re* Dyer v. Evans, 30 O. R. 637; Siddall v. Gibson, 17 U. C. R. 98; Enraght v. Penzance, 7 App. Cas. 240; Honan v. The Bar of Montreal, 19 C. L. T. 377; Chisholm v. Oakville, 12 A. R. 225; *Re* Bowen, 15 Jur. 1196; *Re* Robertson and Chatham, 19 C. L. T. 380; see also Sims v. Kelly, 20 O. R. 291, decided before the appeal in Long Point Co. v. Anderson, and which is perhaps not law. Despite any considerations of public policy if there is jurisdiction to deal with the matter prohibition will not lie: *Re* Hyde v. Caven, 19 C. L. T. 359.

But, if upon the facts, as proved, or upon admitted facts, or upon the proper construction of an Act or document, the judge has no jurisdiction, his finding that he has jurisdiction will not prevent prohibition: see Elston v. Rose, L. R. 4 Q. B. 4, where the judge had jurisdiction over

premises of a certain value and wrongly decided that the value was to be ascertained in a manner not authorized by the statute giving jurisdiction: *per* Blackburn, J., "He applied a wrong rule of law to the facts;" see also Evans v. Sutton, 8 P. R. 367, where the judge wrongly construed an Act to authorize a judgment without evidence: R. v. Arkwright, 12 Q. B. 960; *Re* Coe v. Coe, 21 O. R. 409, where upon the true construction of a statute certain notices must have preceded the inquiry: Ahrens v. McGilligat, 22 C. P. 171, where the judge wrongly applied an Act authorizing service upon a foreign railway corporation by serving a station master, to a case in which he had no jurisdiction: Moore v. Wallace, 13 P. R. 201, where a judge exceeded his jurisdiction by contravening the provisions of a statute: R. v. Judge of County Court of Lincolnshire, 20 Q. B. D. 167, where a judge wrongly construed a will as giving a vested interest in funds to defendant and appointed a receiver thereof: Liverpool Gas Co. v. Everton, L. R. 6 C. P. 414, where a judge's decision upon a question of mixed law and fact, was reviewed and prohibition granted. "A court of limited jurisdiction cannot give itself jurisdiction by finding any facts:" *per* Lord Wensleydale, Rorke v. Errington, 7 H. L. C. 817 at p. 832; Jacomb v. Turner, 1892, 1 Q. B. 47; see McKenzie *In re* Ryan, 6 P. R. 323; *Re* Moberly v. Town of Collingwood, 25 O. R. 625. Sec. 61.

Where it is necessary to interpret a statute in order to find out whether the court has authority to decide the rights of the parties, then if the court misinterprets the statute so as to give itself jurisdiction, prohibition will lie; but if it be necessary to interpret a statute in order to decide those rights prohibition does not lie, however far wrong such interpretation may be: *Re* Long Point Co. v. Anderson, 18 A. R. 401, followed in *Re* Amelíasburg v. Pitcher, 13 O. L. R. 417, and *Re* Errington v. Court Douglass C. O. F., 14 O. L. R. 75, in which it was held that there was no authority to over-rule by prohibition the judge upon the question, whether there was any right of action; it only such a misinterpretation of a statute as gives jurisdiction to an inferior court which can be made ground for prohibition: *Re* Royston Park, 28 O. L. R. 629; *Re* Aurora Scrutiny, 28 O. L. R. 475; Park v. Fletcher, cited 28 O. L. R. at p. 633; *Re* Morgan v. Billings, 7 O. W. N. 138.

But a judge cannot give himself jurisdiction by coming to an erroneous conclusion upon a point of law: Easton v. Rose, L. R. 4 Q. B. 4; Wilkes v. Home Life Association, 8 O. L. R. 91, in which the judge erroneously held a parol executory agreement for a lease to be a binding contract with breach thereof in the division where the action was brought. Easton v. Rose, *supra*, was followed in *Re* Rochon v. Wellington, 5 O. L. R. 102; *Re* McGregor v. Norton, 13 P. R. 223, and in Barr v. McMillan, 7 O. L. R. 70.

And where on a point collateral to the merits of the case, upon the decision of which the limit of its jurisdiction depends, the inferior court has wrongly decided even upon the facts, the decision may be reviewed: London (Mayor) v. Cox, L. R. 2 H. L. 282, 283; Bunbury v. Fuller, 9 Ex. 111; Peal v. Chaytor, 3 B. & S. 620; Thompson v. Ingham, 14 Q. B. 710 (where inferior court wrongly decided that the title to land was not in question); R. v. Stimpson, 4 B. & S. 301; Chew v. Holroyd, 8 Ex. 249; Marsden v. Wardle, 3 E. & B. 695; Chisholm v. Oakville, 12 A. R. 225 at p. 230.

The court will look beyond the evidence in the court below and allow additional evidence to be given showing jurisdiction: Heyworth v. London (Mayor), 1 C. & E. 312.

It is only in a plain case of unlawful assumption of jurisdiction by an inferior court that the extreme remedy of prohibition will be applied:

Sec. 61. *Re* Cummings v. Carleton, 25 O. R. 607; *Re* Grass v. Allan, 26 U. C. R. 123; Rex v. Hamlink, 26 O. L. R. 381.

Application for Prohibition—By Whom Made.—The party against whom the plaint has been lodged generally makes the application. Where in a garnishment proceeding the court has no jurisdiction over the primary debtor, either the debtor or the garnishee may apply: DeHaber v. Portugal (Queen), 17 Q. B. 171; Wadsworth v. Spain (Queen), 17 Q. B. 101.

A stranger may make the application: *Articuli Cleri*, 3 Jac. 1, 3rd objection, L. R. 2 H. L. 270; Baker v. Clark, L. R. 8 C. P. 121; Jacobs v. Brett, L. R. 20 Eq. 1; but the better opinion seems to be that the interference of the court, upon the application of a stranger is discretionary: L. R. 2 H. L. 280; *Re* Forster, 4 B. & S. 187; Wortbington v. Jeffries, L. R. 10 C. P. 379; Chambers v. Green, L. R. 20 Eq. 552; Ellis v. Fleming, 1 C. P. D. 237; Broad v. Perkins, 20 Q. B. D. 533; Ede v. Jackson, Fort. 345.

How Made.—It is not now to be made by ordinary motion (Con. R. 213) but upon a summary application by originating notice: Con. R. 22.

To Whom Made.—The application is made to a judge of the Supreme Court of Ontario in chambers: Con. R. 207 (11); Johnston v. Galbraith, 18 C. L. T. 58; King v. Charing Cross Bank, 24 Q. B. D. 27; R.S.O. (1877), c. 52, s. 3. It may be made to a local judge of the Supreme Court of Ontario in cases where Con. Rule 210 applies, i.e., where the solicitors for all parties reside in the county or so agree.

Material in Support of.—The application is to be supported by affidavits showing the want of jurisdiction: Con. R. 226; all the materials upon which the court below has acted should be brought before the court: *Re* Grass v. Allan, 26 U. C. R. 123.

The affidavit should be entitled, "In the Supreme Court of Ontario," but need not be entitled in any cause: *Ex parte* Evans, 2 Dowl. N. S. 410; Siddall v. Gibson, 17 U. C. R. 98; Miron v. McCabe, 4 P. R. 171; see R. v. Plymouth & Dartmouth Ry. Co., 37 W. R. 334; but if the names of the plaintiff and defendant are used as if there were a cause, the names are mere surplusage: Hargreaves v. Hayes, 5 E. & B. 272; Breedon v. Capp, 9 Jur. 781; and in practice it is usual to style the affidavits, "In the Supreme Court of Ontario, High Court Division. In the matter of a plaint in the Division Court of the, etc., wherein A. B. is plaintiff and C. D. defendant": *Re* Burrows, 18 C. P. 493.

The affidavit must be drawn up in the first person, stating the name of the deponent in full: Con. R. 291; and filed with the clerk in Chambers: Con. R. 298; or the local registrar of the Supreme Court of Ontario when the motion is to be made before the local judge, in cases to which C. R. 210 applies.

It must state clearly and distinctly the facts which show that the application ought to be granted, and show affirmatively that the court has gone beyond its jurisdiction. So, when a judge has jurisdiction to inquire into the objection it must be shown that it was substantiated: *Per* Wilde, C.J., Kempton v. Willey, 1 L. M. & P., p. 280. And the affidavit should state the facts disclosing a meritorious defence: Can. Oil Co. v. McConnell, 27 O. L. R. 549.

For form of affidavit see Form 92.

Sec. 61.

The writ of prohibition is abolished and the order has now the same effect: Con. R. 623.

When application for the order has been made and refused a second application may be made on different grounds from those on which the first application was founded.

It has been held that it is for the party opposing prohibition to show jurisdiction: R. v. Lord Mayor, 8 T. L. R. 298; but see Bongard v. McWhirtier, 12 U. C. R. 143; McWhirtier v. Bongard, 14 U. C. R. 84; *Re* Superintendent of Schools v. Sylvester, 18 U. C. R. 538, where it is laid down that the party applying must make out a clear case.

Notice of Motion.—The notice of motion is an "originating notice": Con. R. 622; and unless the court or judge gives special leave to the contrary, notice should be served (Con. R. 213) seven clear days before the day for hearing: Con. R. 215 (2) and in the computation of such seven clear days, Sundays and holidays are not to be excluded: Con. R. 172. The day of service and the return day are both excluded: Con. R. 173 (2). The Court may require notice to be given to any person claiming any right or interest in the subject matter: Con. R. 624. The judge of the inferior court and the parties opposed in interest to the party making the application, should be served with the notice of motion. If the prohibition is to restrain a ministerial act such as the issue of a warrant of execution or commitment, the clerk should be served with notice: *Re* Woltz v. Blakely, 11 P. R. 430; R. v. Fletcher, 2 E. & B. 279. Form of notice or motion: Form 93.

Rules of Court.—The following are the Consolidated Rules of the Supreme Court referring to prohibition:—

622.—*Mandamus*, prohibition and *certiorari* may be granted upon a summary application by originating notice.

623.—No writ of *mandamus*, prohibition or *certiorari* shall be issued, but all necessary provisions shall be made in the judgment or order.

624.—The Court may require notice to be given to any person claiming any right or interest in the subject-matter of the application.

For the practice on the motion, see Con. Rules 213, *et seq.*

Stay of Proceedings.—Proceedings in the court below cannot be stayed by the higher court pending prohibition: Miron v. McCabe, 4 P. R. 171. The inferior court might, however, by virtue of its inherent power, stay proceedings. But by Con. R. 215 (2) leave may be given by a judge in Chambers to serve short notice of motion, or may make an interim order: Con. R. 216.

Restitution.—If execution has been levied and the money made, the prohibiting court will order its repayment: *Re* Johnson v. Therrien, 12 P. R. 442; but *quære*, see 1 H. & L. 654. And where a transcript had been issued to a higher court, the judgment founded thereon was set aside: Labatt v. Chisholm, 11 C. L. T. 188; see Reattie v. Holmes, 29 O. R. 264.

Sec. 61.

Declaration in Prohibition.—Formerly where a party made out a *prima facie* case for prohibition, and the party against whom the application was made objected to the granting of the writ, the court might direct the applicant to declare in prohibition: Worthington v. Jeffries, L. R. 10 C. P. 379. This was nothing more than an issue directed in a disputed case only, to inform the conscience of the court whether the court below had power to proceed. It could not be resorted to as a matter of course, but only by discretion of the prohibiting court, and then not without the concurrence of the defendant (respondent) who might allow the prohibition to go, in the first instance, without the expense of showing cause: Loudon (Mayor) v. Cox, L. R. 2 H. L. 278; Pewtress v. Harvey, 1 B. & Ad. 154; Mittleberger v. Merritt, 2 U. C. R. 413.

The practice, in such cases, was prescribed by R.S.O. (1877), c. 52, s. 2. This statute was repealed by R.S.O. (1887), Sched. A., p. 2660; 51 Vic. c. 2, s. 2. All former practice inconsistent with the Consolidated Rules is also repealed: C. R. 2.

As the rules now provide for an appeal, there is less necessity for such a proceeding: Mackonochie v. Lord Penzance, 6 App. Cas. 424, at p. 444, and it was unusual: see Toomer v. London, C. & D. Ry. Co., 2 Ex. D. at p. 458; Serjeant v. Dale, 2 Q. B. D. at p. 568.

In a proper case, the court may dispose of the motion summarily or direct an issue to ascertain the actual facts: Con. R. 606 (1). It is always in the discretion of the court to say whether a plaintiff in prohibition shall be ordered to plead: Halsbury, 10, 154.

Appeal.—Formerly there was no appeal, but the party applying for prohibition could move for prohibition in one court and if refused could renew the application in another court and so go from court to court as in the case of other prerogative writs. Now, however, by the Judicature Act, R.S.O. 1914, c. 56, s. 26, and Con. R. 507, a right of appeal is given to a divisional court (The Appellate Division) from every order or judgment of a judge in chambers, of which two clear days' notice must be served: Con. R. 492; and the practice thereon as stated in Con. R. 492-498; and see Con. R. 507 (6) as to stay of proceedings.

An appeal may also be made to the Supreme Court of Canada: R.S.C. c. 139, s. 39 (*c*).

Notice of appeal must be served on county judge: Gibbons v. Chadwick, 12 C. L. T. 328; as he is entitled to appear on the application: R. v. Cooper, 24 Q. B. D. 60.

Costs.—The costs are in the discretion of the court or judge: The Judicature Act, s. 74. A successful party is entitled to and should be awarded costs, unless the court, in the proper exercise of a wise discretion, can see good cause for depriving such party of them, and such party should not be deprived of costs, unless there appears impropriety of conduct which induced the litigation, or impropriety in the conduct of the litigation: McLeod v. Emigh, 12 P. R. 503; *Re* Bros. v. Johns, 24 O. R. 209; see Wallace v. Allen, L. R. 10 C. P. 607; *Ex parte* Overseers of Everton, L. R. 6 C. P. 245. "It is difficult to understand on what principle a litigant who successfully impeaches the jurisdiction of the court into which his adversary has improperly dragged him, is to be deprived of the costs of a proceeding which the conduct of his adversary has rendered imperatively necessary": R. v. London (Justices) 1894, 1 Q. B. 453. Costs were refused where there were impertinent and scandalous statements in applicant's affidavit: *Re* Hamilton ...

Perry, 24 O. f. R. 38; and where the course pursued was not approved of: *Re* Canadian Oil Co. v. McConnell, 27 O. f. R. 549. Sec. 61.

If the objection to jurisdiction was not raised in the court below, the applicant may be refused costs: Nerlick v. Clifford, 6 P. R. 212. Where the point raised was new and had not been raised in the court below, costs were refused on granting prohibition: *In re* Dey v. McGill, 10 O. L. R. 408.

Where a defendant moved for prohibition, on the ground of want of territorial jurisdiction and before the hearing, and pending the motion, the inferior court transferred the plaint to the proper court, it was held that the defendant was entitled to the costs of the motion: Olmstead v. Errington, 11 P. R. 269. Where the opposite party was not in fault, costs were refused: *Re* Hawley v. Young, 7 C. f. T. 346. It is not usual to give costs against the judge: *Re* Johnston v. Therrien, 12 P. R. 442. Where there were not merits but the plaintiff persisted in proceeding, costs were allowed: Rutherford v. Walls, 12 C. f. T. 205; see Nerlick v. Clifford, 6 P. R. 212; Mitchell v. Scribner, 20 O. R. 17; Field v. Rice, 20 O. R. 309.

In several cases the costs of action not arising within the jurisdiction of the court were ordered to be paid by the respective attorneys for the plaintiffs: *Mem.* 30 L. T. 50. But a solicitor will not be ordered to pay the costs unless the rule has been moved for in that form and he has had an opportunity of showing cause: Rogers v. London, C. & D. Ry. Co., 26 W. R. 192.

Effect of Dismissal of Application.—The dismissal of the application for prohibition before trial is conclusive as to the question of jurisdiction, and the judge at the trial should not receive evidence from the defendant upon that question: Symons v. Ress, 1 Ex. D. 410.

Damages.—After obtaining the order of prohibition, an action would seem to lie for the damages sustained by reason of the plaint being prosecuted in a court having no jurisdiction: Buller's N. P. 219; Cro. Cas. 550; Mittleberger v. Merritt, 2 U. C. R. 413.

The costs incurred by a plaintiff in prohibition in his defence to the suit in the inferior court are not recoverable as damages: White v. Steel, 13 C. B. N. S. 231.

Mandamus.—Mandamus is an order issuable out of the Supreme Court of Ontario requiring the inferior court or the judge or the officer thereof to do some particular thing which pertains to their office or duty. "It issues in all cases where the party hath a right to have anything done and hath no other specific means of compelling its performance:" Shortt on Informations, 223. Two circumstances must concur: a specific legal right: R. v. Lewisham Union, 1897, 1 Q. B. 498; see *Re* Whitaker and Mason, 18 O. R. 63; Peebles v. Oswaldtwistle, 1897, 1 Q. B. 625; and the absence of an effectual remedy: R. v. Joint Stock Companies' Registrar, 21 Q. B. D. 131; R. v. St. Giles, Camberwell, Vestry, 45 W. R. 335; If the remedy is doubtful, mandamus will issue; R. v. Nottingham Old Waterworks Co., 6 A. & E. 355; R. v. Bristol Dock Co., 12 East 429; R. v. Nottingham Water Co., 6 A. & E. 355; R. v. Garland, f. R. 5 Q. B. 269.

There must be a demand and refusal: *Re* Peck and the Cor. of Peterborough, 34 U. C. R. 129; *Re* Irving v. Askew, 20 L. T. 584; R. v. Pontypool, C. C. Judge, 71 L. T. 17; and if the officer is entitled to a fee

Sec. 61. it must be paid or tendered with the request: *Re* The Clerk of Euphrasia (Tp.), 12 U. C. R. 622; section 49 (1); Parke v. Clarke, 14 C. L. T. 32.

If there is any other remedy, *e.g.*, application to the judge or appeal, it will not be granted: *Re* Marter and The Cor. of Orwenhurst, 18 O. R. 243; *Re* Charity Comrs. of England and Wales 1897, 1 Q. B. 407. Where the application was resisted on the ground that another remedy was provided, but the court was of opinion that it was not an equally beneficial remedy, mandamus was granted: R. v. Leicester 1900, 2 Q. B. 632. It will not be granted when the applicant himself is in fault: R. v. Wigan, 1 App. Cas. 622; R. v. The G. W. Ry. Co., 69 L. T. 592.

The application must be made in proper time. It must not be delayed too long, neither, on the other hand, must it be made prematurely: Shortt, 227, 250, 251; *Re* McCallum and School Trustees of Brant, 17 O. R. 451; Cook v. Jones, 9 W. R. 618.

"When a judge, having entered upon the hearing, from the evidence, decides he has no jurisdiction to adjudicate between the parties, a mandamus will not be granted" to compel him to hear it: 2 U. C. L. J. 178; *Ex parte* Milner, 15 Jur. 10, 37; *Re* Ratcliffe v. Crescent M. & T. Co., 1 O. L. R. 331; "*Contra*, if having jurisdiction he refuses to hear the case upon the mistaken notion that he has no jurisdiction in respect of some preliminary matter"; s. c.; and see R. v. Southampton C. C., 65 L. T. 320, in which it was held that where the right is clear, mandamus must issue, if the judge, under a mistake of law or a misapprehension of his duty, refused: see also Holborn v. Jones, L. R. 4 C. P. 14, *per* Smith, J.; Hebling v. Duggan, 1 C. L. T. 108; *Re* Emery and Barnett, 4 C. B. N. S. 423; R. v. St. Pancras, 28 Q. B. D. 371; R. v. Cotham, 1898, 1 Q. B. 802. The writ will only be granted when the jurisdiction of the inferior court is clear: Trainor v. Holcombe, 7 U. C. R. 548; Pearson v. Glazebrook, L. R. 3 Ex. 27; *Re* Jackson v. Clark, 36 C. L. J. 68. It will not be granted to compel a judge to alter an adjudication upon a matter within his jurisdiction, nor to compel the clerk to act in disregard of the adjudication of the judge: Burns v. Rutherford, 12 U. C. R. 140; Coolican v. Hunter, 7 P. R. 237; nor to reverse his decision on a point of practice: Gerow v. Hoyle, 28 O. R. 405; *Re* Woods v. Rennet, 12 U. C. R. 167; *Re* Judge of Elgin, 9 U. C. L. J. 238; nor to prescribe what evidence should be received or rejected: R. v. Connolly, 22 Q. B. 220. But the judge cannot set up a general rule of practice contrary to the rules of court: R. v. Judge of Marylebone, C. C. 34 Sol. J. 459; *Re* Oliver v. Fryer, 7 P. R. 325. It will not be granted to compel a judge to approve of security tendered on appeal or to certify the proceedings after the proper time: Ford v. Crabb, 8 U. C. R. 274; Orr v. Barrett, 9 C. L. T. 72; 6 Man. L. R. 300; nor on a mere matter of practice, as where a clerk improperly issued a summons with a blank for the name of a party: *Re* Gerow v. Hoyle, 28 O. R. 405.

Mandamus will issue to compel a judge to try a case before him: *Re* Burns v. Butterfield, 12 U. C. R. 140; unless he is interested: *Re* The Judge of Elgin, 20 U. C. R. 588.

Where the judge wrongly decides a preliminary question and refuses to go into the merits, as in interpleader issues which he refused to hear on the erroneous ground that the particulars of claim were insufficient, mandamus was granted: R. v. Richards, 2 L. M. & P. 351; Churchward v. Coleman, L. R. 2 Q. B. 18. See also R. v. Judge of Southampton, C. C. 65 L. T. 320.

And where before 62 Vic. c. 11, s. 9 (s. 144 of the present Act), the judge entered a non-suit instead of submitting to the jury the issue whether a former adjudication by him (the judge) determined the matter

in dispute, a mandamus was granted: *Re* Cowan v. Allie, 24 O. R. 358. A mandamus will issue to compel the judge to try a case in which the jurisdiction is disputed, but which the court held to be within his jurisdiction: *Re* Sawyer-Massey Co. v. Parkin, 28 O. R. 662; see Brighton Sewers' Act, 9 Q. B. D. 723; Vernott v. Bailey, 4 O. R. 698; *Re* Green v. Crawford, 21 O. L. R. 30. Sec. 61.

A clerk may be compelled to issue an execution: R. v. Fletcher, 2 E. & B. 270; *Re* Linden v. Buchanan, 20 U. C. R. 1; see *Re* Massey Mfg. Co., 11 O. R. at p. 403; *Re* Oliver v. Fryer, 7 P. R. 325; R. v. Surrey, C. C., 21 L. J. Q. B. 310; but his fees should first be tendered him: s. 49; Parke v. Clarke, 14 C. L. T. 32.

A judge cannot be compelled to exercise his discretion in a particular way: *Re* White v. Galbraith, 12 P. R. 513; *Re* Jackson v. Clark, 36 C. L. J. 68; see *Re* McCallum v. School Trustees of Brant, 17 O. R. 471; Giles v. Village of Wellington, 30 O. R. 610; nor will the court interfere with a matter within his discretion if he has really exercised it: Clifton v. Furley, 7 H. & N. 783; Smith v. Chorley District Council 1897, 1 Q. B. 532, 678; and if he enters upon the hearing of a case and decides it, however erroneously, the order will not be granted: *Per* Coleridge, J., R. v. Richards, 20 L. J. Q. B. 352; and *per* Earl, J., *Ex parte* Milner, 15 Jur. 1037. The remedy in such cases is by appeal or prohibition. See R. v. Worcestershire (Justices) 3 E. & B. 477; Sturgis v. Jay, 2 E. & B. 739, 740; *ac* Corbett, 4 H. & N. 452; and where a plaintiff elected to take a nonsuit, on the judge refusing to hear his witnesses, it was held that as long as the nonsuit stood the judge could not be compelled to act: Fortesque v. Paton, 3 L. T. 268; and so, when a judge discharged the jury and directed a nonsuit to be entered, it was held that mandamus was not the remedy: Kerchard v. Chantler, 26 L. T. 474. Where the judge refused to commit a defendant for nonproduction of books under a subpœna *duces tecum*, and pursuant to section 190), on the ground that there was no express provision authorizing a committal in such a case, and the liberty of the subject being involved, he thought it wiser to take that course, the court refused to interfere: *Re* Jackson v. Clark, 36 C. L. J. 68. notice, on his examination as a judgment debtor under section 243 (now

The court will not grant mandamus simply because all persons interested consent, or even ask for it: *Re* McLeod v. Amiro, 27 O. L. R. 232. The grounds on which mandamus will be granted or refused are discussed in that case. No action or other proceeding shall be commenced against any person for or by reason of anything done in obedience to a mandamus or mandatory order: R.S.O. 1914, c. 89, s. 14; and if brought, the judge may set aside the proceedings in such action: *Ibid.* s. 9.

The remedy of mandamus cannot be extended to cases to which it does not extend by law, even by waiver of the parties: *Per* Lord Campbell, C.J., R. v. Lords of the Treasury, 16 Q. B. 357, 359; *Re* McLeod v. Amiro, 27 O. L. R. 232.

Application for.—The application for mandamus should be upon notice to the judge or officer and to the opposite party returnable not less than seven clear days after service. It should be made to a Judge in chambers: C. R. 622. As to practice on applications for mandamus see Con. Rules 207 (11), 210, 213, 622-624, and notes on "Prohibition," *ante*.

If an application is made to a judge in court, costs only of the application will be allowed: *Re* Brookfield and Trustees of Brooke, 12 P. R. 485. The motion should be supported by affidavits.

Sec. 61.

All proceedings should be entitled, "In the Supreme Court of Ontario" In the matter of a certain plaint in the Division Court of the county of , wherein A.B. is plaintiff and C.D. is defendant.

The judge is entitled to appear upon the application: R. v. Cooper, 24 Q. B. D. 69.

The application should be made in a reasonable time. A delay of twelve months was held to bar the right to mandamus: Cote v. Jones, 4 L. T. 306.

The want of the affidavit on the application was held, under the English Rules, to be an irregularity only; and that the judge who failed to attend on the argument could not object to the irregularity after the order had been served: *Ex parte Furber*, 3 H. & N. 521.

See forms of affidavit and notice of motion for *mandamus*: Nos. 94, 95.

Exceptions to Jurisdiction of Division Courts.—In considering the following exceptions to the jurisdiction of Division Courts it is to be noted that under the present Act, section 69, in all cases which are otherwise within the competence of the court, but in which it appears that it has no jurisdiction on account of the title to land or any corporeal or incorporeal hereditament or any toll, custom or franchise coming in question, or the validity of a devise, bequest or limitation under a will or settlement being disputed (see section 61 (a), (b) and (c), *supra*), the action is not on that account to be dismissed but may be transferred to the Supreme Court of Ontario.

No Jurisdiction: Section 61.

Class (a)—Actions for the Recovery of Land.—See notes on this subject in Bicknell & Kappele's Practical Statutes, p. 235. The title of a corporeal hereditament is in question whether its existence or the right of the claimant to it is denied: Adey v. Deputy-Master of Trinity House, 22 L. J. Q. B. 3; s. c., 1 E. & B. 273, *sub nom.* R. v. Everett; *Re* Moberly v. Collingwood, 25 O. R. 625. There must be some show of reason for the claim: Cornwell v. Sanders, 3 B. & S. 206. The claim must be a *bona fide* one, and the right one that can exist in point of law: Hudson v. McRae, 4 B. & S. 585; Lloyd v. Jones, 6 C. B. 81; Hargreaves v. Diddams, L. R. 10 Q. B. 582; Reece v. Miller, 8 Q. B. D. 626. The facts or the evidence must show that title is *bona fide* in dispute: Howorth v. Sutcliffe 1895, 2 Q. B. 358; Lilley v. Harvey, 5 D. & L. 648; Emery v. Barnett, 4 C. B. N. S. 423; and the claim must be of such a nature as, if substantiated would form a defence to the action: Leath v. Vine, 30 L. J. M. C. 107. If there are disputed facts, or a question as to the proper inference from undisputed facts there is no jurisdiction: *Re* Moberly v. Collingwood, 25 O. R. 625. The court will have no jurisdiction if there is a real dispute, although the claim may be founded on the most utter bad faith, and the evidence supporting it is insufficient: Marsh v. Dewes, 17 Jur. 558. In that case the defence set up title upon a ground involving the question of legitimacy, and produced very slight and inconclusive evidence in support of it, while in Lilley v. Harvey, 5 D. & L. 648, *supra*, no evidence whatever was produced in support of the defendants' contention, which was evidently set up merely to avoid the jurisdiction. Where in an action of tort for personal chattels the title to land comes incidentally in question, the jurisdiction is ousted: Trainor v. Holcombe, 7 U. C. R. 548. Where the question was whether certain goods were part of the freehold or not, the

jurisdiction was held to be ousted: Portman v. Patterson, 21 P. C. R. 237. But in a later case it was held to be a question of fact, and if the judge decided that the chattel was not part of the freehold, the jurisdiction was not ousted: *Re* Bushell v. Moss, 11 P. R. 231. The earlier case of Portman v. Patterson was not cited: see McNeil v. Haines, 13 P. R. 115; Macara v. Dines, 2 West. L. T. 99; Muskoka Mill and Lumber Co. v. McDermott, 21 A. R. 129. Sec. 61.

Where a defendant claimed the right to obstruct a street it was held that title was brought in question: R. v. Taylor, 8 P. C. R. 257; so also where a right of way was claimed across a railway: Cole v. Miles, W. N. 1888, 150.

Rent issuing out of land involves the question of title to land, and if the parties had been landlord or tenant the court would have had jurisdiction, but the defendant claiming to be a freeholder, the jurisdiction was ousted: Pearson v. Glazebrook, L. R. 3 Ex. 27; but when in an action for double rent the tenant was estopped from denying his landlord's title, his claim of title was no avail: Wickham v. Lee, 12 Q. B. 521; Bank of Montreal v. Gilchrist, 6 A. R. 650; and see McDonald v. Richmond, 7 O. W. R. 844, where lessor set up The Real Property Limitation Act as a defence, but prohibition was refused as no question of title to land could arise on the evidence; but it would have been otherwise if it had been shown that the lessor's title had expired during the tenancy: Mountnoy v. Collier, 1 E. & B. 630. Where in an action for rent the defence set up that the rent belonged to a third party to whom it had been paid, the jurisdiction was ousted: Fair v. McCrow, 31 U. C. R. 500; but see *Re* Moberly v. Collingwood, 25 O. R. 625; *Re* Whiting v. Sharples, 9 C. L. T. 141; *Re* English v. Mulholland, 12 C. L. T. 89. And in an action for the recovery of the arrears of a rent charge issuing out of land it was held that it was not the title to the land but the title to the rent charge which was in question: Rassano v. Bradley 1896, 1 Q. B. 645. Where a demise is admitted but the question whether certain rooms were included in the demise is disputed, the jurisdiction is ousted: Chew v. Holroyd, 8 Ex. 249; followed in Armstrong v. McGourty, 22 N. B. R. 29, in which it was held that a question as to the duration of the tenancy ousted the jurisdiction.

If a party is charged with liability by reason of ownership of certain land and he denies that ownership, title is in dispute: R. v. Harden, 2 E. & B. 187; see *Re* Knight v. Medora (Tp.), 14 A. R. 112; *Re* South Norfolk v. Warren, 12 C. L. T. 512. In an action for interference with the flow of water through a pipe, if the defendant refuses to admit the plaintiff's title to the easement, the court has no jurisdiction: Howorth v. Sutcliffe, 1895, 2 Q. B. 358.

Though the fact that the title comes in question does not appear on the face of the proceedings, prohibition may be granted: Marsden v. Wardell, 3 E. & B. 695. Application may be made before trial in the inferior court, and prohibition will be awarded if it appear that title must come in question: Macara v. Moorish, 11 C. P. 75; Sewell v. Jones, 15 Jur. 153.

For other cases where jurisdiction ousted see R. v. Davidson, 45 U. C. R. 91; R. v. McDonald, 12 O. R. 381. In these cases a mere *bona fide* claim of right was sufficient, but in division courts title must come in question: Crawford v. Seney, 17 O. R. 74; Barnett v. Montgomery, 5 O. W. N. 884. See also Symons v. Rees, 1 Ex. D. 416; Stolworthy v. Powell, 54 L. T. 795.

When Not Ousted.—The mere setting up of a claim of right is not sufficient; the right or title must really come in question: *Re*

Sec. 61. Emery v. Barnett, 4 C. B. N. S. 423; Lilley v. Harvey, 5 D. & L. 648; R. v. Sandford, 30 L. T. 601; Ball v. the G. T. Ry. Co., 16 C. P. 552. See Seabrook v. Young, 14 A. R. 97; Eversfield v. Newman, 4 C. B. N. S. 418; Richardson v. Jenkin, 10 P. R. 292; Hebling v. Duggan, 1 C. L. T. 108; *Re* Crawford v. Seney, 17 O. R. 74; *Re* Warling v. Town of Picton, 2 O. W. R. 92; *Re* Moberley v. Collingwood, 25 O. R. 625; *Re* Hamilton v. Garner, 12 O. W. R. 758. And the judge has the right to proceed with the case so far as necessary to satisfy himself as to the question of jurisdiction: *Re* Moberly v. Collingwood, *supra;* Barnett v. Montgomery, 5 O. W. N. 884.

If there are disputed facts or a question as to the proper inference from undisputed facts, there is no jurisdiction. If the facts can lead to only one conclusion, and that against the defendant, then there is no such *bona fide* dispute as will oust the jurisdiction: *Re* Moberly v. Collingwood, 25 O. R. 625.

The word "land" means the incorporeal hereditament vested in the owner, not the *reddendum* to be made by the payer: Dean of Ely v. Bliss, 2 D. M. & G. 459; Irish Land Commission v. Grant, 10 App. Cas. 25. Where a lessor has certain rights under a lease and sells, the mere proof by the vendee in an action against the lessor of his paper title does not oust the jurisdiction: see Neads v. McMillan, 29 U. C. R. 415; R. v. Priest, W. N., 1887, 65. Where the question was whether certain rails forming a line fence put by mistake on another's land were the property of the party putting them there, title to land was not in question: *Re* Bradshaw v. Duffy, 4 P. R. 50. The terms of a tenancy do not form matter of title: *Re* English v. Mulholland, 9 P. R. 145; *Re* Knight, 1 Ex. 802; nor the question whether the right to impound is implied from a right to pasturage: Graham v. Spettigue, 12 A. R. 261; nor is the question whether a municipality is bound to repair a road: Knight v. Medora (Tp.), 11 O. R. 138; 14 A. R. 112; nor whether a stream is navigable: Reece v. Miller, 8 Q. B. D. 626. The plea of "not guilty by statute" in an action against a road company for obstructing the flow of water does not bring title to land in question: Overholt v. Paris and Dundas Road Co., 7 C. P. 296. In an action for false imprisonment, no question of title can arise: Eversfield v. Newman, 4 C. B. N. S. 418; nor in an action for the recovery of arrears of taxes, unless the defendant cannot be held liable without trying the question of title: *Re* South Norfolk v. Warren, 12 C. L. T. 512; see Baddeley v. Denton, 4 Ex. 508; Gwynne v. Knight, 1 Ex. 802.

Procedure.—It is the duty of the judge to inquire and decide whether title is really in dispute, but his decision is not final: Thompson v. Ingham, 14 Q. B. D. 710; *Re* Emery v. Barnett, 4 C. B. N. S. 423; and the evidence must be such as would be proper to submit to a jury: *Re* Huntsworth, 33 L. J. M. C. 131. But where he has decided upon conflicting evidence the superior court will not interfere except upon very strong grounds: *Re* Long Point Co. v. Anderson, 18 A. R. 408: *Re* Bowen, 21 L. J. Q. B. 10; Brown v. Cocking, L. R. 3 Q. B. 672; Enraght v. Lord Penzance, 7 App. Cas. 240; Macara v. Dines, 2 West L. T. 99.

The rule laid down in *Re* Bushell v. Moss, 11 P. R. 251, seems wider than that of the other cases. If the claim for title is ignored, the judge should state clearly his grounds for so doing: Birnie v. Marshall, 35 L. T. 373. The action simply stops for want of jurisdiction. A nonsuit cannot be entered: Lawford v. Partridge, 1 H. & N. 621. But the action should not be dismissed but may be removed to the Supreme Court of Ontario upon such terms as the judge thinks fit: section 69. The

order of removal may be made either by a Judge of the Supreme Court or of the Division Court: s. 69, with appeal from the latter: s. 69 (2). Sec. 61.

Care must be taken to distinguish cases in which the right to superior court costs was upheld, upon the ground that title was in question, from cases where the question is, Has an inferior court jurisdiction? The right to superior court costs depends upon the pleadings and not upon what takes place at the trial. The pleas of *non demisit* or not possessed, have been held in Ontario, to raise the question of title: Purser v. Bradburne, 7 P. R. 18; Coulson v. O'Connell, 29 C. P. 341; but see Talbot v. Poole, 15 P. R. 99. A mere general denial of the allegations in the statement of claim may raise a question of title sufficient to entitle the plaintiff to superior court costs: Wornum v. Brady, 12 P. R. 618; Danaher v. Little, 13 P. R. 363; Flett v. Way, 14 P. R. 312. When the question, however, is, Has an inferior court jurisdiction? it is material to enquire what took place, or must necessarily take place, at the trial. The court has to be satisfied that title really comes in question before prohibition will be granted: *Re* Crawford v. Seney, 17 O. R. 74; Latham v. Speeding, 17 Q. B. 444; Morton v. Grand Junction Canal Co., 6 W. R. 543; Barnett v. Montgomery, 5 O. W. N. 884.

Exceptions.—In the following matters division courts have jurisdiction, though the title to land is in question: (a) Actions for damage to land by overflowing the same for the purpose of driving logs, timber, or a sawmill, where the sum claimed does not exceed $20: R.S.O. 1914, c. 86, s. 15, as to which see *post, Damage by Flooding Lands;* (b) Interpleader proceedings: *e.g.*, growing crops seized may be claimed by a mortgagee as part of the land, or rent due for the premises may be claimed by adverse parties; and though, for that purpose, it is necessary to examine the title to land, the jurisdiction will not be ousted. It is a collateral question arising in a matter collateral to the action: Munsie v. McKinley, 15 C. P. 50.

Hereditament.—"The settled sense of that word is to denote such things as may be the subject matter of inheritance but not the inheritance itself": Moore v. Denn, 2 B. & P. 247.

"Corporeal hereditament" includes land, and the division court has no jurisdiction, though the title to a leasehold only may be in question: Tomkins v. Jones, 22 Q. B. D. 599; Chew v. Holroyd, 8 Ex. 249.

An "incorporeal hereditament" is a right issuing out of a thing corporate (whether real or personal); or concerning or annexed to, or exercisable within the same. It is not the thing corporate itself, which may consist of lands, houses, jewels or the like, but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels: Kerr's Blackstone 16; *Re* Christmas, 33 Ch. D. 332. Rents, rights of way and aqueduct, rights to light, rights to customary fees, etc., are instances of incorporeal hereditaments: Stephenson v. Raines, 2 E. & B. 744; Howorth v. Sutcliffe, 1895, 2 Q. B. 358. There must be a dominant and a servient tenement. Rent of land is an incorporeal hereditament, and where the right to recover the rent is in dispute the court has no jurisdiction: *Re* Kennedy v. MacDonell, 1 O. L. R. 250. The right to ground a barge on a navigable river is not a claim to an incorporeal hereditament: Hawkins v. Rutter, 1892, 1 Q. B. 668. Should there be a *bona fide* dispute as to whether a term had been surrendered so as to make rent non-existent, the jurisdiction would be ousted: *Re* Moberly v. Collingwood, 25 O. R. 625.

It is doubtful if an action of trover for a deed is within the jurisdiction: Given v. Scott, 11 U. C. R. 542.

See also *Re* McGorlick and Ryall, 26 O. R. 435.

Sec. 61.

Toll.—A toll is defined to be a tax paid for any liberty or privilege:—It is the title to the toll that must come in question to oust the jurisdiction: Hunt v. The Great Northern Ry. Co., 10 C. B. 904, *per* Jervis, C.J., and Williams, J. The charges of the railway company for conveyance of goods are not within this part of the section: *Ib.* Harbor rates are tolls: R. v. Everett, 1 E. & B. 273; but payments to a railway company for use of locomotive power, as distinguished from the use of their railway, are not: Hunt v. Great Northern Ry. Co., *supra.* The right to take toll under an Act of Parliament must clearly appear, and any doubt is given in favor of the public: Stourbridge Canal Co. v. Wheeley, 2 B. & Ad. 792. A mere claim of right to tolls without showing that it is a *bona fide* claim would not oust the jurisdiction of the court: R. v. Hampshire Jus., 3 Dowl. 47.

Custom.—This limitation is not in the English Act, and it has there been held that the county courts may try a disputed custom: Davis v. Walton, 8 Ex. 153. The word appears to be used here in its technical sense, as signifying local common law: Hammerton v. Honey, 24 W. R. 603; Grand Hotel Co. v. Cross, 44 U. C. R. 169. In Talbot v. Poole, 15 P. R. 99, the court of appeal held that what is meant by a custom is some legal custom by which the right or title to property is acquired or on which it depends Inasmuch as a custom to take fish, or to take water, would be bad as a profit a *prendre*, the jurisdiction of the division courts would not be excluded by setting it up: Lloyd v. Jones, 5 D. & L. 784. It is doubtful if a custom can be proved in this province, there being no "time immemorial" on which to found it: Grand Hotel Co. v. Cross, 44 U. C. R. 153.

Franchise.—An incorporeal hereditament synonymous with liberty A royal privilege or branch of the Crown's prerogative subsisting in the hands of a subject. It arises either from royal grants, or from prescription which presupposes a grant. The kinds are almost infinite, but the principal are bodies-corporate, the right to hold court-leets, fairs, markets, ferries, forests, chases, parks, warrens, fisheries. The remedy for disturbance is an action: 1 Step. Com. Also, the right of voting at an election of a member of parliament: Wharton, 313. See Anderson v. Jellett, 9 S. C. R. 1.

A patent is a franchise, and a question concerning its validity cannot be tried in the Division Court: R. v. Co. Ct. Judge of Halifax 1891. 2 Q. B. 263.

Class (b)—Validity of Devise, &c., Disputed. — Whenever there is any dispute as to the validity of any devise, bequest or limitation under any will or settlement, then the jurisdiction of the division court to inquire into the same is at an end. Where the validity of the bequest was not disputed and no question had been raised as to the validity of the condition in the will, though the right of the devisee to assign and the right of the assignor to recover under the assignment were disputed, the jurisdiction was not ousted: *Re* McGibbon v. Eager, 18 C. L. T. 311.

Class (c)—Malicious Prosecution.—"To put the Criminal Law in force maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person there is that conjunction of injury and loss which is the foundation of an action:" Addison on Torts, 5th ed., 199. If the particulars of a claim should show a good cause of action for false imprisonment, the proceedings in the division court would not be restrained, because the judge in giving judgment, used expressions indicating that he gave damages for

malicious prosecution: Chivers v. Savage, 5 E. & B. 697. Should the particulars be framed so as substantially to show a case of malicious prosecution the court cannot entertain it: Jones v. Currey, 2 L. M. & P. 474. In Hunt v. North Staffordshire Ry. Co., 2 H. & N. 451, the particulars were as follows: "£17 12s. 6d. being for moneys paid for loss of time and attendance before the magistrates, upon a complaint and information of W. on behalf of the defendants." The plaintiff had been summoned before the magistrate for riding in a railway carriage without having paid his fare, and the summons was dismissed with costs, and the action was brought to recover the expenses occasioned by such summons. It was held that the action was, in substance, for malicious prosecution, and was beyond the jurisdiction. A count that the defendant caused plaintiff to be arrested and imprisoned without reasonable or probable cause, on a false and malicious charge of felony, is a count in trespass for assault and false imprisonment, and not a count for malicious prosecution: Brandt v. Craddock, 27 L. J. Ex 314 (Amer. reprint, 3 H. & N. 958). The defendant's wife gave the plaintiff into the charge of a constable on an unfounded charge of felony. The defendant attended at the police station, and, after having been cautioned by the inspector on duty that he would not incur the responsibility of detaining the plaintiff unless the defendant distinctly charged him with felony and signed the charge sheet; the defendant signed the charge sheet, and the plaintiff was detained, and taken next morning before the magistrates, who discharged him. The plaintiff took out a plaint in a county court for false imprisonment, accompanying it with a notice, whereby he expressly disclaimed any cause of action, in respect of the malicious prosecution. The judge, erroneously treating the signing of the charge sheet as the commencement of a malicious prosecution, ruled that the whole was one continuous transaction, and that the false imprisonment could not be separated from the rest, and consequently, that he had no jurisdiction and nonsuited the plaintiff. The court of common pleas, on appeal, directed a new trial: Austin v. Dowling, L. R. 5 C. P. 534. An action for false imprisonment lies where anyone takes another into custody or gives him in charge of a constable without lawful justification for so doing. The defendant must prove that plaintiff gave him in charge. In an action for malicious prosecution the defendant may have simply put the law in motion, as by laying an information upon which a summons or warrant may have issued. Sec. 61.

Libel.—"It is enough to make a written statement *prima facie* libellous, that it is injurious to the character or credit (domestic, public or professional) of the person concerning whom it is uttered, or in any way tends to cause men to shun his society, or to bring him into hatred or contempt or ridicule. When we call a statement *prima facie* libellous, we do not mean that the person making it is necessarily a wrong-doer, but that he will be so held unless the statement is found to be within some recognized ground of justification or excuse:" Pollock on Torts, 206, 207; Roscoe's N. P. 855; Odgers on Libel and Slander; Stroud, 2nd ed. 1092. See Dickerson v. Radcliffe, 17 P. R. 418.

Slander.—"Slander is an actionable wrong when special damage can be shown to have followed from the utterance of the words complained of, and also in the following cases:—Where the words impute a criminal offence; where they impute having a contagious disease which would cause the person having it to be excluded from society; where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession or trade; in short, where they manifestly tend to prejudice a man in his calling. Spoken words which afford a cause of action with-

Sec. 61. out proof of special damage are said to be actionable *per se*; the theory being that their tendency to injure the plaintiff's reputation is so manifest that the law does not require evidence of their having actually injured it. There is much cause, however, to deem this and other like reasons given in our modern books mere afterthoughts, devised to justify the result of historical accident; a thing so common in current expositions of English law that we need not dwell upon this example of it:" Pollock on Torts, 206; Roscoe's N. P. 865. See also Odgers on Libel and Slander, 4th ed.: R.S.O. 1914, c. 71.

Criminal Conversation.—"Against an adulterer the husband had an action at common law, commonly known as an action of criminal conversation. In form it was generally trespass *vi et armis*, on the theory that 'a wife is not, as regards her husband, a free agent or separate person,' and therefore her consent was immaterial, and the husband might sue the adulterer as he might have sued any mere trespasser who beat, imprisoned or carried away his wife against her will:" Pollock on Torts, 196, 197.

Strict proof of the marriage in such cases is necessary: Taylor on Ev. 8th Ed., 190, 191.

Seduction.—This cause of action is also excluded from the jurisdiction of the division court: Meyer v. Bell, 13 O. R. 35; Appleby v. Franklin, 17 Q. B. D. 93. See R.S.O. 1914, c. 72.

Breach of Promise of Marriage.—It will be seen, too, that the action of breach of promise of marriage is also specially excluded from division court jurisdiction. It is unnecessary to enlarge upon this form of action.

Class (d)—Action against a Justice of the Peace.—The Criminal Code, sections 1143, 1144, provides as follows:

"**1143.** Every action and prosecution against any person for anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to criminal law, shall, unless otherwise provided, be laid and tried in the district, county or other judicial division where the act was committed, and not elsewhere, and shall not be commenced except within six months next after the act committed."

"**1144.** Notice in writing of such action and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action."

These sections of the Criminal Code relate only to such actions as are brought against justices of the peace and other official persons for something alleged to have been done by them amiss when acting under an "Act of the Parliament of Canada relating to the criminal law." Of any such action justices of the peace and other official persons are entitled to at least one month's notice. If the notice of action specifies that it is to be brought in a division court, the defendant, if he objects, as he may under s. 61 (*d*), to its being so brought, should serve notice to that effect on the plaintiff after receiving the notice, or if he waits until after the action is brought in the division court, he should file and serve notice of his objection after being served with the summons. The notice of objection puts an end to the division court proceedings as if they had never been begun: Weston v. Sneyd, 1 H. & N. 703.

Sec. 61.

But justices of the peace and other official persons may be called upon to perform duties under statutes of Ontario and also under Acts of the Parliament of Canada not relating to the criminal law. To actions brought against them for anything done in pursuance of their duties under such statutes or Acts the foregoing provisions of the Criminal Code do not apply. Their protection in such cases is given by the provincial statute, The Public Authorities Protection Act, R.S.O. 1914, c. 89. Section 13 (1) of this Act is as follows:

"**13.**—(1) No action, prosecution, or other proceeding shall lie or be instituted against any person for an act done in pursuance or execution or intended execution of any statute, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such statute, duty or authority, unless it is commenced within six months next after the act, neglect or default complained of, or in case of continuance of injury or damage, within six months after the ceasing thereof."

This section, it will be observed, makes no reference to one month's notice. There was such a provision in R.S.O. 1897, c. 88, s. 14, but the present Public Authorities Protection Act (R.S.O. 1914, c. 89) omits it, and notice of action is not now a condition precedent to the bringing of such action. But section 13 (3) of the Public Authorities Act, *supra*, provides the following substitute for formal notice:

"(3) If, in the opinion of the Court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding the court may award to the defendant costs to be taxed as between solicitor and client."

A sufficient opportunity of tendering amends implies a notice and such notice would necessarily refer to an action to be brought in default of sufficient amends being tendered. Also if the amount to be recovered is within the competence of a division court and the complaining party wishes to place himself in an advantageous position with reference to costs (*vide infra*) the notice will necessarily specify that the action is to be brought in the division court. In such circumstances the defendant would be in the same position as if he were being proceeded against for "anything purporting to be done in pursuance of any Act of the Parliament of Canada relating to the criminal law" so far as making his objection under section 61 (*d*) is concerned, and he could serve notice of his objection either after receiving notice of the intended action or wait until after he had been served with the summons before so doing.

A sufficient opportunity of tendering amends implies a reasonable time, and what would be a reasonable time would depend upon circumstances; the result is that the time for giving notice is now an indefinite period instead of the fixed period formerly provided.

Acts in respect of which Protection is Afforded.—The protection is intended for those who are in the wrong. No protection is required by a person who has acted perfectly right: Read v. Coker, 17 Jur. 990; the protection applies where a man endeavors, though unsuccessfully, to follow the Act: *ibid.*; actual bona fide belief is sufficient to entitle a man to protection although there may not have been reasonable ground for such belief: Booth v. Clive, 10 C. B. 827; Read v. Coker (*supra*); Hughes v. Buckland, 15 M. & W. 346; Roberts v. Orchard, 2 H. & C. 769; but the question whether he had reasonable ground for belief may be taken into consideration in determining whether he acted bona fide or not: *Per* Maule J., in Read v. Coker (*supra*); if the act

Sec. 61. done was such that no reasonable man could, in doing it, be supposed to have acted bona fide, there would be no protection: Cann v. Clapperton, 10 Ad. & El. 582 (589); Jones v. Gooday, 9 M. & W. 736 (745); he must honestly intend to put the law in motion and really believe in the existence of a state of facts which if they existed would have justified him in doing it: Heath v. Brewer, 15 C. B. N. S. 803; Halsbury, xxiii, s. 695; see also Hermann v. Seneschal, 13 C. B. N. S. 392; Chamberlain v. King, L. R. 6 C. P. 474; Griffith v. Taylor, 2 C. P. D. 194; Wheatcroft v. Matlock, 52 L. T. 356; Lea v. Facey, 19 Q. B. D. 352; Graham v. Mayor of Newcastle, 1893, 1 Q. B. 643 (647).

One Month's Notice.—See notes to section 20.

Costs.—If the plaintiff brings the action in other than the division court and only recovers an amount within the jurisdiction of the latter court, he can only have costs on the division court scale: Ireland v. Pelatier, 11 P. R. 403; unless of course the defendant objected to being sued in the division court.

If the Justice Objects.—If the defendant objects to being sued in the division court, he should serve notice to that effect on the plaintiff either after receiving the notice of action or by filing and serving notice of objection in the action after being served with the summons. The notice of objection puts an end to the division court proceedings as if they had never been begun: Weston v. Sneyd, 1 H. & N. 705.

The Public Authorities' Protection Act, R.S.O. 1914, c. 89.—The Act contains many important provisions for the protection of public officials. It protects "any person for *inter alia* an act done in pursuance or execution or intended execution of *any public duty*," which would include a bailiff of a division court and constable as well as a justice of the peace. Some of the provisions of the Act relate specifically to bailiffs of division courts.

Class (c)—Actions on Superior Court Judgments.—A division court has jurisdiction to entertain an action upon a judgment of a superior court: As Eberts v. Brooke, 11 P. R. 296: Aldrich v. Aldrich, 23 O. R. 374; but not if execution may be issued thereon in the supreme court or county court: section 61 (e); and this sub-section practically prohibits the bringing of an action in the division court upon any judgment, decree or order of the supreme court or county court. It is no doubt intended to prevent proceedings under the judgment summons clauses from being invoked to aid persons having judgments or decrees in the higher courts upon mortgages of real estate and similar securities, upon which it was found difficult to realize except by harrassing the unfortunate judgment debtor by judgment summons proceedings. These proceedings will be effectually barred by this provision. See also notes to section 8, *ante*.

An action cannot be brought in a higher court on a division court judgment: Crowe v. Graham, 22 O. L. R. 145.

Further Exceptions from D. C. Jurisdiction.—Former Division Courts Acts expressly excluded from the jurisdiction of the court the following additional classes of cases.

These exceptions have been omitted from the recent statute as also from the present statute as being unnecessary to be expressly mentioned, inasmuch as they are either excluded by some other statute or are otherwise not recognizable as actionable.

(1) Gambling Debts.—The definition of a gambling debt is not given in any reported case. Sec. 61.

It is submitted that a gambling debt is "any sum due as a result of a wager, or bet, or game of chance or skill." A wager or bet is defined as a contract entered into without color of fraud between two or more persons for a good consideration and upon mutual promise to pay a stipulated sum of money, or to deliver some other thing, to each other, according as some proposed and equally uncertain contingency should happen, within the terms upon which the contract was made: 2 Chitt. Stats. 3rd ed. *Gaming*, p. 276, note *b*; Bank of Toronto v. McDougall, 28 C. P. 345; Carlill v. Carbolic Smoke Ball Co., 1892, 2 Q. B. 484.

All contracts by way of gaming and wagering are void: Forget v. Ostigny, 1895, A. C. 318; *Re* Summerfeldt v. Worts, 12 O. R. 48; Anderson v. Galbraith, 16 U. C. R. 57; Battersby v. O'Dell, 23 U. C. R. 482; Davis v. Hewitt, 9 O. R. 435.

In Summerfeldt v. Worts, *supra*, a sum due on a cheque given for losses in matching coppers, was held to be clearly a gambling debt.

In an action against the maker of a note for value, payable to bearer, and transferred to the plaintiff for value after it was due, it was held no defence to the plaintiff's transferor, that he received it in payment of a gambling debt: R. & J. 533; Burr v. Marsh, M. T. 4 Vic.

According to the Common Law of England, altered by 8 and 9 V. c. 109 (not in force in this Province), an action might be maintained on a wager, although the parties had no previous interest in the question on which it was laid, if it was not against the interest or feelings of third persons, and did not lead to indecent evidence, and was not contrary to public policy: Thackoorseydass v. Dhoudmull, 6 Moo. P. C. 300.

No action can be maintained by A. against B. on a wager in which A. bets that B. will, and B. that he will not pass his examination as an attorney, inasmuch as B. has the power of determining the wager in his own favor: Fisher v. Waltham, 4 Q. B. 889.

A cheque given partly in payment of money lent by the payee to the maker to enable the latter to play at baccarat and as to the balance to be applied by the payee in discharging the maker's debts incurred in playing that game, was held to be given for an illegal consideration and an action on it could not be maintained: King v. Kemp, 8 L. T. 255, not followed; Moulis v. Owen 1907, 1 K. B. 746.

An agreement in the nature of a bargain, but which is in reality a bet, is invalid: Rourke v. Short, 5 E. & B. 904.

The employment of an agent to make a bet in his own name, on behalf of his principal, implies an authority to pay the bet if lost, and on the making of the bet that authority becomes irrevocable: Read v. Anderson, 10 Q. B. D. 100; 13 Q. B. D. 779; Bridger v. Savage, 15 Q. B. D. 363; Bubb v. Yelverton, *Re* Ker, 24 L. T. 822; Knight v. Lee, 1893, 1 Q. B. 41.

Money paid in discharge of a lost bet made for another, is recoverable from such other person: Oldham v. Ramsden, 32 L. T. 825.

Money lent to enable the borrower to pay a bet, which he had already lost, would not, it is submitted, constitute a gambling debt within the meaning of this section, and would consequently be recoverable by the lender: *Ex parte* Pyke, *Re* Lister, 8 Ch. D. 754.

But money lent for the purpose of playing an illegal game would not be recoverable: McKinnell v. Robinson, 3 M. & W. 434; Carney v. Plummer, 1897, 1 Q. B. 634.

Sec. 61. Money lent by a licensed inn-keeper for the purpose of enabling a guest to play an unlawful game, contrary to his license, would not be recoverable back: Foot v. Baker, 5 M. & G. 335.

As to money lent for gambling purposes, but not so used by borrower: see Tyler v. Carlisle, 1 Amer. St. R. 301 (U.S.).

A bet between individuals as to the result of a parliamentary election is illegal and the plaintiff cannot recover upon a claim for the amount of the bet: Harris v. Elliott, 28 O. L. R. 349; but when the money has been paid over to the winner, the loser cannot recover from the stakeholder the amount deposited with him, the parties being *in pari delicto*, and the illegal act having been performed: Trebilcock v. Walsh, 21 A. R. 55; 23 S. C. R. 695.

A stake-holder who receives bank notes as money, and pays them over wrongfully to the original staker after he has lost the wager, is answerable to the winner for money had and received to his use: Pickard v. Bankes, 13 East 20. But if he pays over the money to the party who has won, he is not liable to repay it to any person whomsoever: Brandon v. Hibbert, 4 Camp. 37; Brown v. Overbury, 11 Ex. 715.

Where A. and B. deposit money in the hands of a stake-holder to abide the event of a boxing match, and when the bettor A. claims the whole sum from the stake-holder and threatens him with an action if he pays it over to B., which he nevertheless does acting upon the decision of the umpire, A. is entitled to recover from him his own stakes as money had and received to his own use: Hastelow v. Jackson, 8 B. & C. 221. In such a case it makes no difference whether the wager be legal or illegal: "The authorities show most conclusively that whether a wager be legal or illegal either of the parties to it may withdraw his deposit or stake from the hands of a stakeholder at any time before the latter has paid it over": *Per* Strong, C.J., in Walsh v. Trebilcock, 23 S. C. R. p. 698. It would be otherwise if no notice was given: *Ib.* To the same effect is Diggle v. Higgs, 2 Ex. D. 422; Trimble v. Hill, 5 App. Cas. 342; Hampden v. Walsh, 1 Q. B. D. 189. See also Logue v. McCuish, 21 N. S. Reps. 75. An action cannot be maintained for money due under an agreement for sale and purchase of wheat on the wheat market when there was no real deal or transaction in wheat between the parties: French v. Brink, 1 O. W. N. 789; Pearson v. Carpenter, 35 S. C. R. 380; Beamish v. Richardson, 49 S. C. R. 595. But a broker who makes an actual contract of purchase and sale completed by delivery and payment on behalf of a principal whose object was merely speculation, is not entering into a gaming contract: Forget v. Ostigny, 1895, A. C. 318.

The following American cases are referred to on the subject of gambling:

"Gambling" includes playing billiards for beer, oysters or cigars: State v. Bishel, 39 Iowa 42; Hausberg v. People, 35 Alb. L. J. 98.

A horse-race is a gambling device: Joseph v. Miller, 2 New Mexico, 621.

The court said: "The word 'gambling' is one of very general application, and is not restricted to wagering upon the result of any particular 'game or games of chance.' In the adjudicated cases on this subject we find that judges often have applied this word indiscriminately to wagering of all kinds. We are unable to discover any distinction in general principle between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet—whether it be by throwing dice, flipping a copper, turning a card, or running a

race. In either case it is gambling. This is the popular understanding Sec. 6 t.
of the term 'gambling device,' and does not include any scheme, plan or contrivance for determining by chance which of the parties has won and which has lost a valuable stake. That a horse-race, when adopted for such a purpose, is a 'gambling device' there can be no doubt: See Shropshire v. Glascock and Garner, 4 Mo. 536, and cases there referred to."

"The word 'gaming' has been held to extend to physical contests whether of man or beast, when practised for the purpose of deciding wagers, or for the purpose of diversion, as well as to games of hazard or skill, by means of instruments or devices:" Boughner v. Meyer, 5 Colo. 71.

Distinction is to be made between bets between individuals and those made in the course of carrying on a gambling device.

"Bets between individuals are not illegal at common law:" Saunders v. The King, 38 S. C. R. p. 387; nor is there any statute against them: the provisions of the Criminal Code prohibiting gambling do not extend to bets between individuals: 2 Geo. V. (Dom.), c. 19; Saunders v. The King, *supra*. Betting is not illegal in the sense of being gaming under the Criminal Code. The mere making of a bet between individuals not engaged in the business of betting upon a horse race or any event not against the policy of the law or controllable by either party, is not illegal or against any provision of the law, or against any public policy recognizable by the courts; and it is submitted that a contract made in regard to it may be enforced. For other instances of legalized betting see the above statute, 2 Geo. V. (Dom.), c. 19; Rex v. Maylett, 15 O. L. R. 348; Rex v. Ellis, 20 O. L. R. 218.

Claim for a bet may be amended by the judge at the trial by substituting a claim for money paid for plaintiff's use, and, there being in reality no bet, may recover: *In re* Sebert v. Hodgson, 32 O. R. 157.

(2) Spirituous Liquors.—The Ontario Liquor License Act, R.S.O. 1914, c. 215, s. 117, is as follows:

117. No action shall be brought by the holder of a tavern license, to recover the price or value of liquor drunk in any tavern.

The word "liquor" is defined by R.S.O. 1914, c. 215, s. 2 (*i*), to include all spirituous and malt liquors and all combinations of liquors and drinks and drinkable liquids which are intoxicating; and section 2 (*i*) *i*. further provides that any liquor which contains more than two and a half per cent. of proof spirits shall be conclusively deemed to be intoxicating.

The jurisdiction of the division court is not excluded in an action for liquors alone. Their price may be recovered by a person having the right to sell them if they are not "drunk in any tavern."

Whether they have been so or not is a question for the judge or jury to determine before proceeding with any other question in the case. If after hearing all the evidence adduced on that point, and it be decided that the liquors were not drunk in a tavern, and the plaintiff otherwise had the right to sell the same, and the judge determines that the court had jurisdiction, the cause could not be prohibited. Another court could not determine on an application for prohibition as to the correctness of his finding on the question of fact.

If a person had not the right to sell such liquors he could not recover the price of same: Sinclair's License Act, p. 285.

Sec. 61.

The question whether the liquors are spirituous within the definition given in the Act must be determined as any other question of fact: Harris v. Jenns, 9 C. B. N. S. 152.

Although "Cronk" was sworn to be a kind of beer, the court would not take judicial notice that it was intoxicating or spirituous: R. v. Beard, 13 O. R. 608.

Liquor containing more than two and one-half per cent. of alcohol is to be conclusively deemed to be intoxicating: s. 2 (i) of the Liquor License Act above mentioned: R. v. Wooten, 33 C. L. J. 746; R. v. McLean, 35 C. L. J. 241; but liquors containing more than 2½ per cent. may be patent medicines and within the exceptions in R. S. O., c. 215, s. 178; Ing Kon v. Archibald, 17 O. L. R. 484; and see also s.s. 175, *et seq.*, of same Act.

If there are several items in the bill, and the illegal ones are separable from the others, the legal ones are recoverable: Gilpin v. Rendle, 1 Selwyn's N. P. 61.

Where money is paid generally on account, without any specific appropriation at the time of payment, and part of the account is illegal (being a demand for liquor sold) and part legal, it was said the creditor would have the right to apply the money on the demand for liquor sold: Philpott v. Jones, 2 A. & E. 41; Cruickshank v. Rose, 5 C. & P. 19; Simpson v. Ingham, 2 B. & C., p. 72; Hooper v. Keay, 1 Q. B. D. 178; Kinnaird v. Webster, 10 Ch. D. 139.

Tavern.—It is submitted that this word means a licensed place, and would include every room, closet, cellar, yard, stable, out-house, shed and any other place of or belonging or in any way appertaining to the tavern: see R.S.O., 1914, c. 215, s. 2 (h). No debt could be created for sale of liquors drunk anywhere without there being a license to sell there: Ritchie v. Smith, 6 C. B. 462. In an action for the recovery of the price of liquor sold to a hotelkeeper, it was held that the words "liquor drunk in a tavern or ale-house," meant in a tavern or ale-house of the vendor: *Re* McGorlick v. Ryall, 26 O. R. 435.

A tavern is defined to be "an hotel, inn or other public house of entertainment kept for the purpose of providing refreshments and accommodation which shall include board and lodging for the public:" The Liquor License Act, s. 2 (o).

Additions to licensed premises do not destroy their character, the question is, are they substantially the same: R. v. Raffles, 1 Q. B. D. 207; R. v. Smith, 15 L. T. 178; Stringer v. Huddersfield, 33 L. T. 568.

It must always be kept in view that in order to oust the jurisdiction of the court, the liquors sued for must be *drunk* in a tavern. See s. 117 of above Act.

A person licensed to sell beer, "to be drank or consumed off the premises," who supplied a pint of beer to a traveller who sat upon a bench placed and fastened against the wall of the house, returning the mug in which he was served, was held to have been properly convicted of selling beer to be drunk on the premises: Cross v. Watts, 13 C. B. N. S. 239. See also Bath v. White, 3 C. P. D. 175; Brigden v. Heighes, 1 Q. B. D. 330; R. v. Palmer, 46 U. C. R. 262.

But ale handed through a window to a customer who called for it and drank part of it whilst standing on the highway, was held not to have been sold "to be consumed on the premises," though he drank the remainder whilst sitting on the window sill of the house: Deal v. Schofield, L. R. 3 Q. B. 8.

Illegal Promissory Notes.—"Notes of hand," by which is meant promissory notes, cheques, orders for the payment of money, due bills, I.O.U.'s, and "all evidences of debt under the hand of the debtor," given for any prohibited matters or things are not within the jurisdiction of any court: *In re* Summerfeldt v. Worts, 12 O. R. 48; such as a gambling debt; or for liquor drunk on the premises, as above mentioned; or in consideration of the withdrawal of a criminal charge: Morgan v. McFee, 18 O. L. R. 30. Sec. 62.

A cheque given in settlement of a gambling debt is void, even though in the hands of an innocent holder: *In re* Summerfeldt v. Worts, 12 O. R. 48; Harger v. Young, 34 Alb. L. J. 376; 37 Alb. L. J. 181.

If a note should in form be given for a loan of money, but in reality for one of the prohibited considerations, it would be invalid: Hill v. Fox, 4 H. & N. 359.

62.—(1) Save as otherwise provided by this Act, the court shall have jurisdiction in: Cases in which the Court has jurisdiction.

(*a*) A personal action where the amount claimed does not exceed $60;

(*b*) A personal action if all the parties consent thereto in writing, and the amount claimed does not exceed $100;

(*c*) An action on a claim or demand of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed $100; provided that in the case of an unsettled account the whole account does not exceed $600;

(*d*) An action for the recovery of a debt or money demand where the amount claimed, exclusive of interest whether the interest is payable by contract or as damages, does not exceed $200 and the amount claimed is

(i.) Ascertained by the signature of the defendant or of the person whom as executor or administrator he represents or—

(ii.) The balance of an amount not exceeding $200, which amount is so ascertained or—

Sec. 62.

(iii.) The balance of an amount so ascertained which did not exceed $400 and the plaintiff abandons the excess over $200.

An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it.

The jurisdiction conferred by this clause shall apply to claims and proceedings against an absconding debtor.

See section 109 and notes thereto.

(*e*) An action or contestation for the determination of the right of a creditor to rank upon an insolvent estate where the claim of the creditor does not exceed $60.

Combining causes of action.

(2) Claims combining

(*a*) Causes of action in respect of which the jurisdiction is by subsection 1 limited to $60, hereinafter referred to as class (*a*);

(*b*) Causes of action in respect of which the jurisdiction is by subsection 1 limited to $100, hereinafter referred to as class (*b*);

(*c*) Causes of action in respect of which the jurisdiction is by subsection 1 limited to $200, hereinafter referred to as class (*c*),

may be joined in one action; provided that the whole amount claimed in respect of class (*a*) does not exceed $60; and that the whole amount claimed in respect of classes (*a*) and (*b*) combined, or in respect of class (*b*), where no claim is made in respect of class (*a*), does not exceed $150, and that the whole amount claimed in respect of classes (*a*) and (*c*) or (*b*) and (*c*) combined, does not exceed $200, and that in respect of classes (*b*) and (*c*) combined, the whole amount claimed in respect of class (*b*) does not exceed $100.

Separate findings on combined claims.

(3) The findings of the court upon claims so joined shall be separate.

(4) The court shall also have jurisdiction in actions of replevin, where the value of the goods or other property or effects distrained, taken or detained, does not exceed [illegible], as provided in *The Replevin Act*. Sec. 62. Jurisdiction in replevin. Rev. Stat. c. 60.

(5) The court shall also have jurisdiction in actions between teachers and school boards as provided by *The High Schools Act*, *The Public Schools Act*, and *The Separate Schools Act*. 10 Edw. VII. c. 32, s. 62. Actions between teachers and school boards. Rev. Stat. cc. 266, 268, 270.

See The High School Act, R.S.O. 1914, c. 268, s. 50; The Public Schools Act, R.S.O. 1914, c 266, s. 87; The Separate Schools Act, R.S.O. 1914, c. 270, s. 54. See further notes on this sub-section: *post*.

Disputed Claims against Estates of Deceased Persons.—By the Surrogate Courts Act, R.S.O. 1914, c. 62, s. 60, where a claim against the estate of a deceased person is disputed by the personal representative, the claimant may, if the claim does not amount to more than $100, and is otherwise within the jurisdiction of the division court, apply to the judge of the division court in which an action for the recovery of the claim might be brought to allow the claim and determine the amount of it.

Action by Alien Enemy.—An alien enemy, resident in Ontario, and quietly pursuing his ordinary avocation, who is allowed to remain in Ontario after the commencement of war, is exonerated from the disabilities of enemies, and may maintain an action in a court of the province. But before permitting such action to proceed the court must be fully informed as to whether the plaintiff is entitled to the protection extended by the Crown under the wording of the Royal Proclamation of 15th August, 1914: Bassi v. Sullivan, 32 O. L. R. 14. An alien enemy residing in the alien's country cannot maintain an action in Ontario: Duncuke v. Swift Canadian Co., Limited, 32 O. L. R. 87; Hall's International Law, 6th Ed., 388; Princess of Thurn v. Moffitt, 1914, W. N. 379; Oskey v. City of Kingston, 7 O. W. N. 251.

Division Courts Have Jurisdiction in the following cases:

Class (a)—Personal Actions.—Section 62 (1 a). "Personal actions" at common law were, "Such actions whereby a man claims debt or other goods and chattels or damages for them, or damages for wrong done to the person": Termes de la Ley, 18; Attorney-General v. Churchill, 8 M. & W. 192; Whidden v. Jackson, 18 A. R. 440; 3 Bl. Com. 117. They comprise debt, covenant, detinue, trespass, replevin and trespass on the case, the last including all cases of wrong where the injury is not immediate or direct, but purely consequential or indirect: Scott v. Sheppard, 2 Bl. 892; Hawkes v. Richardson, 9 U. C. R., at p. 232; 1 Sm. L. C. 737. It is to be noted that personal actions include both actions founded on tort and actions founded on contract: in personal actions founded on tort jurisdiction is limited to a claim for $60: s. 62 (1a); in personal actions founded on contract jurisdiction extends to a claim for $100: s. 62 (1c).

"In all cases of tort the duty that has been violated is general. It is owed either to all our fellow subjects, or to some considerable class of them, and it is fixed by the law and by the law alone. . . . But

Sec. 62. hreach of contract, wilful or not, is the hreach of dutles which the parties havs fixed for themselves;" Pollock on Torts, 9th ed., p. 3.

Under section 65 every division court is now empowered in all actions within its jurisdiction, to grant relief, redress or remedy, or combination of remedies, absolute or conditional, including relief against penalties and forfeitures in as full and ample a manner as might be done in the like case hy the supreme court.

But the relief can only be given as an incident to a cause of action within the jurisdiction. A division court has no jurisdiction to decree ths specific performance of an agreement; so that a claim for rent of premises for a period during which they are not occupied hy ths defendant, and where there is no legal tenancy, hut a mere right to enforce an agreement for n term, is beyond the jurisdiction: Foster v. Reeves, 1892 2 Q. B. 255. And so is an action to recover back money paid under the terms of an instrument, on the ground that the instrument, hy fraud or mistake, does not set forth the true agreement: Crayston v. Massey-Harris Co., 12 Man. L. R. 165. It may be questionahle, on these authorities, whether auch equitahls claims as were held to be recoverahls in *Re* Legarie v. Canada Loan and Banking Co., 11 P. R. 512, and *Re* McGibbon v. Eager, 18 C. L. T. 311, are within the jurisdiction. See notes to s. 65.

Although the claim in detinue is for a return of the goods or their value, it is a personal action: Lucas v. Elliott, 9 U. C. L. J. 147; and the value of the goods sought to be recovered is the test of jurisdiction: see Taylor v. Addyman, 13 C. B. N. S. 309; Leader v. Rhys, 10 C. B. N. S. 369; Clegg v. Baretta, 56 L. T. 775. Such an action is founded on tort: Bryant v. Herbert, 3 C. P. D. 689. In actions of detinus the court may order specific delivery of the chattel detained, without giving the defendant the option of detaining the chattel upon paying its assessed value: see Winfield v. Boothroy, 54 L. T. 574. In such actions ths value of the chattel should be expressed in the judgment: see Chilton v. Carrington, 15 C. B. 730; Corbin v. Lewin, W. N. 1884 p. 62.

Where the plaintiff claims only $60, and the evidence at the trial shows damages for a larger sum the jurisdiction is not ousted: Bodger v. Nicholls, 58 L. T. 441.

A husband is liable for his wife's torts if they were married before the 1st July, 1884: Traviss v. Hales, 6 O. L. R. 574. For liahility of husband for debts incurred hy wife, see Scott v. Allen, 26 O. L. R. 571.

A lunatic is liable for his torts unless he is utterly unconscious of any wrong: Stanley v. Hays, 8 O. L. R. 81.

A parent is not at common law legally responsible for the torts of his infant child. *Quære* whether, if a parent had notice of a vicious propensity of child and did nothing to prevent it, he would be liable for negligence in respect of the child's misconduct: Corby v. Foster, 29 O. L. R. 83; Thibodeau v. Cheff, 24 O. L. R. 214.

The liability of persons keeping animals naturally wild and mischievous is discussed in Connor v. The Princess Theatre, 27 O. L. R. 466.

As to the rights of persons killing dogs found running at large, under a municipal by-law passed under the authority of R.S.O. 1914, c. 246, ss. 9 to 11, see McNair v. Collins, 27 O. L. R. 44.

There is often difficulty in determining whether the action is one of contract or of tort. The rule is laid down in Turner v. Stallibrass, 1898 1 Q. B. 56, that "if the plaintiff, in order to shew a cause of action, must rely on a contract, the action is one founded on contract; otherwise it is one of tort." Therefore when a relation of bailor and bailee

is established, an action for breach of the duty arising out of that rela- Sec. 62.
tionship is an action in tort: *Ibid.* A distinction is made between a breach of contract (action in contract) and breach of a duty arising out of the contractual relationship (action in tort): Edwards v. Mallan, 1908 1 K. B. 1002 (1005). Although in nearly all cases of breach of duty there must be some antecedent consensual relation between the parties, yet when once the relationship is established, and there is a breach of a general duty arising from the relationship, the action in respect of the breach is one of tort, unless the breach be of some particular stipulation: Sachs v. Henderson, 1902 1 K. B. 612 (616); cf. Phillimore, J., in 19 T. L. R. p. 535. An action against an attorney for breach of a general duty, arising out of the retainer, to use sufficient care and skill is an action in tort: Laidlaw v. O'Connor, 23 O. L. R. 696; but where the action is for breach of a positive contract to do some specific act, the action is in contract: Burke v. Shaver, 29 O. L. R. 365. An action against a lessor for wrongfully removing fixtures from house which he had previously agreed to lease to plaintiff was an action in tort notwithstanding the agreement for the lease: Sachs v. Henderson, 1902 1 K. B. 612. An action against a dentist for unskilfully extracting tooth by a "painless process" was held an action in tort. Defendant had fulfilled his contract to extract painlessly but had broken his general duty as a dentist by leaving portions of the tooth in plaintiff's jaw: Edwards v. Mallan, 1908 1 K. B. 1002. But see Steljes v. Ingram, 19 T. L. R. 535, where Phillimore, J., after reviewing the cases, held that notwithstanding the above rules, the substance of the action should be looked at, and therefore an action against an architect for not using due care and skill in supervising the erection of a house was one in contract: cf. Holland, Jurisprudence, 10th ed., 247.

An action against a railway company for delivering goods to insolvent consignees after plaintiff has countermanded delivery is an action in tort: Pontifex v. Midland Ry. Co., 3 Q. B. D. 23; but an action against a railway for negligence in losing goods was held to be founded on contract: Fleming v. Manchester and Sheffield Ry. Co., 4 Q. B. D. 81; but a claim by a passenger for misfeasance or positive negligence by which he is injured is a claim in tort: Taylor v. Manchester S. & L. Ry. Co., 1895, 1 Q. B. 135; Lyles v. Southend, 1905, 2 K. B. 1; Kelly v. Metropolitan, 1895, 1 Q. B. 944; see also Wilkinson v. Canadian Express Co., 27 O. L. R. 283; Robinson v. G. T. R., 27 O. L. R. 290; McDougall v. G. T. R., 27 O. L. R. 369; Pollock on Torts, 9th ed., pp. 548, 550.

Class (b) Consent thereto in Writing.—Section 62 (1. b).

No provision is made for filing the consent, but it is submitted that the consent should be filed on entering the claim.

As to requisites of consent: see notes to sections 82 and 107.

Class (c).—Section 62 (1. c). extends to all actions on contracts where moneys due or damages, not exceeding $100, are sought to be recovered: Morris v. Cameron, 12 C. P. 422; O'Brien v. Irving, 7 P. R. 308, provided that in the case of an unsettled account the whole account does not exceed $600.

Balance of an Unsettled Account.—By 39 Vic. c. 15, s. 2, the amount of an unsettled account inquirable into, was increased from $200 to $400, and by section 62 (1c) of the present Act to $600. In the cases decided before the changes in this law there must now be read $600 as the maximum amount of an unsettled account.

Sec. 62.

A settled account is the same as an account stated, and "an account stated is a settlement of accounts in which both parties or their agents agree upon the amount due from the one to the other": Bates v. Townley, 2 Exch. 152; an account stated and settled "generally takes place after the contracting of the debt or obligation, a kind of reckoning up between debtor and creditor of the state of accounts between them:" Ostrom v. Benjamin, 21 A. R. 467 (469); see Dougall v. Leggo, West. L. T. 203, 246; Lovell v. Phillips, 5 O. L. R 235. The ascertainment of the amount by the act of the parties may be the same thing as a statement of the account by them: Watson v. Severn, 6 A. R. 559; Ostrom v. Benjamin, 21 A. R. at p. 470.

Where plaintiff sued on a demand exceeding $200, but abandoned the excess over $99.75, and defendant claimed set-off exceeding $400, consisting of various unconnected items: Held, within the jurisdiction of the court: Read v. Wedge, 20 U. C. R. 456.

Plaintiff claimed balance of £49 on two notes of £15 each and interest, gave credit for £23 and abandoned excess over £25: Held, that the court had jurisdiction: *Re* Higginbotham v. Moore, 21 U. C. R. 326.

An unsettled account exceeding $400 reduced by payment to $100 was not within the jurisdiction until the present Act: Waugh v. Conway, 4 L. J. N. S. 228.

The plaintiff may recover $100, being the balance of an unsettled account not exceeding $600, but when the whole account exceeds that sum there is no jurisdiction.

Where plaintiff sued for $84 balance due for rent for several years at $160 a year, after deducting payments made from time to time, held, not within the jurisdiction: *Re* Hall v. Curtain, 28 U. C. R. 533, overruling Miron v. McCabe, 4 P. R. 171.

Plaintiff, before 39 Vic. c. 15, claimed $94.88, annexing to his summons particulars of his claim showing an account for goods for $384.23, reduced by credits to the sum sued for; but nothing had been done by the parties to liquidate the account or ascertain the balance, except a small amount admitted to have been paid, and a credit of $33 given for some returned barrels, but which still left an unsettled balance of upwards of $300. Held, not within the jurisdiction: *Re* The Judge of Northumberland and Durham, 19 C. P. 299.

Plaintiff, who was employed by defendants to purchase wool for them on commission, sued them for this commission and $19 paid to an assistant. It appeared that defendant had furnished plaintiff with $1,100, and that plaintiff had expended $36 beyond that sum in the purchase of wool, but no question was made at the trial as to the due expenditure of $1,100, the only question being whether plaintiff was entitled to any commission at all, and no claim was made for the $36 or any part of it, the plaintiff's demand being confined to the commission claimed on the quantity of wool purchased, and not on the price paid: Held, not an action for balance of an unsettled account exceeding $200, the balance of the unsettled account being $36, which was not in question: McRae v. Robins, 20 C. P. 135.

Plaintiff, before the passing of 39 Vic. c. 15, sued for $30 due as a balance of an account for board for self and horse, which appeared at the trial to be for a balance of an unsettled account exceeding $200. He also sued for board for self and horse for a subsequent period, and abandoned the excess of $12 over $100. On objection being taken to the jurisdiction, the judge allowed an amendment. The plaintiff then altered his claim, reducing it to $82, only, and the case was again tried and judgment

reserved, whereupon application was made for prohibition. Held, that the division court had jurisdiction independently of 39 Vic. c. 15, s. 2, but that under that Act the claim might have been investigated, as the subsequent proceedings took place after its passing, and there was, therefore, no necessity for any amendment of the claim: *Re* McKenzie v. Ryan, 6 P. R. 323. Sec. 62.

A claim reduced by set-off is the balance of an unsettled amount within this section: Woodhouse v. Newman, 7 C. B. 654; Furnival v. Saunders, 26 U. C. R. 119; but, where goods are delivered and it is agreed that the amount of them is to be credited on plaintiff's demand they are tantamount to a payment on account: Fleming v. Livingstone, 6 P. R 63. Where it does not appear on the face of the proceedings that the amount is unsettled, prohibition may be refused after judgment: *Re* Lott v. Cameron, 29 O. R. 70.

Abandoning Excess.—Where excess is abandoned it should be done in the first instance in the claim. Where such has not been done the judge may, upon such terms as he shall see fit at any time thereafter but before judgment, permit such abandonment, in which case an entry thereof shall be made in the proceedings: Rule 4. See Pegg v. Howlett, 28 O. R. 473; White v. Galbraith, 12 P. R. 573; School Trustees of Nottawasaga v. Township of Nottawasaga, 15 A. R. 310; Bodger v. Nicholls, 28 L. T. 441; Stogdale v. Wilson, 8 P. R. 5; *In re* Sehert v. Hodgson, 31 O. R. 157. Rule 4 gives the judge power to allow the abandonment of the excess at any time before judgment, and the cases in which it was held that the excess must be abandoned in the claim are not now applicable: see *Re* McKenzie v. Ryan, 6 P. R. 323; Cleveland Press v. Fleming, 24 O. R. 335.

If the excess is not abandoned the proper course is for the judge to enter judgment for the defendant: Vines v. Arnold, 8 C. B. 632. If the judge nevertheless proceeds without abandonment, prohibition may be granted: *Re* McKenzie v. Ryan, 6 P. R. 323; Cleveland Press v. Fleming, 24 O. R. 335; but such prohibition will generally be confined to the excess: *Re* Elliott v. Biette, 21 O. R. 595; *Re* Trimble v. Miller, 22 O. R. 500; Pegg v. Howlett, 28 O. R. 473; *Re* Lott v. Cameron, 29 O. R. 70.

The mere fact of the abandonment will not, before judgment, amount to a release. The plaintiff may, if he wish, withdraw the suit and sue for the full amount. If, however, he goes to trial his recovery of the smaller amount will be a bar to any action he may bring to recover the amount abandoned: Winger v. Sibbald, 2 A. R. 610.

The abandonment of the excess must be the act of the plaintiff himself, or someone authorized by him, and not the act of the judge: Hill v. Swift, 24 L. J. Ex. 137; 3 W. R. 171; nor of the person having merely the general authority to appear in the case as the plaintiff's agent at the trial: Isaac v. Wyld, 7 Ex. 163. The safer course would be to file an abandonment signed by the plaintiff or someone with authority to sign it for him.

Where the claim was upon a solicitor's bill of costs, part of which had been abandoned, and the judge at the trial taxed off a sum from the bill, it was held that the whole sum should not be deducted from the claim as sued but the amount abandoned should be considered: Jarvis v. Legatt, 10 C. L. T. 155.

The abandonment must be made before judgment. If not so made, prohibition may still be granted. The defendant is entitled to have the plaintiff bound by the abandonment before judgment, so that the adjudi-

Sec. 62. cation will be final between the parties as to the cause of action in dispute.

The amount claimed must not be the balance of an unsettled account when such account, in the whole, exceeds $600.

The plaintiff cannot give the court jurisdiction by giving the defendant credit by way of set-off for an amount which the defendant has not admitted to be correct: Furnival v. Saunders, 26 U. C. R. 119. The set-off must be admitted by both parties: Hubbard v. Goodley, 25 Q. B. D. 156; but see Lovejoy v. Cole, 1894, 2 Q. B. 861; and it is a question of fact whether the parties have agreed to set off one account against the other, and the decision of the judge will not be reviewed: *Re* Jenkins v. Miller, 19 P. R. 95. Where an action was brought for the balance of an account aggregating $456.50 (the statute then limiting the amount of the unsettled account to $400, now increased to $600), on which account credit was given for cash payments amounting to $361.50, leaving a balance of $95, it was held that it did not appear on the face of the proceedings that the account was an unsettled one and for all that appeared the account, though exceeding $400, might have been a settled account, and the balance an admitted balance, and therefore the want of jurisdiction was not apparent and that prohibition should, in the exercise of discretion, be refused: *Re* Lott v. Cameron, 29 O. R. 70.

A claim for less than $100 by a mortgagor against a mortgagee for an alleged surplus after a mortgage sale, which realized less than $600, may be sued under this sub-section: *Re* Legarie v. Canada Loan and Banking Co., 11 P. R. 512; see *Re* McGibbon v. Eager, 18 C. L. T. 311. "It is an equitable cause of action for money had and received:" Reddick v. Traders Bank, 22 O. R. 449; but see Hutson v. Vallieres, 19 A. R. 154; Foster v. Reeves, 1892 2 Q. B. 255.

A claim for $100 and interest would be beyond the jurisdiction: Insley v. Jones, 4 Ex. D. 16; Malcolm v. Lees, 15 P. R. 75; *Re* Lott v. Cameron, 29 O. R. 70; Thompson v. Pearson, 18 P. R. 420; no provision similar to that under s.-s. (d) being made with reference to claims under s.-s. (c).

An action for $70 and interest owing upon an annuity under a will, is within the jurisdiction: *Re* McGibbon v. Eager, 18 C. L. T. 311; and so is an action by a legatee against the devisee of lands charged with payment of the legacy if the amount claimed does not exceed $100: see Gray v. Richmond, 22 O. R. 256: see notes to section 113, and notes to section 71.

A person whose goods have been wrongfully taken and sold by another may waive the tort and adopt the sale and recover the proceeds of the sale to an amount not exceeding $100, the cause of action being a breach of implied contract by the defendant to pay over the proceeds to the plaintiff: Kerr v. Roberts, 17 C. L. T. 337.

Class (d): s. 62 (1. d.)—Under the original clause, section 72 (d) of the Division Courts Act, R.S.O. 1897, c. 60, there were conflicting decisions as to the principle of construction of the word "ascertained," and as to whether the *liability* must appear upon the instrument, or whether it is sufficient to produce a writing in which an *amount* is mentioned, leaving it to other evidence to show whether there is a cause of action or not. In *Re* Petrie v. Machan, 28 O. R. 642, an action was brought to recover commission on the sale of goods under an instrument signed by the defendant in which he authorized the plaintiff to dispose of the goods mentioned therein for the sum of $1,000, defendant reserving to himself the right to dispose of them without the plaintiff's assistance and agree-

ing in the latter event to pay plaintiff ten per cent. commission on the above mentioned sum. The defendant disposed of the goods for $350, without the assistance of the plaintiff. It was held that the plaintiff was entitled to recover the commission, and that the claim was within the jurisdiction, the original amount being ascertained by the signature of the defendant. This decision was followed in *Re* Sawyer-Massey Co. v. Parkin, 28 O. R. 662, an action brought to recover the price of a machine under a written agreement signed by the defendant in which he agreed to send the plaintiff within ten days after the machine was started, a promissory note for $125, the price thereof; and in default the price was to become forthwith due and payable. It was held by Robertson, J., that there was no jurisdiction, as the amount was "not ascertained by the signature of the defendant" under this clause, for in addition to proof of the signature, evidence was necessary to show that the terms of the agreement had been performed by the plaintiffs. This decision was reversed on appeal to the Divisional Court, and a mandamus ordered to issue: see also McCormick v. Warnica, 3 O. L. R. 427, to the same effect. Sec. 62.

These latter decisions follow that in Graham v. Tomlinson, 12 P. R. 367. At page 370, Armour, C.J., said, "The statute does not require that the debt shall be ascertained . . . nor that the claim to recover . . . shall be so ascertained, but only that the amount shall be ascertained." See also Thompson v. Pearson, 18 P. R. 420.

The contrary view, giving a more limited construction to the jurisdiction, was held in Kinsey v. Roache, 8 P. R. 515; Wiltse v. Wurd, 8 A. R. 549; McDiarmid v. McDiarmid, 15 A. R. 287; Forfar v. Climie, 10 P. R. 90; Mosea v. Moses, 13 P. R. 12, 144; *Re* Wallace v. Virtue, 24 O. R. 558; and see *Re* Shepherd v. Cooper, 25 O. R. 558; culminating in Kreutziger v. Brox, 32 O. R. 418, on the ground that the *liability* of the defendant as well as the *amount* of the claim must be ascertained by the signature of the defendant, and that the division court has not jurisdiction where it was necessary for the plaintiff to give other and extrinsic evidence beyond the production of documents and proof of signature to them.

Subsequent to these decisions section 72 of the late Division Courts Act was amended by 4 Edw. VII c. 12, s. 1, which was apparently intended to follow the line of opinion expressed in Kreutziger v. Brox, *supra;* this section is as follows:

"72a. The amount or original amount of the claim shall not be deemed to be ascertained by the signature of the defendant or of the person whom as executor the defendant represents within the meaning of clause (d) of sub-section 1 of section 72, when in order to establish the claim of the plaintiff or the amount which he is entitled to recover, it is necessary for him to give other and extrinsic evidence beyond the mere production of a document and the proof of the signature to it."

Under this amendment (which was considered to be declaratory of the law as stated in Kreutziger v. Brox, 32 O. R. 14, and other cases in the same trend and therefore retroactive: *Re* Thom v. McQuilty, 8 O. L. R. 705), it was held in the case last mentioned that the liability as well as the amount must be ascertained by the signature; and that an action for the price (exceeding $200) of a machine sold by the plaintiff to the defendant under a written agreement signed by the latter containing the amount and terms upon which the purchaser was to pay for the machine, under which default was alleged to have been made in such payment, was beyond the jurisdiction of the division court.

It was further decided under the amendment above referred to, that the words "establish the claim" in the amendment meant to establish

Sec. 62.

or ascertain the amount, and that upon proof of the endorsement of the note in question by the defendant and production of it and of the protest a *prima facie* right to recover in the division court was made out and mandamus was granted to the court below which had dismissed the case as not being within its jurisdiction: Slater v. Laboree, 9 O. L. R. 545, and see Bissett v. Schrader, 12 O. W. R. 656.

By the present Act, section 62 (d), further change has been made, and the amount is not to be deemed to be ascertained where it is necessary *for the plaintiff* to give other and extrinsic evidence beyond the production of a document and proof of the signature to it.

It is submitted that this section establishes the law as laid down in Kreutziger v. Brox, 32 O. R. 14, and *Re* Thom v. McQuilty, 8 O. L. R. 705; and that where it is necessary for the plaintiff to give proof of any fact beyond the production of a document (or documents: Interpretation Act, R.S.O. 1914, c. 1, s. 28 (i)), and proof of the signatures to the same, in order to establish the validity of the plaintiff's claim against the defendant, there is no jurisdiction even if the amount is so ascertained, and that the decision in Slater v. Laboree, *supra*, is not affected by the present section. But jurisdiction is not ousted because it appears that there were other dealings between the parties, even if it is necessary to investigate those transactions in order to ascertain whether the note has been paid in whole or in part; that is a matter of defence merely: *Re* Green v. Crawford, 21 O. L. R. 36.

But if the document be produced and the signature proved and no further evidence is necessary to show the completion of the transaction so far as the person signing the document is concerned, the division court has jurisdiction notwithstanding a question arises as to the plaintiff's right to sue in his own name on the document: Renaud v. Thebert, 27 O. L. R. 57.

Scope of section 62 (d).—Under the three sub-divisions of this sub-section in the present Act, the division court has jurisdiction in claims exceeding $100, and not exceeding $200, in any of the following circumstances, and the plaintiff may sue in that court for:

(1) Any sum not exceeding $200 (exclusive of interest, whether such interest is payable by the contract or as *post diem* interest recoverable as damages), such sum being ascertained by a document or documents signed by the defendant or the regularly appointed executor or administrator of the debtor.

(2) Any sum not exceeding $200 (exclusive of interest as mentioned above), which sum is the balance of an original amount which was ascertained in the manner above mentioned.

(3) Any sum which is the balance of an original amount not exceeding $400 so ascertained, provided the plaintiff abandons the excess over $200.

The jurisdiction conferred by the above section 62 (d) applies to claims and proceedings against an absconding debtor: see last clause of the sub-section; also section 199, and notes thereto.

The ascertainment of the amount by the debtor is not binding on a guarantor, there being no liquidation or ascertainment of amount between the creditor and the guarantor; Thomson v. Wede, 22 A. R. 105.

The amount must be ascertained by the signature of the defendant prior to the commencement of the action: see Lucas v. Dixon, 22 Q. B. D. 357; *Re* Graham v. Tomlinson, 12 P. R. 367; White Sewing Machine Co. v. Belfry, 10 P. R. 64; Robb v. Murray, 16 A. R. 503.

Though the plaintiff may sue in a higher court upon the original consideration, he will not obtain the costs of that court if the amount has been ascertained by the signature of the defendant, as by an acceptance: White Sewing Machine Co. v. Belfry, 10 P. R. 64; see Vanderwaters v. Horton, 9 O. R. 548; Brown v. Hose, 14 P. R. 3. Sec. 62.

A claim aggregating more than $100, made up of two amounts, one ascertained by signature and the other not so, was formerly beyond the jurisdiction: *Re* Walsh v. Elliott, 11 P. R. 520; but this is not now law, as class (c) above may now be combined with classes (a) or (b): s. 62 (2).

A claim on a foreign judgment is not a claim ascertained by the signature of the defendant although the judgment was recovered upon a note signed by him: *Re* McMillan v. Fortier, 2 O. R. 231.

An executor de *son tort* is not, within the meaning of section 62 (d) (i), an executor representing the deceased, and an action cannot be maintained in the division court against him for an amount exceeding $200 on a claim ascertained by the signature of the deceased: *In re* Dey v. McGill, 10 O. L. R. 408.

Interest.—Formerly the law was that when interest would bring the amount over $200 the excess had to be abandoned, or prohibition would be awarded either *quousque* until the judgment should be reduced to the proper amount, or partially as to the excess: *Re* Young v. Morden, 10 P. R. 276; *Re* Elliott v. Blette, 21 O. R. 595; *Re* Lott v. Cameron, 29 O. R. 70. But now interest in excess of $200 may be added to claims ascertained by the signature of the defendant: see Pegg v. Howlett, 28 O. R. 473; and it is so expressly provided by section 62 (d), whether such interest be payable by contract or recoverable as damages, that is, for *post diem* interest.

What is a Signature.—A signature is the writing or otherwise affixing a person's name, or a mark to represent his name, by himself or by his authority: R. v. Justices of Kent, L. R. 8 Q. B. 305; 42 L. J. M. C. 112.

A stamped impression is sufficient: Jenkyns v. Gaisford, 3 Sw. & Tr. 93; Bennett v. Brumfitt, L. R. 3 C. P. 28. A mark is sufficient even though the name should not be affixed: Baker v. Dening, 8 A. & E. 94; *Re* Field, 3 Curt. 752; or if a wrong name should be written: *Re* Glover, 11 Jur. 1022; or an assumed name: *Re* Redding, 14 Jur. 1052. Initials are perfectly good: *Re* Wingrove, 15 Jur. 91. The signature may be either at the top or bottom: Durrell v. Evans, 1 H. & C. 174; and even the name of the debtor on a printed billhead upon which the ascertainment of the amount appeared would perhaps be sufficient: Schneider v. Norris, 2 M. & S. 286; Evans v. Hoare, 1892, 1 Q. B. 593. A signature by an agent would be sufficient: R. v. Justices of Kent, L. R. 8 Q. B. 305; *Re* Whitley, 32 Ch. D. 337. A forgery cannot be ratified: Merchants Bank v. Lucas, 18 S. C. R. 704.

Note signed by husband in his own name not as agent: Davidson v. McClelland, 32 O. R. 382.

By the English County Court Rules, 1889, particulars of claim were required to be signed by a solicitor. A lithographed signature is insufficient: R. v. Cowper, 24 Q. B. D. 533; but signature by an authorized clerk is sufficient: France v. Dutton, 1891 2 Q. B. 208. It is not necessary that the signature should shew the agency: *Re* Whitley Partners (Limited), 32 Ch. D. 337. Even the signature in the agent's own name would probably be sufficient: Commins v. Scott, L. R. 20 Eq. 11;

Sec. 62. Wyison v. Dunn, 34 Ch. D. 575. It would not be necessary that the agent's nuthority should be in writing: Emmerson v. Heelis, 2 Tannt. 38.

"The most usuni mode is by an unwritten request or by implication from the recognition of the principai or from his nequiescence in the nct of the ngent": Evnns Prin. & Agents, 21.

But mere proof that an agent has been recognized ns such in other transnctions would be insufficient: Myles v. Thompson, 23 U. C. R. 553; Spooner v. Browning, 1898 1 Q. B. 528.

The nuthority might be hy telegram: Marshaii v. Jamieson, 42 U. C. R. 115; Lilly v. Smnies, 8 T. L. R. 410. Instruments which are defective as promissory notes, either for uncertninty or as containing other agreements, or for any other causes, would be sufficient acknowiedgments withln this section: Pnlmer v. Fahnestock, 9 C. P. 172; 20 U. C. R. 307; Grant v. Young, 23 U. C. R. 387; Third Nntionsl Bank of Chicago v. Coshy, 41 U. C. R. 402; 43 U. C. R. 58.

Even though nnrticuinrs of the ciaim show an excess over $200, this excess may be ahandoned nt the trinl: *Re* Whlte v. Gslbraith, 12 P. R. 513; Bodger v. Nicholis, 28 L. T. 441; Ruie 4; notes *ante*, "Abandonment of Excess."

Class (e): section 62 (e).—Action to determine creditor's right to Rnnk on Insoivent's Estnte.

COMBINING CAUSES OF ACTION.

Section 62 (2), (3).—The foiiowing nre exampies ot ciaims which may be combined:

(a) $60 for tort, and (c) $140 on promissory note.

(n) $60 for tort, (b) $40 on open account, (c) $100 on note.

(a) $10 for tort, (h) $90 damages for hreach of contract, (c) $100 on note.

(h) $99 for dnmages for hrench of contrnct, and (c) $101 on note.

(h) $50 dnmagea for hreach of contrnct, (b) $50 open account, nnd (c) $100 on note.

(c) $100 on note, (a) $40 for tort, nnd (h) $60 open account.

The joinder of severni dlstinct cnuses of action against the sams defendnnt is authorized, hut not the joinder of several nctions ngainst distinct persons: Burstnii v. Beyfus, 26 Ch. D. 35; McLnughlin v. Schsefer, 13 A. R. 253; Thomson v. Eede, 22 A. R. 105; McMurtry v. Munroe, 14 U. C. R. 166; Smurthwaite v. Hannay, 1894 A. C. 494; Peninsular and Orientai SS. Co. v. Tsune Kijima, 1895 A. C. 661; Sadler v. Great Western Ry. Co., 1895 2 Q. B. 688; 1896 A. C. 450; Faulds v. Fanids, 17 P. R. 480.

REPLEVIN.

Section 62 (4).—Replevin in the division courts is governed by The Replevin Act, R.S.O. 1914, c. 69, and The Division Court Rules, 13-25. *post.*

The foiiowing is The Replevin Act:

1. This Act mny be clted ns The Replevin Act,

2. In this Act,

"Sheriff" shaii include sny officer to whom sn execution or nther process is directed.

WHEN GOODS REPLEVIABLE. Sec. 62.

3. Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained or have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery thereof, and of the damages sustained by reason of such distraint, taking or detention.

4. An action of replevin shall not be brought for the recovery of personal property seized under process by and in the custody of a sheriff, bailiff or other officer, or for the recovery of any liquor seized by a license inspector, constable or other officer under The Liquor License Act.

5. Where a sheriff has in his hands an order of replevin, and the property to be replevied or any part thereof is reasonably supposed to be secured or concealed in any dwelling house of the defendant, or of any other person holding the same for him, and the sheriff publicly demands at the door of such dwelling house delivery of the property to be replevied, and the same is not delivered to him within six hours after such demand, he may, and shall, if necessary, but during daylight only, break open such dwelling house for the purpose of replevying such property or any part thereof, and, if found therein, shall make replevin according to the order.

[NOTE.—Rule 19 says within 24 hours.]

6. Where the property to be replevied, or any part thereof, is reasonably supposed to be secured or concealed in an enclosure other than a dwelling house of the defendant, or of another person holding the same for him, and the sheriff publicly demands at the enclosure delivery of the property to be replevied, and the same is not forthwith delivered to him, he may, and shall, if necessary, at once break open such enclosure for the purpose of replevying such property, or any part thereof, and, if found therein, shall make replevin according to the order.

[See Rule 19, which also provides for the same circumstances as sections 5 and 6 here, but differ from them in some important respects.]

7. Where the property to be replevied, or any part thereof, is reasonably supposed to be concealed either about the person or on the premises of the defendant, or of any other person holding the same for him, and the sheriff demands from the defendant, or such other person, delivery thereof, and delivery is neglected or refused, he may, and if necessary, shall, search and examine the person, and, subject to the next two preceding sections, the premises of the defendant or other person, for the purpose of replevying the property, or any part thereof, and, if found, shall make replevin according to the order.

REPLEVIN IN COUNTY COURTS.

8. The County and District Courts shall have jurisdiction in replevin as is provided in The County Courts Act.

[Section 22 (1) (e) of The County Courts Act, R.S.O. 1914, c. 59, says that the County and District Courts shall have jurisdiction in "Actions for the recovery of property, real or personal, including actions of replevin and actions of detinue where the value of the property does not exceed $500.]

Sec. 65. REPLEVIN IN DIVISION COURTS.

#120

9. Where the value of the property distrained, taken or detained does not exceed [redacted] and the title to land is not brought in question, the action may be brought in the Division Court for the division within which the defendant or one of the defendants resides or carries on business, or where the property was distrained, taken or detained.

Rules 13-25 *post*, provide the practice in replevin cases in the division court with forms. Additional forms are given in the Appendix hereto.

Note that "sheriff" in The Replevin Act includes any officer to whom process is directed, and so includes a bailiff to whom division court process is directed.

Formerly, the question of title to land did not oust the jurisdiction of the division courts in replevin (see Fordham v. Ackere, 4 B. & S. 578), but now section 9 of The Replevin Act and section 61 (a) of The D. C. Act exclude jurisdiction in such cases: see notes *ante*.

In replevin, a verdict or judgment is divisible, so that the plaintiff may recover for whatever part of the goods he is entitled to and the defendant for the rest: Sills v. Hunt, 16 U. C. R. 521; Haggart v. Kernahan, 17 U. C. R. 341; Henderson v. Sills, 8 C. P. 68; Canniff v. Bogart, 6 U. C. L. J. 59; Roscoe's N. P. 1070.

Notice of action is not necessary in replevin: Lewis v. Teale, 32 U. C. R. 108; Folger v. Minton, 10 U. C. R. 423; Manson v. Gnroett, 2 P. R. 389; Gay v. Matthews, 4 B. & S. 436.

When Replevin Will Lie.—Wherever trespass is maintainable, so also is the action of replevin: Brown v. Zimmerman, 15 U. C. R. 568.

A special property in goods, such as that of a bailee or pledgee, is sufficient to support replevin: Halsbury, xi., s. 4023; any person out of whose possession books, etc., have been taken, whether by force or fraud or without right, may replevy under our statute; but when the right to the custody and possession depends on the holding of an office, it should appear that the applicant holds the office and is, therefore, entitled to such books, etc.: Hammond v. McLay, 10 U. C. L. J. 269; and replevin will lie though there has been no wrongful taking but a detention merely, for every detention is a new taking: Deal v. Potter, 26 U. C. R. 578; Gates v. Bent, 31 N. S. R. 544.

An equitable title will support an action of replevin: Carter v. Long, 26 S. C. R. 430, see also Connell v. Hickcock, 15 A. R. 518.

A person in possession of goods may have no right against the true owner, yet may have a right to maintain replevin against a wrong-doer: Gilmour v. Buck, 24 C. P. 187; therefore one who has bare possession may maintain the action against a wrong-doer: *Ib;* Meyerstein v. Barber, L. R. 2 C. P. 661; L. R. 4 H. L. 317; and see Glenwood v. Phillips 1904 A. C. 405. And if an agent is entrusted with money to buy goods the principal has the same interest in the goods bought as he had in the funds producing them; and if the goods are mixed with those of the agent the principal may replevy a quantity to be taken from the mass equivalent to the portion of the money used in the purchase, as well as the unexpended balance: Carter v. Long, 26 S. C. R. 430. In Smalley v. Gallagher, 26 C. P. 531, it was held that where an action of replevin is brought on the ground that the facts would sustain an action of trover, the fact of conversion must be clearly established. But see section 3 of the Replevin Act, *ante*, in which it is provided that where goods, etc., have been "otherwise wrongfully taken or detained,

the owner or other person capable of maintaining an action for damages Sec. 62.
therefor may bring an action of replevin," etc., and for the recovery of damages.

One who is entitled to possession as agent of a foreign corporation, the owner, is entitled to maintain replevin in his own name: Coquillard v. Hunter, 36 U. C. R. 316.

The claimant of goods seized and sold by a bailiff under an execution may maintain replevin against the purchaser of the goods: Reid v. McDonald, 26 C. P. 147. In such a case the bailiff cannot sell the goods and issue an interpleader for the proceeds; but if he sells the goods and claim is made to the proceeds, he may interplead therefor: *Ib.*, p. 163. A third party claiming goods as his own which are seized and sold under an attachment from the division court, cannot now maintain replevin in a superior court, as the attachment is not against him: Arnold v. Higgins, 11 U. C. R. 101; Jameson v. Kerr, 6 P. R. 3; Anderson v. McEwen, 8 C. P. 532; Barclay v. Sutton, 7 P. R. 14; Burke v. McWhirter, 35 U. C. R. 1, were decided under the old Replevin Act, and section 4 of the present Replevin Act prohibits an action of replevin for property seized under process and in the custody of a sheriff, bailiff, license inspector, constable, or other officer.

The legal representative of a deceased owner may maintain replevin against the purchaser of goods sold by a person who had agreed to manage a farm for the deceased in consideration of his getting, amongst other things, one third of the increase of young stock and who illegally sells all the stock: Duffill v. Erwin, 18 U. C. R. 431. The owner of goods may replevin them from a workman although there may be moneys due to the latter for work done on the goods on a settlement of accounts between them: Bush v. Pimlott, 9 C. P. 54.

If the vendor has no title, the purchaser can have none, and the true owner can replevy: Kerby v. Cahill, 6 O. S. 510; Lecky v. McDermott, 8 S. & R. 500; Cundy v. Lindsay, 2 Q. B. D. 96; 3 App. Cas. 489; and the true owner of goods stolen, or found, or bought from someone who has no authority to sell, may replevy them no matter where found, notwithstanding that they have been sold at public sale: McKinley v. McGregor, 3 Whar. 396; Buffington v. Gerrish, 15 Mass. 156; Rowley v. Bigelow, 12 Pick. 307; or transferred to an assignee for benefit of creditors: Farley v. Lincoln, 51 N. H. 577; Thompson v. Rose, 16 Conn. 71; and the owner can replevy from the buyer or anyone else who is in possession of a chattel sold by one who has borrowed it: Roland v. Gundy, 5 Ohio 202.

There is no market overt in Ontario, and a purchaser cannot, as in England, acquire title by purchase in a public market place, as against the owner: see Hargreave v. Spink, 1892 1 Q. B. 25.

Replevin may be brought upon a distress for school rates (and no notice of action is necessary in such case): Applegarth v. Graham, 7 C. P. 171; Spry v. McKenzie, 18 U. C. R. 161; Askew v. Manning, 38 U. C. R. 345; or for other taxes: Sargant v. City of Toronto, 12 C. P. 185; see also Gillies v. Wood, 13 U. C. R. 357; Haacke v. Marr, 8 C. P. 441; the prohibition of the writ contained in the words "or other officer," in section 4 of the Replevin Act, doubtless applying only to an "officer" to whom an execution or other process is directed: section 2; a warrant of distress for taxes or school rates is not a "process": see Rule 2 (8).

Section 4 very much enlarges the scope of the corresponding section in the former Replevin Act, which limited the prohibition to a "party to an action" in regard to goods "seized under process against such party."

Sec. 52. R.S.O. 1897, c. 66, s. 3, and former Rule 40. Where some of the rates distrained for are collectable and others no , the rates legally collectable must be first paid: Corbett v. Johnston, 11 C. P. 317; see also Anglin v. Minis, 18 C. P., *per* Wilson, J., at p. 174. The legal rates must separately appear on the collector's roll to justify the distress: Hurrell v. Wink, 8 Taunt, 369; Sibbald v. Roderick, 11 A. & E. 38; Coleman v. Kerr, 27 U. C. R. 13; Squire v. Mooney, 30 U. C. R. 531; Victoria M. F. Ins. Co. v. Thompson, 9 A. R. 620.

Replevin will also lie, for goods sold so that the property in them vests in the purchaser: O'Rourke v. Lee, 18 U. C. R. 607. Also by the hirer of a chattel hired on the terms of certain monthly payments which, when complete, will vest the property in the person to whom it is hired, on default of payment of the instalments: Mason v. Johnson, 27 C. P. 205; Nordheimer v. Robinson, 2 A. R. 305; Walker v. Hyman, 1 A. R. 345; McDonald v. Forestal, 29 Gr. 300; 9 S. C. R. 12; Weeks v. Lalor, 8 C. P. 237; Bush v. Fry, 15 O. R. 122; but a demand should be first made therefor: Tuffts v. Mottashed, 29 C. P. 530; also for goods in hands of a guardian in insolvency under the Insolvent Act: Jameson v. Kerr, 6 P. R. 3; for goods obtained by fraud or upon a preconceived design not to pay for them: Higgons v. Barton, 26 L. J. Ex. 342; Kingsford v. Merry, 11 Ex. 577; Clough v. London & N. W. Ry. Co., L. R. 7 Ex. 26; Cundy v. Lindsay, 3 App. Cas. 459; McCuffis v. Allen, 57 Vt. 505. But an innocent party purchasing from the fraudulent purchaser would be protected: White v. Garden, 10 C. B. 19; Stœser v. Springer, 7 A. R. 497. Formerly, if the fraudulent purchaser were convicted of false pretences, the property would revert to the original vendor even as against an innocent purchaser: Bently v. Vilmont, 12 App. Cas. 471; but see now Criminal Code, 1030, under which an innocent purchaser is protected against any order of restitution, even if his vendor has been convicted of theft or receiving stolen goods or false pretences. Replevin will also lie for a swarm of bees: R.S.O. 1914, c. 107; for money in a box or for leather made into shoes if sufficiently identified, and for the increase of animals *ferœ naturæ* and reclaimed: Morris on Replevin, 101; also for a ship and her sails: Marsh, 110; Prideaux v. Warne, Sir T. Rnym. 132; for a vessel acquired under proceedings *in rem* in a foreign admiralty court: VanEvery v. Grant, 21 U. C. R. 542; Castrique v. Imrie, L. R. 4 H. L. 414; see Dunsmuir v. Klondike & Columbian Gold Fields, Ltd., 6 B. C. R. 200; for growing timber sold and afterwards cut into logs by the purchaser, as against the owner of the land: McGregor v. McNeil, 32 C. P. 538; but not if title to land comes in question: s. 61 (a); for leases and other title deeds: Burr v. Munro, 6 O. S. 57; Anderson v. Hamilton, 4 U. C. R. 372; Dowling v. Miller, 9 U. C. R. 227; for goods distrained off premises: Huskinson v. Lawrence, 26 U. C. R. 570; for growing crops: Glover v. Coles, 7 Moore, 231; for goods seized under a search warrant and removed to another county and there detained, the removal to another county being unjustifiable, and the detention there being a trespass *ab initio*: Hoover v. Craig, 12 A. R. 72. Where the goods of A. having been seized by the sheriff under an execution against B. had been handed over by the sheriff to an assignee to whom B. had made a voluntary assignment in insolvency, it was held that A. might maintain replevin against the assignee: Burke v. McWhirter, 35 U. C. R. 1.

In order to maintain an action against a lien holder, the lien must be first discharged, or an offer or tender of the amount of the lien made: Lake v. Biggar, 11 C. P. 170; McMillan v. Byers, 15 S. C. R. 194. But

a tender properly made and improperly rejected is not equivalent to payment in the case of a mortgage, and replevin for the title deeds would not lie: Bank of New South Wales v. O'Connor, 14 App. Cas. 273. The remedy is an action for redemption: *Ib.* In replevin for goods seized for taxes it must distinctly be shown by the defendant that such goods are liable to distress in order to justify the seizure: Sargent v. City of Toronto, 12 C. P. 185; see Robins v. Coffee, 9 O. R. 332. Sec. 62.

The provisions of the Municipal Act which prevent actions being brought for anything done under a by-law, until such by-law has been quashed, do not apply to replevin: Wilson v. The Corp. of Middlesex, 18 U. C. R. 348. Where one person wrongfully intermingles his property with that of another, all the person whose property is intermingled can require is that he should be permitted to take from the whole an equivalent in number and quality for that he originally possessed: McDonald v. Lane, 7 S. C. R. 462; see Carter v. Long, 26 S. C. R. 430.

Whether there has been a taking or detention is a matter of defence at the trial: Gilchrist v. Conger, 11 U. C. R. 197.

Where Goods Not Replaviable.—A mere servant of the owner cannot bring replevin; nor a bailiff who never had actual possession: Cool v. Mulligan, 13 U. C. R. 613. If neither trespass nor trover would be maintainable neither would replevin: Caron v. Graham, 18 U. C. R. 315; Schaffer v. Dumble, 5 O. R. 716, except in cases where it would be maintainable at common law: *Ib.*

It has been held that replevin will not lie in the following cases:

For a chattel seized by a collector of customs for breach of the revenue laws: Scott v. McRae, 3 P. R. 16; by a purchaser to whom neither possession nor property in the chattel has passed: Bloxam v. Sanders, 9 B. & C. 941; Henry v. Cook, 8 C. P. 29; nor if there is not a contract within the Statute of Frauds: Keating v. Parkin, 22 C. P. 569; for goods in the hands of an official assignee under the Insolvent Act of 1879: Barclay v. Sutton, 7 P. R. 14; see also Campbell v. Lepan, 21 C. P. 363; against a pound-keeper: Ibbotson v. Henry, 8 O. R. 625; nor goods seized under a distress warrant for non-payment of a fine imposed by a conviction, if sought to be replevied by the person against whom the distress issued, unless the magistrate acted without jurisdiction: Hannagan v. Burgess, 8 C. L. T. 193; nor goods seized under process by a sheriff, bailiff or other officer, or liquor seized under the Ontario Liquor License Act: the Replevin Act, s. 4.

Estoppel.—The plaintiff may be estopped by acquiescence from disturbing goods in the defendant's possession: O'Shaughnessy v. Ball, 21 S. C. R. 415.

Demand.—The same evidence of demand is necessary in replevin as in trover and for the same cause: Smalley v. Gallagher, 26 C. P. 531.

In replevin against one person, goods cannot be taken out of the peaceable possession of another without notice or demand: G. W. Ry. Co. v. McEwan, 28 U. C. R. 528; Hoorigan v. Driscoll, 8 P. R. 184; Stoeser v. Springer, 7 A. R. 497.

Where goods are in the possession of defendant under the terms of a hire receipt, such demand is necessary before replevin: Tuffts v. Mottashed, 29 C. P. 530.

Application for Replevin Summons.—In ordinary cases application must be made to the judge for an order upon an affidavit by

Sec. 62. "the person claiming the property, or *some other person*," showing to the satisfaction of the judge: (1) the facts of the wrongful taking or detention complained of; (2) the value and description of the property taken or detained; (3) that the person claiming is the owner of the property or lawfully entitled to the possession thereof (as the case may be): Rule 13 (1). For form of affidavit, see Form 38. If the affidavit is not made by "the person claiming the property" the "other person" making it should show in the affidavit that he is the agent, or state facts showing some right to intervene: see Arnold v. Hamilton, 1 P. R. 263.

Upon the application the judge may proceed *ex parte* or may direct notice to be served on the defendant to show cause why the summons should not issue, and may, on the *ex parte* application, or on the return of the motion to show cause, grant or refuse the summons, and in case the summons is granted may direct the bailiff to take a bond in double the value of the property, or may direct him to take and detain the property until the further order of the judge, or he may impose any terms in granting or refusing the summons as under the circumstances in evidence appears just: Rule 14.

When Summons May Issue Without an Order.—The summons in replevin may be issued without an order from the judge if the "person claiming the property, *his servant or agent*, makes an affidavit entitled and filed in the court out of which the summons is to issue, stating: (*a*) that the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof (describing the property in the affidavit); (*b*) the value of the property to the best of his belief; (*c*) that the property was wrongfully taken out of the possession of the claimant, or has been fraudulently got out of his possession, within two calendar months next before the making of the affidavit; (*d*) that the deponent is advised and believes that the claimant is entitled to the summons; (*e*) and that there is good reason to apprehend that unless the summons is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect to the property: Rule 13 (2). For form of affidavit, see Form 39.

Within two Calendar Months.—See notes to section 20 *ante*. An order must afterwards be obtained within fourteen days after the seizure of the goods, otherwise the bailiff may, in fourteen days, redeliver the goods to the defendant: Rule 18.

On Distress for Rent or Damage Feasant.—When property is distrained for rent or damage feasant, no order is required before issuing the summons. But the claimant, "*his servant or agent*," must make and file an affidavit in the same terms as in clauses (a) and (*b*) of Rule 13 (2), and adding: "That the property was taken under color of a distress for rent or damage feasant." In such case the summons shall state that "the defendant has taken and unjustly detains the property, under color of a distress for rent, or for damage feasant (as the case may be)": Rule 13 (3, c).

As to who may distrain animals damage feasant seems to depend upon the possession of the land to which or upon which the injury is done: see Boden v. Roscoe, 1894 1 Q. B. 608.

Animals trespassing, or, as it is called, "damage feasant" (doing damage) may be distrained by the person upon whose land they are trespassing if taken at the time of the trespass: Warner v. Biggs, 2 C. & K. 31. Hogs, pigeons, chickens, snares, nets, etc., may also be dis-

trained damage feasant: Bacon's Abr. tit. Distress, F.; but they must not be at the time in actual possession and use, or under the actual personal control of some person. A horse on which one is riding, for instance, cannot be distrained: Field v. Adames, 12 A. & E. 649; or a net which is in a man's hand at the time: Hoskins v. Robins, 2 Saund. 328; Storey v. Robinson, 1 T. R. 138; but a dog within whistle might be: Bunch v. Kenington, 1 Q. B. 679. Pigeons might be shot: Hannan v. Mockett, 2 B. & C. 939; but not chickens: Anderson's Dictionary, 305. A railway company may distrain engines and trucks encumbering their line: Ambergate Ry. Co. v. Midland Ry. Co., 2 E. & B. 793. If cattle escape and do damage owing to defects in a fence which the person who is damaged was bound to maintain, under a municipal by-law, the distress would be illegal: Ives v. Hitchcock, Dra. 247; Singleton v. Williamson, 7 H. & N. 410. Sec. 62.

If a tender is made of sufficient amends before animals are impounded in a common pound, the owner may sustain replevin: Gullivar v. Cozens, 1 C. B. 788; Vertue v. Beasley, 1 Moo. & R. 21; but replevin will not lie against a pound keeper: Ibbottson v. Henry, 8 O. R. 625; or the owner may pay the amount demanded and recover any sum in excess of the damage as money had and received: Green v. Duckett, 11 Q. B. D. 275.

Distress for damage feasant may be made, not only for damage to the freehold, but for injuries to other animals: Boden v. Roscoe, 1894 1 Q. B. 608.

Sheep herded by a boy upon an open common are not running at large in contravention of a by-law of the municipality on the subject, and a constable who impounds them is liable in replevin for so doing: Ibbottson v. Henry, 8 O. R. 625; nor can cattle straying on to open land or into an open shop from the highway be distrained, if they are lawfully travelling on such highway, unless left an unreasonable time: Tillett v. Ward, 10 Q. B. D. 17.

Summons in Replevin.—In actions of replevin the first process shall be a "summons in replevin": Form No. 41; Rule 15: Form of claim in replevin: Form 40: Rule 16.

No other cause of action shall be joined in the summons: G. W. Ry. Co. v. Chadwick, 3 U. C. L. J. 29; see Morgan v. Wheatley, 6 Ex. 88, at p. 97.

Court in which Action may be Brought.—The action may be brought in the division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained, taken or detained: Replevin Act, s. 9. As to where the defendant "resides or carries on business," see notes to section 72.

Security.—Before the bailiff acts on the summons he must take a bond, with two or more sufficient sureties, in double the value of the property to be replevied, as stated in the summons. The bond shall be assignable to the defendant, and the bond and assignment thereof may be in the words or to the effect in the forms Nos. 42 and 43, the condition being varied to correspond with the summons: Rule 17. Where an application is made to the judge for an order, he may direct the bailiff to take a bond in double the value of the property, or may direct him to take and detain the property until the further order of the judge, instead of replevying the same to the plaintiff: Rule 14.

Sec. 62.

Should the bailiff not take a bond, the seizure should be set aside: Lawless v. Radford, 9 P. R. 33; and an action would lie against the bailiff and his sureties for taking an insufficient bond: Norman v. Hope, 13 O. R. 556, in which it was held that the bond must be signed by the plaintiff as well as by the sureties. Rule 17 only requires "sufficient sureties," but if the bond should not be signed by the plaintiff, it would probably be not sufficient to enable the defendant if successful, to bring an action against the plaintiff, at all events upon the bond, and so would be defective. The form of bond, No. 42, provided by Rule 17, expressly includes the plaintiff as one of the persons bound. Rule 17 requires two or more sufficient sureties, and one surety is not sufficient: Norman v. Hope, *supra*.

A subscribing witness is necessary: Heley v. Cousins, 34 U. C. R. 63.

In taking the security, the bailiff should exercise reasonable discretion in deciding upon the sufficiency of the sureties. See note *infra*, "Replevin Bond."

Particulars.—On entering a claim in replevin, the plaintiff must specify and describe, in the particulars of the claim the goods, chattels, property, etc., distrained, taken or detained, and the distress or other taking or detention of which he complains: Rule 16; Form 40, of claim in replevin. The description should be sufficiently clear to enable the bailiff to identify the property: Jones v. Cook, 2 P. R. 396; Hoorigan v. Driscoll, 8 P. R. 184; "98 logs" would be insufficient: *Ib.*; "230 sheep and lambs" would be insufficient: *Ib.* Where the action is brought for the detention of the goods only, the claim should be framed in detinue: Stephens v. Cousins, 16 U. C. R. 329; and a lien cannot be given in evidence under a plea denying the plaintiff's property: *Ib.*

Executing the Writ.—A bailiff would be liable for not executing the writ: Boys v. Smith, 9 C. P. 27. By Rule 19 the bailiff is required to demand deliverance from the owner or occupant of any dwelling house or enclosure in which any property to be replevied is concealed or secured, and if such property is not delivered up to him within twenty-four hours, he may break open the house or enclosure for the purpose of effecting the seizure. But it is a question whether the Replevin Act supersedes the Rule, and sections 5, 6 and 7 of the Act prescribe the mode of executing the writ and what force may be used. Rule 19 differs from sections 5 and 6 of the Act in important respects, *e.g.*, as to the time that must elapse after the demand before breaking into a dwelling house. If the bailiff should be held to have broken in too soon (following the provisions of the Act) he would be liable in an action for damages to the householder, while if he should miss seizing the goods by waiting too long (following the Rule) he would be liable to the plaintiff.

The provision made for breaking into a dwelling house, under s. 5, is an invasion of the maxim, "Every man's house is his castle:" see Semayne's case, 1 Sm. L. C. 228; American Concentrated Meat Company v. Hendry, W. N. (1893), 67, 82; 5 R. 331; Long v. Clarke, 1894 1 Q. B. 119.

If the property is not secured or concealed in the place broken open, the bailiff is, under the Rule, a trespasser: Ratcliffe v. Burton, 3 B. & P. 229; Johnson v. Leigh, 6 Taunt, 244. But if there were reasonable grounds for supposing that the goods were there, it would be a good defence: Replevin Act, ss. 5 and 6, *supra*. See also The Public Auth

Sec. 62.

ortties Protection Act, R.S.O. 1914, c. 89, s. 12. Inner doors may be broken open without waiting, if entry is effected through the outer doors without breaking: Kerby v. Denby, 1 M. & W. 366; Hutchinson v. Birch, 4 Taunt, 619; even though the bailiff may have climbed over a wall into the yard of the house: Long v. Clarke, 1894 1 Q. B. 119.

Ordinary things upon the person cannot be taken, as to do so might involve a breach of the peace, but when the bailiff is acting under a writ of replevin an exception is established, and if the bailiff finds that any of the property to be replevied is concealed about the person or the premises of the defendant, or any other person holding the same for him, he may, after demand and refusal of delivery, search the person and premises for the purpose of effecting the seizure: Replevin Act, s. 7; but if the goods are in the possession of a person not holding them for the defendant, the writ will not justify the taking: G. W. Ry. Co. v. McEwen, 28 U. C. R. 528; Hoorigan v. Driscoll, 8 P. R. 181; Stoeser v. Springer, 7 A. R. 497. The outer door of a workshop or other building, not being a dwelling house or connected therewith, may be broken open forthwith after demand if the goods to be replevied are therein: Replevin Act, s. 6; Hodder v. Williams, 1895, 2 Q. B. 663.

Where the summons issues without an order, the bailiff must take and detain the property until the order is obtained from the judge, and he may within fourteen days from the time of his taking the same re-deliver it to the defendant, unless, in the meantime, the plaintiff obtains and serves on the bailiff an order directing a different disposition of the property: Rule 18. The evident construction of this Rule is that the bailiff must wait 14 days before re-delivering the goods to the defendant for the order to be obtained by the plaintiff.

Inventory.—The bailiff must make out an inventory of the goods replevied: Form 45; Rule 20 (c).

Fees.—In regulating the fees on issuing a summons in replevin the value of the goods will be determined by the amount sworn to in the affidavit for the order or summons.

Service of the Summons.—The service is the same as in ordinary cases, as to which, see notes to section 87.

The copy must not be served until the bailiff has replevied the property or some part of it, if he cannot replevy the whole: Rule 21.

Substitutional Service.—If the summons cannot be served the judge may make an order for substitutional service: Section 88 and notes thereto.

Setting aside the Summons.—The defendant may, at any time, apply to the judge to discharge or vary the summons or order, or to stay proceedings, or for any other relief to be specified in the notice, and the judge may make such order thereon as to him may seem meet: Rule 22.

This Rule enables the judge to preserve the property pending the litigation, or to sell the same. It removes any doubt which might exist as to the power of the judge to set aside his own order. If the possession of the property be specially valuable to the defendant, the judge may order its return to him pending the litigation upon his giving the plaintiff security. The question whether the defendant had, in fact, taken or detained the property cannot be dealt with on this motion. That is the question to be tried in the action; and the defendant's denial of such

Sec. 62. taking or detention is no ground for setting aside the summons or order: Gilchrist v. Conger, 11 U. C. R. 197.

The Rule applies to an application on the merits and not for irregularity only; and where the writ was directed to a sheriff who was also sole liquidator of the plaintiffs and as such instituted the action, this was at most an irregularity and could not be taken advantage of after appearance had been entered (and perhaps not at all): Alpha Oil Co. v. Donnelly, 12 P. R. 515.

Return of the Summons.—The bailiff must, with the summons, file with the clerk a memorandum containing the names, residence and calling of the sureties, the date of the bond and the names of the witnesses thereto, a list and description of the articles replevied, and if only a part of it is replevied and the bailiff cannot replevy the rest he must state in his return the articles the bailiff cannot replevy and the reason why he cannot: Rule 20. For form of return, see Form 44. Sheriffs and bailiffs should observe the necessity for their making a proper return to the writ: Carveth v. Greenwood, 3 P. R. 175.

It is a good return to say the cattle are dead or the goods destroyed by fire: Morris, 115.

In addition to the formal return to be made as above, the bailiff must give a correct and full statement of the particulars in detail of all his charges made for fees and disbursements in the execution of the writ: Rule 100.

Writ of Withernam.—By the former Rule 54, if the property or any of it had been eloigned—that is, removed so that the bailiff was unable to seize it—he was required to make a return to that effect, and on the filing of such return a writ in Withernam (a replevin of other goods in lieu of the goods eloigned) issued and the bailiff proceeded to seize such other goods and to take security as before: old Rule 54.

The Writ in Withernam has been abolished, and in the Supreme Court Con. Rule 367 provides for an order being made in place of the Writ in Withernam. In the division court, however, there is now no provision either by the Act or Rules for obtaining an order in such case, all the provisions in the former Act and Rules being omitted. But section 65 *post* provides that the division court shall have power to "grant relief, redress or remedy," in actions within its jurisdiction in as full and ample a manner as might be done in the like case by the Supreme Court. Hence under this section, it is submitted, the relief or remedy given by Con. Rule 367 is made applicable, and an order may be made to take other goods in place of those eloigned. Form of Order No. 45 (1), *post*.

Under such an order any goods of the defendant to the value of the goods eloigned may be taken by the bailiff, but the defendant by giving a bond with two sureties to answer to the plaintiff for the goods mentioned in the original summons, may regain possession of the goods seized in reprisal. In the Supreme Court the plaintiff may, instead of proceeding in Withernam, receive damages for the goods eloigned: Con. Rule 367 (2); Deal v. Potter, 26 U. C. R. 578; Graham v. O'Callaghan, 14 A. R. 477; Dewis v. Teak, 32 U. C. R. 108. Under old Rule 41, no other cause of action could be joined with replevin, but that Rule has been omitted in the new Rules.

Parties.—All part owners should join in the application for a replevin summons, but if one of the part owners is entitled to the exclu-

sive possession, he is entitled to apply alone; neither a tenant-in-common, nor a joint-tenant, nor a partner can maintain replevin against a co-tenant or partner for taking the common property: McNabb v. Howland, 1 C. P. 434; Ecclestone v. Jarvis, 1 U. C. R. 370. Sec. 62.

Judgment by Default.—Unless a defendant who has been served with the summons and statement of particulars leaves with the clerk a notice disputing the plaintiff's claim within eight, ten or twelve days after the service, according to the return day of the summons, the plaintiff may proceed with the action in the same manner as if the defendant had appeared and had admitted the plaintiff's right to the possession of the goods; but the judge may, on sufficient grounds shown and on such terms as he thinks just, let the defendant in to defend: Rule [illegible] See notes to section 100.

When the plaintiff is entitled to judgment by default he may sign final judgment for $2 and costs: Rule 24.

Payment into Court.—The defendant may, not less than six days before the day of trial, pay into court such sum as he thinks a full satisfaction for plaintiff's demand, together with costs up to the time of such payment. In such case the defendant should leave with the clerk a consent in writing to the delivery of the replevin bond to the plaintiff, and if the plaintiff accepts the money the proceedings shall be discontinued. The plaintiff should, on such payment being made into court, observe the provisions of section 112.

Jury.—The right of trial by jury is now extended to actions of replevin where the value of the goods sought to be recovered exceeds $20: section 130.

Damages When Plaintiff Succeeds.—Where the goods are promptly recovered the damages are usually confined to the expenses of the replevin bond, because there is no other damage; but whatever damages have been actually sustained may be recovered, and cannot be recovered in a subsequent action: Gibbs v. Cruickshank, L. R. 8 C. P. 451; see Stimson v. Block, 11 O. R. 96.

In replevin, the jury may assess the damages as in trespass; and in an action arising out of wrongful distress for alleged arrears of rent damages are recoverable for the illegal distress and for annoyance and injury to credit and reputation in trade: Smith v. Enright, 69 L. T. 724. See note *infra* "Judgment and Execution."

Damages When Defendant Succeeds.—In this event judgment is to be for the return of the goods to the defendant, with such costs and damages as may be awarded: Rule 25.

The damages which may be awarded, on the trial of the replevin suit, to the defendant, are not for the goods replevied or for the infringement of his rights thereto, but as a compensation for the expense and trouble he has undergone: Pratt v. Rutledge, 1 Salk. 95; see Hawkins v. Eckles, 2 B. & P. 359, 361 (*a*). The replevin bond affords an additional remedy to the defendant of which he may avail himself by action on the bond in case the condition of it is broken. See note *infra* "Action on Bond."

Judgment and Execution.—Rules 24, 25; Forms 45 (2), 45 (3), of judgments. Forms of Executions, 54, 54 (1). In replevin a verdict or judgment is divisible, so that the plaintiff may recover for whatever part of the goods he is entitled to, and the defendant for the

Sec 62. rest: Sills v. Hunt, 16 U. C. R. 521; Haggart v. Kernahan, 17 U. C. R. 341; Henderson v. Sills, 8 C. P. 68; Cannlff v. Bogart, 6 U. C. L. J. 59.

If damages are not awarded, the defendant could recover them in an action on the bond: Williams v. Crow, 16 A. R. 301.

A landlord is entitled to get judgment against his tenant for his rent up to the value of the goods distrained without setting up a counterclaim. There must be a demise at a fixed rent: Hayward v. Haswell, 6 A. & E. 265; Knight v. Bennett, 3 Bing. 361.

Where goods levied under execution are replevied by the grantee of a judgment debtor under a bill of sale, the sheriff may put in a claim of special property: Lyman v. Sheriff, 9 C. L. T. 289.

A stranger whose goods have been distrained for rent on the premises of a tenant, cannot, in replevin, any more than the tenant, question the landlord's right to demise: Smith v. Aubrey, 7 U. C. R. 90.

If the distress proves wrongful, the damages assessed may include the cost of the replevin bond and such consequential or special damages as have been proved, as for instance, injury to the property during its detention or by its removal, and loss to the plaintiff by being deprived of its use: Gibbs v. Cruickshanks, L. R. 8 C. P. 454; Smith v. Enright, 69 L. T. 724. In the latter case the damages included illegal distress, cost of replevying, solicitors' charges in and about replevying, loss from stoppage of and interference with business, damage for annoyance and injury to credit and reputation in trade. The county court judge held that the first and last items could not legally be allowed. But on appeal his decision was reversed, the court remarking that "It is clear that in an action of replevin a jury may assess damages in the same way that they may in an action of trespass. . . . Those items (i.e., for alleged distress and for annoyance and loss of reputation in trade) are both in point of law recoverable in the present action. Gibbs v. Cruickshanks, L. R. 8 C. P. 454, covers the first item, and Brewer v. Dew, 11 M. & W. 625, is equally in point as to the damage claimed by the last item."

Where goods are seized upon a search warrant under the Canada Temperance Act, a judgment on *certiorari* quashing the warrant will not estop defendant in a replevin suit from justifying under the warrant where he was not a party to the proceedings to quash it; such a judgment being a judgment *inter partes* only: Sleeth v. Hurlbert, 25 S. C. R. 620. See notes *infra* on Replevin Bond.

Replevin Bond.—For form of bond see Rule 17 and Form 42. The bond should not be in the disjunctive, but should be conditioned to prosecute the suit with effect *and* return the goods, etc.: Kennin v. Macdonald, 22 O. R. 484. See note *supra*, "Security."

There may be more than two sureties in the bond: Rule 17.

The bond may be attested by only one witness, but a subscribing witness is required: Henry v. Cousins, 34 U. C. R. 63.

A bailiff is bound to inquire into the sufficiency of the pledges or sureties in the bond: Hunter v. Blades, 5 Taunt. 225; Norman v. Hope, 14 O. R. 287; Horsfall v. Sutherland, 31 N. S. R. 471.

A bond though irregular, as taken to the judge, may be good as a voluntary bond: Stansfield v. Hellawell, 7 Ex. 373; and would be enforceable by the bailiff, who would stand as a trustee for the defendant: *Ib.*

The defendant is entitled to see the bond before he takes a step in the cause: Logus v. Prescott, 18 C. L. T. 186.

If the bailiff fails to take the necessary bond before seizure, the seizure will be set aside with costs, to be paid by the bailiff: Lawless v. Radford, 9 P. R. 33. See Bates v. Mackay, 1 O. R. 34. The amount of damages against a bailiff for taking an insufficient bond could not exceed the penalty of the bond: Norman v. Hope, 13 O. R. 556; 14 O. R. 287. See also Jeffrey v. Bastard, 4 A. & E. 823. Sec. 62.

A coroner acting in the place of a sheriff is subject to all the common law and statutory liabilities as well as the rights of the office of sheriff, and is personally responsible for taking insufficient security: Horsfall v. Sutherland, 31 N. S. R. 471.

Assignment of Bond.—The bond is assignable to the defendant: Rule 17; and an action will lie against the bailiff for refusal to assign it: Pacaud v. McEwan, 31 U. C. R. 328. For form of assignment see Form 43.

The bond cannot be assigned while the suit is pending: Becker v. Ball, 18 U. C. R. 192. It is assignable when the court in which the action was brought refused to try the case for want of jurisdiction: Welsh v. O'Brien, 28 U. C. R. 405. It is to be assigned "upon the order of the judge:" s. 213 (2).

Action on Bond.—If the plaintiff does not prosecute his suit with effect and without delay, the defendant may, upon the order of the judge, take an assignment of the bond from the bailiff and sue on it in his own name; see Rule 17: Bacon v. Langton, 9 C. P. 410; Becker v. Ball, 18 U. C. R. 192; Welsh v. O'Brien, 28 U. C. R. 405; Mulvaney v. Hopkins, 18 U. C. R. 174; Johnson v. Parke, 12 C. P. 179; Meloche v. Reaume, 34 U. C. R. 606: Culham v. Love, 30 U. C. R. 410; Caswell v. Catton, 9 U. C. R. 282, 462: Bletcher v. Burn, 24 U. C. R. 259; Meyers v. Baker, 26 U. C. R. 16; Golding v. Belnap, 26 U. C. R. 163; Patterson v. Fuller, 31 U. C. R. 323; McKelvey v. McLean, 34 U. C. R. 635; Mulvaney v. Hopkins, 18 U. C. R. 174; and also where the summons in replevin and subsequent proceedings are set aside: Meloche v. Reaume, 34 U. C. R. 606; Churchill v. Durham, 29 C. P. 474; but see O'Donnell v. Duchenault, 14 O. R. 1.

The bond may be sued in the division court, no matter how large the penalty may be: section 213; Exchange Bank v. Springer, 13 A. R. 390. But no more than the amount of the penalty can be recovered: *Ib.*; McMahon v. Ingersoll, 6 O. S. 301; Randall v. Burton, 4 P. R. 9; Hatton v. Harris, 1892 A. C. 547.

If the plaintiff prosecute his suit with effect and without delay, there is no action on the bond: Caswell v. Catton, 9 U. C. R. 382; but the inability of the plaintiff's solicitor to communicate with his client will not prevent a forfeiture of the bond: Bletcher v. Burn, 24 U. C. R. 124.

To prosecute "with effect" the plaintiff must bring the action to a termination which is not an unsuccessful one: Jackson v. Hanson, 8 M. & W. 477; Tummons v. Ogle, 6 E. & B. 571.

But want of due diligence may, if the defendant in replevin is prejudiced by the delay, constitute a breach of the condition: Gent v. Cutts, 11 Q. B. 288; Harrison v. Wardle, 5 B. & A. 154; and when two years had been permitted to elapse without any steps being taken in the replevin suit, the bond was forfeited; and in such case the obligee could recover, although judgment has not been signed: Axford v. Perrett, 4 Bing. 586. See also Morris v. Matthews, 2 Q. B. 293; Evans v. Bowen, 19 L. J. Q. B. 8.

Sec 62 **Defences in Action on Bond.**—The bond is subject to the provisions of section 8 of 8 and 9 William III. c. 11, which is now embodied in R.S.O. 1914, c. 56, s. 125, and is as follows:

"**125.**—(1) In an action commenced or prosecuted in any court upon a bond for non-performance of any covenant or agreement in any indenture, deed or writing, the plaintiff may assign as many breaches as he thinks fit, and, upon trial of such action, not only such damages and costs as have heretofore been usually assessed shall be assessed, but also damages for such of the breaches so assigned as the plaintiff upon the trial of the issues shall prove, and the like judgment shall be entered as heretofore in such action.

(2) If judgment is given for the plaintiff by confession or default, he may suggest as many breaches of the covenant and agreements as he thinks fit, and the damages that he shall have sustained thereby shall be assessed; and if the defendant after such judgment entered, and before any execution executed, pays into the court in which the action is brought to the use of the plaintiff such damages so to be assessed by reason of all or any of the breaches of such covenants or agreements, together with the costs of suit, a stay of execution on the judgment shall be entered upon record.

(3) If by reason of any execution executed, the plaintiff or his executors or administrators are fully paid or satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the execution, the body, land or goods of the defendant shall be thereupon forthwith discharged from the execution, which shall likewise be entered upon record; but such judgment shall, nevertheless, remain, continue, and be as a further security to answer to the plaintiff and his executors or administrators such damages as shall or may be sustained for further breach of any covenant or agreements in the same indenture, deed, or writing, contained, upon which the plaintiff may apply to the court in which judgment is entered for leave to issue execution upon the judgment against the defendant, or his executors, or administrators, suggesting other breaches of the covenants or agreements, and to call upon him or them to shew cause why execution shall not be awarded upon the judgment, upon which the court shall make such order as may be deemed just.

(4) Upon payment or satisfaction of such future damages, costs and charges all further proceedings on the judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, land or goods shall be discharged out of execution."

Where a sheriff seized goods claimed by a third party under a chattel mortgage, but none of the goods were removed by the sheriff and no one was left in charge and no act of any kind done indicating continuance of possession on the part of the sheriff, and the goods remained in the possession of the claimant, an action of replevin for their recovery could not be sustained; the right of the sheriff to seize and sell the equity of redemption being clear the claimant was not damaged by the mere advertising of the goods for sale, and no action would lie for an intention not carried into effect; and the sheriff could justify on any valid ground existing at the time of the levy: Gates v. Bent, 31 N. S. R. 544.

Set-Off.—A set-off may be pleaded to an action by the assignee of the bond: McKelvey v. McLean, 34 U. C. R. 625; also payment into court: Thompson v. Kaye, 13 C. P. 251.

Staying Proceedings.—The court has always power, which it will exercise to stay proceedings on a replevin bond when it would be equitable and just to do so: Bates v. Mackay, 1 O. R. 34; see also Ruttan v. Short, 12 U. C. R. 485; Headley v. Closter, 13 U. C. R. 331. But it has been said that courts are averse to staying proceedings and prefer leaving the question of damages to be tried in the ordinary way: Hoover v. Zavits, T. T. 1 & 2 Vic.; Culham v. Love, and Love v. Culham, 30 U. C. R. 410; Meyers v. Baker, Hargreaves v. Meyers, 26 U. C. R. 16; Meloche v. Renume, 34 U. C. R. 606; Johnson v. Parker, 12 C. P. 170. But if the plaintiff in replevin be hindered from prosecuting the suit with effect by the default of the defendant in replevin the court will prevent the latter from proceeding on the bond: Evans v. Bowen, 10 L. J. Q. B. 8. Sec. 62.

Damages in Action on Replevin Bond.—The actual damage is all that can be recovered: Heley v. Cousins, 34 U. C. R. 63; Kemlo v. Macdonald, 22 O. R. 484; and see notes to section 65 "Relief against Penalties."

On judgment for plaintiff for part and a return of the rest, the plaintiff in replevin is liable for not prosecuting the suit with effect as to the goods for which he failed and for not returning them: Patterson v. Fuller, 31 U. C. R. 323.

Liability of Sureties.—The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the costs of suit on the bond: Hefford v. Alger, 1 Taunt. 218.

Release of Sureties.—A release by the defendants in replevin to one of several obligors in a replevin bond, after assignment by the bailiff to him would release all the sureties and preclude him from suing the bailiff for taking insufficient security: Kirkendall v. Thomas, 7 U. C. R. 30; and a reference of the suit to arbitration, without the assent of a surety, would discharge him: Archer v. Hurte, 4 Bing. 464; Hutt v. Gilleland, Hunt v. Keith, 1 U. C. R. 540; nor will the attendance of the sureties on an arbitration imply consent to the reference: Burke v. Glover, 21 U. C. R. 294; see 10 U. C. L. J. 169; and a postponement of the trial without the direct consent or concurrence of the sureties discharges them: Cannift v. Hogart, 6 C. P. 474; but not if the trial is postponed without plaintiffs' concurrence: O'Connell v. Duchenault, 14 O. R. 1.

Enlarging the time for making an award does not discharge the sureties: Aldridge v. Harper, 10 Bing. 118. On subject of release of sureties generally, see notes to sections 93 and 96.

Order for Sale of Perishable Goods.—There is no authority for any such order: Innes v. Hutcheon, 9 O. L. R. 392, but it was suggested in this case that the plaintiff may sell the goods without an order, taking the risk of damages in that regard in case of failure in the action.

JURISDICTION UNDER SCHOOL ACTS.

Section 2 (5): Actions between School Teachers and School Boards.—The Public Schools Act, R. S. O. 1914, c. 266, s. 87, provides for the agreement between a teacher and School Board, and for the payment of salary and its enforcement, and is as follows:

Sec. 62. **87.**—(1) Every agreement between a board and a teacher shall be in writing signed by the parties thereto and sealed with the seal of the board.

(2) No person shall be employed or act as a teacher unless he holds a certificate of qualification.

(3) Unless otherwise expressly agreed, a teacher shall be entitled to be paid his salary in the proportion which the number of days during which he has taught bears to the whole number of teaching days in the year.

(4) Every teacher shall be entitled to his salary notwithstanding his absence from duty on account of sickness for a period not exceeding four weeks in any one year of his employment, if the sickness is certified to by a physician, or in a case of acute inflammatory condition of the teeth or gums by a licentiate of dental surgery, but the period of four weeks may in any case of sickness be allowed and extended at the pleasure of the board without a certificate.

(5) If at the expiration of a teacher's engagement his salary has not been paid in full, the salary shall continue to run at the rate mentioned in the agreement until paid, if an action to recover it is commenced within three months after the salary is due and payable.

(6) All matters of difference between boards and teachers, in regard to salary or other remuneration, whatever may be the amount in dispute, shall be determined in the Division Court of the division where the cause of action arose, subject to appeal, as provided by this Act.

(7) If it appears to the Judge on the trial of an action for the recovery of a teacher's salary that there was reasonable ground for the board disputing its liability, and that it was willing and offered to pay to the teacher any sum not so in dispute, the Judge may relieve the board from the liability imposed by sub-section 5, in whole or in part.

An agreement cannot be made for a longer period than 1 year: Grattan v. Ottawa Sep. S. T., 8 O. L. R. 135.

The provisions contained in the above statute, section 87 (1), that the agreement must be in writing, signed by the parties and sealed with the seal of the board, are imperative and where a teacher was verbally engaged for a year and was dismissed, no damages for wrongful dismissal could be recovered: McMurray v. E. Missouri P. S. B., 21 O. L. R. 46.

Where the agreement gave either party a right to terminate it at one month's notice, and the board gave the teacher notice pursuant to a resolution passed at a meeting, the notice of the calling of which had not stated that this matter would be considered and of which some of the trustees were unaware and some did not attend; in an action by the teacher for $132.03 salary, it was held that the matter fell within this provision, and the division court had jurisdiction: Greenlees v. The Picton School Board, 2 O. L. R. 387; see also Glidden v. Yarmouth Public School Trustees, 17 O. L. R. 343; McPherson v. Trustees of Osborne, 1 O. L. R. 261.

The High Schools Act, R. S. O. 1914, c. 268, s. 50, contains similar provisions as to high school teachers; and The Separate Schools Act, R.S.O. 1914, c. 270, s. 54, also provides similar remedies for teachers in those schools.

Appeal.—An application may be made by either party to the Minister of Education for an appeal, and the Minister may appeal to the divisional court of the supreme court in cases under The Public

Schools Act, section 105; and similar appeal is allowed under The High Schools Act, section 50 (4); see *post* "Appeals." Section 54 of The Separate Schools Act contains the words "subject to appeal as provided by this Act," but no appeal is provided by it. Secs. 63, 64.

Additional Jurisdiction of Division Courts.—The division court judge is given special jurisdiction under The Damage by Flooding Act, R.S.O. 1914, c. 86. The provisions of that Act are, however, restricted to the provisional counties and electoral districts mentioned in s. 3 of that Act.

Judge to try.

63. Except in actions in which a jury is demanded, as hereinafter provided, the Judge shall hear and determine in a summary way all questions of law and fact and may make such order or judgment as appears to him just and agreeable to equity and good conscience, which shall be final and conclusive between the parties, except as herein otherwise provided. 10 Edw. VII. c. 32, s. 63.

Orders Agreeable to Equity and Good Conscience.—This expressly authorizes a judge to do what he, as an arbitrator, may consider just, and does not bind him to observe technical rules either of law or equity. The provision, however, adds nothing to the practical effect of unappealable cases in which his decision, no matter how wrong it may be in point of law, cannot be reviewed: see *ante*, notes on Prohibition; Home v. Camden, 2 H. Bl. 536; *Re* Dyer v. Evans, 30 O. R. 637; see *Ex parte* Moses, Mosea v. Parker, 1896 A. C. 245; Brown v. Mitchell, 7 U. C. L. J. 298.

In appealable cases it would, doubtless, be found that a decision erroneous in point of law, but founded on the views of a division court judge as to equity and good conscience, would be corrected. The provision was referred to by Boyd, C., in Legaria v. Canada Loan and Banking Co., 11 P. R. 512; see *Re* McGibbon v. Eager, 18 C. L. T. 311; Foster v. Reeves, 1892 2 Q. B. 255; Crayston v. The Massey-Harris Co., 12 Man. L. R. 163.

Jury.—See sections 130-144 and notes.

The Judge shall Hear and Determine.—This provision is, of course, subject to that in section 142 (2), which allows the judge to call a jury upon his own motion to try any disputed fact.

Jurisdiction in Provisional Judicial Districts.—See sections 220-236 *post*.

Judge may order payment in money, although contract not for payment in money.

64. Upon a contract for the payment of a sum certain in labour or in any kind of goods or commodities or in any other manner than in money, the Judge may give judgment for the amount in money as if the contract had been so expressed, if the goods and commodities have not been delivered or the labour or other thing performed in accordance with the contract. 10 Edw. VII. c. 32, s. 64.

Sec. 65.

Payment Otherwise Than in Money.—Agreements are sometimes entered into for payment of a certain sum in some designated commodity. In this section such a transaction appears to be placed upon the same basis as a liability upon a promissory note, and the judge is empowered to give judgment as if the contract had originally been payable in money. A demand is usually not necessary on the part of the plaintiff before suit, it being incumbent on the defendant to offer to perform the work or otherwise fulfil his promise: Teal v. Clarkson, 4 O. S. 372; Jones v. Gibbons, 8 Ex. 920; Crabtree v. Messersmith, 19 Iowa, R. 179.

Should the contract be to deliver wheat F. O. B., it would be the duty of the buyer to provide the cars for the shipment, and if not done, there would be no breach: Marshall v. Jamieson, 42 U. C. R. 115. The right of action would be assignable: see notes to section 83, "Assignment of Chose in Action."

Powers of Courts.

65.—(1) The court in actions otherwise within its jurisdiction shall have power to grant relief, redress, or remedy or combination of remedies, either absolute or conditional, including the power to relieve against penalties and forfeitures, in as full and ample a manner as might be done in the like case by the Supreme Court.

Courts not to grant injunctions or receiver.

(2) Nothing in this section shall confer jurisdiction to grant an injunction or to appoint a receiver. 10 Edw. VII. c. 32, s. 65.

In Like Cases in the Supreme Court.—See Ontario Judicature Act, R.S.O. 1914, c. 56, s. 19.

Injunction or Equitable Execution.—This section enables the judge of a division court in every proceeding before him within his jurisdiction to grant the same relief, redress and remedy and combination of remedies, as if the action were in the Supreme Court; and, therefore, it was thought, that in any case within the jurisdiction of the court, the judge of a division court could deal with it in the same manner as a judge of the Supreme Court might in an action in that court. In *Ex parte* Martin, 4 Q. B. D. 212; s.c., *sub nom* Martin v. Bannister, 4 Q. B. D. 491, it was held that section 89 of The Judicature Act of 1873, to which section 65 (1) is similar, gave power to an inferior court, having no wider jurisdiction in this respect than our division courts, to grant an injunction in an action within its jurisdiction and to commit for disobedience thereof. And in Richards v. Cullerne, 7 Q. B. D. 623, the right under this section was held to extend to all orders, whether final or interlocutory. Jessel, M.R., said: "The section applies in every case where, if the action were in the High Court, a party could be committed for disobedience." Brett, L.J., said: "The County Court then has the same power as the High Court at every stage." But by the Act of 61 Vic. c. 15, s. 1 (s.-s. 2), it was declared that the jurisdiction of division courts did not extend to the granting of an injunction in cases otherwise within the competency of the court. That Act said nothing about power to appoint receivers, but that power (as well as the power to grant injunctions) was expressly withdrawn by 10 Edw. VII. c. 32, s. 65 (2). The result of this latter enactment is to

render division courts powerless to aid a judgment creditor by the ap- Sec. 65.
pointment of a receiver or by way of equitable execution.

The history of the above section and the effect of the original enactment and of the amendments to it, were fully reviewed in the 2nd edition of Bicknell & Seager's Division Courts Act, pp. 109-115.

As the statute now stands a division court has no authority or machinery by which a judgment creditor in that court can invoke some of the very useful and important remedies open to a judgment creditor in the supreme court or county court, against his debtors' assets for the satisfaction of his judgment.

Until recently, it was thought that an action for equitable relief in aid of a division court judgment might be brought in the county court, although the cases of Berkeley v. Elderkin, 1 E. & B. 805; Austin v. Mills, 9 Ex. 288; Bailey v. Bailey, 13 Q. B. D. 855; R. v. Cy. Ct. Judge of Essex, 18 Q. B. D. 706; McPherson v. Forrester, 11 P. R. 362; Donnelly v. Stewart, 25 P. R. 39, and Aldrich v. Aldrich, 21 O. R. 376; 21 O. R. 124, seemed to indicate that such an action could not be maintained; but it is now finally settled by Crowe v. Graham, 22 O. L. R. 145, that no such action can be brought.

Equitable Execution against Lands.—The jurisdiction of division courts to order a sale of lands by way of equitable execution, is discussed in the notes to section 171.

Equitable Relief to the Plaintiff.—There are two things which, so far as the plaintiff is concerned, restrict the benefit conferred on him by this section as it stands. The first is the fact that equitable relief can only be granted in respect of a cause of action within the jurisdiction of the division court. That is provided for by section 65 (1) itself by the words "in actions otherwise within its jurisdiction." To the same effect is section 21 of the Ontario Judicature Act, R.S.O. 1914, c. 56. Sections 16 to 22 of that Act set forth the rules according to which law and equity are to be administered in every civil cause or matter, and section 23 says that such rules are to be in force and have effect in all courts, but only in so far as the matters to which they relate are cognizable by such courts. Hence, before any equitable relief can be granted to the plaintiff the matter must first of all be within the jurisdiction of the division court as limited by section 62, and in considering the limitations of that section it must be noted that "personal actions" are common law actions only, *i.e.*, actions which before the fusion of law and equity would have been recognized in a court of law: McGugan v. McGugan, 21 O. R. 289.

In Foster v. Reeves, 1892 2 Q. B. 255, it was decided by the Court of Appeal in England, that where the value of the premises exceeded £500 (that being one of the limits of the county court jurisdiction) the equitable doctrine that a person who enters under an executory agreement for a lease is to be treated as in possession under the terms of the agreement, could not be applied by the county court so as to enable the plaintiff to recover a money demand within the jurisdiction. In other words, when the application of a purely equitable doctrine is necessary as a condition precedent to enabling the plaintiff to recover money (rent, dividend, etc.), the division court cannot entertain the action for the money demand unless the matter in respect of which the purely equitable doctrine is to be antecedently applied is itself within the jurisdiction of the court as defined by section 62 above: see also Holland v. Doyle, 102 L. T. Newspaper, 347; Pitt-Lewis, Yearly County

Sec. 65. Court Practice, 1913, 1, 60. Distinguish from such a case, however, cases in which the cause of action is an equitable cause of action for money had and received. Thus an action may be maintained for a sum of money held by the defendant in trust for the plaintiff, such as the surplus proceeds of property sold under the power of sale in a mortgage: Legarie v. Canada Loan and Banking Co., 11 P. R. 512; or for interest received by the defendant upon moneys invested by him for the plaintiff's benefit: *Re* McGibbon v. Eager, 18 C. L. T. 311; see also Allen v. Fairfax Cheese Co., 21 O. R. 598. So if a plaintiff is entitled to possession of goods, though his title be merely equitable, he may, as we have seen, maintain an action: Carter v. Long, 26 S. C. R. 430; Connell v. Hickok, 15 A. R. 518; Stevens v. Hince, 30 L. T. R. 419.

The second thing that tends to minimize the benefit of the section so far as the plaintiff is concerned, is the restriction contained in sub-section (2). Previous to the enactment of that sub-section the division court had, it was submitted, power under section 65 (1) to grant an injunction and enforce obedience thereto by committal. If the plaintiff had a cause of action which was within the jurisdiction of the division court, he was entitled to obtain from that court not only the remedies which were formerly granted by a court of law, viz., judgment for the amount and execution therefor, but also any additional remedies which he might have obtained in a court of chancery: Martin v. Bannister, 4 Q. B. D. 491; Fitchett v. Mellow, 18 P. R. 161. This conclusion was supported by a comparison with similar legislation in England and the decisions thereunder. The *fons et origo* of section 65 (1) was section 89 of the English Judicature Act of 1878, which is as follows:

"Every inferior court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such court, such relief, redress or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal, in as full and ample a manner as might and ought to be done in the like cases by the high court."

Under this section it was held in Martin v. Bannister, 4 Q. B. D. 491, that an English county court had power to grant an injunction and enforce obedience thereto by committal. The English County Courts Act of 1865 said nothing about the county courts having power to grant an injunction, and the court had to act, if at all, under the above section of the Judicature Act. In Richards v. Cullerne, 7 Q. B. D. 623, it was held that the county court could, under the same section, enforce even an interlocutory order by committal. "It (section 89), applies to every case where, if the action were in the High Court, a party could be committed for disobedience." But now that by sub-section (2) the right to grant injunctions and appoint receivers has been declared no longer to exist, the most useful and important remedies which the section might otherwise have placed within the power of the court to grant to a plaintiff are no longer available, and the section would seem to add little or nothing to the powers of the court to grant any "relief, redress, remedy or combination of remedies," to a plaintiff.

Should a case arise in which a division court should be asked to grant a purely equitable remedy, it could only grant it if the cause of action was otherwise within its jurisdiction: see McGugan v. McGugan, 21 O. R. 289. Had the power to grant injunction not been taken away, a

division court would, in an action for breach of contract, where the damages were fixed by the contract at $100 or less, have jurisdiction to grant an injunction although damages were not claimed: Stiles v. Eccleatone, 1903 1 K. B. 544. Sec. 65.

It was held in Whidden v. Jackson, 18 A. R. 440, that the county court had no jurisdiction to declare the right to rank upon an insolvent estate because the action was not a "personal action," and if it were, yet it was not "an action in which damages are claimed, or a debt." The same principle applied to division courts before the enactment of section 62 (c), which now gives jurisdiction in such cases.

Equitable Relief to the Defendant.—The section confers plenary powers upon division courts to allow a defendant to defeat the plaintiff's claim by a defence which could not have been raised or would not have been effectual in a court of law. It was formerly necessary where a person had a good equitable, but no legal defence to a claim, to commence an action in the Court of Chancery to restrain the plaintiff from prosecuting the action at law. This is now unnecessary. So, where a defendant was sued for a penalty or forfeiture, it was necessary for him to file a bill in chancery to be relieved therefrom. The division courts may now in such a case grant the relief. Every ground of defence, equitable or legal, and every cross-claim, either for legal or equitable relief, which will have the effect if successful, of defeating the plaintiff's recovery, in whole or in part, must be given effect to in actions in the division court.

Procedure.—Except so far as section 226 (1) allows the rules of procedure of the Supreme Court are inapplicable to the division courts. "The power given to the inferior court is that in any action before such court it may give the same relief, redress or remedy which would be given in a similar action in the superior court. It gives to the inferior court authority to grant the same relief, redress or remedy as the result of the action, but it does not give such court the same power, as the judges of the superior court have, to arrive at the granting of such relief, redress or remedy": *per* Brett, M.R., 10 Q. B. D. 508. The rules of the Supreme Court are not, therefore, applicable to division courts. These courts must proceed with their own machinery and under rules framed by the board of county judges, except that the "principles of practice" of the Supreme Court may be applied under section 226 (1).

So it would seem clear that where the granting of equitable relief requires the application of the special machinery of the Supreme Court to work it out, this section does not apply; and that the effect of it is merely to authorize the division court in pronouncing judgments, to apply the principles of law and equity now administered by the Supreme Court: see Building & Loan Co. v. Heimrod, 19 C. L. T. 361; Bank of Ottawa v. McLaughlin, 8 A. R. 543; Fletcher v. Noble, 9 P. R. 258; Connors v. Birmingham, 20 C. L. J. 10.

In Pryor v. City Offices Co., 10 Q. B. D. 504, it was held that the judge of an inferior court had not the power of the High Court, on a motion for a new trial, to direct judgment for either party, the inferior court having no such express power as is conferred upon our division courts by section 123 (3).

A nonsuit has not the effect of preventing the plaintiff from bringing a fresh action, notwithstanding the rule of the Supreme Court giving that

Sec. 65. effect to such a judgment in Supreme Court cases: Building and Loan Ass'n v. Helmrod, 19 C. L. J. 254; Bank of Ottawa v. McLaughlin, 8 A. R. 543. "The rule of the high court is a rule of procedure applying only to the courts to which it is in terms made applicable": per Spragge, C.J.O. The rules of the Supreme Court as to the service on partners do not apply to the division courts: Clarke v. McDonald, 4 O. R. 310; see also Guy v. G. T. Ry. Co., 10 P. R. 374. But see the new section 93 (6-8), as to service on partners. See also Willing v. Elliott, 37 U. C. R. 320 (1876), where it was held that the procedure of the high court as to discovery was not applicable to division courts: and see also Wood v. Leetham, 61 L. J. Q. B. 215.

Relief against Penalties and Forfeitures.—Section 65 (1) enables the division courts to grant relief against penalties and forfeitures "in actions otherwise within its jurisdiction." Since 8 & 9 Wm. III. c. 11, a penalty on a contract has not been recoverable as a penalty, the right of recovery being restricted to actual damages. That Statute is now embodied in R.S.O. 1914, c. 56, s. 125; see R.S.O. 1897, c. 324, s. 4. Since the passing of the above Imperial Statute, the contest has principally been whether a sum payable on the non-performance of a contract is a penalty to be relieved against, or a sum fixed by the parties as liquidated damages and, therefore, to be enforced. The following rules have been established:—

1. Where there is a stipulation that on non-payment of a smaller sum a larger sum shall be paid, the larger sum is a penalty: Astley v. Weldon, 2 B. & P. 346; *Re* Newman, 4 Ch. D. 724 (732); Wallis v. Smith, 21 Ch. D. 243 (259).

But where a certain sum of money is due and the creditor agrees to take a lesser sum provided it be paid at a certain time, reserving the right to have full payment should there be a failure to pay on the day named, that is not a penalty: Thompson v. Hudson, L. R. 4 B. L. 1; so a stipulation that the whole amount of an indebtedness is to become payable in the event of default in paying a certain instalment thereof, is not a peualty: Protector Loan Co. v. Grice, 5 Q. B. D. 592; Wallingford v. Mutual, 5 App. Cas. 685.

2. Where one lump sum is made payable by way of compensation on the occurrence of one or all of several events, some serious and some trifling, the same is a penalty: Astley v. Weldon, 2 B. & P. 346 (353); Kemble v. Farren, 6 Bing. 141; Magee v. Lavell, L. R. 9 C. P. 107; *Re* Newman, 4 Ch. D. 724; Elphinstone v. Monkland Iron and Coal Co., 11 App. Cas. 332; Pelee Island Navigation Co. v. Doty, 23 O. L. R. 402; or where there is a substantial difference in value between two things, for the omission of either of which the same sum is to be paid: Willson v. Love, 1896 1 Q. B. 626; or where there is such a difference that the sum payable cannot be treated as a genuine pre-estimate of the loss: Public Works Commissioner v. Hills, 1906 A. C. 368.

3. But where the sum is payable on a single event only, that event not being the non-payment of money, or where the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, and there is no substantial difference between them, the amount will be treated as liquidated damages: Craig v. Dillon, 6 A. R. 116; Wallis v. Smith, 21 Ch. D. 243; Schrader v. Lillis, 10 O. R. 358; Law v. Local Board of Redditch, 1892 1 Q. B. 127; or where the amount payable is made proportionate to the extent to which the defaulting party fails to implement his obligation, and a minute or difficult and complex system of examination would be necessary to assess the damage: Clyde-

hank Engineering Co. v. Don Jose Ramos, 1905 A. C. 6; or wbera it Sec. 65.
is impossibie at the date of tbe contract to foresee the extent of uncertain damages which may be suatained by its breach or tbe cost and difficuity of proving it, and the amount is reasonabie: Webster v. Boaanquet, 1912 A. C. 394; and tbe ruie is tha same tbougb the contract describea the amount as a penalty: Chatterson v. Crothers, 9 O. R. 683.

4. In the case of a *deposit*, whicb is to be forfeited for a breach of a number of stipuiations of wbich some may be tri6ing, tbe general ruie is said not to appiy and tba bargain of tbe parties must be carried out: Wallace v. Smitb, 21 Ch. D. 243 (258). At all events tha fact tbat tbe sum of money in question has been deposited is a circumstance whicb must be taken into account by the judge in ascertaining the intention of tbe parties: Pye v. Britisb Automobiie Syndicate, 1906 1 K. B. 425.

In a contract between vendor and purchaser the deposit is in the noture of a guarantee for the performance of tbe contract: Coiiins v. Stimson, 11 Q. B. D. 142 (143); Howe v. Smitb, 27 Ch. D. [illegible]; Fletcher v. Campbell, 29 O. L. R. 501 (506); and a purcbaser disentiiled hy defauit to specific performance cannot recover bis deposit: Howe v. Smitb, 27 Cb. D. 89; iikewisa a vendor obtaining rescission owing to defauit of tbe purcbaser is entitled to retain tba deposit: Hall v. Burnali, 1911 2 Ch. 551; Griffitbs v. Vezey, 1906 1 Ch. 796; *contra*, Jackson v. De Kadich, 1904 W. N. 168; but in calcuiating the deficiency to be paid by the purcbaser on a resaie by the originai vendor, credit muat be given hy the vendor for the amount of the deposit wbicb he bas received: Sbuttlewortb v. Clews, 1910 1 Cb. 176.

But a atipulation in a contract wbicb purports to forfeit instaiments of purchase money already paid (as distinct from a deposit operating as a guarantee as well as part payment) stsnds on a different footing, being in the nature of a resoiutive condition or a condition subsequent or of defeasance; and a stipuiation that payments already mada ara to be forfeited if on a certain day tbe agreement remains wholly or partly unperformed is, even in contracta whare time is made of tba essence, a penalty to be relieved against, provided compensation can be made by tbe payment of purcbase money and interest: *In re* Dagenham (Thames) Dock Co., L. R. 8 Ch. 1022; Klimer v. British Coiumbia Orcbard Lands Limited, 1913 A. C. 319; Boyd v. Richards, 29 O. L. R. 119; Bark-Fong v. Cooper, 49 S. C. R. 14. The case of Labelle v. O'Connor, 15 O. L. R. 519, so far as it is inconsistent with these casés, can no ionger be regarded as an authority.

If tha snm fixed by tbe contract is reaiiy iiquidated damages tbere is no gronnd for reiief against it: Empire Loan & Savings Co. v. McRae, 5 O. L. R. 710; bnt an agreement that a sum named is to be consldered liquidated damages does not make it so if it is reaiiy a penaity: Townsend v. Rumbaii, 19 O. L. R. 433.

Whether tbe sum named is a penalty or iiquidated damages depends on all the circumstances and what tbe real intention of the parties was: Pye v. Britisb Automobiie Syndicate, 1906 1 K. B. 425; Waiiis v. Smitb, 21 Ch. D. 243; Law v. Local Board of Redditcb, 1892 1 Q. B. 131; Clydebank Engineering v. Don Jos Ramos, 1905 A. C. 6; Puhiic Works Commissioner v. Hills, 1906 A. C. 378; sea Townsend v. Toronto H. & B. Ry. Co., 28 O. R. 195; Townsend v. Rumbali, 19 O. L. R. 435, 436; Pelee Island Navigation Co. v. Doty, 23 O. L. R. 402; McManus v. Rothschiid, 25 O. L. R. 138; St. Catharines Improvement Co. v. Rutherford, 31 O. L. R. 574. In tbese cases the subject is fuiiy ciucidated.

Sec. 66.

A party cannot avoid the contract by paying the penalty. "If a thing is agreed to be done, though there be a penalty annexed to its non-performance, yet the very thing itself must be done": French v. Macale, 2 Drew. & War. 274; National Provincial Bank v. Marshall, 40 Ch. D. 112.

Negligence or intentional participation in the act which gives rise to the forfeiture by the party seeking relief from the forfeiture, may deprive him of relief: see Imray v. Oakshette, 1897 2 Q. B. 218; Matthews v. Smallwoods, 1910 1 Ch. 777; long delay and laches will deprive the applicant of the right to enforce a forfeiture: City of Toronto v. Toronto Electric Light Co., 10 O. L. R. 621.

The Supreme Court (and the division court also), will not relieve against a forfeiture which a court of equity would formerly not have relieved against: Hill v. Barclay, 18 Ves. 63; Eastern Tel. Co. v. Dent, 1899 1 Q. B. 835; Barrow v. Isaacs, 1891 1 Q. B. 417.

Formerly the section included in its provisions the power to grant relief against penalties, forfeitures and "agreements for liquidated damages," but in the revision of the statutes in 1897, and in the present statute, section 65, the latter clause is omitted and the express power to deal with agreements for liquidated damages is not now expressly given; but the authority conferred by the present section upon the division court, "to relieve against penalties and forfeitures in as full and ample manner as might be done in like case in the Supreme Court" includes the right to relieve against a real forfeiture, although it may be stated in the agreement to be liquidated damages.

Appeal.—The right of the division court to relieve against penalties and forfeitures was first given in 1886. It was then subject to appeal in the manner there provided. Upon the revision of the statutes in 1897 this restriction disappeared and the right to appeal in cases under this section is governed, as in other cases, by sections 125-129 and R.S.O. 1914, c. 56, s. 26.

Attachment and Sequestration.—Attachment and sequestration are "remedies," and, possibly, for disobedience to orders within the jurisdiction, the division courts are equipped with all the powers of the Supreme Court: Martin v. Bannister, 4 Q. B. D. 212, 491; Richards v. Cullurne, 7 Q. B. D. 623; but in *Re* Jackson v. Clarke, 36 C. L. J. 68, a division court judge refused to commit a judgment debtor for refusing to produce documents under a subpœna *duces tecum*, upon the ground that the Act did not contain any provision expressly authorizing a committal; and a mandamus to compel him to do so was refused.

Actions Otherwise within Its Jurisdiction.—It is to be noticed that the plaintiff's cause of action, in which equitable relief is invoked, must be otherwise within the jurisdiction of the division court: *Re* McGugan v. McGugan, 21 O. R. 289. See notes to s. 69.

Minors may sue for wages.

66. A minor may sue for any sum not exceeding $100 due to him for wages, or for work or services, as if he were of full age. 10 Edw. VII. c. 32, s. 66.

A Minor May Sue for Wages.—This is a special privilege given to minors, *i.e.*, persons under 21 years of age.

It does not restrict infants from suing for anything but wages, but was intended to enable them to recover for their own labor in their own

name, without the intervention of a next friend: Ferris v. Fox, 11 U. C. R. 612. In all other actions and proceedings a minor must procure the written authority of a next friend and file the same with the clerk on entering the suit (Form 72), and the cause shall proceed in the name of the infant by such next friend: Rule 36. The old Rule 235, required the next friend to attend personally at the office of the clerk to sign the undertaking. This is not now required. Probably an affidavit of execution would now be necessary, Form 72 (1). Sec. 66.

An infant has six years to bring an action after attaining his majority: Taylor v. Purnell, 43 U. C. R. 239. It is doubtful if an infant can hire himself for wages to his parent and whether the contract is binding on the latter: Perlet v. Perlet, 15 U. C. R. 165; but see Smith v. Smith, 29 O. R. 309. The wages of a minor belong to himself and not to his parents: Delesdernier v. Burton, 12 Gr. 569.

A next friend is not a party to the action: *Re* Corsellis, 31 W. R. 414; Dyke v. Stephens, 30 Ch. D. 189; Taylor v. Wood, 14 P. R. 449; Vann v. The Canadian C. C. Co., 13 O. L. R. 421.

In general a next friend is in the same position as any other litigant, and receives or pays costs personally as between himself and the defendants: Smith v. Mason, 17 P. R. 444. And if the plaintiff or claimant fail in, or withdraw, or discontinue his suit, and do not pay the amount of costs awarded against him, execution may be issued for the recovery of such amount from the next friend: s. 173.

Any person, except the defendant, may commence an action as next friend of an infant: *Re* Taylor, W. N. (1881), p. 81; Lewis v. Nobbs, 8 Ch. D. 591. See *Re* Burgess, 25 Ch. D. 243. A father having no adverse interest to his children will be preferable to a stranger: Woolf v. Pemberton, 6 Ch. D. 19. The next friend need not be a solvent person: *Re* McConnell, 3 Ch. Chas. R. 423; see Jones v. Evans, 31 Sol. Jour. 11; Foster v. Cautley, 10 Ha. App. 24. A married woman may not be a good next friend: Thynne v. St. Maur, 34 Ch. D. 465. It was held under former C. R. 197, that if an action is commenced without a next friend, the irregularity, if any, would be waived by the appearance of the defendant: *per* James, L.R., *Ex parte* Brockelbank, 6 Ch. D. 358. But in the divisional courts the rule is in the imperative. If a suit should be instituted on behalf of an infant without a next friend, it might be dismissed with costs, to be paid by the party entering it: Daniels Ch. Pr. 6th ed. 105. The next friend cannot bind the infant by a compromise unless it is made for the benefit of the infant: Rhodes v. Swithenbank, 22 Ch. D. 577.

It is an actionable wrong to persuade a servant to break his contract: Branch v. Roth, 10 O. L. R. 284.

An infant is not liable for a devastavit as an executor *de son tort*: Young v. Purvea, 11 O. R. 597.

The doctrine of contributory negligence does not apply to an infant of tender age: Merritt v. Hepenstal, 25 S. C. R. 150.

An infant cannot be a common informer: Garrett v. Roberts, 10 A. R. 650.

An infant is not bound by an executory contract made with him by a person who was induced to do so by the infant's fraudulent representation that he was of full age; but if he has acquired property or derived anything by means of such representation, he will be forced to restore it: Jewell v. Broad, 20 O. L. R. 176.

A mother is not under any legal obligation to maintain her children: Wilson v. Boulter, 26 A. R. 184; see Wright v. McCabe, 30 O. R. 390.

See authorities collected: 34 C. L. J. 587.

Sec. 66.

Rights and Liabilities of Master and Servant.—The right of a servant to recover his wages, when recoverable on an entire contract of service and payable in an indivisible sum, depends on the *complete* performance of his term of service. If hired, for instance, for a year for a lump sum as wages, and he leaves before his time has expired without just cause, he forfeits his wages: Huttman v. Boninois, 2 C. & P. 510; Lilley v. Elwin, 11 Q. B. 742; Turner v. Robinson, 5 B. & Ad. 789; Blake v. Shaw, 10 U. C. R. 180. See also Warburton v. Heyworth, 6 Q. B. D. 1; Barrie Gas Co. v. Sullivan, 5 A. R. 110; Sheriock v. Powell, 26 A. R. 407. But if the servant has been paid any portion of such year's salary the employer is not entitled to recover it back, neither is he entitled to have it applied on account of moneys payable in respect of a previous year's service. Although the employer, on dismissing his servant, may have assigned one ground therefor, he is not precluded from afterwards showing the entire ground for such dismissal: Tibbs v. Wilkes, 23 Gr. 439; but see Maw v. Jones, 25 Q. B. D. 107. The rule that an indefinite hiring is to be taken as a yearly one (Rettinger v. Macdougall, 9 C. P. 485), is not a rule of law, but the jury are to say what the terms of the hiring were, judging from the circumstances of the case; thus, on an indefinite hiring at certain weekly wages, the jury may infer that the hiring was weekly: Baxter v. Nurse, 6 M. & G. 935; see Bain v. Anderson, 28 S. C. R. 481; Holloway v. Lindberg, 30 N. S. R. 421. So a hiring contract for a year with weekly payments was a contract for a year; but merely limits the amount of wages for a specified time and is only a weekly hiring: Robertson v. Jenner, 15 L. T. N. S. 514; as explained in Noble v. Gunn Limited, 1 O. W. N. 844, in which it was held that a contract for a year with weekly payments was a contract for a year; so a hiring at "£2 a week and a house": Evans v. Roe, L. R. 7 C. P. 138, is a hiring by the week and not by the year. Indefinite hiring is presumably a yearly one, but there is no inflexible rule that an indefinite hiring of a clerk must be so construed: Gould v. McCrae, 14 O. L. R. 194; Fairman v. Oakford, 5 H. & N. 635. In that case the plaintiff entered the defendant's employment at a salary of £250 a year, which was paid weekly. The jury found it a weekly hiring and the court refused to interfere: see also Rettinger v. Macdougall, 9 C. P. 485. A sub-contract to employ a salesman so long as the employers' contract with third persons might remain in force, that contract being terminable at any time, is not within section 4 of the Statute of Frauds: Glenn v. Rudd, 3 O. L. R. 422. Where a book-keeper was engaged for one year, and his employment was continued afterwards, it was held that there was no presumption that it was to continue for another year. The employer may dismiss him at any time upon reasonable notice, and where there is no evidence of usage, the customary three months' notice there is reasonable: Harnwell v. Parry Sound Lumber Co., 24 A. R. 110.

Where plaintiff, who had been hired for one year, was retained in the services of a company which afterwards bought out the business of the employer, it was held that as on the evidence there was no hiring for a definite period but merely a temporary arrangement, the plaintiff could not recover damages for dismissal: Bain v. Anderson, 24 A. R. 296; 28 S. C. R. 481.

A person engaged by the president of a company at a fixed salary per month is entitled to recover at the rate agreed on for his services, although there was no contract under seal: Forrest v. Great N. W. Central Ry. Co., 12 Man. L. R. 472; Bernardin v. North Dufferin, 19 S. C. R. 581.

Should a person be hired for a year, his wages payable *at the rate of so much per month*, it is submitted, on the authority of Taylor v. Laird, 1

H. & N. 266; Fairman v. Oakford, 5 H. & N. 635, and Button v. Thompson, L. R. 4 C. P. 330, to be clearly established that each month's wages would become vested at the end of each month and could not be divested by any misconduct of the servant, and that the rule about forfeiture of wages does not apply to such a case. The case of Walsh v. Walley, L. R. 9 Q. B. 367, is clearly distinguishable from the others. Where a master, having a right to discharge his servant for misconduct, condones the act and retains the servant, he cannot afterwards discharge him for the same act: Phillips v. Foxall, L. R. 7 Q. B. 680, *per* Blackburn, J.; but this condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs the old offences may be invoked and put in the scale against the offender as cause for dismissal: McIntyre v. Hockin, 16 A. R. 498. With regard to menial or domestic servants there is a common understanding, though the contract is for a year, that it may be dissolved by either party on giving a month's warning or a month's wages: Beeston v. Collyer, 4 Bing. 313, *per* Gaselee, J.; Fawcett v. Cash, 5 B. & Ad. 904; Nowlan v. Ahlett, 2 C. M. & R. 54. If the master should, without just cause, turn the servant away without notice, the latter would be entitled to recover a month's wages beyond the arrears: Robinson v. Hindman, 3 Esp. 235; but see Maw v. Jones, 25 Q. B. D. 107. If a servant misconduct himself, the master may turn him away without any warning: Spain v. Arnott, 2 Stark, 256. A refusal to obey a lawful order (as to remain at home at a certain time, or to do a proper day's harvest work, etc.), is a good ground of dismissal: s.c., and Lilley v. Elwin, 11 Q. B. 742. And it matters not how reasonable or urgent the excuse for the servant's wilful absence may be: Turner v. Mason, 14 M. & W. 112. See McEdward v. Ogilvie Milling Co., 8 C. L. T. 150; 5 Man. L. R. 77. If a clerk claims to be a partner he can be forthwith dismissed: Amor v. Fearon, 9 A. & E. 548. So where a clerk disobeys a direction to apply remittances in a particular way: Smith v. Thompson, 8 C. B. 44; or a traveller neglects immediately to remit sums collected in accordance with the terms of his engagement: Blencarn v. Hodges' Distillery Company, 16 L. T. 608; or sells his employer's goods to a brothel keeper, *Ib.*; or where a servant embezzles, though his wages due exceed what he has embezzled: Brown v. Croft, 1 Chitty, Prac. 82. So where a servant employed to purchase goods for his master, accepts even on a single occasion a commission from the seller without his master's knowledge: Boston Deep Sea, &c., Co. v. Ansell, 39 Ch. D. 339: see Lister v. Stubbs, 45 Ch. D. 1; or is discovered in any gambling transaction or in the nature thereof: Pearce v. Foster, 17 Q. B. D. 536; Priestman v. Brastreet, 15 O. R. 558; or is found drinking intoxicating liquor while on duty as a roadmaster on a railway: Marshall v. Central Ontario Ry. Co., 28 O. R. 241. In the case of household servants or those who have access freely to the household, any immoral conduct, not of trivial character, will justify dismissal: Denham v. Patrick, 20 O. L. R. 347; the indecent conduct having been an isolated act occurring several years before, the lapse of time is not an exculpation if the master's knowledge of it is recent: *Ib.* In this case the authorities on the subject are reviewed. Where a person is engaged by a firm, the death of one of the partners puts an end to the contract, and no action can be brought against survivors for not employing the plaintiff: Tasker v. Shepherd, 6 H. & N. 575; Burnet v. Hope, 9 O. R. 10; but a voluntary parting with the business is a breach of the contract to employ: Stirling v. Maitland, 5 B. & S. 840; and so is a dissolution of a partnership, although the continuing partners offer employment on the same terms: Brace v. Calder, 1895 2 Q. B. 253; and the fact that the defendants' manufactory had been burnt down would be no excuse for dismissal: Sec. 66.

Sec. 66. Turner v. Goldsmith, 1891 1 Q. B. 544. It le different with a person paid by commission: *Ex parte* Maclure, L. R. 5 Ch. 737; hut see last case. It ls an implied condition ln contracts for personal service, that the death of elther party shall dissolve the contract: Farrow v. Wilson, L. R. 4 C. P. 744. Incapacity in a servant from illnese arising after a contract for personal service, absolute in its terms, has been entered into, ls an answer to an action for its breach: Boast v. Firth, L. R. 4 C. P. 1; Robinson v. Davidson, L. R. 6 Eq. 269; 24 L. T. 755.

Incapacity of the servant from sickness does not determine the contract, illness being in the category "Act of God"; nor will it justify dismissal without regular notice: R. v. Wintersett, Cald. 208. On the other hand, it has been held that a servant is entitled to be paid his wagee during the time of illness: Patten v. Wood, 51 J. P. 549; 36 Alb. L. J. 399, 400. In Cuckson v. Stones, 1 E. & E. 248, it was held that temporary inability did not suspend the right to wages, but total and permanent disability, such as paralysis, etc., would justify a rescission of the contract. The use of the word "continuously" in the contract with reference to the servant's performance of duties will make no difference: McDougall v. VanAllen Co., Limited, 19 O. L. R. 351. But such total inability does not deprive the servant of his right to wages for the time he actually served, where the agreement is not for any specified time: Bayley v. Rimmell, 1 M. & W. 506.

Even illness brought on by the servant's own folly such as the case of a nervous person allowing himself to be overcome by a drug which he had begun to use when ill and afterwards continued to use and thereby brought on a temporary incapacity to perform his duties, was held not to justify his dismissal as the circumstances taken together made it apparent that the result could not fairly be taken out of the category "Act of God": McDougall v. VanAllen, *supra*, in which the question of what illness or misconduct justifies dismissal is fully discussed.

A sailor disabled in the course of his duty is entitled to wages for the whole voyage: Chandler v. Grieves, 2 H. Bl. 606 (note); 3 R. R. 525. Incompetence or ignorance will justify dismissal: Harmer v. Cornelius, 5 C. B. N. S. 236.

Where an apprentice, who could have been dismissed at a week's notice, was dismissed without notice, the defendants not acting under the notice clause, he was held entitled to recover for all damages flowing naturally from the breach, and was not limited to the value of a week's notice: Maw v. Jones, 25 Q. B. D. 107.

A clerk taken into an office for "three months on trial at a salary of $800 per annum," held not a yearly hiring: Hughes v. Can. P. L. & S. Socy., 39 U. C. R. 221. Under a contract of hiring, with a reservation on the part of the employer of the right of dismissal at any time, if he had cause, the employer may discharge the employee at any time, provided the right is exercised *bona fide* and without malice: Doyle v. Wurtzburg, 32 N. S. R. 107.

A contract to serve for one year, the service to commence on the second day after that on which the contract is made, is a contract not to be performed within a year and is within the 4th section of the Statute of Fraude: Britain v. Rossiter, 11 Q. B. D. 123. The statute does not avoid the contract, but only bars the remedy: Maddison v. Alderson, 8 App. Cas. 473; McManus v. Cooke, 35 Ch. D. 681; but a contract to serve for one year, the service to commence on the day next after that on which the contract was made, is not a contract which is not to be performed within a year, within the meaning of the Statute of Fraude, s. 4: Smith v. Gold Coast, 1903 1 K. B. 285, 538.

A suit by the servant against the master for debt arising out of an independent transaction is not a cause of a discharge of the servant: Clay Com. Telephone Co. v. Root, 33 Alb. L. J. 215. Sec. 67.

Unless a specific contract of hiring be proved, the court will discountenance an action by a child against a parent or person occupying a parental position for services rendered while living in the parent's or such person's house: Sprague v. Nickerson, 1 U. C. R. 284; Wismer v. Wismer, 23 U. C. R. 519; Peckham v. Depotty, 17 A. R. 273; and where an action was brought by a woman against her brother, with whom she had lived for several years, it was held there was no implied promise to pay: Redmond v. Redmond, 27 U. C. R. 220. But a promise of remuneration may be recovered upon; McGugan v. Smith, 21 S. C. R. 263; see Hendricks v. Hendricks, 27 U. C. R. 447. See also *Re* Ritchie, Sewery v. Ritchie, 23 Gr. 66; Pickering v. Ellis, 28 U. C. R. 187.

Where services were rendered in expectation of marriage, but no contract of hiring, held that a refusal to marry did not entitle plaintiff to maintain action for wages: Robinson v. Shistel, 23 C. P. 114; but where the plaintiff rendered services in hopes of a pecuniary reward in the shape of a legacy, he was held entitled to be paid for the services *quantum meruit*: Baxter v. Gray, 3 M. & G. 771.

As to implied right to remuneration for services, see Peckham v. Depotty, 17 A. R. 273; Bradley v. Bradley, 1 O. W. N. 110.

67.—(1) A cause of action shall not be divided into two or more actions for the purpose of bringing the same within the jurisdiction of the court. Causes of action not to be divided.

(2) Where a sum for principal, and also a sum for interest, is due and payable to the same person upon a mortgage, bill, note, bond or other instrument, he may notwithstanding anything in this section contained, but subject to the other provisions of this Act, sue separately for every sum so due. 10 Edw. VII. c. 32, s. 67. Principal and interest may be sued for separately.

Splitting a Cause of Action.—It is often a difficult matter to say what is "dividing a cause of action" within the meaning of this and the corresponding section of the English Acts, 9 and 10 Vic. c. 95, s. 63, and 51 and 52 Vic. c. 43, s. 81. The expression "cause of action" in this section means "cause of one action," and is not limited to an action on one separate contract: Grimbley v. Aykroyd, 1 Ex. 479.

"A cause of action" is the entire set of facts that give rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment: *per* Lord Esher, M.R., Read v. Brown, 22 Q. B. D. 128; see Wright v. Arnold, 6 Man. L. R. 1.

Where a tradesman had an account against a party for an amount within the jurisdiction of the court, in which the items were so connected with each other that the dealing was not intended to terminate with one contract, but to be continuous, so that one item, if not paid, should be united with another, and form one continuous demand, it was held to be a "cause of action" within the meaning of the section, and the fact that one item in the account was separated from the rest by an interval of several years did not prevent the section from operating: Copeman v.

Sec. 67. Hart, 14 C. R. N. S. 731; see also *Re* Grece v. Walsh, 10 U. C. L. J. 65; 3 P. R. 196; Kimpton v. Willey, 9 C B. 719.

A tradesman's bill for a series of articles (aven though the claim was contracted within the jurisdiction of different courts) cannot be split into different causes of action: Bonsey v. Wordsworth, 18 C. B. 325, following Grimbley v. Aykcoyd, 1 Ex. 479, and Wood v. Perry, 3 Ex. 442.

When it is to be inferred that it was contemplated that there should be continuous dealing to be included in periodical bills, the result of the arrangement and the legal position of the parties is that, upon the delivery and acceptance of the first parcel an entire contract is created and a complete cause of action arises, the tradesman being under no obligation to give further credit. When on a subsequent day other goods are delivered and accepted, a new contract arises, not simply to pay for the goods then delivered, but a new entire contract by which the tradesman waives the right to payment for prior goods, and the purchaser agrees to pay for both parcels as upon an entire sale. After the successive waiver and extinguishment of each preceding contract, the only existing contract and cause of action *ex contractu* will be the last: note of Sergeant Manning, Dodd v. Wigley, 17 C. B. 115; Morris v. Tharle, 24 O. R. 159.

In a contract for carrying timber by barge from one place to another, a charge for hauling by horses part of the way forms part of the entire contract, and cannot be sued for separately: Barnes v. Marshall, 18 Q. B. 785.

Damages against a carrier for breach of a contract of carriage must all be recovered in one action, though part of the goods are delivered to A. and the remainder to B.: Russell v. Waterford and Limerick Ry. Co., 16 L. R. Ir. 314.

When premises were rented at $125 a month, no formal lease being made and four months' rent became due, it was held that separate plaints for three instalments of rent was the splitting of a cause of action: *Re* Jordon v. O'Brien, 11 P. R. 287.

This case is in conflict with Wallace v. Whelan, Circuit Reports in Ireland, 582; but it was followed in *Re* Clark v. Berber, 26 O. R. 47, where interest and taxes alone were held not to be recoverable apart from instalments of principal due on an agreement to pay the principal by instalments with interest half-yearly and taxes; and in *Re* McDonald v. Dowdall, 28 O. R. 212, in which it was held that an action for $100 interest due on a deposit receipt upon which the whole sum was partly due and collectable, was splitting the cause of action. In the last case, *Re* Clerk v. Barber, 26 O. R. 47, was followed but commented on as irreconcilable with such cases as Dickenson v. Herrieon, 4 Price, 282, approved of in Attwood v. Taylor, 1 M. & G. 307.

An action brought to recover two instalments of interest paid by the plaintiff on a mortgage, against the payment of the principal and interest, of which the defendant had contracted to indemnify him, was held by Armour, C.J., to be a splitting of the cause of action within the meaning of this section: Ball v. Bell, 26 O. R. 123; but this decision was reversed by the divisional court: 26 O. R. 601. This was before the enactment of sub-section 2 of section 67, by which seperate actions may now be brought in the division court for principal or interest "upon a mortgage, bill, note, bond or other instrument" payable to the same person. But even now a mortgagee cannot sue in the division court for the amount of an instalment of interest within the jurisdiction when other instalments of interest are due, which bring the whole amount

beyond the jurisdiction: *Re* Real Estate Loan Co. v. Guardhouse, 20 O. R. 602. Sec. 67.

The conflicting authorities referred to in the foregoing paragraphs are discussed in *Re* McKay v. Clare, 20 O. L. R. 344, which was distinguished as being for moneys lent as distinct loans at different times and places and pursuant to no course of dealing, and so not necessarily to be massed *en bloc* for the purpose of litigation.

In Wickham v. Lee, 12 Q. B. 526, Erle, J., says: "It is not a splitting of actions to bring distinct pleas where, in a superior court, there would have been two counts. I am not sure whether the Court of Exchequer puts it so, but that is clearly the true construction of the Act." In that case it was held no contravention of the section to bring separate actions for rent of premises and for double value for holding over after notice to quit; but see this case explained in *Re* Clark v. Barber, 26 O. R. 47. Where two promissory notes would, in an action at law, have been declared on in two separate counts, the bringing of two separate actions to recover upon them is not splitting a cause of action: *Re* Franklin v. Owen, 15 C. L. T. 158, 185; M'Gorlick v. Ryall, 26 O. R. 435; see *Re* Babcock v. Ayres, 27 O. R. 47; School Trustees of Nottawasaga v. Township of Nottawasaga, 15 A. R. 310.

Damage to goods and injury to the person, although they have been occasioned by the one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action: Brunsden v. Humphrey, 14 Q. B. D. 141.

In School Trustees of Nottawasaga v. The Township of Nottawasaga, 15 A. R. 310, it was held that a judgment in the division court against the township council for the surplus school-rates received by them in 1891, did not preclude the plaintiffs from recovering, in an action in the county court, the surplus received in the five subsequent years, and that the recovery in the division court was for separate and distinct causes of action. This case is explained in *Re* Clark v. Barber, 26 O. R. 47.

An action to recover the first instalment due on a promissory note payable in three annual instalments, is not splitting a cause of action: *Re* Babcock v. Ayres, 27 O. R. 47; nor is an action by an assignee for the benefit of creditors against one of several persons to recover from him his share of moneys divided amongst such persons in contravention of the provisions of the Act respecting Assignments and Preferences, R.S.O. 1914, c. 134, s. 13, although the total amount of the payment to all such persons is beyond the jurisdiction: *Re* Beattie v. Holmes, 29 O. R. 264.

Money paid by the endorser of two notes, as against the executrix of the maker, was held one cause of action, and the plaintiff having sued for and recovered one sum, could not bring another action for the amount of another payment made by him: *per* Logie, Co.J., Gilbert v. Gilbert, 4 C. L. J. 229; but this is not good law in view of *Re* Franklin v. Owen, 15 C. L. T. 158, 185, and other cases cited above. A claim for an alleged breach of an agreement to return a yoke of oxen in as good condition as when they were hired, and a claim for the hire of the same oxen, both claims arising out of the same contract of hiring, constitute but one cause of action: *per* Hughes, Co.J., Light v. Lyons, 7 U. C. L. J. 74.

On a contract for the delivery of shipment of a large quantity of deals, in instalments, each instalment to be paid for on delivery, it was held that the plaintiff could recover on each shipment as delivered: O'Leary v. Stewart, 9 C. L. T. 494; see further Frost and Wood Co., Ltd. v. Leslie, 27 O. L. R. 450.

Sec. 67.

A., having a cause of action against B. for £19 0s. 8d. for money lent between 1846 and 1848, also a cause of action on a separate account for goods sold and delivered, work and labor, and money paid between 1845 and 1849 amounting to £19 19s. 0d., after deducting a payment of £8 5s. 3d. on account, levied two plaints in respect of them in the county court. *Held*, that this was not a splitting of a cause of action: Kimpton v. Willey, 9 C. B. 719.

Claims for goods sold and money lent, though entered in plaintiff's books as one account, are not one cause of action; Brunskill v. Powell, 1 L. M. & P. 550; nor are two claims, one for salary and the other for money lent: Richards v. Martin, 23 W. R. 93; nor a demand for a horse sold, another for rent due, and a third for goods sold and delivered: Neale v. Ellis, 1 D. & L. 163; nor claims for work and labor, and another for a balance due for money paid by plaintiff for the defendant: McRae v. Robins, 20 C. P. 135.

The true distinction between demands, rights or causes of action which are single and entire and those which are distinct is, could they all have been included in the prior statement of the cause of action? By this is not meant in the same petition or suit, for a party may have as many suits as he has causes of action, and may bring them at different times or at the same time, but if he brings them and they are depending at the same time and by the same tribunal, he does so subject only to the right of consolidation if they be such as could have been united in one petition: Secor v. Sturges, 16 N. Y. 554; Perry v. Dickerson, 85 N. Y. 345.

Proving a claim on a note and account as an undivided claim before the assignee in insolvency does not merge the original claims, and the note and account may be sued on separately; Harvey v. McPherson, 6 O. L. R. 60.

Prohibition will be granted when a party splits a cause of action to bring it within the jurisdiction of the division court: *Re* Grace v. Walsh, 3 P. R. 196; Gilbert v. Gilbert, 4 C. L. J. 229; Light v. Lyons, 7 U. C. L. J. 74; McRae v. Robbins, 20 C. P. 135; *Re* Clark v. Barber, 26 O. R. 47; Ball v. Bell, 26 O. R. 60, and other cases cited *supra*.

Sub-Section 2. Actions for Principal and Interest on Mortgages, etc.—Prior to the passing of sub-section (2) in the Division Courts Act of 1897, the decisions as to the right to bring actions for the recovery of the interest due on a mortgage or other instrument, separately from an action for principal then overdue, were somewhat conflicting: see the decision of Armour, C.J., Rail v. Bell, 26 O. R. 123, reversed on appeal, 26 O. R. 601; *Re* Clark v. Barber, 25 O. R. 253, overruled, 26 O. R. 47; McDonald v. Dowdall, 28 O. R. 212; Dickenson v. Harrison, 4 Price 282; Attwood v. Taylor, 1 M. & G. 307, and the provision in that Act was intended to and did settle the question, and a sum for principal and also a sum for interest thereon may be recovered in separate actions. In *Re* Real Estate Loan Co. of Canada v. Guardhouse, 29 O. R. 602, decided after sub-section 2 was passed, it was held that while a plaintiff may sue separately for principal and interest due on a mortgage, he must sue for the whole principal or interest and not for portions of either, and that one action cannot be maintained for one instalment of interest when other instalments of interest are due which bring the whole amount beyond the jurisdiction. It was also held in that case that this sub-section applies only to an action brought upon the mortgage by a person to whom the money is payable thereon and not to an action brought by

the assignee of the mortgagor upon a covenant entered into by his vendee with him to pay off the mortgage and indemnify him against it. Secs. 66, 69.

But in Bail v. Bell, 26 O. R. 601, the Divisional Court held in separate actions brought by a mortgagor for instalments of interest which he had been compelled to pay after the mortgaged lands had been conveyed to the defendant whose duty it was to have paid them, that each of the payments was a separate cause of action.

Section 67 (2) does not enable a person to sue separately for principal and interest where the interest claimed is payable as damages; i.e., *post diem* interest: Phillips v. Hanna, 3 O. L. R. 558.

See section 193 as to examination of a judgment debtor on a judgment under this provision.

Due and Payable.—See notes to section 146.

68. A judgment in an action brought for the balance of an account, or for a part of a claim, where the residue is abandoned to bring the claim within the jurisdiction of the court, shall be a full discharge of all demands in respect of the account for the balance of which such action was brought, or for the whole claim, as the case may be. 10 Edw. VII. c. 32, s. 68. Judgment to be full discharge.

Where Residue is Abandoned.—See notes to section 62.

A Judgment of a Division Court.—The judgment must, of course, be between the same parties or their privies: McIntosh v. Jarvis, 8 U. C. R. 535. In Winger v. Sibbald, 2 A. R. 610, it was held that the commencement of a suit in a division court for part only of the entire claim and endorsing an abandonment of the balance on the summons is not *per se* a release of the excess, but that the part so abandoned cannot be sued for after the recovery of judgment in such suit. See also Vines v. Arnold, 8 C. B. 632; Nelson v. Couch, 15 C. B. N. S. 108; School Trustees of Nottawasaga v. Township of Nottawasaga, 15 A. R. 310; notes to section 62, title "Abandonment of Excess."

The judge should be particular to order that the judgment be entered for the plaintiff as the section directs, namely: "In full discharge of his cause of action as set forth in the claim." If the plaintiff objects, the defendant is entitled to judgment; see 15 A. R. at p. 320.

69.—(1) Where it appears at any stage of an action otherwise of the proper competence of the court that the Court has not cognizance thereof on account of the title to land or any corporeal or incorporeal hereditament, or any toll, custom or franchise coming in question, or the validity of a devise, bequest or limitation under a will or settlement being disputed, the action shall not on that account be dismissed, but a Judge of the Supreme Court, or the Judge of the court in which the action is pending, may order the same to be transferred to the Supreme Court upon such terms as to the payment of costs or otherwise as he may think fit, and thereafter the action shall Transfer of actions to Supreme Court.

Sec. 69. proceed in the Supreme Court as if originally commenced therein, and as if the defendant had entered an appearance; but the Supreme Court or a Judge thereof may give such directions as to procedure as may be deemed proper.

Appeal from order. (2) Where the order is made by a Judge of the Division Court an appeal shall lie therefrom to a Judge of the Supreme Court in Chambers who may rescind the order or vary the terms thereof. 10 Edw. VII. c. 32, s. 69.

At Any Stage of an Action.—This section provides for the removal of cases otherwise within the jurisdiction of division courts to the Supreme Court of Ontario, if during the progress of the action, title to land, or to any corporeal or incorporeal hereditament, or any toll, custom or franchise (section 61 (a)), or the validity of any devise, bequest or limitation under any will or settlement (section 61 (b)) comes in question. It does not apply to cases arising under section 62. As to removal of cases to the Supreme Court where the defence or counterclaim of the defendant involves matter beyond the jurisdiction, see section 71 and notes thereto.

Action Otherwise of the Competence of the Court.—If the division court has no jurisdiction over the plaintiff's cause of action, proceedings in respect thereof are *coram non judice*, and the judge has no power over them; the above section only applies where the action in which the question of title, etc., is raised is within the jurisdiction of the division Court: *Re* McGugan v. McGugan, 21 O. R. 289. See, however, *In re* Sebert v. Hodgson, 32 O. R. 157.

It has been held that *certiorari* does not apply to interpleader proceedings: *Ex parte* Summers, 18 Jur. 522; and that an action could not be removed after verdict or judgment had been given: see notes to section 70. But the words "at any stage of an action" may give to this section a wider application than either of the other sections, providing for the removal of cases to the superior court, and may be held to include every period after the issue of the summons until the action is finally disposed of, so that if it be necessary to try any of the prohibited questions arising within the section "at any stage of the action" the proceedings may be removed.

The concluding sentence of the section seems to indicate that it is intended to apply to cases other than those in which formal pleadings would be necessary, as the judge making the order for removal to the Supreme Court may direct the mode of procedure to be adopted after the transfer, e.g., a stated case.

A Judge of the Court.—It is submitted that it will be found to be more convenient in most cases that the application to transfer should be made to the judge of the division court.

Upon any question arising at the trial involving the question of title to land, etc., the judge should, if requested so to do, make an order of transfer forthwith. If the judge of the division court refuses to make the order, an application may then be made to a judge of the Supreme Court in chambers: see notes to section 70. The affidavit on such motion should show the refusal of the judge of the inferior court: Bank of Hamilton v. Baine, 12 P. R. 439.

Sec. 70.

After the transfer the jurisdiction of the division court judge is at an end and he cannot make any order even as to costs: Hares v. Lea, L. R. 10 Eq. 683; 22 L. T. 715; Harris v. Judge, 1892, 2 Q. B. 565; Duke v. Davis, 1893 2 Q. B. 107, 260.

Directions as to Procedure.—If the order of transfer makes no provision for procedure subsequent thereto, the action will proceed in the Supreme Court as if originally commenced therein and as if the defendant had entered an appearance. See Davis v. Williams, 13 Ch. D. 550, and notes to section 71. In the absence of any directions to to future proceedings, the case would proceed by the usual pleadings, etc.

Payment of Costs or Otherwise.—Fry, J., in giving judgment for the plaintiff in an action transferred, made the plaintiff bear the costs of the trial in the court below: Ward v. Wyld, 5 Ch. D. 779.

See notes to section 70.

As to clerk's duties on transfer of the action, see notes to section 71.

Appeal.—Section 125 does not apply to the appeal under section 69 (2).

There is no provision for an appeal to the Supreme Court of Canada from the decision of the Supreme Court of Ontario in a case transferred from the division court: Tucker v. Young, 30 S. C. R. 185. But there is an appeal from the decision of the judge of the Division Court to the Divisional Court: R.S.O. 1014, c. 56, s. 26; Con. Rules, 491, *et seq.*

Action may be removed into High Court in certain cases.

70. If it appears to a Judge of the Supreme Court that an action is a fit one to be tried in the Supreme Court, he may order that it be transferred to the Supreme Court upon such terms, as to payment of costs or otherwise, as he may think fit. 10 Edw. VII, c. 32, s. 70.

Removal of Action by Certiorari.—Formerly *certiorari* could not be granted unless the amount of the "debt or damages" claimed amounted to $40 and upwards: R.S.O. 1897, c. 60, s. 82; see Solomons v. London C. & D. Ry. Co., 10 W. R. 59; but that provision is omitted from the present statute. *Quære*, whether an action for a trifling sum would be considered a "fit" one to be transferred to the Supreme Court.

Certiorari pre-supposes jurisdiction in the inferior court, and where a division court has no jurisdiction to entertain or try the case, this section will have no application: Wiltse v. Ward, 8 A. R. 549; Ferguson v. Sampey, 10 C. L. T. 110; Whidden v. Jackson, 18 A. R. 439; Meyers v. Baker, Hargreaves v. Meyers, 26 U. C. R. 16; O'Brien v. Welsh, 28 U. C. R. 394; McGugan v. McGugan, 21 O. R. 289; except in cases under section 69.

A defendant cannot wait and take the chances of a decision in his favor, and finding it adverse, apply for *certiorari*: Knight v. Medora, 11 O. R. 138; 14 A. R. 112; Black v. Wesley, 8 U. C. L. J. 277; Gallagher v. Bathie, 2 C. L. J. 73; Holmes v. Reeve, 5 P. R. 58; and *certiorari* will not lie after verdict: Tully v. Glass, 3 O. S. 149; nor after judgment: Sherk v. Evans, 22 A. R. 242; Douglas v. Hutchinson, 5 O. S. 341; Walker v. Gann, 7 D. & R. 769; McKenzie v. Keane, 5 U. C. L. J. 225; nor to garnishee proceedings under section 155, the garnishee being a

Sec. 70. party to the proceedings from the beginning, if final judgment has been obtained against the primary debtor, even though the liability of the garnishee has not been determined: *Re* Broderick v. Merner, 17 P. R. 264; nor where the defendant knows all the facts before a trial but nevertheless argues the case and obtains the opinion of the judge, even though the judge desire it: Holmes v. Reeve, 5 P. R. 58. But in some cases, at all events, it seems the order will be made at any time before the matter is finally decided: see *Re* East Dulwich Bdg. Socy., 39 W. R. 32.

A justice of the peace, having given notice of objection under section 81 (d), cannot afterwards move for *certiorari*: Weston v. Sneyd, 1 H. & N. 708. A plaintiff is not entitled to remove his own suit: Prudhomme v. Lazure, 3 P. R. 355; Dennison v. Knox, 9 U. C. L. J. 241.

Certiorari is too late if delivered to the judge after verdict rendered, and the spirit of the English statute, 43 Eliz. c. 5, applies when plaintiff's witnesses were sworn and no jury called: Black v. Wesley, 8 U. C. L. J. 277.

Grounds for Certiorari.—A suit was removed by *certiorari* from the division court to one of the superior courts on the ground that a question of law as to the application of the Statute of Limitations would arise on the trial: Ridley v. Tullock, 3 U. C. L. J. 14. This case can only have application, we submit, when the Statute of Limitations cannot be fairly discussed or decided in the division court. Where a judge has declined to grant *certiorari* the court will not do so, merely because it appears that possibly a serious question of law may arise, nor merely because the decision in the particular case may be of great importance to the applicant as likely to affect other cases of a similar nature: Staples v. Accidental Death Ins. Co., 10 W. R. 59; see Batt v. Price, 1 Q. B. D. 264.

It has been held that *certiorari* will lie to remove an action when difficult questions of law are likely to arise: Cataraqui Cemetery Co. v. Burrowes, 3 U. C. L. J. 47; Hunt v. The G. N. Ry. Co., 2 L. M. & P. 268; Rees v. Williams, 7 Ex. 51; Longbottom v. Longbottom, 8 Ex. 203; and when the defendant resided in a part of the province far distant from the division in which the action was commenced, and also on account of difficult questions of law: Nugent v. Chambers, 3 U. C. L. J. 108. But it is only when the points of law likely to arise are of *general* importance that *certiorari* will be granted; it is not enough that they are important to one of the parties: see Solomon v. London C. & D. Ry. Co., 10 W. R. 59; Staples v. Accidental Death Ins. Co., 10 W. R. 59; Batt v. Price, 1 Q. B. D. 264; Munday v. Thames Ironworks Co., 19 Q. B. D. 59; Potter v. G. W. Colliery Co., 10 T. L. R. 380. The order for *certiorari* is in all cases discretionary and an appeal will only lie for a wrongful exercise of such discretion: see Banks v. Holingsworth, 1893 1 Q. B. 442. The terms on which the order is granted should not, however, be such as to practically deprive a litigant of his right to the order: Symons v. Dimsdale, 2 Ex. 533.

The expression of a wrong opinion by a judge is no cause for removal: Holmes v. Reeves, 5 P. R. 58.

After trial and judgment in a division court as to the right of a landlord to recover a month's rent under a lease, another action was brought for three months' subsequent rent, whereupon the defendant applied to a judge of the high court for *certiorari* which was refused on the ground that though the case might be of importance as affecting cases of a similar nature, that was not in itself sufficient, no difficult questions of law or fact appearing to be involved; on appeal the court refused to

interfere with the discretion of the judge as to the granting of the writ, and also on the ground that by the judgment of the division court in the first action, the matter in question was *res judicata*: Fraser v. Orbendorfer, 36 C. L. J. 101; see Humphries v. Humphries, 1010, 2 K. B. 531; Cooke v. Rickman, 1911, 2 K. B. 1125. Sec. 70.

Motion for Certiorari.—The application is made by originating notice: C. R. 622; and may be made to the Master of the Supreme Court of Ontario in Chambers: s. 70; C. R. 208 (14), or to a local judge of the Supreme Court, in cases within C. R. 210; the practice being laid down by C. R. 213, *et seq.*

All material facts should be brought before the court: Parker v. B. & E. Ry. Co., 6 Ex. 184.

Where the court considered that a defence was not *bona fide* the writ was quashed, although it was sworn that difficult matters of law would arise: Kenworthy v. Sidebottom (unreported), C. P. D. 16th May, 1876. And the same principle would apply to prevent the court from making an order.

The order for *certiorari* will not be granted when there is an admission or something tantamount to it, by the party suing it out, that he is making the application for the purpose of delay: Landens v. Shiels, 3 D. P. C. 90. The order for *certiorari* may be set aside on the application of the party issuing it when no step has been taken by the opposite party: Ruffman v. Thornwell, 2 W. W. & H. 51.

The affidavit should state not merely that difficult questions would arise, but also what those questions were and the grounds upon which they would arise: Golding v. Caudwell, 2 L. M. & P. 175.

A section in an act taking away *certiorari* does not apply to the case of a total absence of jurisdiction: *Ex parte Bradlaugh*, 3 Q. B. D. 509; R. v. Jukes, 8 T. R. 542; R. v. Dowling, 17 O. R. 698; Hespeler v. Shaw, 16 U. C. R. 104; *Re* Holland, 37 U. C. R. 214; R. v. Horning, 8 O. L. R. 215; Rex v. St. Pierre, 4 O. L. R. 76; Col. Bk. v. Wilian, L. R. 5 P. C. 417, unless there is another adequate and more convenient remedy: R. v. Cook, 14 Can. Cr. Cas. 495. In Gegg v. Adams, 9 C. L. T. 311; 10 C. L. T. 2, an order to transfer was refused, but it was imposed upon the plaintiff, as a term in dismissing the appeal, that he should submit to examination before trial in the division court.

Application for *certiorari* must be made by the party himself, either in person or by his solicitor, and cannot be made by another person in his name: R. v. Riall, 11 Ir. C. L. R. 280.

The writ of *certiorari* has been abolished and an order is now issued instead: C. R. 623.

For forms of affidavit, notice of motion and order, see forms 96, 97 and 98.

The affidavit should be entitled in the Supreme Court of Ontario: *Ex parte Nohro*, 1 B. & C. 267; Smyth v. Nicholls, 1 P. R. 355; R. v. Plympton, 37 W. R. 343.

The plaintiff is not entitled to remove his own plaint from a division court to a higher court: Prudhomme v. Lazure, 3 P. R. 355; after removal there is no way of compelling the defendant to assist the plaintiff to proceed in the higher court: Dennison v. Knox, 3 P. R. 150; 9

Sec. 71.

U. C. L. J. 241; Garton v. The G. W. Ry. Co., 1 E. & E. 258. After removal the plaintiff cannot proceed for a different cause of action than that sued in the court below: Mason v. Morgan, 3 P. R. 325; Hunter v. The G. T. Ry. Co., 6 P. R. 67; and a judge of the division court has no right to interfere with the case until it goes back to the court: Barnes v. Cox, 16 C. P. 236; Ewing v. Thompson, 8 U. C. L. J. 332.

If the plaintiff continues the proceedings, he does not commence *de novo* in the Supreme Court, but delivers a statement of claim reciting the proceedings in the inferior court, and the issue of the *certiorari*, see Ashley v. Ashley, 17 L. T. 265.

Return to Order.—For form of return by judge to *certiorari* see form 99.

The return should be under seal: R. v. Kenyon, 6 B. & C. 640. The original record must be returned: Askew v. Hayton, 1 Dowl. 510; Palmer v. Forsyth, 4 B. & C. 401.

Where a case is removed from a division court of an outer county into the Supreme Court, the papers should be filed in the central office at Toronto; but the venue need not be laid in the County of York: Chambers v. Chambers, 3 U. C. L. J. 205 *per* Draper, J. The clerk of the court is required to annex together all the proceedings and papers filed and transmit the same, together with the order of transference, or a copy thereof, to such officer of the Supreme Court as the order directs.

Costs.—In *Ex parte* G. W. Ry. Co., 2 H. & N. 557, the court refused to make it a condition that defendant, if successful, should have no more than inferior court costs.

The order for *certiorari* entitles defendant to full costs of the Supreme Court if he succeeds in the action without any certificate from the judge who tries the cause: Corbey v. Rohlin, 5 U. C. L. J. 225. A defendant, however, will not get the costs of removal unless the order provides for them: Kerr v. Cornell, 1 C. L. J. 326. The judge may make the order on such terms as to costs or otherwise as he may think fit: s. 70.

The judge of the division court has jurisdiction as to costs of the action in his court, though he have no jurisdiction on the subject matter of the action: C. R. 766.

Duty of court where defence or counter-claim involves matter beyond jurisdiction. Frivolous defence.

71.—(1) Where a defence or counterclaim involves matter beyond the jurisdiction of the court, the Judge may order that the whole case be transferred to the Supreme Court or to the County Court of the county within which the Division is situate.

(2) If it appears that a defence or counterclaim is frivolous or vexatious, the Judge, instead of proceeding under subsection 1, may order that the defence or counterclaim be struck out, but an order made under this subsection shall not be a bar to an action by a defendant for the recovery of the claim which formed the subject matter of the set-off or counterclaim.

(3) It shall not be necessary that any pleading be delivered into the court to which the action is transferred unless the court or Judge thereof so directs. 10 Edw. VII. c. 32, s. 71. Sec. 71. Pleadings.

A transfer will not necessarily be ordered although set-off, defence or counterclaim may involve matter beyond the jurisdiction of the court, if some relief may be granted and ample justice can be done: *Re* Powell v. Daneyger, 1 O. W. R. 63; McGregor v. Union Life, 7 O. W. R. 423.

Counterclaim: s. 71; Rule 21; Set-off: s. 113.—See s. 113 and notes. Counterclaim (Form No. 15, *post*) and set-off (Form 14) are each of them created by statute. At common law, if there were cross demands between the parties and an action was brought by one of them upon his claim, the defendant could not enforce his cross demand in any way except by bringing a separate cross action, except in the cases of a sale with a warranty or a contract for services where the defendant would set up by way of defence the diminution in value of the article sold or the services rendered by reason of the breach of the warranty or contract. Mondel v. Steel, 8 M. & W. 858, explained in the "Camosun" 1909 A. C. 597, at p. 610, *et seq.* But by the Imp. Statutes, 2 Geo. II. c. 22, s. 13; and 2 Geo. II. c. 24, s. 5, the right was for the first time given to the defendant to set off his claim against that of the plaintiff when there were mutual legal debts between them: Rees v. Watts, 11 Exch. 410. These (known as the statutes of set-off), are now embodied in The Judicature Act, R.S.O. 1914, c. 56, as follows:

126. Where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other. R.S.O. 1897, c. 324, s. 5.

127.—(1) Mutual debts may be set against each other, notwithstanding that such debts are deemed in law to be of a different nature, except where either of the debts shall accrue by reason of a penalty contained in any bond or specialty.

(2) Where either the debt for which the action is brought, or the debt intended to be set against the same, has accrued by reason of any such penalty, the debt intended to be set off shall be pleaded, and it shall be shown by the pleading how much is truly and justly due on either side; and if the plaintiff recovers in any such action, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff after one debt being set against the other. R.S.O. 1897, c. 324, s. 6.

128. If, upon a defence of set off, a larger sum is found to be due from the plaintiff to the defendant than is found to be due from the defendant to the plaintiff, the defendant shall be entitled to judgment for the balance remaining due to him. R.S.O. 1897, c. 324, s. 7.

Set-off Under C. S. U. C. c. 22, and Under The Judicature Act.—Under C. S. U. C. c. 22 (from which the foregoing sections of The Judicature Act have been taken) a defendant could have pleaded a set-off only in certain cases; thus only a debt of a liquidated amount could be set off; it could be set off only in an action in which the plaintiff's claim was also liquidated; both debts must be due from and to the same parties in the same right; both debts must be due at the date of

Sec. 71. tbe plaintiff's writ; neither must be in the nature of a penalty; moreover, botb debts bad to be *legal* debts as distinct from equitable claims: Odgers on Pleading, 7tb ed., p. 237; Bullen & Leake, 6tb ed., p. 772. The Ontario Judicature Act, passed in 1881, abrogating as it did tbe distinction between legal snd equitable rights, removed this last requirement, and tberesfter the defendant could set off not only a legal debt, but also any clsim which he could have set off in a Court of Chancery. Otherwise the rules of set-off were not altered by The Judicatura Act. Whatever was a good set-off either nt law or in equity before the passing of The Judicstura Act, is a good set-off still; and notbing else is admissible as a set-off although it may be quite good as a counterclsim. To be a reai set-off the claim must still be for a liquidated smount and create a mutual debt between the same parties in the same rigbt; also equity would not allow a set-off between a debt dua to or from tbe estate of a deceased person and a debt due from or to the executor or administrstor personaily; neither would it permit debts which only became payable since the death of the deceased to be set off sgainst debts due to him in bis iifetime. These rules still apply, aud are iilustrated by the following examples.

A claim against the estste of a dead man cannot be set off against a debt due to bim in his lifetime: Rees v. Watts, 11 Ex. 410; Naweli v. Nationai, 1 C. P. D. 496; *Ex parte* Morier, 12 Ch. D. 491; Hallett v. Hallett, 13 Ch. D. 232; conversely a debt due from a testator dnring his iifetime cannot be set off sgainst a sum wbich never waa payable to the testator himself: *In re* Gregson, 36 Ch. D. 223; an executor sued for his personai debt cannot set off a debt due from tba plaintiff to the estate of whicb be is executor: Nelson v. Roberts, 69 L. T. 352; if sn executor sue for a debt due to the estate, the defendant cnnnot set off a debt due to him from the executor personally: *In re* Dickinson, 1888 W. N. 94. Both debts must still be due from and to the parties in tbe same right: see Stumore v. Campbeli & Co., 1892 1 Q. B. 314; David v. Rees, 1904 2 K. B. 435; Lister v. Hooson, 1908 1 K. B. 174; Lord v. G. E. Rsil. Co., 1908 2 K. B. 54; hut a debt dne from the plaintiff to a third person duly assigned before action by tbat third person to tbe defendant may now be set off: Bennett v. Whita, 1910 2 K. B. 643; sn agent wbo bss received money for a disclosed principal cannot deduct from the amount so received a debt due to him personally from tha sama dehtor: Richardson v. Stormont, 1900 1 Q. B. 701; but a debt from an agent can be set off agsinst bis principal if the principai remains nndisclosed and sllows bis agent to sct as principal in tba transaction: George v. Giagett, 7 T. R. 359; Montagu v. Forwood, 1893 2 Q. B. 350; a debt due from a *cestui que trust* can be set off against a claim made by a trustee on behaif of that *cestui que trust*: Bankes v. Jarvis, 1903 1 K. B. 549. A debt accruing due after tha commencement of an action is not within the statutes of set-off and cannot be pleaded as snch: Richards v. James, 2 Ex. 471. A plaintiff can plead in reply to a set-off tbat it is barred hy tbe Statute of Frands or by the Statnte of Limitstions or that it is for any other reason not sn actionahle debt st the date of the writ: Walker v. Clements, 15 Q. B. 1046; Smith v. Betty, 1903, 2 K. B. 317.

An ssignee of a *chose in action* takes subject to all rigbts of set-off availahla against tbe assignor: Roxhurgbe v. Cox, 17 Ch. D. 520, 526.

Counterclaim Under The Judicature Aat.—The Judicature Act not only shrogated the distinction between legal and equitabie rigbts and tbns enlarged tbe application of set-off, aliowing tba defendant to plead as set-off equitahle as well as legal claims, hut it also gave to the

defendant a very wide power of counterclaiming: R.S.O. 1914, c. 56, s. 16 (d); this power is embodied in Con. Rule 115, which is as follows:— Sec. 71.

115. A defendant may set up by way of counterclaim, any right or claim, whether the same sounds in damages or not.

Thus cross-relief became obtainable, not only by way of set-off under the statutes of Geo. II., above mentioned, but also by way of counterclaim. Every cross-claim of whatever kind may now be pleaded as a counterclaim; so long as it is within the jurisdiction of the court it does not matter what the amount of it may be; it may be for either liquidated or unliquidated damages; it need not relate to or arise out of the same transaction as the plaintiff's claim; if the defendant has any valid cause of action, legal or equitable (within the jurisdiction of the Court), there is no necessity for him now to bring a cross-action, unless his counterclaim be of such a nature that it cannot be conveniently tried by the same tribunal or at the same time as the plaintiff's claim: Odgers, 4th ed. 598; Bullen & Leake, Precedents, 6th ed., p. 535. An equitable counterclaim (if within the jurisdiction), may now be raised in an action of law, and a legal counterclaim in a Chancery suit: Fleming v. Loe, 1901, 2 Ch. 594; a claim founded on tort may be opposed to one founded on contract, or *vice versa*: Stooke v. Taylor, 5 Q. B. D. 576; to an action on a solicitor's bill of costs, the defendant may counterclaim for negligence: Lumley v. Brooks, 41 Ch. D. 323; even a cause of action which has accrued to the defendant since the plaintiff issued his writ can now be pleaded as a counterclaim: Beddall v. Maitland, 17 Ch. D. 174; it is only where the defendant seeks to bring in some person who is not already a party to the action, and make him defendant to the counterclaim, that the relief for which the defendant asks must relate to or be connected with the original subject of the action: Barber v. Blaiberg, 19 Ch. D. 473; S. F. Edge, Ltd. v. Weigel, 1907 97 L. T. 447; Grills v. Farrand, 21 O. L. R. 457; a defendant may by his counterclaim ask for relief against forfeiture: Adams v. Adams, 1892 1 Ch. 369; Warden v. Sewell, 1893 2 Q. B. 254.

A cross-action may, however, still be brought: Adamson v. Tuff, 44 L. T. 420; Neale v. Clarke, 4 Exch. Div. 295; Caird v. Moss, 33 Ch. D. 22, 35; subject to the authority of the court to stay it and direct it to be brought in by way of counterclaim in the other action, if adequate relief can be so obtained: Adamson v. Tuff, *supra*; Irwin v. Speery, 11 P. R. 229; Conmee v. C. P. R., 11 P. R. 149; Tumm v. Hedensford Gas Co., 3 Exch. Div. 151.

Distinction Between Counterclaim and Set-off.—The distinction is thus defined: "A set-off allegee a liquidated debt due from the plaintiff to the defendant, which balances the liquidated claim of the plaintiff and shows on the whole account between the plaintiff and defendant nothing is due to the plaintiff. A set-off to an amount equal to the plaintiff's claim is, therefore, a defence to the action. A counterclaim, which is a creation of the Judicature Act, is, on the other hand, in the nature of a cross-action by the defendant, which may be made although in respect of, or against a claim for unliquidated damages:" Stooke v. Taylor, 5 Q. B. D. 576, *et seq.*, *per* Cockburn, C.J.; Bainea v. Bromley, 6 Q. B. D. 694, *per* Brett, L.J.; Gates v. Seagram, 19 O. L. R. 216, in which the history of the law of set-off and counterclaim, and a review of the authorities, is given. This distinction is sometimes material especially with regard to the question of costs, which ought to be disposed of, in the case of a counterclaim, as if the claims of the parties were the subjects of separate actions: Gates

Sec. 71. v. Seagram, 17 O. L. R. 493; see also notes to section 170. Counterclaim and set-off are distinct proceedings; and a counterclaim is not the same thing as a separate action; still everything that is done in respect to proceedings upon a counterclaim must be treated as if it were so, and in settling the rights of the parties the claim and the counterclaim are for all purposes, except execution, two independent actions: Stumere v. Campbell, 1892 1 Q. B. 316; McGowan v. Middleton, 11 Q. B. D. 469; Sykes v. Sacredoti, 15 Q. B. D. 425; Amon v. Bobbett, 22 Q. B. D. 548; Neck v. Taylor, 1893 1 Q. B. 560.

If the matter claimed is properly a subject of set-off it should be pleaded as a set-off, and not as a counterclaim: Gerardot v. Welton, 19 P. R. 162, 201; Chamberlain v. Chamberlain, 11 P. R. 501; but if the defendant's claim is not within the statutes of set-off above quoted, it must be made by way of counterclaim. A set-off is a statutory *defence* to the whole or to a portion of the plaintiff's claim; a counterclaim consists of a cross-claim asserting a separate and independent demand of any nature whatever: Stooke v. Taylor, 5 Q. B. D. 577; Thomson v. S. E. Ry. Co., 9 Q. B. D. 320, 330; whether it is connected with the plaintiff's claim or not, and whether it sounds in damages or not: Con. Rule 115.

The Division Courts Act does not contain any provision similar to Con. Rule 115, expressly giving the right to counterclaim in division court actions; but that rule is applicable, and the mention of "counterclaim" in section 71 of the Division Courts Act implies the right to it in the division court: Awberry v. McLean, 19 C. L. J. 335.

The distinction between set-off and counterclaim is still of importance for some purposes. Thus, s. 126 of The Judicature Act, R.S.O. 1914, c. 56, allows a set-off against the estate of an insolvent debtor, but says nothing about a counterclaim. Also there is a distinction in the matter of costs; a set-off being a *defence* to the plaintiff's action, if the set-off be equal to or greater than the amount of the plaintiff's claim, the plaintiff's action fails, even though he prove his claim, and he must (subject to the direction of the judge) pay the costs; but a counterclaim is a cross-action and if the plaintiff succeeds in his claim and the defendant on his counterclaim, each is entitled to his costs, to be set off one against the other: Bullen & Leake, 6th ed., p. 537. Then, too, the distinction is material in considering the application of section 113 (3) of the present D. C. Act; that section provides that a division court may deal with a *set-off* for an amount beyond the jurisdiction to the extent necessary to answer the plaintiff's claim, but says nothing about a *counterclaim;* and there is now no corresponding provision in the Act enabling a division court to deal in a similar manner with a counterclaim beyond the jurisdiction. Section 76 of R.S.O. 1897, c. 60, did contain a similar provision with reference to a counterclaim, but that provision has been omitted from the present Act. Under section 71 (1) the judge may order the whole case to be transferred to the Supreme Court where the counterclaim involves matter beyond the jurisdiction, and that appears to be the only way in which he can now deal with such a counterclaim, except in the case of a frivolous or vexatious counterclaim, which he may order to be struck out as provided by section 71 (2).

Beyond the Jurisdiction.—For the purpose of ascertaining the question whether the counterclaim involves matter beyond the jurisdiction of the court, it will, doubtless, be dealt with as if it were a separate action within the meaning of sections 61 and 62.

In applying section 76 of R.S.O. 1897, c. 60, it was held that the inferior court might deal with a counterclaim which would, if it were an original action, be beyond its jurisdiction, to the extent necessary to answer the plaintiff's claim, but no further: Davis v. Flagstaff Mining Co., 3 C. P. D., at p. 237; Wallace v. People's Life Ins. Co., 30 O. R. 438; Wellington v. Fraser, 19 O. L. R. 88. The same principle would still apply in the case of a set-off. Sec. 71.

Counterclaim Frivolous or Vexatious.—The court will act under this provision only where the counterclaim is clearly within this category: Attorney-General v. London & N. W. Ry., 1892, 3 Ch. 377; Reichel v. Magrath, 14 App. Cas. 667; and will do so with caution: see cases cited in Holmsted's Judicature Act, 4th ed., 541-546. The principles upon which the court will act are fully elucidated in the case of Thompson v. Big Cities Ry. & Ag. Co., 1 O. W. N. 933.

But independently of this section (71), the court has authority to control its own procedure so as to prevent an abuse of it or permit it to work an injustice: Lawrey v. Tuckett, 2 O. L. R. 162; Brophy v. Victoria L. I. Co., 2 O. L. R. 651; Haggart v. Pellicier, 1892, A. C. 61.

The court will, in a proper case, order a counterclaiming defendant to give security for costs: Sykes v. Secerdotl, 15 Q. B. D. 423; Lake v. Haseltine, 55 L. J. Q. B. 205; but not where the counterclaim is in substance a defence to the action: Neck v. Taylor, 1893 1 Q. B. 560; see New Fenix Compegnie v. General Accident, 1911 2 K. B. 619.

Limits of Counterclaim.—The defendant cannot counterclaim against the plaintiff and a third person unless the counterclaim relates to or is connected with the subject of the plaintiff's action: Grills v. Farrand, 21 O. L. R. 457; Edge v. Weigel, 97 L. T. 447; Times Storage Co. v. Lowther, 1911, [illegible]. B. 100; see section 97 *post*, for provision for adding a plaintiff in [illegible]e division court; the plaintiff must have some interest in the counterclaim against a third person: Romann v. Brodrecht, 9 P. R. 2; "a pleading which asks no cross-relief against a plaintiff, either alone or with some other person, is not a counterclaim": *per* Jessel, M.R., in Furness v. Booth, 4 Ch. D., p. 587; a defendant cannot counterclaim for himself and a third person: Pender v. Taddei, 1898 1 Q. B. 798; but it may be a sufficient reason for joining a person as defendant, that, if joined, he would have a counterclaim either jointly with the original defendant against the plaintiff, or arising out of the transactions the subject of the action: Montgomery v. Foy, 1895, 2 Q. B. 321; see Norris v. Beezley, 2 C. P. D. 80; if a man die insolvent, the creditors only get a dividend on their claims, and hence, if a defendant has only a counterclaim for the debt due to him from the estate, he must pay up his debt to the estate in full and prove for the money due to him in the administration proceedings, where he will only get a dividend on his claim: Odgers, p. 240; he may do otherwise with a real set-off; The Judicature Act, s. 126; if a plaintiff sues in his own right, the defendant cannot countercloim against him as trustee or executor or administrator; if he sues as trustee or executor or administrator, the defendant cannot counterclaim against him in his own right: Macdonald v. Carington, 4 C. P. D. 28; McEwan v. Crombie, 25 Ch. D., p. 177; Stumore v. Campbell, 1892 1 Q. B. 314; if a company is being wound up, a debtor to the company may counterclaim for unliquidated damages: Mersey Steel and Iron Co. v. Naylor, 9 Q. B. D. 648, 663; 9 A. C. 434; but no set-off, whether liquidated or not, is allowed against a claim for calls: Black & Co.'s Case, L. R. 8 Ch. App. 254; *In re* Hiram Maxim Lamp Co., 1903, 1 Ch. 70; *In re* Law Car, etc., Corporation, 1912,

Sec. 71. 1 Ch. 405; a debtor to the company cannot counterclaim for damages for which the receiver or liquidator alone is liable: Sovereign Bank v. Parsons, 18 O. L. R. 665; 24 O. L. R. 387; but in the absence of a liquidation the persons of a contracting company may remain legally intact though controlled by receivers so as to enable a defendant to counterclaim for breach of a contract with the company continued by the receivers: s. c., 1913 A. C. 160.

A counterclaim cannot be set up when an action upon its subject matter could not, for any reason, be brought: Birmingham Estates v. Smith, 13 Ch. D. 506; or if it is not *bona fide*: Lee v. Ashwin, 1 Times 291. Any number of counterclaims may be made in one action: Naylor v. Farrer, 26 W. R. 809; provided they are within the jurisdiction of the court; but if the trial of the case brought by the plaintiff is likely to be thereby embarrassed or delayed, the counterclaims may be disallowed: Naylor v. Farrer, *supra*; so if the counterclaim is of such an incongruous nature as to be incapable of being conveniently tried with the original claim: Bartholomew v. Rawlings, W. N. (1876), 56; or if it would involve a lengthy investigation into a long account, and thus unduly delay the trial, especially a jury trial: Canadian Securities Co. v. Prentice, 9 P. R. 324. See also Holmested's Judicature Act, 4th ed., 526-531, for examples of counterclaims allowed and disallowed.

If the debt arose after the issue of the summons, it must be set up by way of counterclaim: Chamberlain v. Chamberlain, 11 P. R. 501; see Beddall v. Maitland, 17 Ch. D. 174.

A defendant can only set up by way of counterclaim or set-off a demand for which he can bring an action. Therefore a cause of action which arose out of the jurisdiction cannot be set up by way of counterclaim or set-off unless the circumstances be such as to permit of an action being brought upon it: Canadian Bank of Commerce v. Northwood, 8 C. L. T. 356; 5 Man. L. R. 342.

It is not essential that the amount claimed by the counterclaim should equal that claimed by the plaintiff: Mostyn v. West Mostyn Coal and Iron Co., 1 C. P. D. 145.

A claim which the Court of Chancery would, before the Judicature Act, have restrained a defendant from pleading as a set-off, *e.g.*, claim against an intestate as maker of a promissory note not due until after his death, cannot be set up as a counterclaim: Newell v. Nat. Pro. Bank of England, 1 C. P. D. 496.

A counterclaim need not arise out of the same subject as the cause of action. There can be a counterclaim for an entirely different subject as between the parties to the action themselves: Brown v. Nelson, 11 P. R. 121; McLean v. Hamilton St. Ry. Co., 11 P. R. 103.

If the action of the plaintiff is stayed, discontinued or dismissed or should he not appear on the trial, a counterclaim or set-off may, nevertheless, be proceeded with: Rule 29; and see McGowan v. Middleton, 11 Q. B. D. 464, overruling Vavasseur v. Krupp, 15 Ch. D. 474; where the plaintiff's action was held to be frivolous, the court still granted the defendant the relief prayed for by his counterclaim: Adams v. Adams, 45 Ch. D. 426; The Salybia, 1910 P. 25.

The courts will give effect to equitable rights, though not set up by way of counterclaim: Mostyn v. West Mostyn Coal and Iron Co., 1 C. P. D. 145; Eyre v. Hughes, 2 Ch. D. 148; Breslauer v. Barwick, 36 L. T. 52.

Counterclaims have been allowed against assignees of choses in action in the following cases. Claim of breach of same contract: Young

v. Kitchin, 3 Ex. D. 127; Exchange Bank v. Stinson, 32 C. P. 158; Government of Newfoundland v. Newfoundland Ry. Co., 13 App. Cas. 199, see page 213, where it is said: "Unliquidated damages may be set off as between the original parties and also against an assignee, if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment." See also Irving v. Morrison, 27 C. P. 242; Henderson v. Brown, 18 Gr. 86; Williams v. Silbey, 4 Giff. 142; Gould v. Close, 21 Gr. 275; Cavendish v. Greaves, 24 Beav. 163; *Re* West of England and S. W. Dist Bank, *Ex parte* Branwhite, 40 L. T. 652; *Re* National Alliance Co., Ashworth's Case, 7 L. T. 64; Greene v. Harris, 16 S. C. R. 714; Parsons v. Sovereign Bank, 1913 A. C. 160. Sec. 71.

But where a defendant counterclaims against an assignee of a chose in action for a debt due from the assignor to the defendant, such counterclaim is "a shield and not a sword," and, therefore, if the amount of the counterclaim exceeds the amount of the debt assigned, the defendant can recover nothing from the assignee but must sue the assignor for the balance: Young v. Kitchin, 3 Ex. D. 127; Government of Newfoundland v. Newfoundland Ry. Co., 13 A. C. 199; Baker v. Adam, 102 L. T. 248.

In an action for rent, a claim for damages for breach of an implied covenant in the lease, may be set up by way of counterclaim: Mostyn v. West Mostyn Coal & Iron Co., 1 C. P. D. 145.

A person named in a defence as party to a counterclaim thereby made, cannot counterclaim against the defendant: Street v. Glover, 2 Q. B. D. 498; Alcoy v. Greenhill, 1896 1 Ch. 19.

It is optional with a defendant to set up a counterclaim, and his not doing so does not bar his right to take any other proceedings: Hindlay v. Haslam, 3 Q. B. D. 481.

Where a defendant delivered a counterclaim against his co-defendant but sought no relief against the plaintiff as to the matters set up in such counterclaim and the counterclaim was struck out at the trial, the co-defendant was held to be entitled to the same costs as against the counterclaiming defendant as he would have been entitled to upon a successful motion to strike out the counterclaim and that his having pleaded to it did not militate against his rights: Cope v. Crichton, 18 P. R. 462.

In an action on a mortgage given for the balance of purchase money of land, the defendant may counterclaim, setting up fraud in the transaction, and seeking a return of the money paid, with interest: Lee v. McMahon, 2 O. R. 654; see also Bartholemew v. Rawlings, W. N. (1876), 56.

In an action for wages, the master may counterclaim for damages sustained by reason of the servant's improperly leaving his employment: Awberry v. McLean, 19 C. L. J. 335.

A counterclaim for short deliveries of cargoes of goods under former contracts was allowed in an action for the price of goods: Cappeleue v. Brown, W. N. (1875), 231. Where plaintiff sues only one or more of several persons jointly liable under section 93, the defendant may avail himself of any set-off or counterclaim to which he would be entitled if all parties liable were sued: Stackwood v. Dunn, 3 Q. B. 822; see Toplis v. Grane, 5 Bing. N. C. 636.

Notice and Particulars of Counterclaim.—A counterclaim being "a defence under a statute" must in all cases be served upon the plaintiff not less than six days before the day of trial if he resides within

Sec. 71. the division, or a copy left for him with the clerk if he resides without the division: section 113 (1).

Counterclaim may be Disposed of in Separate Action.—Where it is contended by the plaintiff or any other party to the action that the counterclaim ought not to be disposed of by way of counterclaim, but in an independent action, the judge may, on application to him, make such order as shall be just.

Whether the counterclaim is to be allowed or disallowed is therefore a matter of discretion to be exercised upon consideration of all the circumstances, including rights involved in the counterclaim and the question of delay and convenience of trial: Canadian Securities Co. v. Prentice, 9 P. R. 324; see Holmested's Judicature Act, 4th ed., p. 528.

And where, in the case of counterclaim or of any incidental claim arising at the trial, the judge thinks it can be better disposed of by an independent action, he may order such claim to be excluded whether any application for that purpose be made to him or not; but the discretion given should only be exercised in the plainest cases.

Where the claim and counterclaim were of such a nature as might well and conveniently be tried together, the fact that the trial would involve considerable expense and inconvenience to witnesses was not sufficient ground for ordering the claim and counterclaim to be tried separately: Benjamin v. Turner, 18 C. L. T. 395. But the venue was changed in order to overcome the objection as to cost of witnesses: *Ib.*

Judgment on Counterclaim.—Although the effect of establishing a counterclaim is the same as the obtaining of cross-judgment, it is not necessary that a separate judgment be entered for the plaintiff and defendant respectively on the claim and counterclaim, but the balance may be struck, and, if in favor of the defendant, judgment may be for such balance, or for so much for the plaintiff on the claim and for so much for the defendant on the counterclaim. This does not affect the question of costs, which would follow the event under section 170 (2), in the absence of any order, and the plaintiff would be entitled to the costs of the claim and the defendant to the costs of the counterclaim: see Canadian Pacific Ry. Co. v. Grant, 11 P. R. 208; Baines v. Bromley, 6 Q. B. D. 695; Hallinan v. Price, 41 L. T. 627; Hawke v. Brear, 14 Q. B. D. 841; Ward v. Morse, 23 Ch. D. 377; Westacott v. Bevan, 1891 1 Q. B. 774; Atlas Co. v. Miller, 1898 2 Q. B. 500.

Set-off.—See section 113.

In the case of a set-off, when the amount due the defendant exceeds the amount claimed by the plaintiff, the judge may order that an amount of the set-off equal to the plaintiff's claim be satisfied by the claim, but the adjudication is no bar to the recovery in a subsequent action by the defendant of the residue of the set-off: section 113 (3).

When judgment is given for defendant, he will be entitled to issue execution and take proceedings upon it as on an ordinary judgment for the recovery of the balance.

Payment into Court When Lien Claimed.—Where an action is brought (or a defendant in his statement of defence or counterclaim seeks) to recover specific property, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to hold the property by virtue of a lien, or otherwise, as security for money, the judge, upon being satisfied, by affidavit, or

otherwise, of the existence of such lien or security, may order that the party seeking to recover the property be at liberty to pay into court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs, as the judge may direct, and that, upon such payment into court being made, the property be given up to the party seeking to recover it. The whole sum for which the lien is claimed must be brought into court, though it exceeds the value of the specific property: Gebruder Nef v. Ploton, 25 Q. B. D. 13. Sec. 73.

Case to be Transferred.—Where an order is made under this section, the clerk of the court must annex together all the proceedings and papers filed with him and transmit the same together with the order of transference or a copy thereof to such officer of the Supreme Court as the order directs.

The record in such proceedings would therefore be the summons, the particulars of claim, the set-off and counterclaim and all other papers on file as well as the order of transfer.

After the transfer the proceedings are regulated by the practice in the Supreme Court: Davis v. Williams, 12 Ch. D. 530. The power given by the section is not to transfer a part but the whole proceeding: Davis v. Fiagstaff Mining Co., 3 C. P. D. 228, at p. 232. The application to transfer cannot be made *ex parte*: Anon., W. N. (1876), 12.

Appeal.—In cases transferred under sections 70 and 71 there is no appeal (as in cases under section 69), from an order of transfer.

There is an appeal from the decision of the trial judge in the Superior Court, to the Divisional Court: R.S.O. 1914, c. 56, s. 26; Con. Rule 491 *et seq.*

PROCESS AND PROCEDURE.

Division in which Action to be Entered.

In what court actions may be entered and tried.

72.—(1) An action may be entered and tried

(*a*) In the court for the division in which the cause of action arose or in which the defendant, or any one of several defendants, resides or carries on business at the time the action is brought; or

(*b*) In the court the place of sitting whereof is the nearest to the residence of the defendant.

Place of trial in action for wages of woodmen. Interpretation of "woodman."

Provided, that any action for wages of a woodman may be entered and tried in the court holden for the division in which the contract of hiring was made, notwithstanding any stipulation in the contract of employment or otherwise. In this section "woodman" shall mean a person performing labor or services in connection with any logs or timber, and shall include cooks, blacksmiths, artisans and all others usually employed in connection with such labor or services.

NOTE: As to this, see R.S.O. 1914, c. 141.

Sec. 72.

Service of summons in such case.

Execution.

(2) In the cases provided for by clause (*b*) of subsection 1 and by subsection 2 of section 80, the summons may be served by a bailiff of the court out of which it issues, and upon judgment being recovered execution against the goods and chattels of the debtor, and all other process and proceedings to enforce payment of the judgment, may be issued to the bailiff of such court, and be executed and enforced by him in the county in which the debtor resides, as well as in the county in which the judgment was recovered. 10 Edw. VII. c. 32, s. 72.

May be Entered.—See section 83 and following sections.

At the Time the Action is Brought.—The issue of the summons is the commencement of the action: Rule 3.

Territorial Jurisdiction.—Any action in respect of which the division court has jurisdiction may be entered and tried (1) "in the court holden for the division in which the cause of action arose," or (2) "in which the defendant or any one of several defendants resides or carries on business," or (3) "in the court, the place of sitting whereof is nearest the defendant's residence."

The right given by section 77 to enter the action in the division in which the debt is by the contract made payable only applies to claims for more than $100, and in cases under $100 there is no jurisdiction in any division court except those enumerated in section 72: see *Re* Black v. Johnston, 5 O. W. N. 968.

Division in which Cause of Action Arose.—It will be observed that the language of this clause is, "in which the cause of action arose," and not as in the English County Courts Act of 1888 (s. 74), "in which the cause of action or claim *wholly or in part* arose." The consequence is that the cause of action must arise wholly within a division before an action can be brought therein under this clause. It may be noted that prior to 1867 the jurisdiction of English County Courts was determined by the Act of 1846, (9 & 10 Vict. c. 95, s. 60) which was similar to the above section of the D. C. Act in that it required the cause of action to arise wholly within the district. Consequently the decisions under s. 60 of the English Act of 1846 are in point for the purpose of ascertaining whether the cause of action arose within the jurisdiction. The same is true of decisions as to jurisdiction of the Mayor's Court under the Mayor's Court of London Procedure Act (20 & 21 Vict. c. 157, s. 12) which has no jurisdiction where any material part of the cause of action arises out of its jurisdiction: see Bowler v. Barberton, 1897, 1 Q. B. 164.

What is a Cause of Action.—A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court: *Re* International Harvester Co. v. Kerton, 7 O. W. R. 453. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved: *per* Lord Esher, M.R., Read v. Brown, 22 Q. B. D. 131.

"Everything which is necessary to make the action maintainable is part of the cause of action": *per* Maule, J., Borthwick v. Walton, 15 C. B. 501. Attention, therefore, has to be paid to the *onus* of proof. If

upon the failure of the plaintiff to prove any fact, the defendant would be immediately entitled to judgment, that fact is part of the cause of action: *per* Fry, L.J., 22 Q. B. D. 132. In an action upon a contract it may be necessary to prove the contract, the performance thereof by the plaintiff and the breach. If all of these facts did not occur in the same division the cause of action did not arise therein and the court for that division would have no jurisdiction: Watt v. Van Every, 23 U. C. R. 196; Noxon v. Holmes, 24 C. P. 541; Kemp v. Owen, 14 C. P. 432; Carsley v. Fiskin, 4 P. R. 255. See also Sichel v. Borch, 2 H. & C. 954; Allhusen v. Malysrejo, 3 Q. B. 340; Jackson v. Spittall, L. R. 5 C. P. 542; Durham v. Spence, L. R. 6 Ex. 46; Cherry v. Thompson, L. R. 7 Q. B. 573; Vaughan v. Neidon, L. R. 10 C. P. 47. A contract arrived at by proposal and acceptance is made where it is accepted: Newcomb v. De Roos, 2 E. & E. 271; O'Donohoe v. Wiley, 43 U. C. R. 350; McNaughton v. Hay, 12 O. W. R. 858 and 1033; but see Green v. Beach, L. R. 8 Ex. 208. If the parties use the post or telegraph office as a means of communication, the sending by the proposer of his proposal from a place outside the division is no part of the cause of action. "It is as if he were speaking to the person to whom such [letter or] telegram is directed at the place to which he directs it to be sent, and where he intends it to be delivered. The authority to transmit the message when established is merely evidence which goes to fix the sender with the responsibility of sending it, but it is no part of the cause of action": *per* Hawkins, J., Cowan v. O'Connor, 20 Q. B. D. 640, followed in Noble v. Cline, 18 O. R. 33; see also Grundy v. Townsend, W. N. (1888), 67; Rennie v. Ratcliffe, 35 L. T. 833; R. v. Rogers, 3 Q. B. D. 28; Bennett v. Cosgriff, 38 L. T. 177; Household Fire Co. v. Grant, 4 Ex. D. 577; but see *contra*, Hagle v. Dalrymple, 8 P. R. 183; Taylor v. Jones, 1 C. P. D. 87; R. v. Holmes, 12 Q. B. D. 23; Evans v. Nicholson, 32 L. T. 778; Taylor v. Nicholls, 1 C. P. D. 242; Gold v. Turner, L. R. 10 C. P. 149. Sec. 72.

"If I, residing in England, sent down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them:" *per* Lord Lyndhurst, Pattison v. Mills, 1 Dow & Clark, 342, at p. 363; see Jackson v. Grimley, 16 C. B. N. S. 380. "Suppose the two parties stood on different sides of the boundary line of the district, and that the order was then verbally given and accepted, the contract would be made in the district in which it was accepted": *per* Hill, J., Newcomb v. De Roos, 2 E. & E. 275. The material fact appears not to be where was the letter written or the agent appointed, but was the proposal written by, or was the party acting as agent actually the agent of, the party with whom the contract completed within the division was made: see also Green v. Beach, L. R. 8 Ex. 208.

The following are illustrations of the application of the rule. In suits for goods sold and delivered the contract must be made, the goods delivered, and the breach, viz., the non-payment, take place, within the same division: Borthwick v. Walton, 15 C. B. 501; Barnes v. Marshall, 18 Q. B. 785; Jackson v. Beaumont, 11 Ex. 300; *Re* Walsh, 1 E. & B. 383; Kemp v. Owen, 14 C. P. 432; Carsley v. Fisken, 4 P. R. 255; Watt v. Van Every, 23 U. C. R. 196; *Re* Elliott v. Norris, 17 O. R. 78; Gold v. Turner, 10 C. P. 149; Northey Stone Co. v. Gidney 1894 1 Q. B. 99.

In an action for a reward the offender was apprehended in one division and convicted in another. The cause of action did not arise in either district: Hernaman v. Smith, 10 Ex. 659. In actions on bills, notes or cheques against the drawer, acceptor or maker, the drawing, accepting or making and the dishonor must occur in the same division: Noxon v. Holmes, 24 C. P. 541; Trevor v. Wilkinson, 31 L. T. 731;

Sec. 72. Wilde v. Sherridan, 16 Jur. 456; 21 L. J. Q. B. 260; King v. Farrell, 8 P. R. 119; *Re* Olmstead v. Errington, 11 P. R. 367; Cookn v. Gill, L. R. 8 C. P. 107. Bnt when it is unnecessary to prove presentment and dishonor, as where a drawer hns no effects in the hnnds of the drawee, the nction is maintainnhle in the division where the drawing took pince: Wirth v. Austin, L. R. 10 C. P. 689.

In nn action against an endorser the action cannot be hrought in the division in which he writes his name, though thn dishonor takes place in thnt division, if the delivery tnkes piace in nnother division, as the indoreement is not complete nntii delivery: Buckley v. Hann, 5 Ex. 43; see Mnreton v. Allen, 8 M. & W. 494; Henth v. Long, 1 L. M. & P. 333.

If a plaintiff sues upon n contract which is in writing the signing of the contract is a mnterial part: Normnn v. Marchant, 7 Ex. 723.

Where an agreement between the pnrtiea was signed hy defendants in Toronto nnd hy pinintiff in Peterborongh, the cause of nction did not wholiy arise in Peterborough: *Re* Dunn v. Gouriay, 17 C. L. T. 415.

The order for goods is n materiai pnrt of a cause of nction for their pricc: Borthwick v. Wniton, 15 C. B. 501; Jackson v. Beaumont, 11 Ex. 300; and it mnkea no difference whether the order is in writing or not: Borthwick v. Wniton, 15 C. B. 501. And where an order was given in Ontnrio to the traveiier of a whoiesaie merchnnt in Montreai, "Ship *via* G. T. R. 1st Sept.," the hreach was the non-shipment nnd not n snbsequent refusai hy correspondence; therefore, the whoie cnnse of action did not arise where the order wns given: *Re* Diamond v. Wnidron, 28 O. R. 478. Nor wiii it be impiied in a contract for the saie of goods that the vendor is to send or carry the goods to the vendee; therefore, when a defendant iiving and doing husinesa in Quebec, entere into a contract to seii and ship goods to the piaintiff doing husiness in Ontario, it is a contract to be performed in Quebec: Empire Oil Co. v. Valierand, 17 P. R. 27. But where nn order was given hy defendants in Montreai to pisintiff's traveiier, which was to be nccepted hy piaintiff hy ietter from Toronto, it was heid thnt acceptnnce hy post was contempinted hy the parties, nnd the contract was made in Toronto, where the piaintiff's letter of acceptance was mniied: Binckley v. Eiite Costume Co., 9 O. L. R. 382; Nixon v. Jamieson, 18 O. L. R. 625.

If deiivery is through a carrier who is the agent of the vendor, nnd is paid hy him, the cause of action in part arises where the carrier deiivera the goods to the consignee: Arndt v. Porter, 30 L. J. Ex. 19.

Where an empioyer posts out of the jurisdiction a letter which amounts to n wrongfui dismissal, the mere fact thnt the servant received such letter *within* the jurisdiction does not give him a cause of action nrising within the jurisdiction: Holland v. Bennett, 1902 1 K. B. 867.

In nn nction for money hnd and reeeived the receipt must tnke piace within the division: *Re* Gariand v. Omnium Securities Co., 10 P. R. 135; Rennie v. Ratcliff, 35 L. T. 833.

In nn nction on a warranty of a horse, the contract of saie mnat be mnde and the wnrranty given within the division: Aris v. Orchnrd, 6 H. & N. 160: see Cooper v. Caswell, 16 Sol. J. 636. Where a solicitor sned n mortgagor for costs of preparing n mortgage for which he received no instructions from the mortgagor, it was heid thnt the consent of the mortgngor to become such wns a mnterial pnrt of the cnuse of nction: Jackson v. Grimley, 10 C. B. N. S. 380. Where n deht has been nssigned, the assignment is a materiai fnct for the pinintiff to prove, and it must, therefore, have been mnde within the division: Read v. Brown, 22 Q. B. D. 128. Where a cnuse of nction is compiete before the denth of the

dehtor, the probate of his will is no part of the cause of action: McCai- Sec. 72.
lum v. Gracey, 10 P. R. 514; hut where an action was hrought for a legacy against an administrator with the will annexed, the cause of action was held not to be complete withont proof of tha letters of administration: *Re* Fuller v. McKay, 2 E. & B. 573. Where thers is a settlement of nccounts within the jurisdiction amounting to an account stated, that is a cause of action within the jurisdiction: see Brenan v. Crawley, 16 W. R. 754. So an admission made within the jurisdiction, if anfficient to amount to an account atated, will give jurisdiction: Grundy v. Townsend, W. N. (1888), 67. But an admissIon which does not alter the aituation of the parties at all, as *e.g.*, that made hy going through an account where the items are ail on one aide, will not amount to an account stated: Ashhy v. James, 11 M. & W. 542, 544; Brenan v. Crawley, 16 W. R. 754. In an nction against a railway company for illegally putting a passenger off a train, the cause of actIon arisea at the place of putting off, and not where the ticket was issued: Ralph v. G. W. Ry. Co., 14 C. L. J. 172; see Canada Southern Ry. Co. v. Gebhard, 109 U. S. 527. In an action for witnesa feea, the cause of action comprises the service of the suhpœna nnd the attendance at court: Whitehead v. Burt, 7 T. L. R. 609.

In an nction for flooding plaintiff'a land by draining a stream, the erection of the drain is part of the cause of action, and it was held that the action could not be hrought in another division in which the flooded land was situate1: *Re* Doolittle v. Electric Maintenance and Supply Co., 3 O. L. R. 400. But hy the Statute of Ontario, R.S.O. 1914, c. 86, s. 6, as to procedurs in actions for flooiing land, actions for damages for flooding lands in which the claim does not exceed $20, may be hrought in the division where the flooded lands lie. This atatute appiies only to provisional judicial districts, the provisional county of Haiihurton, and the electoral districts of Eaat Victoria, East Peterborough, North Hastinga and North and South Renfrew: section 3. Elsewhere the rule laid down in tbe Doolittie case, *supra*, wiii govern.

In an action for the price of goods ordered in Toronto by the defendant who resided at Beiieville to be sent to him hy express to Beiieville, it was held that as the plaintiff muat prove acceptance of the goods at Beiievilie in order to take the case out of the 17th section of the Statute of Frauds, the whoie cause of action did not arise in Toronto: *Re* Tsyior v. Reid, 13 O. L. R. 205: and see Connor v. Dempsey, 6 O. L. R. 354; *Re* Diamond v. Wnldron, 28 O. R. 478; McNaughton v. Hays, 12 O. W. R. 858 (1033); Canadian Oil Co. v. McCounell, 27 O. L. R. 549; Mitchell v. Doyle, 4 O. W. R. 725.

Where Defendant Resides.—"What is the meaning of the word 'resides'? I take it that that word, where there is nothing to show that it is used in a more extenaive senae, denotes the piace where an individual eats, drinks and aleeps, or where his famiiy or bis aervants eat, drink and aleep:" *per* Bayley, J., R. v. North Curry, 4 B. & C. 959. "Usual piace of residence" means the dweiling in which he lives with his family and sleeps at night: R. v. Hammond, 17 Q. B. 772; Grogan v. London & M. Ins. Co., 53 L. T. 761. It is an "amhiguoua word," and may receive a different meaning according to the statnte in which it is found: *per* Cotton, L.J., *Re* Bowie, *Ex parte* Breull, 16 Ch. D. 484; and see Stroud'a Legal Dictionary, 1731, where its different meanings are diacussed and the leading authorities are cited. Ordinarily, men are anpposed to reside where their wives and familiea do, hut this is not alwaya correct. A man may reside in one piace and his wife and family in another: Cartwright v. Hinds, 3 O. R. 384, 395, and cases cited.

Sec. 72. Cockburn, C.J., in Wellington v. Whitchurch, 4 B. & S. 106, said, the maxim: "that a husband's domicile is where his wife lives, applies only where a man is generally in one place and occasionally elsewhere." That is the general rule, but in the interpretation of the meaning of these words every case must depend upon its own circumstances: *Ex parte* Breuil, 16 Ch. D. p. 488; Denneen v. Wallberg, 3 O. W. N. 1511.

"Residence," *qua* legal proceedings is synonymous with "domicile" or "home:" Lambe v. Smith, 15 L. J. Exch. 287, 15 M. & W. 434; but see Foote, Foreign and Domestic Law, 3rd ed., pp. 52, 53.

A person who has no permanent place of abode "dwells" at the place at which he may be temporarily residing: Alexander v. Jones, L. R. 1 Ex. 133. The domicile of the husband is that of the wife: Macdonald v. Macdonnid, 5 U. C. L. J. 66. Defendant worked in the province of Quebec, but his wife and family lived across the river in Ontario, where his wife kept a store, and where he often came to see her. Held, that defendant's residence was with his family, and that he was subject to be sued in the proper Division Court in Ontario: *Re* Ladouceur v. Salter, 6 P. R. 305. Where a man having his permanent residence at one place, has a lodging, for a temporary purpose, at another place, held that he does not "dwell" at the latter place: Macdougall v. Paterson, 11 C. B. 755. In the argument and from the remarks of Maule, J., at p. 763 of the report in this case, it appears to have been taken for granted that "residence" and "dwelling" were synonymous. The same view was taken by Cockburn, C.J., in Butler v. Ablewhite, 6 C. B. N. S. 747. A temporary or compulsory residence, at the time of the commencement of the action, in gaol does not constitute the place of dwelling of the party: Dunston v. Paterson, 5 C. B. N. S. 267. Nor is imprisonment pending a trial any abandonment of residence: Charlton v. Morris, 1895 2 I. R. 541.

The residence must be of a permanent character, and not merely for a temporary purpose: Marsh v. Conquest, 17 C. B. N. S. 418.

A man may have two permanent places of residence, and the question of jurisdiction must depend on the fact "where his actual residence, at the time of action brought was:" *per* Cockburn, C.J., Butler v. Ablewhite, 6 C. B. N. S. at p. 747; Pilgrim v. Knatchbull, 18 C. B. N. S. 798. See also Kerr v. Haynes, 2 L. T. 11; Bailey v. Bryant, 1 E. & E. 340; Dryden v. Smith, 17 P. R. 500; and see Jeune v. Mersman, 2 O. W. N. 418. The authorities on the meaning of "residence" are reviewed in *Re* Sturmer and Town of Beaverton, 24 O. L. R. 65, and in *Re* Fitzmartin and Village of Newburgh, 24 O. L. R. 102.

A company is only "domiciled or ordinarily resident" where its head office is: Jones v. Scottish Accident Ins. Co., 17 Q. B. D. 421, and cases there cited; Watkins v. Scottish Imperial Ins. Co., 23 Q. B. D. 285.

Where a railway company had their principal office in London and a station at A. Held, that they carried on business in London, not at A.: Shields v. G. N. Ry. Co., 7 Jur. N. S. 631; and 8 U. C. L. J. 195. A corporation has been held to dwell where its business is carried on: Taylor v. Crowland Gas, etc., Co., 11 Ex. 1.

The G. W. Ry. Co. has its principal station at Paddington, where the directors meet, the secretary resides, and general meetings are held, and whence orders emanate. Held, that the company "dwells" at Paddington within the meaning of 9 and 10 Vic. c. 95, s. 128: Adams v. G. W. Ry. Co., 6 H. & N. 404; and this decision has been followed in Ahrens v. McGillivrat, 23 C. P. 171; Westover v. Turner, 26 C. P. 510. See also The Oldham B. & M. Co. v. Heald, 3 H. & C. 132; Palmer v. Caledonian Ry. Co., 1892, 1 Q. B. 823.

It is no objection to the jurisdiction that the defendant has become resident within the division for the very purpose of giving jurisdiction; provided that the residence was actual and *bona fide* and not colorably and collusively acquired before issuing the summons: Massey v. Burton, 2 H. & N. 597; Baker v. Wait, L. R. 9 Eq. 103. But a plaintiff cannot by making a person, who is in his interest, and who resides within the jurisdiction of a certain Division Court, a defendant in a suit for the purpose of giving that court jurisdiction: Baker v. Walt, *supra*. The case of Bridges v. Douglas, 13 C. L. J. 358, is at variance with the above case, but it must be observed that the attention of the learned judge (Morison, J.), who decided Bridges v. Douglas, was not called to the English case above referred to. It seems to the writers that to give jurisdiction in such a way would be a fraud not only on the other defendants, but on the statute itself. Sec. 72.

A company for the manufacture and sale of goods, however, "dwells" at the place of manufacture and sale, and not at its registered office, and is distinguished in this respect from a railway company: Keynsham B. L. Lime Co. v. Baker, 2 H. & C. 729.

But a building contractor "carries on his business" where his general place of business is, and not at the locality where particular contracts are being executed: Gorslett v. Harris, 29 L. T. O. S. 75.

A joint stock company "dwells" where the substantial business of the company and its negotiations are carried on, and not necessarily in the locality where its property is situated and its immediate objects carried on: Aberystwith Pier Co. v. Cooper, 13 L. T. 273. Cockburn, C.J., said, the company "cannot be said to dwell at the pier at Aberystwith."

A railway company having its head office in Montreal with lines traversing the Dominion from one end to the other, with numerous stations on the line where it traverses every province at each of which some of their business is done is resident in each province in which the line of their railway runs: Tytler v. The C. P. Ry. Co., 29 O. R. 654; 26 A. R. 467, *per* Burton, C.J.O., at p. 469, *per* Osler, J.A., at p. 472.

A foreign corporation established by foreign law which sets up an office within the jurisdiction, and carries on a principal part of its business here, ought to be considered as resident here as if established by our law: Haggin v. Comptoir d'Escompte de Paris, 23 Q. B. D. 519; Badcock v. Cumberland Gap Park Co., 9 T. L. R. 113; Newby v. Von Oppen, etc., Co., L. R. 7 Q. B. 293; Palmer v. Gould Mfg. Co., W. N. (1884) 65; La Burgogne, 1899, P. 1; Compagnie Generals v. Low, 1899, A. C. 431; Logan v. Bank of Scotland, 1904 2 K. B. 495; 1906 1 K. B. 141; Saccharin v. Chemische, 1911 2 K. B. 516; see also Okura v. Forsbacka, 1914 1 K. B. 715.

As to what constitutes residence, reference is also made to Wanzer v. Woods, 13 P. R. 511; Allen v. Allen, 15 P. R. 458; *Re* Craigmish, 1892, 3 Ch. 180.

The question of residence is not to be decided by mere length of time, but by intention which is to be gathered from the circumstances: King v. Fixwell, 3 Ch. D. p. 518; Bonbright v. Bonbright, 1 O. L. R. 629, 2 O. L. R. 249; see *Re* Sturmer and Town of Beaverton, 24 O. L. R. 65; *Re* Fitzmartin and Newburgh, 24 O. L. R. 102.

To constitute an abandonment of a domicile once chosen, two things must concur, *i.e.*, an abandonment in fact and an intention not to

Sec. 72. return: Udney v. Udney, L. R. 1 Sc. App. pp. 451-2; Bonhright v. Bonhright, *supra*.

Where a Defendant Carries on Business.—The words "carry on business" mean "the possession within the jurisdiction of a place of business held in the name of the firm by a partner or by a person or persons in the pay of the firm:" Annual Practice, 1908, vol. 1, p. 650. The phrase "carrying on," implies a repetition or series of acts: *per* Brett, L.J., Smith v. Andreson, 15 Ch. D. 247. See also *Re* Siddall, 29 Ch. D. 1; Crowther v. Thorley, 48 L. T. 644; *Re* Thomas, 14 Q. B. D. 379; Harris v. Amery, L. R. 1 C. P. 148.

To "carry on" business means, primarily, to carry on one's own business; therefore it cannot be said in reference to a salaried clerk "that he carries on business" at the place where his employer's office is: Lewis v. Graham, 20 Q. B. D. 780; s.c. sustained, 22 Q. B. D. 1; Buckley v. Hann, 5 Ex. 43; Sangster v. Kay, 5 Ex. 386; Le Talieur v. S. E. Ry. Co., 3 C. P. D. 18; Detroit Soap Co. v. Thatcher, 15 C. L. T. 161.

"The business must be some business in which he has control, or acts as one of the partners engaged in carrying it on," and "a particular clerk or workman who is engaged about the business, but has no control over it whatever, cannot be said to carry on business:" *per* Coleridge, C.J., Lewis v. Graham, *supra*. A clerk in the Admiralty does not "carry on business" at his office within section 40, London Small Debts Act: Buckley v. Hann, 5 Ex. 43, nor does a deputy sealer in the Court of Chancery: Rolfe v. Learmouth, 14 Q. B. 196; nor a clerk in the Privy Council office: Sangster v. Kay, 5 Ex. 386; nor a partner in a mine on the cost-book principle, the business of which is wholly carried on by an agent: Mitchell v. Hender, 18 Jur. 430.

But there is no principle of law which decides what "carrying on" trade is; a multitude of circumstances make up what is called "carrying on" a trade, for it is a compound fact made up of a variety of things: *per* Jessel, M.R., Erichsen v. Last, 8 Q. B. D. 414; not a few isolated business transactions. See Sziter v. St. Lawrence Lumber Co., 28 N. S. R. 335.

A firm carrying on business in Scotland, with a branch office within the jurisdiction of a county court in England, was sued in the firm's name, and the summons was served at the branch office: Held, that the firm "carried on business" within the jurisdiction; that the service was good, and that the county court judge was wrong in declining to exercise jurisdiction; that if the service had been bad, it amounted to a mere irregularity, which might be waived by the conduct of the defendants: Weatherly v. Calder, 61 L. T. 508.

The words "carries on business" were said by Coleridge, J., in Rolfe v. Learmouth, 14 Q. B. 199, to mean "some fixed place at which the party's business is carried on, at least for a certain time."

A surgeon and apothecary, who occupies a position similar to that of a general medical practitioner in this country, has been held to "carry on business" where he daily attends patients, although resident out of it: Mitchell v. Hender, 18 Jur. 430. But see Nussey v. Glendinning, 23 Law T. 93, where it was held that "something like abiding permanency is wanted to constitute a carrying on of business within the meaning of the statute."

A railway company "carries on business" only at its principal office where the directors meet and the general business of the company is transacted: Minor v. Lon. & N. W. Ry. Co., 1 C. B. N. S. 325; Brown v.

L. & N. W. Ry. Co., 4 B. & S. 326; LeTailleur v. S. E. Ry. Co. 3 C. P. D. 18; Shields v. The G. N. Ry. Co., 7 Jur. N. S. 631, and 8 U. C. L. J. 195; Ahrens v. McGilligat, 23 C. P. 171; Pearson v. C. P. Ry. Co., 1 West. L. T. 47; Westover v. Turner, 26 C. P. 510. In the latter case it was also held that the fact of the railway company having in addition to its local station, a factory for the making and repair of the rolling stock used on the road, and employing a number of workmen therein, did not bring such place within the statute. But see Tytler v. C. P. R. Co., 29 O. R. 654; 26 A. R. 467. Sec. 72.

A benevolent society whose head office is not fixed by charter or by statute, "carries on business" at the place where its chief officer resides and transacts their financial business: Franklin v. Owen, 15 C. L. T. 105.

By the appointment of a general agent to do business in a place, a corporation cannot be held to be carrying on business there. The question is whether the person doing business is the servant of the defendant: Corbett v. The General Steam Nav. Co., 4 H. & N. 482. Where an agent had a firm's name affixed to his office, and their note paper contained a heading referring to his office as their London address, but his authority was limited, it was held that the firm did not carry on business at his office: Baillie v. Goodwin, 33 Ch. D. 604; Grant v. Anderson 1892 1 Q. B. 108; see also Ryckman v. Randolph, 20 O. L. R. 1, and notes to section 89.

It is to be noticed that provision in this section as to residence or carrying on business, refers to "the time the action is brought:" see Ryckman v. Randolph, 20 O. L. R. p. 4.

As to notice disputing the jurisdiction, see section 78 and notes thereto.

When defendant resides out of Ontario: see section 75.

Nearest to the Residence of the Defendant: s. 72 (b).—See notes to section 80. It is the *place of sitting*, not the residence of the clerk or the place where he has his office, which determines the right to bring the action under this section.

As to what is the place of sitting: see Malcolm v. Malcolm, 15 Gr 13; Moffatt v. Carleton Place Board of Education, 5 A. R. 202. See also section 8 and notes thereto.

As to place of residence: see notes *ante*. Section 72 (*b*) does not apply where there is more than one defendant, unless the condition of the operation of the section as to residence applies to all of them: *Re* Sinclair v. Bell, 28 O. R. 483; see Hill v. Hicks, 28 O. R. 390. But in an action against partners, one of whom was out of Ontario, the action could have been brought against the one residing nearest to the court in which the summons was issued: *Re* Sinclair v. Bell, *supra*. See section 93 and notes to section 73.

The distance is measured as the crow flies: Moufiet v. Cole, L. R. 8 Ex. 32; Duignan v. Walker, 5 Jur. N. S. 976; Atkyns v. Kinnier, 4 Ex. 776; and the word "nearest," has been held to be synonymous with next: Smith v. Campbell, 19 Ves. 400. See also Bathard v. London Sewers Co., 54 J. P. 135.

Agreements or Provisions for Place of Trial.—See s. 74, which covers not only agreements *inter partes*, but provisoes, etc., in special statutes, providing that actions may be brought in divisions other than those designated by the D. C. Act.

Secs. 73, 74.

Actions of Replevin.—These actions must be brought in the division within which the defendant or one of the defendants resides or carries on business, or where the property was distrained: The Replevin Act, *ante*.

Wages of "Woodmen" s. 72 (1).—R. S. O. 1914, c. 141, s. 11.—This statute only applies to the Provisional County of Haliburton and to the Provisional Judicial Districts: s. 2. Division Courts there have jurisdiction in the cases provided for by this statute where the claim does not exceed $200. An attachment may issue: s. 17, Form 77 to Rules. Form of affidavit for attachment: 77 (1); and of corroborating affidavits under s. 17. No order of the judge is necessary, but the judge may set the attachment aside or order the release of the logs: s. 16 (2).

When actions may be brought in other than the regular divisions.

73. If a person desires to bring an action in the court of a division other than as in the next preceding section mentioned, the Judge may by order authorize an action to be entered and tried in the court of any division in his county adjacent to the division in which the defendant or one of the defendants resides, whether such defendant resides in the county of the Judge granting the order or in an adjoining county. 10 Edw. VII. c. 32, s. 73.

Leave to Bring in Adjacent Division.—Leave to bring an action under this section may be granted by the judge on production of an affidavit (form 100), and in the summons, it shall be stated: "Issued by leave of the judge": Rule 5.

Leave should be granted *ex parte*: *Re* Trust and Investment Corporation of South Africa, 1892, 3 Ch. 332. The order under this section may be made at any time, and on an application for prohibition, it was held that if prohibition were granted, the case would still remain subject to the power of the judge to make the order, and as it had been tried on its merits, prohibition was refused: *Re* Sinclair v. Bell, 28 O. R. 483.

No leave can be granted to bring a suit in a division other than the one *adjacent* to the division in which the party sued resides, but the division may be in the same or an adjoining county. The word "adjacent" here means "contiguous or bordering upon": see Kingsmill v. Millard, 11 Ex. 313; Earl of Lisburn v. Davies, L. R. 1 C. P. 259, and *per* Erle, C.J., at p. 264.

Effect of agreement as to place of trial.

74. No proviso, condition, stipulation, agreement or statement which provides for the place of trial of an action, matter or proceeding shall be of any force or effect where the defendant, within the time limited for disputing the plaintiff's claim or within such further time as the Judge shall allow, files with the clerk of the court in which the action was commenced a notice disputing the jurisdiction of the court and an affidavit of the defendant or his agent stating that in his belief there is a good defence to the action on the merits, and the division

wherein the cause of action arose, or partly arose, and the division where the defendant resides. 10 Edw. VII. c. 32, s. 74; 1 Geo. V. c. 17, s. 38. Sec. 75.

A waiver of the benefit of this section is of no validity: *Re* Shupe v. Young, 10 O. W. R. 185, 282; St. Charles v. Caldwell, 12 O. W. R. 1185; *Re* Taylor v. Reid, 13 O. L. R. 205. The provisions of this section are retroactive and apply to contracts made before they were passed: Sylvester v. Brown, 8 O. W. R. 964, 9 O. W. R. 80; Bell v. Goodison Thresher Co., 12 O. L. R. 611. See R.S.O. 1914, c. 183, s. 150, as to actions on premium notes.

75.—(1) Where it is provided that a claim may be entered, or an action brought, or that a person may be sued in a Division Court, the action may be brought, notwithstanding that the residence of the defendant is, at the time of bringing the action, out of Ontario, and the action may be brought in the court of the division in which the cause of the action arose or partly arose. Actions where defendant resides out of the Province.

(2) The service of the summons may be made by a bailiff of the court out of which it issued or by any person who may, either before or after the service, be approved by the Judge or by the clerk, but such summons shall be served at least fifteen days before the return day thereof. Service of summons on non-residents.

(3) The affidavit of service, if not made in Ontario, may be sworn before any officer or person having authority to administer oaths under *The Evidence Act*. Proof of service. Rev. Stat. c. 76.

(4) Where service of the summons has been effected out of Ontario, the Judge may allow, as costs in the action, a sum towards the expenses incurred in effecting service, not exceeding in the whole $5. 10 Edw. VII. c. 32, s. 75. Allowance for service out of Ontario.

Where it is Provided.—**The introductory words of this section refer to a claim or an action of the proper competence of a division court, and not to an action against a defendant resident out of the jurisdiction. It was contended that whatever may have been the intention of the Legislature, the section failed in the accomplishment of its object, because the words used refer to the action against the defendant resident out of the jurisdiction, and nowhere in the Act is provision made for such action, and nowhere is it provided "that a claim may be entered or an action brought," etc. But it was held that the words "an action brought," etc., or claim "entered," etc., mean simply an action of the proper competence of a division court, and therefore an action against a defendant residing in Montreal for an amount within the competence of section 62, should have been brought in the division court: Hicks v. Jacob, 19 C. L. T. 88.**

Out of Ontario.—**This section, as originally introduced by 57 Vic. c. 23, s. 12, applied only to cases which arose wholly within the limits**

Sec. 75. of some division court: see Bicknell & Seager, 1st ed. vol. 2, p. 388; Franklin v. Owen, 15 C. L. T. 185. But in the revision of the statutes in 1897 it was amended so as to include, as does also the present section, cases in which the cause of action "partly arose" within some division. If no part of the cause of action arose anywhere in Ontario, the court would have no jurisdiction over a defendant who resides out of the Province, and such a defendant would, perhaps, not be required to file a notice disputing the jurisdiction under section 78: see Knight v. Madora, 14 A. R. 112, per Patterson, J.A., at p. 113; and per Osler, J.A., p. 116, following Mead v. Creary, 32 C. P. 1.

All of these cases could, however, be supported on the principle that the notice is only necessary where, the case being otherwise of the proper competence of the division court, the consent of parties could give jurisdiction. The failure to give notice disputing the jurisdiction may be construed as consent to jurisdiction. If a defendant resident out of the jurisdiction, and over whom the court would not otherwise have jurisdiction, appears and defends an action, such appearance is a waiver of any objection to the jurisdiction, and a judgment recovered against him in any such action is binding upon him: Warriner v. Kingsmill, 8 U. C. R. 107; Bevin v. Bletcher, 23 U. C. R. 28; *Re* Guy v. G. T. Ry. Co., 10 P. R. 372; Beaty v. Cromwell, 9 P. R. 547; Senes v. Meyers, 15 P. R. 381; but if the defendant was not at, or during the time proceedings were taken to recover the judgment, a resident of or domiciled within the province, and did not appear therein, the judgment would have no effect outside of the province: Schibsby v. Westenholz, L. R. 6 Q. B. 155; McLean v. Shields, 9 O. R. 690. But if by agreement he had submitted himself to the courts of this province, the judgment would be binding upon him: Copin v. Adamson, L. R. 9 Ex. 345; 1 Ex. D. 17; unless he filed a notice disputing the jurisdiction: section 74, *supra*, and notes thereto.

If the defendant is a corporation having its head office out of the province, and the cause of action partly arose in one division and partly in another, the action may be brought in either division: section 70.

Garnishee Proceedings.—In Franklin v. Owen, 15 C. L. T. 105, garnishee proceedings were taken under section 183 (now 148), against a primary debtor residing in the United States, the garnishees being a benevolent society, whose head office was not fixed by charter or by statute. The division court judge held that the court of the division in which the chief financial officer of the society resided and transacted the business of the society had jurisdiction, notwithstanding that the cause of action arose elsewhere and that the primary debtor resided elsewhere, and also that such court had jurisdiction notwithstanding the residence of the primary debtor outside of Ontario. On application for prohibition this decision was overruled and prohibition granted on the ground that the statute, as then expressed, gave jurisdiction in a case where the defendant resided out of the province of Ontario only to the division in which the cause of action arose, that this section was not intended to apply to a garnishee plaint at all, and even if it did it was not to be construed in the manner contended for by the primary creditor: per Street, J., *Re* Franklin v. Owen, 15 C. L. T. 158, affirmed on appeal, 15 C. L. T. 185. Since then, in the revision of the statutes, this section has been extended to cases in which the cause of action "partly arose" in any division, and probably if the garnishee resided or carried on business in any such division, garnishee proceedings might be instituted. It does not appear that a division court has power to adjudicate on a garnishee plaint against a garnishee resident out of the province except in cases

under section 153, where the garnishees are a "body corporate not having their chief place of business within the province:" see Parker v. Odette, 16 P. R. 69; Boswell v. Piper, 17 P. R. 257; Braun v. Davis, 14 C. L. T. 194; 9 Man. L. R. 534; Canada Cotton Co. v. Parmalee, 13 P. R. 308. And see notes to sections 146, 153 and 155. Sec. 75.

But a bank authorised by Parliament to do business in Ontario, although its head office is out of the province, is deemed potentially and actually resident within the jurisdiction of Ontario for the purposes of the law as well as for the transaction of its business: County of Wentworth v. Smith, 15 P. R. 372: see notes to section 72, *ante*.

Service of Summons.—Sub-section 2 of this section would authorize service of the summons to be made in a foreign country on a defendant residing there at the time of bringing the action. If the service were made by any literate person it would be valid. Though the bailiff is made responsible for the service of all process he is not bound to serve documents unless they are to be served in or near to his division, and under section 46 he is not entitled to mileage beyond the limits of his county: see notes to section 46. Under this sub-section he may go to any distance outside of the jurisdiction for the purpose of serving the summons, but by sub-section 4 the cost of such service is restricted to a sum not exceeding $5. The bailiff would be entitled to charge 15c. per mile under item 7 of the Tariff of Bailiffs' Fees up to that amount, but no more.

When Defendant is a Foreigner.—This section applies as well to foreigners as to British subjects domiciled abroad: *Re* Coy v. Arndt, 8 O. L. R. 101. Service of a writ running in the King's name on a foreigner in a foreign country might involve unpleasant questions: Cookney v. Anderson, 1 D. J. & S. 365, and cannot therefore be allowed; the Consolidated Rules under the Judicature Act apply (*In re* Coy v. Arndt, *supra*), and provide that in actions in the Supreme Court notice of the writ, and not the writ itself, shall be served: see Bedington v. Bedington, 1 P. D. 426; Henderson v. Hall, 8 P. R. 355. Section 226 provides that the general principles of practice of the Supreme Court may be applied to proceedings in the Division Court; and a notice (Con. Rule 29) must be served instead of a summons: *Re* Coy v. Arndt, 8 O. L. R. 101. For form of notice, which is in accordance with the form set forth in that case, see Form 101.

Affidavit of Service.—The Ontario Evidence Act, R. S. O. 1914, c. 76, s. 38, is as follows:

AFFIDAVITS, ETC., MADE OUT OF ONTARIO.

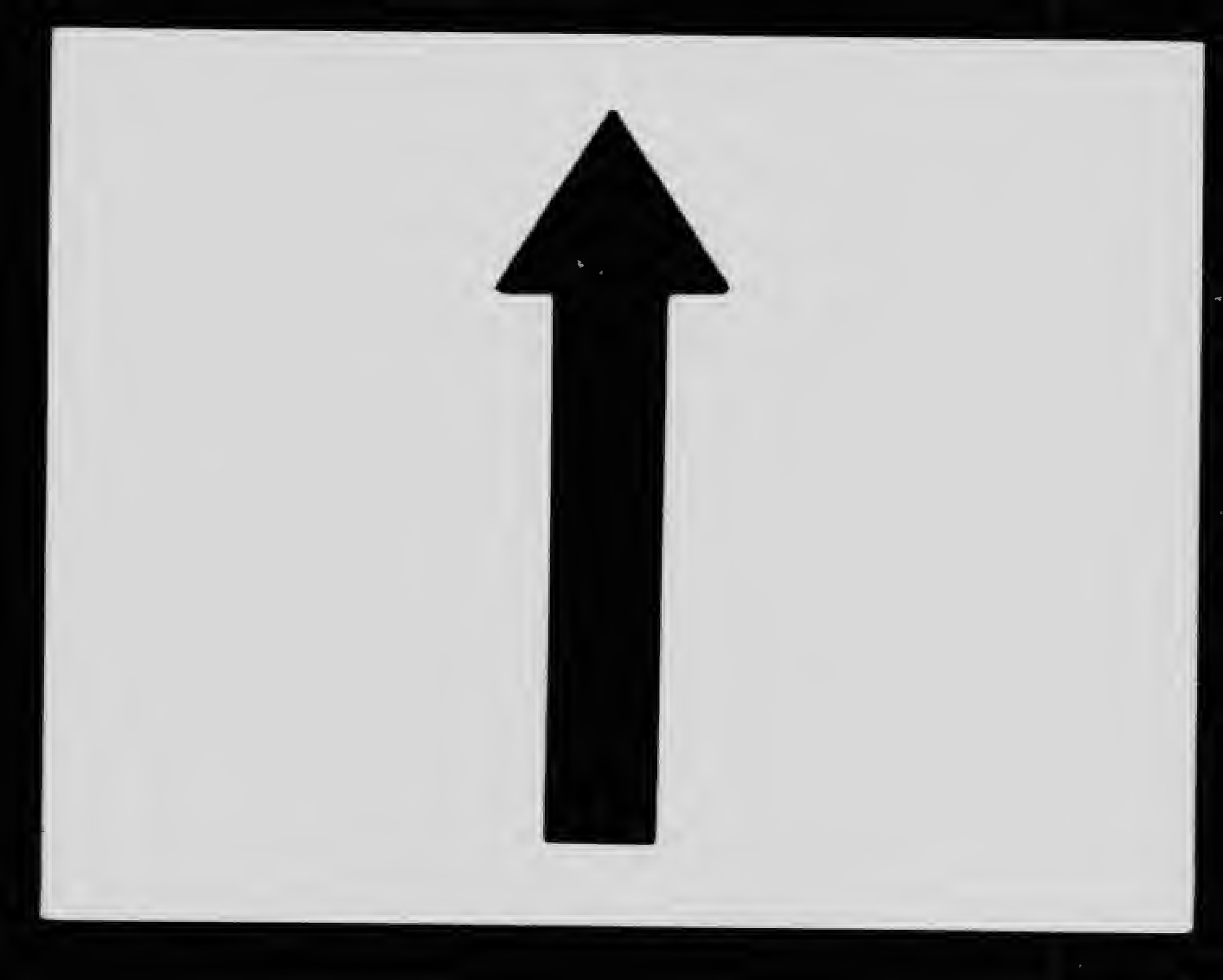
"**38.** Oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made out of Ontario:

(*a*) In England or Ireland before a Commissioner authorized to administer oaths in the Supreme Court of Judicature of England or Ireland;

(*b*) In England or Ireland before a Judge of the Supreme Court of Judicature of England or Ireland;

(*c*) In Scotland before a Judge of the Court of Session or the Justiciary Court of Scotland;

(*d*) Before a Judge of any of the County Courts of Great Britain or Ireland, within his County;



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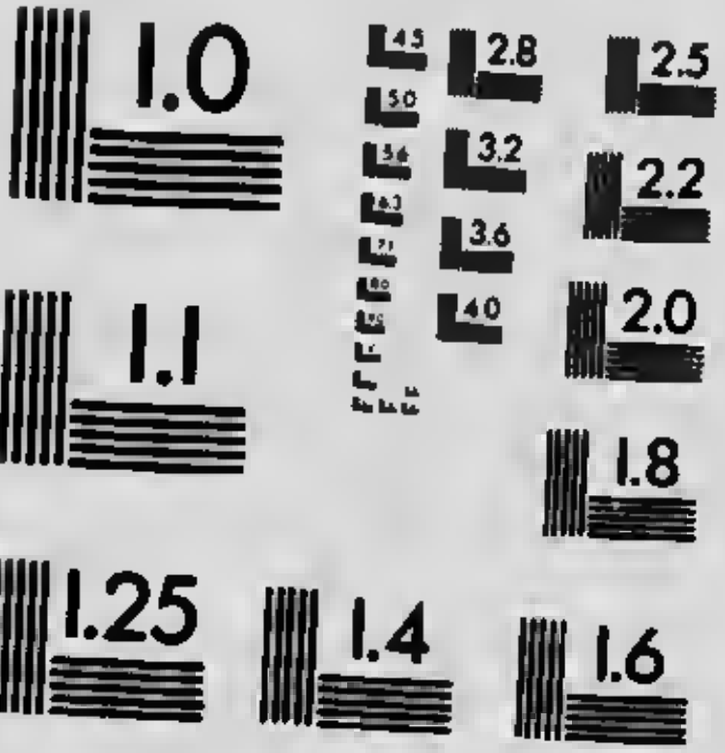

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Sec. 76.

(*e*) In Great Britain or Ireland, or in any Colony of His Majesty, or in any foreign country, before the Mayor or Chief Magistrate of any City, Borough or Town corporate, certified under the common seal of such City, Borough, or Town corporate;

(*f*) In any Colony belonging to the Crown of Great Britain, or any dependency thereof, or in any foreign country before a Judge of any Court of Record or of supreme jurisdiction;

(*g*) In the British possessions in India, before any Magistrate or Collector certified to have been such under the hand of the Governor of such possession;

(*h*) In Quebec, before a Judge or Prothonotary of the Superior Court or Clerk of the Circuit Court;

(*i*) In any foreign place, before any Consul, Vice-Consul, or Consular Agent of His Majesty exercising his functions;

(*j*) Before a Notary Public and certified under his hand and official seal;

(*k*) Or before a commissioner authorized by the laws of Ontario to take such affidavits;

shall be as valid and effectual and shall be of like force and effect to all intents and purposes as if such oath, affidavit, affirmation or declaration had been administered, sworn, affirmed or made in Ontario before a Commissioner for taking affidavits therein, or other competent authority of the like nature."

This affidavit, as well as all other affidavits, may be sworn before any of the fuctionaries mentioned above or those mentioned in section 120 (1); but must not be sworn before the agent of the party on whose behalf it is made, or the clerk or partner of such agent: section 120 (2). See Rules 42-50 as to affidavits and oaths.

Substitutional Service.—Under this section substitutional service could not be ordered in any case in which it would be improper to do so under section 88; as to which see notes to that section.

At Least Fifteen Days.—The return day of the summons could very properly have been left to the discretion of the judge. Where the service is to be made in distant countries, fifteen days would clearly be insufficient. The provisions of this section were no doubt originally suggested by transactions arising from the relations existing between residents on either side of the borders of the province and were intended to meet such cases.

As to computation of time, see notes to section 31.

Where defendant is a corporation not having head office in Ontario.

76. Where the defendant is a corporation not having its head office in Ontario, and the cause of action arose partly in one division and partly in another, the plaintiff may bring his action in either division. 10 Edw. VII. c. 32, s. 76.

Foreign Corporations.—In any action against a foreign corporation, not having its head office in Ontario, the claim must be entered and the action brought, under this section, in the court of one of the divisions in which the cause of action partly arose. This provision is intended to overcome the difficulty which formerly prevented such corporations from being proceeded against when the cause of action did not arise in any

one division. The service of the summons may be effected in the way directed by section 89, if the company carries on business in Ontario; otherwise the service may be made as provided in section 75: see notes to section 89, *post*. Sec. 77.

77.—(1) Where the debt or money payable exceeds $100, and is made payable by the contract of the parties at a place named therein, the action may be brought thereon in the court of the division in which the place of payment is situate, subject, however, to the action being transferred to the court of any division in which but for this section it might have been brought. Place of trial where amount sued for exceeds $100.

(2) The Judge of the court in which the action is brought may, upon application of the defendant made within the time limited for disputing the plaintiff's claim, make an order transferring the action accordingly. Changing place of trial in such cases.

(3) The application shall be supported by an affidavit of the applicant or his agent stating that the applicant intends to defend the action, that there is a good defence upon the merits, that the cause of action did not wholly arise in the division in which the action is brought, that the witnesses for the defence, or some of them, reside within the division in which the defendants, or one of them, resided or carried on business at the time the action was brought, and that the application is not made for the purposes of delay; and the dates of the next two sittings of the court to which it is sought to have the action transferred shall also be shown. Affidavit in support of application.

(4) The order shall direct at what sittings of the court the action shall be tried, subject to all rights of postponement as in other cases, and shall be attached by the clerk to the summons and other proceedings in the action, and he shall forthwith transmit them to the clerk of the court to which the action is transferred, and enter a minute thereof in his procedure book. Order and papers to be transmitted to clerk.

(5) Upon receipt of the order and other papers by the clerk of such last mentioned court he shall enter the action and proceedings in his procedure book. To be entered in procedure book.

(6) All the papers and proceedings in the action thereafter shall be intituled and carried on as though the action had originally been entered in the last mentioned court. Style.

(7) The defendant shall forthwith serve a copy of the order upon the plaintiff or his agent. 10 Edw. VII. c. 32, s. 77. Order to serve.

Sec. 77.

Debt or Money Payable.—This section is only applicable to such claims as are suable under section 62, sub-section 1 (*d*). The "debt" itself must exceed $100. When a note was given for $99, and at the time of suit $24 had accrued for interest since the maturity of the note, it was held that the suit did not come within this section. The $24 was not payable except as damages: *Re* Brazill v. Johns, 24 O. R. 209; and see notes to section 62. But where two promissory notes, each under $100, but amounting to over that sum, are sued in one action, the section applies: Union Bank v. Cunningham, 1 O. W. R. 432, distinguishing Brazill v. Johns.

The words "debt or money payable" are not identical with those used in section 62 (1), but they mean substantially the same.

Any Place Named Therein.—Any form of words employed by the parties which reasonably indicate a particular place of payment would be within this section. A bill or note payable "at the Bank of Montreal, Toronto," or at the office of the payee or any other person in any particular place, without further words of designation, would be within the section.

May be Brought.—The plaintiff has the option of bringing the action in the court for the division in which place of payment is situate. See Interpretation Act, R.S.O. 1914, c. 1, s. 29 (s); R. v. Bishop of Oxford, 4 Q. B. D. at p. 554; Cameron v. Wait, 3 A. R. 175, *per* Harrison, C.J. The general jurisdiction of the court is unaffected by this section. Prohibition will not be granted if the judge refuses to transfer the action, the word "may" being permissive: *Re* Black v. Johnston, 5 O. W. N. 968.

The Court has a discretion to refuse prohibition even when an action is brought in a Division Court having no jurisdiction, and will do so when there has been inexcusable delay on defendant's part and he does not disclose any really meritorious defence: *Re* Canadian Oil Companies v. McConnell, 27 O. L. R. 549; see also *Re* Mitchell v. Boyle, 4 O. W. N. 725, where prohibition was granted notwithstanding some delay in applying; and McDonald Thresher Co. v. Stevenson, 4 O. W. N. 732.

Might Have Been Brought.—As to what division, see notes to section 72.

Where a division court becomes seized of the right to entertain a claim under this section, it would possess that right until the close of the case: Haldan v. Beatty, 43 U. C. R. 614.

Where the action was brought in the wrong court, in a cass not within this section, it could not be transferred to another court under this section, and prohibition was granted against the court to which the case was transferred, without prejudice to the right to an order of transference under section 79: *In re* Frost v. McMillen, 2 O. L. R. 303; McDonald Thresher Co. v. Stevenson, 4 O. W. N. 732.

Sub-section (2).—The application is to be made by the defendant, or, if there be more than one, by or on behalf of all, to "the judge of the court in which the action is brought." The clerk would be entitled to the same fees, of and about the order, as he would in other matters.

The application must be made within the time limited for disputing the plaintiff's claim, viz.: eight days from the day of service of the summons, when the defendant, or one of the defendants, resides within the county in which the action is brought, or within 12 days if none of the

defendants reside within such county: see section 98 and notes thereto; or within 15 days if served out of Ontario: section 75 (2). The judge has no power to enlarge this time: Serjeant v. Dale, 2 Q. B. D. 558; Hudson v. Tooth, 3 Q. B. D. 46; Barker v. Palmer, 8 Q. B. D. 9, reported more fully in 30 W. R. 59; see R. v. Murray, 27 U. C. R. 134; R. v. The G. W. Ry. Co., 32 U. C. R. 506; and cases cited 9 P. R. p. 236; Grant v. Holland, W. N. (1880) 156; *Ex parte* Luxon, *Re* Pidsley, 20 Ch. D. 701; *Re* West Simcoe, 1 E. C. 128; *Re* McLean v. Osgoode, 30 O.R. 430. Sec. 77.

"Within" a named period means exclusive of the day of service: Williams v. Burgess, 12 A. & E. 635; Robinson v. Waddington, 13 Q. B. 753; Mitchell v. Foster, 12 A. & E. 472; Stroud, 889; Radcliffe v. Batholomew, 1892, 1 Q. B. 161. See also Kennedy v. Purcell, 14 S. C. R. 453, as to computation of time.

For instance, if a summons was served on the 10th day of the month, the 18th and 22nd would respectively be the last days for the application. If the last of such days fell on a holiday, then the application could be made on the following day: Inter. Act, R.S.O. 1914, c. 1, s. 28 (h). As to holidays, see notes to section 105. If the last day should fall on a Monday which happened to be a holiday by virtue of Inter. Act, s. 29 (1), which provides that if another holiday falls on Sunday the next following day shall be a holiday in lieu thereof, such Monday would also be excluded.

Should the judge be away from home and the defendant be unable, for that reason, to apply on the last day, it would be sufficient for him to leave the papers, on which he rested his application, with the clerk or at the judge's chambers within the proper time, and then his application could be considered as "made:" See R. v. Allen, 4 B. & S. 915; Berridge v. Fitzgerald, L. R. 4 Q. B. 630; Bain v. Gregory, 14 L. T. 601; Lewis v. Calor, 1 F. & F. 306; Hughes v. Griffiths, 13 C. B. N. S. 334; Mumford v. Hitchcocks, 14 C. B. N. S. 361; Christopher v. Croll, 16 Q. B. D. 66; *Re* Sweetman and Gosfield, 13 P. R. 293 arris v. Meyers, 16 Gr. 117.

Requisites of Affidavits Generally.—The formal requirements of affidavits generally in division courts are regulated by Rules 42 to 50, inclusive. An affidavit must contain the words "make oath," for, although the jurat certifies that the deponent was sworn, it will not be sufficient unless the affidavit states that he makes oath: Allen v. Taylor, L. R. 10 Eq. 52. It should be divided into paragraphs and numbered consecutively, and should state concisely the sources of knowledge or belief. The requirements of Rules 42 to 50 should be closely followed.

The affidavit in this case must be made by the defendant or his agent; but an affidavit of a solicitor's managing clerk is insufficient unless it states he has some particular charge of the suit: Elmsley v. Gosgrove, 6 P. R. 164. If the sources of knowledge are not given it is necessary to distinguish between facts within the knowledge of the deponent and those believed by him, and in the one case to set forth his means of knowledge, and in the other, the sources of information: Rule 45

Aff ..hould be drawn up in the first person and should state the nam... full of the deponent, and his description and true place of abode: Rule 43. An affidavit sworn in the United States, though expressed in the third person, was received: *Re* Husband, 12 L. T. 403; Blamey v. Blamey, 1902 W. N. 138.

An affidavit giving only the initials of deponent's second name is regular: De Forrest v. Bunnell, 15 U. C. R. 370.

Sec. 77.

Should the parties be described in the summons by initials or by a wrong name, the affidavit may also use such initials or wrong name: De Forrest v. Bunnell, 15 U. C. R. 370; Sims v. Prosser, 15 M. & W. 151; Hodgson v. May, 7 D. & L. 4; R. v. Sheriff of Surrey, 8 Dowl. 570; Beauchamp v. Cass, 1 P. R. 291. The deponent should sign his usual signature, and if he does so, it is no objection that it does not correspond with the name given in the affidavit: Folger v. McCallum, 1 P. R. 352; Hands v. Clements, 11 M. & W. 815.

The signature may be in a foreign character: Notham v. Cohen, 3 Dowl. 370.

The description of a person is that which tells what he is, and when a statute required the name, place of abode and description of a person to be given, and only the name and place of abode were given, it was held to be a total omission of the description: R. v. Tugwill, L. R. 3 Q. B. 704. "Gentleman" is not a proper description of a deponent who has any office or occupation: Allen v. Thompson, 1 H. & N. 15: Adams v. Graham, 33 L. J. Q. B. 71: *Ex parte* Hooman, L. R. 10 Eq. 63; Broderick v. Scole, L. R. 6 C. P. 98; but is of a person who never had any occupation: Gray v. Jones, 14 C. B. N. S. 743; or who is out of employment: Moorewood v. South Yorkshire Ry. Co., 3 H. & N. 798; Smith v. Cheese, 1 C. P. D. 60; but is not a proper description of a solicitor's clerk: Beales v. Tennant, 29 L. J. Q. B. 188, even though he had previously been a solicitor: Tuton v. Sanoner, 3 H. & N. 280. A deponent who had been a contractor and financial agent may be properly so described though not actively engaged in such business: Sharp v. Brown, 38 Ch. D. 427. A ship broker may be described as a "broker:" Gujen v. Sampson, 4 F. & F. 974; but a stock broker could not be described as a stock exchange broker: *Re* Levy, 30 L. T. N. S. 317. A clerk in the admiralty is properly described as a "government clerk:" Grant v. Shaw, L. R. 7 Q. B. 700. A schoolmaster is not properly described as a "tutor:" Lee v. Turner, 20 Q. B. D. 773. A clerk to an accountant, who sometimes did business on his own account, was sufficiently described as an accountant: Briggs v. Boss. L. R. 3 Q. B. 268; but a clerk in an accountant's department of a railway company would not be truly described as accountant: Larchin v. North Western Deposit Bank, L. R. 10 Ex. 64.

The place of abode should be that at the time of making the affidavit: Butler v. O'Neill, 4 C. P. D. 354. The place of business of the deponent or of his employer is sufficient: Attenborough v. Thompson, 2 H. & N. 559; Blackwell v. England, 8 E. & B. 541; Simmons v. Woodward, 1892, A. C. 100.

If an action has been commenced the court and style of cause must be placed at the head of every affidavit intended to prove any fact therein: Rule 43, and in a contemplated action it is proper to entitle the affidavit, "In the matter of a contemplated action:" Young v. Braesey, 1 Ch. D. 277. If there is a cause in court and the affidavit is not entitled therein it is bad, because no perjury can be assigned on it: *Re* Burrowes, 18 C. P. 502. The jurat to an affidavit made by more than one person should give the names of all the deponents, but if taken at one time by the same officer, he may state that it was "sworn by both (or all) of the above named deponents:" Rule 44. The following form may be used: "The above named deponents, A. B. and C. D., were severally sworn at Paris, in the county of Brant, this day of 19 , before me, E. F. A Commissioner, etc."

If sworn by an illiterate or blind person the officer should state in the jurat that the affidavit was read in his presence to the deponent,

tbst the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. If this is not done the affidavit cannot be received in evidence, unless the judge is satisfied that the affidavit was read to and was understood hy the deponent: Rule 46. Sec. 77.

If there are interlineations, alterations or erasures in the jurat or in the body thereof the affidavit cannot be nsed without the leave of the judge: Rule 48; unless the alteration, interlinention or erasure is initialed hy the officer taking the affidavit: *ibid.* But a clerk or bailiff would bave no autbority to accept an affidavit having an alteration, interlineation or erasure in it without first applying to the judge for the necessary leave to use it. If endorsed by the judge as follows: "Leave is hereby given to read and make use of the witbin affidavit, notwithstanding tbe interlineation (alteration or erasure) therein," it will be sufficient.

An affidavit sworn before a notary public in Ontario need not now be authenticated by bis seal of office: R.S.O. 1914, c. 160, s. 8; previously the seal was necessary: Boyd v. Spriggins, 17 C. L. T. 58; Ryan v. Sutherland, 17 P. R. 331.

A clerk or commissioner in taking an affidavit, should subscribe not only bis name, but the word "Commissioner" or "Comr." or "Clerk," as the case may be: Pawson v. Hall, 1 P. R. 294; Brett v. Smith, 1 P. R. 309; Babcock v. Mnn. Council of Bedford, 8 C. P. 527.

If sworn in a foreign country, and tbat fact is duly certified to, the absence of the signature of deponent bas been held no objection: *Re* Howard; *Re* Ashcroft, L. R. 9 C. P. 347; but if tbe signatnre of the commissioner were omitted, the affidavit would not be received: Nisbet v. Cock, 4 A. R. 200. Present Rule 43 peremptorily requires that the affidavit "shall be signed" by the deponent.

Affidavits purporting to be sworn on a day not arrived are void: *Re* Robertson, 5 P. R. 132.

The jurat may he referred to, to explain the date of a fact deposed to in tbe affidavit: Lyman v. Bretborn, 2 Chamb. R. 108.

Tbe presumption of law is tbat an affidavit is in the same state as when it was sworn, as to alter it is an act of fraud and misconduct which will not be presumed: R. v. Gordon, Dears. C. C. 586.

An affidavit purporting to be "sworn before at, etc.," omitting the word "me," held sufficient: Martin v. McCharles, 25 U. C. R. 279; but where the words were "sworn at, etc.," omitting "before me," it was held insufficient: Archibeid v. Hubley, 18 S. C. R. 116. For forms of general heading and conclusions of affidavits, see Form 16: Rule 47

Affidavits Not to be Sworn Before Solicitor or Agent of Party.—No affidavit in any action in a division court sworn before the solicitor or agent of the party on whose behalf it was made or before the clerk or partner of such solicitor or agent shall be read: section 120 (2); Rule 50.

For officers before whom affidavits may be sworn see Section 120 (1).

Requisites of Affidavit under Section 77 (3).—It is particularly to be noted tbat the affidavit must state the six distinct facts enumerated in sub-section 3. The omission of any one fact would be fatal to the application even if all the necessary facts are sworn to, the Judge has yet a discretion to refuse the application: *Re* Black v. Johnston, 5 O. W. N. 968.

Sec. 77. **By Whom the Affidavit must be Made, &c.**—The provision in section 77 (3) is imperative, and an affidavit of the applicant or his agent must be produced. An affidavit by the agent is now sufficient without any reasons being given for its not being made by the defendant.

Notice to Plaintiff.—The statute does not expressly or impliedly state that the order can be made, *ex parte*. It is submitted, therefore, that the plaintiff should have an opportunity of showing cause.

"It is one of the first principles of justice that no man's rights shall be adjudicated upon without giving him an opportunity of being heard in support of them:" *per* Willes, J., Thorburn v. Barnes, L. R. 2 C. P. at p. 401; see Fisher v. Keane, 11 Ch. D. 353; *Ex parte* Tucker, *Re* Tucker, 12 Ch. D. 308; R. v. Law, 27 U. C. R. 260.

No provision is made for the costs of the application, so that only costs of the ordinary fees of the clerk and bailiff under the tariff would be allowable. Should one of the parties die during the consideration of the application, the judge could still make the order, dating it as of the day of the argument: Ward v. Vance, 3 P. R. 210.

Forthwith Transmit.—The duty of the clerk in this respect is imperative, and his wrongful refusal could be followed by mandamus: R. v. Fletcher, 2 E. & B. 279; *Re* Linden v. Buchanan, 20 U. C. R. 1, and it would probably be granted with costs: R. v. Langridge, 24 L. J. Q. B. 73.

As to the meaning of the word "forthwith" see notes to section 20 (2). When an act is one which is capable of being done without delay, no delay can be permitted: *per* Jessel, M.R., *Re* Southam, *Ex parte* Lamb, 19 Ch. D. 69. See also Furber v. Cobb, 18 Q. B. D. 494, at p. 504; Love v. Fox, 15 Q. B. D. 679, *per* Bowen, L.J. It means "speedy and prompt action and an omission of all delay:" *per* Cockburn, C.J., R. v. Berkshire (Justices), 4 Q. B. D. 469. In matters of procedure it sometimes means within twenty-four hours: Morton v. Bank of Montreal, 18 C. L. T. 157. Where a consequence is "forthwith" to follow an event it imperatively excludes a time within which something else may be done inconsistent with that consequence, as when a statute says that on the resignation of a corporate officer the town council shall "forthwith" declare the office vacant, the resignation cannot be withdrawn: R. v. Wigan, 14 Q. B. D. 908.

Shall Enter.—The plaintiff must prepay the clerk's costs, otherwise he would not be obliged to enter the suit: see section 49.

It is submitted that the defendant would have the same time for disputing the plaintiff's claim as if the summons had been originally issued from the court to which the action is removed, unless the judge by his order should prescribe the time for entering the defence.

"**Forthwith Cause to be Served:**" see note *supra* as to meaning of "forthwith."

If the order is not taken out or acted upon the defendant would be taken to have abandoned it: Kenny v. Hutchison, 6 M. & W. 134; Belcher v. Goodered, 4 C. B. 472; Normanby v. Jones, 3 D. & L. 143; Kerr v. Douglass, 26 U. C. R. 357; 4 P. R. 102; Morley v. Bank of B. N. A., 10 U. C. L. J. 128; Ferguson v. Eillott, 7 P. R. 7; Kelley v. Wade, 14 P. R. 13; Molsons Bank v. Dillahaugh, 13 P. R. 312.

If the order be waived or abandoned it is not necessary to set it aside: *Re* Wilson and Hunter, 9 U. C. L. J. 133.

Where an order was made under this section which ought to have been made under section 79 (formerly section 91) prohibition was granted without prejudice to the right of the defendant to apply for an order under the latter section: *Re* Frost v. McMillen, 2 O. L. R. 303. Sec. 78.

Service of Order.—The defendant must forthwith serve a copy of the order on the plaintiff or his agent: section 77 (7).

As to what is sufficient service in cases where (as here) the statute does not require in express terms personal service, see notes to section 100. In connection with what is there stated it is to be noticed that although section 77 (7) does not expressly require personal service, the words "on the plaintiff or his agent" are explicit and personal service should be made in one of the two ways indicated by the section. Service on a corporation, whose chief place of business is not within the province, is made in the manner indicated in sections 89 (2), if it carries on business within Ontario; otherwise as provided in section 75; see notes to section 89; and in the case of partners in section 93 (4): see notes to those sections.

The order need not be served by the bailiff, but may be served by the defendant or any one acting for him.

Notice Where Jurisdiction Disputed.

78. Where a defendant, or a garnishee intends to contest the territorial jurisdiction of the court, he shall leave with the clerk, within eight days after the day of service of the summons on him (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen or more days before the return), a notice in writing that he disputes the jurisdiction of the court, and the clerk shall forthwith give notice thereof to the plaintiff, or his agent in the same way as notice of defence is given, and in default of such notice, the jurisdiction shall be considered as established and determined, and all proceedings may thereafter be taken as fully and effectually as if the action had been properly entered or taken in such court. 10 Edw. VII. c. 32, s. 78. Notice where jurisdiction of court disputed to be given

Defendant.—This includes primary debtor: section 2 (d).

Notice Disputing Jurisdiction.—This notice is an indispensable requisite to a proceeding founded upon the fact that a division court had no territorial jurisdiction. A notice once given cannot, apparently, be withdrawn, except by consent of all parties, and a notice given by a primary debtor or garnishee would inure to the benefit of all parties. The notice need not be in any particular form. If it expresses the defendant's intention to dispute the jurisdiction (giving the grounds: Rule 30), it would be sufficient: see Harper v. Child, 1 F. & F. 652; Lowe v. Owen, 12 C. P. 101; Everard v. Watson, 1 E. & B. at p. 804, *per* Campbell, C.J.; Paul v. Joel, 4 H. & N. 355; Bain v. Gregory, 14 L. T. 601; Aldridge v. Medwin, L. R. 4 C. P. 464; Allen v. Geddes,

Sec. 78. L. R. 5 C. P. 201. Rule 30 requires that the notice disputing the jurisdiction must state the grounds of such dispute, otherwise the judge may order judgment to be entered. It is expressly provided by this section, and also by section 82, that the notice must be in writing.

If the garnishee disputes the jurisdiction but the primary debtor does not and the plaintiff abandons all claim against the garnishee prohibition will not lie: Boyd v. Sergeant, 10 O. W. R. 377.

For form of notice, see Form 13 (10).

No affidavit is now required: Mitchell v. Doyle, 4 O. W. R. 725.

Leave with the Clerk.—See notes to section 98, sub-section 1.

Within Eight Days.—See notes to section 98. The time for giving notice cannot be extended: *Re* McLean v. Osgoode, 30 O. R. 430; notes to section 123; nor abridged: Hamilton P. & L. Socy. v. McKim, 13 P. R. 125. And the judge cannot after the expiration of the time limited by the statute grant leave to file the notice: *Re* McLean v. Osgoode, 30 O. R. 430.

Forthwith.—See notes to section 20 (2). As to the requirements of this notice, see section 82; notes to sections 102 and 103. The defendant is also required to leave his address, or that of his solicitor or agent, with the clerk: Rule 84.

Disputing the Jurisdiction of the Court.—Statutes relating to the practice and procedure of a court only apply to matters within its jurisdiction: Ahrens v. McGillegat, 23 C. P. 171.

The necessity of a notice disputing the jurisdiction only arises where "the *territorial* jurisdiction" is disputed, i.e., where the cause is one triable in *some* division court. If it is beyond the jurisdiction of *any* division court and is only suable in some *higher* court no notice need be given: Mead v. Creary, 8 P. R. 374; 32 C. P. 1; Manufacturers and Merchants M. F. Ins. Co. v. Campbell, 1 C. L. T. 134; *Re* Knight v. Medora, 14 A. R. 112; Graham v. Tomlinson, 12 P. R. 307. See notes to section 75. Should it be impossible for a party to leave with the clerk a notice disputing the jurisdiction owing to the clerk's absence or a like cause, the party would not be debarred of his right: see notes to section 77, sub-section 2. And if the clerk omitted to give the notice required, neither party's rights in the suit would be prejudiced by it. Should the clerk refuse to perform any part of his duty in regard to such notice, its performance could be enforced by mandamus: notes to section 61, title "Mandamus." And the omission by the clerk to do so would render him liable for any damage either party could prove he had sustained in consequence of such default: Parks v. Davis, 10 C. P. 229; Henly v. Mayor of Lyme-Regis, 5 Bing. 108; Ferguson v. Earl of Kinnoul, 9 Cl. & F. 251; Rogers v. Dutt, 13 Moo. P. C. 209; Carey v. Lawless, 13 U. C. R. 285. An action would also be maintainable against his sureties on their statutory covenant: Nerlich v. Mallory, 4 A. R. 430; notes to section 26.

Prohibition Shall Not Lie.—These words in the former Act are omitted from the present. They were introduced in the former Act to neutralize the effect of Clarke v. Macdonald, 4 O. R. 310, which was founded on the English case of Oram v. Bracy, 2 Ex. D. 347, which case was overruled by Chadwick v. Bull, 14 Q. B. D. 855.

In Default of such Notice.—That is the notice disputing the jurisdiction.

Sec. 79.

When action entered in wrong Court.

79.—(1) If it appears that an action should have been entered in some other court of the same or some other county, it shall not fail for want of jurisdiction, but, on such terms as the Judge shall order, all the papers and proceedings in the action may be transferred to any court having jurisdiction in the premises, and shall become proceedings thereof as if the action had been entered therein, and shall be continued as if it had originally been entered in the last mentioned court.

Clerk to place on list and notify parties.

(2) The clerk of the court, to which the proceedings have been transferred, shall place the action on the list for trial at the next sittings of his court which commences six clear days or more after he receives the papers, and he shall forthwith after receiving the papers notify the parties or their agents by registered post of the date, hour and place of the sittings, and the clerk issuing the summons shall certify in detail to the court to which the action is transferred all the costs incurred up to the date of the transfer. 10 Edw. VII. c. 32, s. 79.

If it Appears.—In the original section, 91, of the Act of 1897, it was provided that "the party making the application" shall satisfy the judge by affidavit of the alleged want of jurisdiction of the Court from which the action is being transferred. This is now omitted. The want of jurisdiction may appear on the face of the proceedings, as in the following cases under the old section: *Re* Hill v. Hicks, 28 O. R. 390; Webster v. McDougall, 26 C. L. J. 85; Spencer v. Wright, 37 C. L. J. 245.

Want of Jurisdiction.—The question of territorial jurisdiction is one very frequently raised in division courts, and in such cases the judges are compelled to apply the provisions of this section whenever it is found that an action has been brought in the wrong division. The question is fully discussed in the notes to section 72.

Application for Transfer.—Formerly it was held that if the section did not take away the right to prohibition it at least contemplated an application being made in the first instance to the Judge of the division court, in which the action was brought to have the action transferred to "some other court," and when such application was not made by the defendant prohibition was refused: *Re* Watson v. Woolverton, 9 C. L. T. 480, affirmed by C. P. Divisional Court, 22 O. R. 586 (*n*); followed in *Re* Hill v. Hicks, 28 O. R. 390; although *Re* Brazill v. Johns, 24 O. R. 209, had decided otherwise, holding that the defendant need not apply to transfer the case; the onus of having the case transferred to the proper court not being upon the defendant: see *Re* Thompson v. Hay, 22 O. R. 583; 20 A. R. 379. But in *Re* Gibbons v. Cannell, 4 O. W. N. 270 and in *Re* Mitchell v. Doyle, 4 O. W. N. 725, the law was established in accordance with Brazill v. Johns, *supra*, and prohibition was granted when the defendant filed a notice disputing "the jurisdiction to try the case" although he did not appear at the trial, nor make an application to the judge to transfer the case. "It is not *lex scripta*

Sec. 79. that a defendant must apply to the judge of a division court for transfer before applying for prohibition:" Britton, J. in *Re* Mitchell v. Doyle, *supra*. The changes in s. 79 (1) are remarked on in these cases.

For cases showing when a discretion will be exercised against granting an application for prohibition, see "Prohibition," *ante; Re* Mitchell v. Doyle, 4 O. W. N. p. 727.

If the judge declines to try the question of jurisdiction or gives a wrong decision upon it, prohibition will be granted: *Re* Thompson v. Hay, 22 O. R. 583; 20 A. R. 379.

A garnishee proceeding under section 155 is an "action" within the meaning of this section and may be transferred from a wrong to a proper division: *Re* McCabe v. Middleton, 27 O. R. 170; section 2 (1. a.)

Section 78 expressly includes a "garnishee" proceeding.

Either party may make the application. If the jurisdiction is disputed and the court is satisfied that it has no jurisdiction, the plaintiff would be unsafe in taking judgment: *Re* Thompson v. Hay, 22 O. R. 583; 20 A. R. 379. The judgment would be a nullity: *Re* Forbes v. Michigan Cent. Ry. Co., 20 A. R. 584; Keating v. Graham, 26 O. R. 36.

The order need not specify the date of the sittings of the court to which the case is transferred at which the case shall be tried, as is required under section 77 (3).

For form of notice of motion, see form 51 (2); for form of order, form 51; and of affidavit, form 51 (1).

The application to transfer may be made at any time before or at the trial: *Re* Thompson v. Hay, 22 O. R. 583; 20 A. R. 379; but see as to laches of defendant: Mitchell v. Doyle, 4 O. W. R. p. 727, and cases there cited.

Upon Such Terms as the Judge Shall Order.—The terms a judge should impose will depend entirely upon the circumstances of each particular case. The proceeding is somewhat analogous in this respect to an application to postpone a trial or for the amendment of proceedings, in both of which cases the general rule is to impose the payment of costs.

Formerly the power of the judge to impose costs, in such cases, was doubted, but by section 170, sub-sections 1 and 4, that difficulty is removed.

Effect of Transfer.—It is only upon the transfer that a suit in which jurisdiction has been successfully disputed becomes effective. Therefore a garnishee summons properly issued and served will take priority over one which is issued in the wrong division though it is afterwards transferred to the proper division: Sewrey v. Burk, 16 C. L. T. 322.

Sub-Section 2—Clerk's Duties.—The clerk who issued the summons must certify to the court to which the case is transferred, in detail, all the costs incurred up to the date of transfer, inclusive: section 79 (2). He should also furnish the clerk of the court to which the action is transferred with the addresses of the parties to the suit, so that the latter clerk may be able to give the notices required by s. 79 (2).

The clerk who receives the papers and proceedings is required to enter them in his procedure book and number the action in its regular order as if it were a new action, and place it on the list for trial: s. 79 (2). He is also required to notify the parties or their agents *forthwith*

of the date, hour and place of sitting at which the action will be tried: Sec. 80, s. 79 (2).

For form of notice of transfer, No. 75.

Lists for Trial.—See section 106.

Next Sittings of the Court, *e.g.*, that which shall be held next following the date on which the papers and proceedings are received by the clerk. See Booth v. Vicars, 13 L. J. Ch. 147; R. v. Surrey (Justices), 6 Q. B. D. 100; R. v. Sussex (Justices), 4 B. & S. 966.

Six Clear Days.—"Clear days" mean that the time is to be reckoned exclusive of both first and last days: Liffin v. Pitcher, 1 Dowl. N. S. 767; *Re* Sams and The City of Toronto, 9 U. C. R. 181; *Re* Railway Sleepers Co., 29 Ch. D. 204; Zouch v. Empsey, 4 B. & Ald. 522; R. v. Shropshire, 8 A. & E. 172; R. v. Aberdare Canal Co., 14 Q. B. D. 854.

The day on which the papers were received and the court day would be excluded.

Holidays.—Enumerated in R. S. O. 1914, c. [illegible] s. 29 (1).

If the last of the six days falls on a holiday the time limited is extended to the next following day which is not a holiday: same statute, s. 28 (h). The provisions of ss. 28 and 29 of this statute apply to "every Act" and are expressly made applicable by Rule 2 (7), and so the case of *Re* McKay v. Talbot, 3 O. L. R. 253, is not now applicable. See notes to section 105, "Holidays."

Forthwith.—As used here "forthwith" implies speedy and prompt action and an omission of all delay; as quickly as is reasonably possible. R. v. Berkshire Jus. 4 Q. B. D. 469; Notes to section 77.

Registered Notices.—The notices must be sent by post, prepaid and registered. It would not be a compliance with the statute to deliver them in any other manner: see notes to section 78. The clerk is to register all notices sent by mail and to preserve the certificate of registration with the other papers in the suit: Rule 78.

Costs, etc.—The clerk of the court in which the action was originally entered should be paid his costs at the time the claim is entered. He would not be bound to act if they are not so paid, nor would the clerk of the court to which the transfer is made be obliged to enter the suit until his costs are paid: See section 49 and notes thereto. Each clerk will only be allowed to charge for the proceedings in his own court.

The defendant, it is submitted, should by the order transferring the action, be relieved of any costs other than those which would have been occasioned had the case been originally entered in the proper court.

Notices on Summons.—See section 86.

Transfer under Wrong Section.—Where an order was made improperly transferring an action under the provisions of section 77 instead of under this section, prohibition was granted: *In re* Frost v. McMillen, 2 O. L. R. 303.

Actions by and against Clerks and Bailiffs.

80.—(1) A clerk or bailiff shall not sue or be sued in the court of which he is clerk or bailiff.

Sec. 80.

Idem.

(2) A clerk or bailiff shall sue or be sued separately or jointly with another person in the court of any next adjoining division whether in the same or another county.

Commenced before appointment.

(3) Nothing in this section shall prevent proceedings from being continued in the court in which the action was brought, where it was commenced before the appointment of such clerk or bailiff. 10 Edw. VII. c. 32, s. 80.

Suits by or against Clerks or Bailiffs.—Under the former section (92 in the old D. C. Act) the provision was merely permissive as regards persons who may wish to sue clerks or bailiffs, but the prohibition as to clerk or bailiff suing in his own court was complete. In other words, a clerk or bailiff could be sued in his own division, but he could not himself sue for anything there. By the present section the prohibition is also complete against a clerk or bailiff being sued in his own division. The wording of sub-section (2) has also been adjusted so as to do away with all questions as to the jurisdiction of the adjoining court to entertain any case within the jurisdiction of a division court, such as arose in *Re* Hill v. Hicks, 28 O. R. 390.

Sue or be Sued.—The old D. C. Act, s. 92, said "sue and be sued *for any debt*," which seemed to exclude claims for torts: see Hill v. Hicks, 28 O. R. 390 (393). The words "for any debt" are now omitted and the suit may now be brought in the adjoining division for a claim in tort as well as for a debt.

Although created by statute the bailiff is subject to a common law liability, so that if any one is injured by his neglect to carry out the duties imposed on him by statute, he is liable to an action: Watson v. White, 1896 2 Q. B. 9.

In the Same or Another County.—The action may now be brought in the adjoining division, either in the same county or in another adjoining county.

Sub-Section 3.—If an action against a clerk or bailiff is pending in the court at the time of his appointment, it may be continued and enforced in the ordinary way, notwithstanding such appointment.

As to particulars in actions against officers and their sureties, see Form 12.

Adjoining County.—The term "adjoining" means touching or contiguous as distinguished from lying near or adjacent; in contact with: *Re* Ward, 52 N. Y. 397; Miller v. Mann, 55 Vt. 479. In a penal statute the word means "absolutely contiguous without anything between:" *per* Parke, J., R. v. Hodges, Moo. & M. 341. But the meaning in other statutes is less strict: see Lon. & S. W. Ry. Co. v. Blackmore, L. R. 4 H. L. 610; Hobbs v. Mid. Ry. Co., 20 Ch. D. 418, *per* Manisty, J. And an "adjoining owner" was held to include an owner of land separated from surplus lands of a railway by only a private road over which such owner had a right of way: Coventry v. L. B. & S. C. Ry. Co., L. R. 5 Eq. 104. See also Harrison v. Good, L. R. 11 Eq. 338.

Secs. 81-83.

81. An action by or against a Judge may be brought in any court of a county adjoining that in which he resides. 10 Edw. VII. c. 32, s. 81.

Action by or against Judge.

An Action.—The action must be within the jurisdiction of a division court. Even the consent of the parties could not give jurisdiction in a case beyond the competence of *any* division court: Jones v. Owen 5 D. & L. 669; Buse v. Roper, 41 L. T. 457; Wellesley v. Withers, 4 E. & B. 750; Foster v. Usherwood, 3 Ex. 3; Farquharson v. Morgan 1894, 1 Q. B. 552; Lee v. Cohen, 71 L. T. 824. See notes to section 61.

A Judge.—"Judge" includes junior judge: section 2 (1) (*g*). The judge or junior judge must reside in the county of which he is such, so that the "adjoining county" may be taken to mean the county adjoining that in which the person sued is judge or junior judge.

82. Unless otherwise provided, every notice required by this Act shall be in writing. 10 Edw. VII. c. 32, s. 82.

Notices to be in writing.

In Writing.—"Writing," or "written," or any terms of like import, shall include words printed, painted, engraved, lithographed, photographed, or represented or reproduced by any other mode in a visible form: Interpretation Act, R.S.O. 1914, c. 1, s. 29 (*h h*). The language of this section is imperative, and any verbal notice would be inoperative, and might be entirely disregarded: *Re* McGregor v. Norton, 13 P. R. 223. See General Form of Notice, No. 76, and Forms of Notices of Defence, No. 13.

The fees also must be paid: see section 49: *Re* Parke v. Clarke, 14 C. L. T. 32.

Entry of Claim, Service, Etc.

83.—(1) The plaintiff shall enter his claim with the clerk and at the same time shall deliver to him a copy (and if necessary, copies) of his account, claim or demand in writing in detail (and in cases of tort, particulars of his demand) and each claim shall be numbered according to the order in which it is entered, and a summons in the prescribed form shall be issued, bearing the number of the claim on the margin thereof, and on the trial no evidence shall be given of any cause of action except such as is contained in the claim so entered.

Entry of claim with Clerk.

(2) In an action on a promissory note, bill of exchange or cheque, the same shall be filed with the clerk before judgment, unless otherwise ordered, or unless it be shown that the note, bill or cheque is lost, or that it cannot for some other reason be produced. 10 Edw. VII. c. 32, s. 83.

Promissory note, etc., to be filed before judgment.

Particulars of his Demand.—Forms 9-12. This section prescribes the manner of entering a division court suit. On entering a

Sec. 83. claim with the clerk, the plaintiff must furnish a copy, or, if necessary, copies of his claim in detail; and in cases of tort (personal actions under section 62, classes (*a*) and (*b*), particulars of demand.

Frequently such forms of account as, "to amount of account rendered" are given, as the particulars here required. Such are insufficient The statute requires *particulars in detail.* As to the claim and particulars, see Forms 9 to 12.

Unless particulars are given with reasonable certainty and detail, judgment by default cannot be signed or ordered under sections 98, 99 and 100; and it is only when such particulars have been *personally served*, that judgment may be given for default at the trial without further proof under section 108.

The claim when entered with the clerk should contain *all* the requisites of this section in order to be complete.

The plaintiff is bound to furnish the claim, and the clerk should not prepare it, and cannot make any charge for it if he does, no fee being provided in the tariff for it. But he may prepare and charge for necessary copies if they are not furnished by the plaintiff. When there is only one defendant the clerk may charge for o*nly two* copies of the claim and summons under any circumstances. The christian and surname of the plaintiff or plaintiffs should be inserted in the summons: see Form 32; Walker & Co. v. Parkins, 2 D. & L. 982. A note payable to John Souther & Son was held to be properly sued upon in the name of John Souther & Co., on evidence that they were the persons so designated: Wallace v. Souther, 16 S. C. R. 717.

In the case of a defendant partnership firm it is advisable to add the individual partners as defendants also, if it is intended to pursue them by way of judgment summons in the event of there being insufficient property to recover payment; because a judgment summons cannot be issued against a partnership firm as such.

The defendant's christian and surname should, in general, be inserted in full. He may be sued by any name or names he may have acquired by usage or reputation, and this applies to both his christian and surname: Arch Pract. 186; Williams v. Bryant, 5 M. & W. 447; Browne v. Smith, 1 P. R. 347; Cor of the Township of Beverley v. Barlow, 10 C. P. 178; R. v. Worthanbury (Inhabitants), 7 Q. B. 555; Price v. Harwood, 3 Camp. 108; Borthwick v. Ravenscroft, 5 M. & W. 31; *Re* Clarke and Chamberlain, 18 O. R. 270.

A Summons in the Prescribed Form.—All actions of every kind whether for debt or tort or otherwise are now to be commenced by a summons in the Form No. 32 *post:* Rule 3. This form is headed "Special Summons," but it is applicable to all classes of cases. When the claim attached to the summons is for a debt or money demand it must contain the "particulars of claim with reasonable certainty and detail" required by ss. 98-100; and it then becomes a "specially endorsed" summons, or a "special summons" within the meaning of those sections.

When the action is for tort or replevin or for a claim other than the recovery of a debt or money demand merely, it will be seen by reference to Form 32 that no notice disputing the claim is required. But in the case of a defence of tender before action, it would seem to be necessary to file with such defence a notice disputing the plaintiff's claim in every case: s. 111. A notice demanding a jury, or a plea of set-off or counterclaim or any statutory defence such as the statute of limitations,

must of course be filed in any case as required by the notices endorsed on Form No. 32. Sec. 83.

As to the plea of tender before action in Detinue, see Rule 39; and as to payment into court, see Section 112.

Alias or Pluries Writ.—Instead of issuing an alias or a pluries process the original summons may be renewed by an order of the Judge at any time before the summons expires: Rule 7. An "alias" writ is a second writ, and a "pluries" writ is any writ after the second: Wharton, 36, 560; 7 U. C. L. J. 178.

Concurrent Summonses.—Where there are more defendants than one and they reside in different counties, concurrent summonses may issue for the defendants residing out of the county in which the action is brought, but costs only of the summonses actually served shall be allowed on taxation, unless the judge otherwise orders; and such concurrent summonses must correspond with the original and be marked in the margin "Concurrent": Rule 6.

The summons, whether original or concurrent, is to be issued by the clerk: section 34; and must be sealed with the seal of the court and authenticated by the signature of the clerk: Rule 3; see forms which include signature. It has been held that the omission of the signature is an irregularity merely which may be amended: Archibald v. Hubley, 18 S. C. R. at p. 125.

The signature of the clerk's name by a clerk in the office having general authority is sufficient: France v. Dutton, 1891, Q. B. 208.

Amendment of Claim.—The omission to state the place of abode would be merely an irregularity and could be waived: Ross v. Gandell, 7 C. B. 766; or amended under the very wide powers of amendment conferred by sections 97, 104: Matthews v. Victoria (city), 5 B. C. R. 287; Conrad v. Alberta Mining Co., 17 C. L. T. 133; Miller v. Flewelling, 17 C. L. T. 265. If the name or description of the plaintiff is insufficient or incorrect, it may be amended at the instance of either party: see sec. 97. A reasonable degree of certainty in the description of the defendant's residence, etc., will suffice: Arch. Prac. 186, 187. Describing a defendant as of "Clapham in the county of Surrey," was held sufficient: Toulmin v. Bowditch, 11 Jur. 45. Where an action was brought in the name of an officer of a local authority, instead of the local authority itself, the name of the latter was allowed to be substituted for the original plaintiff: Mills v. Scott, L. R. 8 Q. B. 496; see Bolingbroke v. Townsend, L. R. 8 C. P. 645; and s. 97 now covers this point. Where a renewal note was sued on, the plaintiff was allowed to substitute the original note as the claim instead of the renewal, which defendant claimed to be a forgery: Matthews v. Marsh, 5 O. L. R. 540. An amendment was also allowed substituting another person as plaintiff: Pegg v. Howlett, 28 O. R. 473; s. 97 now provides for this being done.

An amendment may be allowed up to the last stage of the proceedings on proper terms: s. 97; Peterkin v. McFarlane, 9 A. R. 429; *Re* Trufort, 34 W. R. 56. If all the evidence has been given it is a mere matter of form to adapt the particulars to the matters proved: Gough v. Rench, 6 O. R. 699. "Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a mere matter of favor or of grace:" *per* Bowen, L.J., Cropper v. Smith, 26 Ch. D. 700 at p. 710. Therefore there is no kind of error or mistake, which if not fraudulent or intended to overreach, a

Sec. 83. court ought not to correct if it can be done without injustice to the other party: *Ib.*

Refusal of Amendment.—If the defendant cannot be compensated in costs, leave to amend should not be given: *Re* Gnuiard and Gibbs' Patent, 57 L. J. Q. B. 209; and where parties cannot be placed in the same position as if the claim had been correct in the first instance leave should be refused: Stewnrd v. North Metropolitan Tram. Co., 16 Q. B. D. 556; as where the nmendment would deprive defendant of the defence of the Statute of Limitations: Weldon v. Neal, 19 Q. B. D. 394.

The court may refuse to allow an nmendment raising nn entirely new case: Newby v. Sharp, 8 Ch. D. 39; Smith v. Boyd, 18 P. R. 296; and nn amendment will not be allowed for the sole purpose of determining how the costs of the action shall be awarded: Webber v. Wedgewood, W. N. (1883), 8.

The subject of adding and changing parties is fully discussed in the notes to section 97.

Lost Promissory Note.—Before suing on a lost note, n plaintiff should tender sufficient security, otherwise he would be made to pay the costs of the suit: La Banque Jacques Cartier v. Strachan, 5 P. R. 159; see Orton v. Brett, 19 C. L. T. 117. The non-filing of a bond of indemnity for n lost note is a matter of practice and not a ground for interference with the division court on an application for prohibition: *Re* McGoirick v. Ryall, 26 O. R. 435. Form of Bond, Form 102.

Section 83 (2) was evidently intended for the purpose of altering the law as declared in the case of *Re* Drinkwater v. Clarridge, 8 P. R. 504, in which it was held that the clerk was bound to enter judgment on n special summons, without the production of the note sued on. Unless otherwise ordered, the note must now be filed with the clerk before judgment.

Assignment of Chose in Action.—R. S. O. 1914, c. 109, s. 49, contains the rule of law in force since 31st December, 1897, with reference to the *legal* assignment of choses in action, and is as follows:

"**49.**—(1) Any absolute assignment, made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee if this section had [not] been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor."

(NOTE: The word "not" in the above section was omitted from the Revised Statutes, but added by amendment, 4 Geo. V. c. 2, sch. (23)).

"(2.) In case of an assignment of a debt or other chose in action, if the debtor, trustee or other person liable in respect of the debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he thinks fit, to call upon the several persons making claim thereto

to interplead concerning the same, or he may, if he thinks fit, pay the same into the Supreme Court under and in conformity with the provisions of law for the relief of trustees: 1 Geo. V. c. 25, s. 45." Sec. 83.

That is, under The Trustee Act, R.S.O. 1914, c. 121, s. 38.

The enactment embodied in the above s. 49 (1) is identical with that contained in the English Judicature Act, 1873 (36-37 Vic. c. 66, s. 25 (6)). The former law on the subject in Ontario was contained in R.S.O. 1887, c. 122, and R.S.O. 1897, c. 51, s. 58. The English cases apply in Ontario: Cohen v. Webber, 24 O. L. R. p. 173; Sovereign Bank v. International, 14 O. L. R. p. 514.

Any Absolute Assignment.—The statute excludes assignments "purporting to be by way of charge only" and limits its application to absolute assignments. A letter addressed to a tenant directing him to pay the plaintiff the rent until the order shall be countermanded, is an absolute assignment: Knill v. Prouse, 33 W. R. 163.

The assignment must not be "by way of charge only:" Durham v. Robertson, 1898, 1 Q. B. 765; but an assignment of debts, upon trust that the assignee shall pay himself a sum due and the remainder to the assignor, is an absolute assignment of the debts, with a trust as to the proceeds, and is a valid legal assignment within the meaning of the statute: Burlinson v. Hall, 12 Q. B. D. 347; as also is an assignment in trust to pay several sums: Comfort v. Betts, 1891, 1 Q. B. 737; Duff v. Canadian Mut. Fire Ins. Co., 9 P. R. 292; Wiesener v. Rackow, 76 L. T. 448, C. A.; Fitzroy v. Cave, 1905, 2 K. B. 364, following Comfort v. Betts, *supra*.

In National Provincial Bank v. Harle, 6 Q. B. D. 626, it was held that a mortgage of debts was not a good legal assignment; but that case was disapproved in Tancred v. Delagoa Bay Ry., 23 Q. B. D. 239, which decided that a mortgage assigning the debt with proviso for reassignment was valid as an absolute assignment so far as the debt was concerned. The Tancred case was followed in Durham v. Robertson, 1898, 1 Q. B. 765.

The assignment must be an assignment of the whole contract, and not merely of the rights and interests of the assignor as security for a debt: Mercantile Bank v. Evans, 1899, 2 Q. B. 613. But if, upon the construction of the whole document, it really constitutes an assignment of the whole chose in action, it will (no matter what its form) be a valid legal assignment, although expressed to be by way of security: Hughes v. Pump House Hotel Co., 1902, 2 K. B. 190; *Re* Bland and Mohun, 5 O. W. R. 522.

An assignment absolute in form yet not really intended to pass the title to the debt but made merely for the purpose of appointing the assignee the agent of the assignor is not in fact an absolute assignment called for by the statute: Mills v. Small, 14 O. L. R. 105. See also Fairbanks v. Saunders, 9 O. W. R. 184; Elgie v. Edgar, 9 O. W. R. 614.

The effect of the leading cases upon the question "what is an absolute assignment within the statute?" is discussed in Sovereign Bank v. The International Portland Cement Co., 14 O. L. R. 511: "The test would seem to be: Does the document purport to assign *all* the debt, though that may be simply security for a possibly smaller sum; or does it purport to assign only sufficient of the debt to secure the amount of the advance?"

Sec. 23.

By Writing, etc.—The assignment in order to be a good legal assignment in accordance with the statute, must be in writing: Rennie v. Block, 26 S. C. R. 556. This is essential to bring it within the express condition in the statute: *Re* Suttons Trust, 12 Ch. D. 175. It must be "under the hand of the assignor," that is, signed by him or by his authority.

Under the general law as to the authority of partners, one partner may make a good assignment in the firm name of a debt due the firm: Marchant v. Morton, *supra; In re* Briggs, 1906, 2 K. B. 200.

It may be in any form. Thus a letter addressed to a tenant directing him to pay the rent to the plaintiff is in accordance with the statute: Knill v. Pronse, 33 W. R. 163; so also is an order in writing on trustees of money for the assignor: Harding v. Harding, 17 Q. B. D. 442.

An order in writing signed by the payee of a promissory note, directing the maker to pay the amount of it to a third person, is a good assignment of the moneys owing on the note: Tyrrell v. Murphy, 30 O. L. R. 235, in which numerous authorities are cited.

Where a written undertaking was made by a merchant to his banker, who supplied him with capital, that the purchase money of any goods he sold was to be paid by the purchaser to the banker direct, and on goods being sold by the merchant, the banker wrote to the purchaser informing him of the arrangement and asking for payment, it was held that there was a good equitable assignment of the purchase money to the banker, and that the notice given was sufficient: Brandt v. Dunlop, 1905, A. C. 454.

Debt or Other Legal Chose in Action.—For a definition of chose in action, see Stroud's Legal Dictionary, 308.

The statute only affects procedure, enabling the assignee to sue in his own name, which he could not formerly do, and it does not enlarge the class of things lawfully assignable: McCormack v. Toronto Ry. Co., 13 O. L. R. at p. 657; Torkington v. McGee, 1902, 2 K. B. 427; Walker v. Bradford Bank, 12 Q. B. D. 511; Schroeder v. The Central Bank, 24 W. R. 716; Marchant v. Morton, 1901, 2 K. B. 829; Tolhurst v. Association of Portland Cement Mfrs., 1903, A. C. 414. So a cause of action *ex delicto* is not assignable: Dawson v. Great Northern & City Ry. Co., 1904, 1 K. B. 277; 1905, 1 K. B. 260; McCormack v. Toronto Ry. Co., *supra*. Although this has been questioned in many cases: see Colonial Bank v. Whinney, 30 Ch. D. 261, 275, 287; 11 App. Cas. 426; Cohen v. Mitchell, 25 Q. B. D. 262; the McCormack case would seem to be expressive of the preponderating authority on the subject.

An unascertained part of a debt is not a subject of assignment under the statute: Jones v. Humphreys, 1902, 1 K. B. 10.

If against public policy to allow an assignment of a particular claim, *e.g.*, of a bond securing a wife's alimony, such assignment will be invalid: Reiffenstein v. Hooper, 36 U. C. R. 295; *Re* Robinson, 27 Ch. D. 160. But the court cannot consider whether the ulterior motive of the parties in making the assignment is against public policy: Fitzroy v. Cave, 1905, 2 K. B. 364.

A cheque on a bank does not constitute an assignment of the money to the payee: Schroeder v. The Central Bank, 24 W. R. 716; but after the cheque is marked good by the bank the latter becomes the payee's debtor: Boyd v. Nasmith, 17 O. R. 40.

A debt not yet due may be assigned: Brice v. Bannister, 3 Q. B. D. 569; Buck v. Robson, 3 Q. B. D. 686; Walker v. Bradford Old Bank, 12 Q. B. D. 511, 516. Sec. 83.

The words "not transferable" written across the face of a deposit receipt do not affect the validity of the claim of an assignee for the money deposited: *Re* Commercial Bank of Manitoba (Barkwell's Case), 11 Man. L. R. 494; see *Re* Turcan, 40 Ch. D. 5.

For an exhaustive enumeration of the subjects capable of assignment within the statute, see Halsbury, Vol. 4, p. 371.

The debtor, being a third party common, set up that the assignment was voluntary: Walker v. Bradford Old Bank, 12 Q. B. D. 511; Tyrell v. Murphy, 30 O. L. R. p. 243.

Notice of Assignment.—The statute calls for "express notice in writing to the debtor." Notice is not essential, however, in order to effectuate the transfer as between assignor, assignee and debtor, either in the case of a transfer under the statute or in the case of an equitable assignment, but only to protect the assignee against further assignments and to secure the debtor against other claims: Rennie v. Quebec Bank, 1 O. L. R. 303, 3 O. L. R. 541, and cases cited there; Eby-Blain Co. v. Montreal Packing Co., 17 O. L. R. 292; Walker v. Bradford, Old Bank, 12 Q. B. D. 511; Newman v. Newman, 28 Ch. D. 678; Gorringe v. Irwell, 34 Ch. D. 128; *Re* Williams Hamilton Mfg. Co., 1 O. W. N. 421.

The meaning of the clause requiring notice is that until it is given the assignee would have to sue as he would before the statute have sued, *i.e.*, in the name of the assignor or in an action to which the assignor is a party: Walker v. Bradford Old Bank, *supra;* Torkington v. McGee, 1902, 2 K. B. 427.

Notice is of course required in order to bind the debtor, for if he paid the assignor without notice, or without being aware of the assignment, he would be protected, the assignment being binding upon him only from the time he receives notice of it: Tailby v. Official Receiver, 13 A. C. 534. See also Marchant v. Morton, 1901, 2 K. B. 829; Kelly v. Selwyn, 1905, 2 Ch. 117.

A notice of assignment may be sufficient to put the debtor on inquiry and prevent him paying the original creditor without further inquiry, and yet not be sufficiently clear and precise to entitle the assignee to sue under the statute: McMillan v. Orillia, 6 O. L. R. 126.

The notice may be given after the assignor's death: Walker v. Bradford Old Bank, *supra;* Bateman v. Hunt, 1904, 2 K. B. 530; Tyrell v. Murphy, 30 O. L. R. p. 243.

An assignment made abroad, by persons resident abroad, of a fund invested in British securities is governed by the English law, and the assignee who gave notice is entitled to prevail against a prior assignee who did not give notice: Kelly v. Selwyn, 1905, 2 Ch. 117.

Equitable Assignments.—Prior to the statute above mentioned, certain assignments of choses in action were enforceable in equity and were known as equitable assignments. These are not in any way affected or invalidated by the statute.

A parol assignment of a chose in action is a valid equitable assignment: Trusts Corporation of Ontario v. Rider, 24 A. R. 157; Todd v. Phœnix and United Fire Ins. Co., 3 B. C. R. 302; McMaster v. Canada Paper Co., 21 C. L. J. 216; Lee v. Friedman, 20 O. L. R. 49. But

Sec. 83. evidence of n verbal assignment must be corroborated: *Re* McRae, 6 O. L. R. 238. And a verbal assignment may take priority over n subsequent written one: Heyd v. Millier, 29 O. R. 735; and see cases in Holmested's Judicature Act, 4th ed., p. 451, *et seq.*

A present appropriation, by order, of a particular fund operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect: Heyd v. Millar, 29 O. R. 735. A verbal agreement between employer, employee and a third person who supplied goods to the employee, that such goods should be paid for out of wages earned from time to time, is an equitable assignment of the wages *pro tanto*: Lee v. Friedman, 20 O. L. R. 49; but the amount of board deducted by agreement out of wages and payable by the employer to the boarding house keeper is merely the subject of a debit and credit transaction between the latter parties with which the employee has nothing to do and so is not wages: Olson v. Maclin, 4 O. W. N. 287, distinguishing Lee v. Freidman, *supra*. The endorsement and delivery of a banker's deposit receipt, with the intention to make a gift, operates as a good equitable assignment of the amount on deposit at the bank: *Re* Griffin, Griffin v. Griffin, 1899, 1 Ch. 408.

The delivery by a debtor to his banker of an order to pay the creditor the debt out of a fund on deposit in the bank, is a good equitable assignment *pro tanto* of the fund to the creditor: Trunkfield v. Proctor, 2 O. L. R. 326.

There may be a good equitable assignment of a small sum out of a large amount: Brice v. Bannister, 3 Q. B. D. 569; *Ex parte* Hill, 10 Ch. D. 615; *Ex parte* Moss, *Re* Toward, 14 Q. B. D. 310; Mitchell v. Goodall, 44 U. C. R. 398; 5 A. R. 164; Bank of British North America v. Gibson, 21 O. R. 613. An order to amount to an equitable assignment should specify the fund out of which it is payable: Hall v. Prittie, 17 A. R. 306; Percival v. Dunn, 29 Ch. D. 128; but evidence is admissible to show that the order was in reality dealing with a particular fund: Lane v. Dungannon Agricultural Association, 22 O. R. 264; see National Pro. Bank of England v. Harle, 6 Q. B. D. 626; Mercantile Bank v. Evans, 1899, 2 Q. B. 613.

An assignment of a chose in action as a continuing security for advances is a good equitable assignment, and no notice is necessary to give it validity as between the parties: Sovereign Bank v. International Portland Cement Co., 14 O. L. R. 511.

The holder of a policy on his own life, in order to secure a loan, signed a document addressed to the lenders in which he stated: "For collateral security I have placed aside and assigned to you a policy of insurance in the Standard Life Insurance Company for $2,000," and it was held to be a good equitable assignment of the policy: Thomson v. Macdonnell, 13 O. L. R. 653.

Whether a creditor can split up a single cause of action into many actions, without the consent of his debtor, is an interesting question, and the general opinion seems to be that he cannot. Mr. Justice Story said: "A debtor has a right to stand on the singleness of his original contract, and to decline any legal or equitable assignment by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to other persons:" Mandeville v. Welch, 5 Wheat. 286.

A debtor cannot, however, disregard an equitable assignment of a part, and cannot compromise or settle with the assignor or even modify the terms of the contract without the consent of the assignee after notice

of the assignment: Brice v. Bannister, 3 Q. B. D. 569; Burlinson v. Hall, 12 Q. B. D. 347. Sec. 33.

If the debtor consents to the assignment, as by accepting an order, the assignee may sue without making other holders of the demand parties to the suit: Surtees v. Hubbard, 4 Esp. 204; 6 R. R. 853; Grant v. Aldrich, 38 Cal. 514. Where there has been a partial assignment, the proper course would seem to be to make the assignor, if he retains any interest, and the other assignees, parties to the action against the debtor, and have the rights of all parties declared. The debtor in such cases might be allowed to retain his costs out of the fund: see Lett v. Morris, 4 Sim. 607; Smith v. Everett, 4 Bro. C. C. 64; James v. Newton, 2 New Eng. Rep. 820, where the American authorities are collected.

An accepted order is equivalent to payment as against the creditor or persons claiming Mechanics' Liens under him: Jennings v. Willis, 22 O. R. 439. An assignment of two specific funds in the disjunctive is a good equitable assignment by one or the other: Quick v. South Colchester, 3 O. R. 614.

Not Every Chose in Action Assignable.—A claim for personal services as a singer in a choir is not in its nature assignable: Kemp v. Baerselman, 1906, 2 K. B. 604; Cohen v. Webber, 2 O. W. N. 1283. And where a chose in action is of such a nature that it is not assignable, a claim for damages for breach of the contract respecting it is not assignable: Cohen v. Webber, *supra;* May v. Lane, 64 L. J. Q. B. 236, as explained in the later case of Torkington v. Magee, 1902, 2 K. B. pp. 433, 434. The latter case was reversed on the facts on appeal: 1903, 1 K. B. 644. In all cases in which a personal element is introduced: *e.g.*, where B. contracted to supply K. with all the eggs required in his business, and the latter agreed not to purchase eggs from any one else, the claim of B. for eggs supplied is not assignable: Kemp v. Baerselman, 1906, 2 K. B. 604.

The assignee of a wage earner's claim for wages stands in the place of the assignor and is entitled to the preference given to the wage earner by The Wages Act, R.S.O. 1914, c. 143: Porterfield v. Hodgins, 29 O. L. R. 409; approved in appeal, 6 O. W. N. 2; and an assignee of a number of claimants for wages may now join them all in one suit or proceeding to enforce the claims: same statute, s. 8 (4).

So the assignee of a wages claim is entitled to all the remedies to which the wage earner would have been entitled in order to recover from the directors of a company 1 year's wages under R.S.O. 1914, c. 178, s. 98; or from the liquidator of a company under the same statute: see Lee v. Friedman, 20 O. L. R. 49.

Suits by Assignee.—When a legal assignment has been made the assignee must sue in his own name: Wellington v. Chard, 22 C. P. 518; Cousins v. Bullen, 6 P. R. 72; but when the assignment is merely equitable the assignee should be a co-plaintiff, or at any rate a defendant: Daniels' Ch. Pr. 265. The assignor cannot be added as plaintiff without his own consent. If the debt has been assigned by way of security only, the assignor may maintain the action: Prittie v. Connecticut Fire Ins. Co., 23 A. R. 449; but it may be proper to add the assignee so as to bind him: Biggs v. Freehold Loan & S. Co., 26 A. R. 232, 248.

The assignee of a judgment acquires all the rights and remedies of the assignor, and so may attach a debt due to the judgment debtor: Goodman v. Robinson, 18 Q. B. D. 332.

Sec. 84.

Assignee Takes Subject to Equities.—This applies as well to equitable assignments as to those under the statute. The assignor can give no greater right than he has himself: West of England Banking Co. v. Batchelor, W. N., 1882, 11; Roxburghe v. Cox, 17 Ch. D. 520; Webb v. Smith, 30 Ch. D. 199; Martin v. Bearman, 45 U. C. R. 205; but an ultimate assignee is not subject to equities which would have been available against an intermediate assignee, but not against the original creditor: *Re* Milan Tramways Co., *Ex parte* Theys, 25 Ch. D. 587.

In any of the following circumstances the assignee takes subject to the equities: if the debtor has, before the assignment or before becoming aware of it, given the assignor a promissory note for the debt: Bence v. Shearman, 1898, 2 Ch. 582; or has a set-off: Christie v. Taunton, 1893, 2 Ch. 181; or has paid the assignee after the assignment without notice: Crawford v. Canada Life, 24 A. R. 643; or even if the debtor has a counterclaim for a debt (or even for unliquidated damages: Newfoundland v. Newfoundland Ry. Co., 13 A. C. 200), or for a liability which arose subsequently to the assignment or notice, if such liability is connected with transactions with which the assigned debt is also connected, but not otherwise: Christie v. Taunton, 1893, 1 Ch. 181; Farquhar v. Toronto, 26 O. R. 356; and see Quebec Bank v. Taggart, 27 O. R. 162.

As to what equities the assignment is subject to, see Davies v. Petrie, 1906, 2 K. B. 786.

What to accompany summons.

84. The clerk shall annex the plaintiff's account or particulars to the summons, and shall deliver copies of the summons and account or particulars to the proper person to serve the same. 10 Edw. VII. c. 32, s. 84.

Particulars of Claim.—See also section 83, and notes thereto.

Shall Annex the Plaintiff's Particulars.—A copy of the claim must be annexed to the summons; and to each copy of summons to be served must likewise be annexed a copy of such claim: Rule 3, s. 84.

The neglect of the clerk to comply with the statute and rules in this respect would not vitiate the proceedings. They would be amended, if necessary, upon proper terms, the principle of law, that the act of the court shall not injure any man, being applicable: see notes to section 97. Any damage which the plaintiff might sustain by want of reasonable care on the part of the clerk would be the subject of an action against him and his sureties.

The Proper Person to Serve the Same.—That is the bailiff: s. 34; except as "otherwise provided" by the Act: *Ib.*; i.e., by ss. 75 (2) and 91. By the English County Court rules of 1875, it was provided that "the summons shall be delivered to the bailiff," words almost identical with s. 34, and it was held that the rule was obligatory and not merely directory: Barker v. Palmer, 8 Q. B. D. 9. The plaintiff cannot demand that it be served by some one else: In re Wilson v. McGinnis, 10 O. L. R. 98; and the reasons given in the judgment in that case indicate that service can only be made by the bailiff except as otherwise provided by the statute. It has never been expressly decided, however, whether a summons served by any one other than the bailiff is validly served: see Whitehead v. Fothergill, Dra. 200.

Secs. 85-87.

85. The summons, with a copy of the account or particulars attached, shall be served ten days at least before the return day thereof, and, where a defendant resides out of the county in which the action is brought, fifteen days at least before the return day thereof. 10 Edw. VII. c. 32, s. 85.

When summons to be served. Where defendant resides out of county.

Service.—As to the different modes of service of summons, see notes to section 87.

Affidavit of Service.—Form 20, and note at foot thereof.

Days at Least.—This means clear days, that is exclusive of the day of service and the day of return. Sunday would be included as one of the days: *Re* Railway Sleepers Supply Co., 29 Ch. D. 204: see note to section 78, *tit.* "Clear Days."

Return Day.—The "return day" means the day on which the summons is returnable. Its primary meaning is the day originally fixed for the hearing: R. v. Leeds County Court, 16 Q. B. D. 691. The summons is returnable on the eleventh day after service if the defendant, or all of the defendants, reside within the county in which the action is brought, and on the sixteenth day after service if any of the defendants do not reside within the county. If the defendant resides out of the province the service shall be at least fifteen days before the return day of the summons: section 75 (2).

A defendant does not waive his right to the full time for trial by entering a dispute notice: Zarita v. Mann, 16 C. L. J. 144: see also Barker v. Palmer, 8 Q. B. D. 9; Hudson v. Tooth, 3 Q. B. D. 46.

As to bailiff's duties on receiving summons for service, see s. 46.

As to service of summons in foreign division, see s. 37.

Concurrent Summonses.—See Rule 6; s. 83 and notes thereto.

86. There shall be endorsed upon the summons a notice informing the defendant that any application to change the place of trial must be made within the time limited for disputing the plaintiff's claim. 10 Edw. VII. c. 32, s. 86.

Endorsement upon summons.

Changing Place of Trial.—See section 79 and notes thereto. The notice required by this section must be endorsed on the summons and be signed by the clerk in the words of Form No. 32, cl. 6. Neglect of the clerk to sign the notice might be held to enlarge indefinitely (to the trial?) the right to move to change the place of trial. The notice seems to be material only in cases falling within section 77, *i.e.*, where the amount claimed exceeds $100, and the action is brought in the division where it is payable. The time within which the application must be made is specific. No power is given to the judge to enlarge the time: see note to section 77, sub-section 2.

87. Where the amount of the claim exceeds $15 the service shall be personal, and where the amount does not exceed $15 the service may be on the defendant, his wife or servant, or on

When service to be personal or otherwise.

Sec. 87. a grown up inmate of the defendant's dwelling-house or usual place of abode or business. 10 Edw. VII. c. 32, s. 87.

Claim.—A sum included for interest will form part of the "claim:" Insley v. Jones, 4 Ex. D. 10; Thompson v. Pearson, 18 P. R. 420; Rodway v. Lucas, 10 Ex. 670; Smart v. Niagara and Detroit Ry. Co., 12 C. P. 406; Northern Ry. Co. v. Lister, 4 P. R. 120; McKenzie v. Harris, 10 U. C. L. J. 263.

Personal Service.—Service means personal service where possible: Young v. Dominion Construction Co., 10 P. R. 130. Personal service means delivering to the defendant a copy of the process, and showing him the original if he desire it: Gogga v. Huntingtower, 12 M. & W. 503; Philipson v. Emmanuel, 56 L. T. 858; and leaving a copy personally with him: Woods v. McFadden, 10 O. L. R. 643.

Merely showing the summons to the defendant would not be good service; a copy must be left with him: Worley v. Glover, 2 Str. 877. If, on the refusal of a defendant to take the copy of the summons, the officer brings it away with him, the service is not good: Pigeon v. Bruce, 8 Taunt. 410; Erwin v. Powley, 2 U. C. R. 270.

Unless the defendant, within a reasonable time, asks to see the original summons, it need not be shown to him: Petit v. Ambrose, 6 M. & S. 274; Thomas v. Pearce, 2 B. & C. 761.

It has been held, that fifteen minutes was not an unreasonable time: Westley v. Jones, 5 Moore, 162.

If inspection of the original is demanded and refused the service is bad: Weller v. Wallace, R. & J.'s Dig. 2872.

If the defendant refuses to receive the copy after being told its nature and its being offered to him, it may be placed on his person: Bell v. Vincent, 7 D. & R. 233; or placed before him and left with him: Worley v. Glover, 2 Str. 877. If he refuses to take it and it is taken away by the bailiff, there is no service: *Ib.*

The following have been held to be cases of personal service: Where the writ was put through the crevice of a door to the defendant, who had locked himself in: Smith v. Wintle, Barnes, 405; where the writ had been enclosed in a letter to defendant, which he had read, and from which he took out the copy: Boswell v. Roberts, Barnes, 422. See also Aldred v. Fficks, 5 Taunt. 180; but see the later case of Redpath v. Williams, 3 Bing. 443. Handing the copy in an envelope to the defendant without informing him of the contents, and he having no knowledge of the same, is not good service: Bank Russe, etc. v. Clark, W. N., 1894, 20.

Where, the door of the defendant's house being fastened, the officer spoke to him through the closed window, explaining the nature of the process, and then placed a copy of it under the door informing defendant thereof, after which he returned to the window and showed the original summons to defendant, who said: "That will do," it was held good service: Re Colin Campbell, 9 C. L. T. 145.

Service upon the treasurer was held good service upon the county: Watts v. Beemer, 8 C. L. J. 255, *per* Wilkes, Dy. J.

If the particulars of demand should be amended after service, judgment could not be entered without re-serving the summons: Guess v. Perry, 12 P. R. 460.

If a person refuses to take a copy of the summons, the proper course is to inform him of its nature, and throw it down in his presence: *per*

Patteson, J., Thompson v. Pheney, 1 Dowl. 443; but if the defendant is illiterate the document should be explained: Rita v. Schmidt, 12 Man. L. R. 138. Sec. 67.

In Gogge v. Huntingtower, 12 M. & W. 503, the facts were these. In order to serve defendant, a person went three times to his residence, when he saw a female servant, who said her master was not at home. On the third occasion the servant let down over the garden wall a basket, into which the writ was put. The servant then took the basket and shortly afterwards the voice of the defendant was heard in the yard saying to the servant, "Take it back; I will not have it." The party called on a subsequent day, when the servant said she had given the writ to her master. Held, not a personal service. In Christmas v. Eicke, 3 D. & L. 150, the facts were these. Several calls had been made at defendant's residence by the party who was endeavoring to serve the writ, without success. On the last occasion, having inquired if the defendant was at home, and having received an evasive answer, he waited in the hall. Having afterwards gone into the parlor for a few minutes, he saw the defendant running upstairs. He immediately followed after defendant, but before he could give him a copy of the writ, the defendant went into a room and fastened the door. He then called out to him, and told the defendant that he had a writ against him at the suit of the plaintiff, and, putting a copy of it through a crevice of the door, told him that that was a copy of the writ. Held, not actual personal service, but only constructive service. But see Smith v. Wintle, *supra*. Service upon "a female servant at the lodgings of the defendant" is not good service: Price v. Thomas, 11 C. B. 543. In Heath v. White, 2 D. & L. 40, it was held that where the party attempting to serve the writ of summons went to the defendant's house, and seeing him standing at a closed window on the ground floor, told him in an audible voice the purpose for which he came, and threw a copy of the writ down in his sight, and in the presence of his wife, who had come out of the house, and who had denied that he was at home, and left it lying there in defendant's garden, the service was not sufficient. If proceedings be taken as if personal service had been effected when it was not, they are irregular only, and not null (Holmes v. Russell, 9 Dowl. 487), and a defendant must move promptly after knowledge of it to set them aside: see Johnston v. DeVeber, 8 C. L. T. 383; or he will be taken to have waived the irregularity: Willis v. Bull, 1 Dowl. N. S. 303. But where no irreparable wrong will be done, and a plaintiff has obtained judgment by default, lapse of time is not a bar to the application to set it aside: Atwood v. Chichester, 3 Q. B. D. 722. If there are conflicting affidavits as to service, and the party serving has deposed to personal service, the courts will not set aside the proceeding upon an affidavit of the defendant that he has not been served: Morris v. Colea, 2 Dowl. 79; Giles v. Hemming, 6 Dowl. 325; Emerson v. Brown, 7 M. & G. 476.

Service on Sunday is invalid: Taylor v. Phillips, 3 East, 155; R.S.O. 1807, c. 324, s. 3, now R.S.O. 1914, c. 56, s. 124, which is still in force notwithstanding the decision of the Privy Council that local legislation as to the Lord's Day is *ultra vires*, the above mentioned section being merely a consolidation of a Statute which was in force in Ontario at the time of Confederation: Attorney-General v. Hamilton Street Ry., 1903, A. C. 524; (7 Can. Cr. Cas. 326); and not being repealed by the Dom. Lord's Day Act: R.S.C. c. 27, s. 14. Service on any other holiday is good: Foster v. Toronto Ry. Co., 31 O. R. 1. See also notes to s. 105, as to holidays.

Sec 97. If the bailiff cannot effect the service of the summons in time for the sitting of the Court mentioned therein, he must return the same to the clerk, who must insert the dates of the next two sittings and return the same to the bailiff immediately: Rule 105.

Service may be made at any hour of the day or night: Upton v. Mackenzie, 1 D. & R. 172; Priddee v. Cooper, 1 Bing. 66. The summons may be served in any county in Ontario, and by any bailiff: *Re* Ladouceur v. Salter, 6 P. R. 305; although not bound to go outside of his own division: section 46. Service is good though made while defendant is attending court in his own cause: Poole v. Gould, 1 H. & N. 99; City of Kingston v. Brown, 4 U. C. R. 117. The summons, we need scarcely say, must be served by one who can read so as to be able to swear, if necessary, to the correctness of the copy: Delafield v. Jones, Ca. Pr., C. P. 34. But inability to write is not an objection: Baker v. Coghlan, 7 C. B. 131. Where, in an action against a father, process was served upon his son, of the same name and appearance entered and defence made by the son, the court held that a verdict for defendant was correct, and that, whether there was collusion or not, the plaintiff could not recover against the son so as to charge the father: Killens v. Street, M. T. 4 Vic. A writ directed to J. S. was, by mistake served upon his son of the same name, who, a few days afterwards, gave it to the father, the defendant telling his son that the sheriff had made a blunder, and defendant at his son's request took it to an attorney, who, upon defendant's instructions, entered appearance, and afterwards put in pleas: it was held good service: The Provincial Insurance Company of Canada v. Shaw, 19 U. C. R. 360. In an action on a mortgage the writ was served on the mortgagor's father, who, by his son, an attorney, entered an appearance and defended the suit, and a verdict was taken against the mortgagor, the verdict was set aside because served on the wrong person, and no notice or knowledge of the proceedings were shown to have reached the defendant: Sutherland v. Dumble, 14 C. P. 156; see also Walley v. M'Connell, 13 Q. B. 903. An admission of service of summons waives all technical irregularities: Otis v. Rossin, 2 P. R. 48. A defective service of a summons, regularly issued and in proper form, is cured by the appearance of the defendant and an appearance "under protest" is unknown to the practice of the court: Dom. Coal Co. v. Kingswell, S. S. Co., 30 N. S. R. 397. Where personal service is not necessary, the bailiff should be particular in serving one of the three persons mentioned in this section, and showing the *nature* of the service in the affidavit: and when served on "a grown-up inmate of the defendant's dwelling-house or usual place of abode or business," his or her name, if possible, should be stated in the affidavit, and the fact that the person was grown-up and was an inmate of the particular house, etc.: See Form 20. On these points, see particularly, 2 U. C. L. J. 85, 86 and 104, where the mode of service is fully discussed.

Where the suit is on the judgment of a court of the province of Quebec, on a personal service made in Ontario in an action in which the cause thereof arose in Quebec, the judgment is conclusive on the merits: Court v. Scott, 32 C. P. 148, and cases there cited; R.S.O. 1914, c. 56, ss. 50-52. But the courts of this province will not aid in giving force to a foreign judgment based upon grounds which would not support such a judgment here: Swaizie v. Swaizie, 31 O. R. 81.

Whether service of a summons from a division court is good is a matter peculiarly for the decision of the judge: Waters v. Handley, 6 D. & L. 88: Zohrab v. Smith, 5 D. & L. 635; see Robinson v. Lenaghan, 2 Ex. 333.

As to service on a corporation having its head office out of the province, see sections 89 and 153. Sec. 87.

As to service on partners, see section 93, sub-section 4.

Substitutional service: section 88.

If a defendant gives notice of defence, it is submitted that he would thereby waive proof of service or any irregularity of service: Davis v. Pearce, L. R. 5 C. P. 435; *Re* Jones, 1 L. M. & P. 65; Dart v. Citizens Ins. Co., 11 P. R. 513; Boyce v. Sacker, L. R. 39 Ch. D. 251.

And if the defendant appears and contests the action at the trial, personal service is also waived: *Re* Guy v. G. T. Ry. Co., 10 P. R. 372; see also *Re* Merchants' Bank v. Van Allen, 10 P. R. 348.

Renewal of Summons.—If not served a summons expires at the expiration of twelve months from its date, including that date, unless an application be made within that time for an order renewing the summons for a further period of twelve months from the date of such order: Rule 7. It is not necessary that the order should be made within the twelve months so long as the application is made in time. If the judge should be absent the papers should be left with the clerk, in which case the application may be considered as made: see note to s. 77. The day of issue of the summons is included, so that it would be necessary for the plaintiff issuing a summons on the 7th June, 1914, to apply to the judge for an order for its renewal before the 6th June, 1915.

So also the renewed writ must be served, or again renewed, within 12 months from the date of renewal, including the date of renewal: Quaid v. King, 1 O. L. R. 51. An order to renew was not set aside even although the defendant showed he could have readily been found and served at his residence in Toronto at any time, there being, upon the application for the renewal, no material fact known to the plaintiff withheld, and the judge making the order being satisfied with the reasons for delay given upon the application for renewal: Canadian Bank of Commerce v. Tennant, 5 O. L. R. 524.

The time for making the application cannot be extended: see notes to section 77: Doyle v. Kaufman, 3 Q. B. D. 340; Hewitt v. Barr, 1891, 1 Q. B. 98. If satisfied that reasonable efforts have been made to effect service, or for other good reason, the judge may order that service shall be good, if made within twelve months from the date of the order, and so from time to time during the currency of the further period allowed and the writ in such case must be renewed by being marked by the clerk, on its delivery to him by the plaintiff, with the date of the day, month and year of such renewal. The original writ is then available to prevent the operation of any statute of limitations, and for all other purposes: Rule 7 (b). What are "reasonable efforts" to effect service must depend on the circumstances of each case: Tomlinson v. Gontley, L. R. 1 C. P. 231. Where a defendant went away to avoid service and could not be found, a proper case was made out: Smalpage v. Tonge, 17 Q. B. D. 644. It is for the judge to determine whether the facts give him jurisdiction and the Supreme Court will not review his decision: *Re* Hibbitt v. Schilhroth, 18 O. R. 390; Charrington v. Witherby, 23 Sol. Jour. 230. But where material facts were suppressed on the application for renewal, it was set aside: Mair v. Cameron, 18 P. R. 484.

Other Good Reason.—Where plaintiffs delayed service of the writ for nearly four years, awaiting the determination of another suit, which, if decided in a certain way, would have made the action useless,

Sec. 88.

it was held that this was not a good reason: Howland v. Dominion Bank, 15 P. R. 56; 22 S. C. R. 130. "The position of the defendant should be considered, and he should not have an action hanging over him for an indefinite time, unless some good excuse for want of diligence in its prosecution be shown": *per* Osler, J.A., 15 P. R. 62.

But where the delay arose from the pendency of an appeal in an action between the same parties, the decision of which would affect the plaintiff's course, the order for renewal was made: Gilmour v. Magee, 14 P. R. 120; and where some of the defendants could not be found, and the plaintiff was in feeble health, and unable to give the matter attention, an order for renewal was confirmed: Cairns v. Airth, 16 P. R. 100.

Before an order for renewal can be made there must be some real excuse for the delay; and to hold a summons unserved to practically extend the time allowed by the Statute of Limitations is an abuse of the process of the Court: Appleyard v. Muilgan, 3 O. W. N. 943.

Of the Judge's Order.—The original order of the judge must be delivered to the clerk. The renewal is for twelve months from the date of the order, the date of the order not being included.

As to Statute of Limitations, see notes to section 113.

Form of Order.—See Form 103. Form of renewal is given in Rule 7 (a).

General Provisions.

Substitutional service.

88. The Judge may make an order for substitutional service or for service by advertisement or otherwise. 10 Edw. VII. c. 32, s. 88.

Substitutional Service.—The object and effect of substitutional service was expressed by Mellor, J., in Watt v. Barnett, 3 Q. B. D. 163, at p. 186: "The object of the rule was to obviate the difficulties that the plaintiff might be exposed to by reason of the defendant's going abroad and keeping abroad and it being impossible to effect personal service, and to prevent the plaintiff's right being entirely defeated by reason of these difficulties. It was intended, in my opinion, in such cases to enable the court to order substituted service, and that when such service is directed, it should have all the effects of personal service." See *Re* Urquhart, 24 Q. B. D. 723, at p. 726.

The right which every defendant has, to be served personally with the summons, can only be taken away by statutory enactment: see Thorburn v. Barnes, L. R. 2 C. P. 384: *Re* Pollard, L. R. 2 C. P. 106; Ferguson v. Carman, 26 U. C. R. 26; Maxwell on Statutes, 2nd ed., 443.

The rule governing substitutional service seems to be that where, *at the time of the issue of the writ*, there could at law have been personal service of it upon the defendant sought to be served, but circumstances prevented such service being made, then substitutional service may be allowed. But if at the time the writ was issued, personal service could not at law have been made, then substitutional service cannot be ordered: Field v. Bennett, 56 L. J. Q. B. 89; Hillyard v. Smyth, 36 W. R. 7; De Bernales v. New York Herald, 1893, 2 Q. B. 97 (note); Jay v. Budd, 1898, 1 Q. B. 12, *per* Rigby, L.J., at p. 17.

Affidavit for Substitutional Service.—For formalities and general requirements of affidavits, see Rules 42-50 and Forms 16, 20. For

form of affidavit, see Form 104. The affidavit should show such facts as would satisfy the judge that all efforts have been made which could be reasonably expected to serve the defendant or ascertain his whereabouts, and should also show what the efforts were: Skegg v. Simpson, 2 DeG. & Sm. 454; Lush's Prac., 3rd ed., 375; and that all practicable means of effecting personal service have been exhausted, and that such service, or at any rate "*prompt* personal service" is impossible: Forth v. Bush, 9 Jur. N. S. 431; Brooker v. Smith, 4 L. T. 545; Mander v. Faicke 1891, 3 Ch. 488. It should be shown where the defendant resided or carried on business, what business he had been or was engaged in, what specific efforts had been made to serve him and why it was not done, and, if founded on the fact that the defendant has absconded, it should be stated, and whether or not he had any, and if so, what friends or relations residing in the province: see Stephen v. Dennie, 3 U. C. L. J. 69; Flower v. Allen, 2 H. & C. 688, *per* Bramwell, B., at p. 694; Irving v. Strait, 1 Ch. Chamb. 2. Sec. 88.

It would not be enough to show that defendant had gone abroad and had no private residence in the province: Kitchen v. Wilson, 4 C. B. N. S. 483; it is necessary to show that the defendant is evading service or that his whereabouts are unknown: Robertson v. Mero, 9 P. R. 510; Adler v. Benjamin, 1 T. L. R. 308; Wilding v. Bean, 1891, 1 Q. B. 100; Jay v. Budd, 1898, 1 Q. B. 12, at p. 18.

If the defendant is evading service, the affidavit should state the deponent's belief to that effect, giving the facts upon which the inference is founded.

show that if service is made on so-so it will reach the defendant

The manner in which it is proposed that service is to be effected, and that there is a reasonable probability of the summons coming to the knowledge of the defendant, should be shown: Cook v. Dey, 2 Ch. D. 118; Copes v. Brewer, 24 W. R. 40; Furber v. King, 50 L. J. Ch. 496.

The Scope and Effect of the Section.—Before 57 Vic. c. 23. ss. 12, 13, and 14 (now section 75), the process of division courts had no effect against a man residing out of the province: Ontario Glass Co. v. Swartz, 9 P. R. 252, unless he had, in Ontario, an office and an agent doing business on his behalf, or had absconded. And although section 75 may have been intended to cover such cases, it does not appear to confer any additional power to order substitutional service in any case where it would previously have been improper to do so. But under this section the widest possible powers are conferred, and it would appear that an order may be made for substitutional or other service not only of the summons but any other process, in any manner which the judge in his discretion may direct: see Jay v. Budd, 1898, 1 Q. B. 12, at p. 16; Whitley v. Honeywell, 24 W. R. 851. The word "process" is defined to mean any summons, writ, or warrant issued under the seal of the court: Rule 2 (8).

As to actions against firms or individuals whose chief place of business is not within Ontario, see s. 89 and notes thereto; and as to an action against a person, whether a British subject or not, carrying on business under another name, see s. 96.

When Substitutional Service cannot be Ordered. — The principle of substitutional service is thus stated by Lord Esher, M.R.: "I do not see how substitutional service can be ordered when the conditions are such that original personal service could not possibly be effected. The expression 'substituted service' implies in itself that the original service could, under certain circumstances, possibly be effected": *Re* Easy, *Ex parte* Hill, 13 Q. B. D. 538. See Field v. Bennett, 56 L. J.

Sec. 88. Q. B. 89; Fry v. Moore, 23 Q. B. D. 395; Hillyard v. Smyth, 36 W. R. 7; Wilding v. Bean, 1891, 1 Q. B. 100; De Bernales v. New York Herald, 1893, 2 Q. B. 97 (n); Sloman v. Government of New Zealand, 1 C. P. D. 563; Worcester Banking Co. v. Firbank, 1894, 1 Q. B. 784; O'Connor v. The Star Newspaper Co., 30 L. R. Ir. 1. Substitutional service will not be ordered against a foreign sovereign: Mighell v. Sultan of Johore, 1894, 1 Q. B. 149; or against a colonial government: Sloman v. Government of New Zealand, 1 C. P. D. 563; or against a foreign ambassador: Musurus Bey v. Gadban, 1894, 2 Q. B. 352.

Cases Where Substitutional Service Ordered.—The principle on which the court will order substituted service is that the process so ordered to be served will reach the person served: Whyte-Melville v. Whyte-Melville, 85 L. T. Jour. 7; or that it is likely to come to his knowledge: Hope v. Hope, 19 Beav. 327; 4 De G. M. & G. 328. Therefore, such service will be allowed upon persons authorized to accept that particular service or who will communicate the process to the defendant: *Ib.; Re* Slade, 30 W. R. 28. For instance, such service has been allowed on solicitors who have acted for defendant in the subject matter of the action: Hornby v. Holmes, 4 Hare, 306; Hope v. Hope, 19 Beav. 327; Jay v. Budd, 1898, 1 Q. B. 12; on a former solicitor of the defendant: Watt v. Barnett, 3 Q. B. D. 3, 363; see The Pommerania, 4 P. D. 195; on the defendant by mail in a letter addressed to him at his last address: Dymond v. Croft, 3 Ch. D. 512; on defendant's managing clerk at his offices and upon his solicitors: Armitage v. Fitzwilliam, W. N. (1875) 238; Jay v. Budd, 1898, 1 Q. B. 12; see Tottenham v. Barry, 12 Ch. D. 797; on a special agent of defendant: Hobhouse v. Courtney, 12 Sim. 140; on general agents: Jones v. Cargill, 11 L. T. 566; on wife when husband out of the jurisdiction: Bank of Whitehaven v. Thompson, W. N. (1877) 45; on a person in communication with the defendant: Dicker v. Clarke, 11 W. R. 625; on relations and by advertisement: Wolverhampton (&c.) Co. v. Bond, 29 W. R. 599; see Coulburn v. Carshaw, 32 W. R. 33. In an action against an assignee in insolvency who had absconded, service was allowed on an inspector of the estate: London & Can. L. & A. Co. v. Thompson, 8 P. R. 96. In an action against husband and wife and the husband could not be found, service was directed to be made by advertisement, subject to the direction of the registrar: Whitley v. Honeywell, 24 W. R. 851; and in another case by serving the defendant's wife, by leaving a copy at the house and by advertisement in two local papers: Mellowa v. Bannister, 31 W. R. 238; Waters v. Waters, 24 W. R. 190. In Alexander v. Alexander, 1 O. L. R. 639, substitutional service was made by posting, and it was held that the order should not have been made as the same was not likely to reach the knowledge of the defendant. But if it can fairly be inferred that the defendant has notice of the proceedings the notice will be allowed: Taylor v. Taylor, 6 O. L. R. 356, 545. The person served as agent may apply to set aside the service: Doremus v. Kennedy, 2 Grant 65.

An order was made for service on a foreigner out of jurisdiction of notice of writ by registered letter sent to a trustee of the defendant and to his wife: Ditton v. Bornemann, 3 T. L. R. 3.

An order was made for substitutional service of a writ against a defendant whose christian name was unknown and was left blank in the writ: 35 Sol. J. 17.

Evading Service.—Where defendant evades service an order may be made for service by leaving a copy of the writ at his office and last

known lodgings and by advertisement: Cook v. Dey, 2 Ch. D. 218; Crane v. Julilon, 2 Ch. D. 220; Bank of Whitehaven v. Thompson, W. N. (1877) 45; Hamliton v. Davies, W. N. (1880) 82. Sec. 88.

When it was clear that defendant was evading service, service was ordered by leaving a copy of the writ at defendant's dwelling house and by copies being sent to him by mail: Copes v. Brewer, 24 W. R. 46. See also Trent Cycle Co. v. Beattie, 15 T. L. R. 176; *Re* Urquhart, 24 Q. B. D. 723.

Where defendant is out of the jurisdiction and his whereabouts are unknown, and there is no one in the jurisdiction who is likely to be in communication with him, service may be ordered by advertisement alone: Hartley v. Dilke, 35 L. T. 706; or by advertisement and mailing copies of the writ to different addresses at which defendant has been heard of: Stimson v. Stimson, 6 Gr. 379.

Where defendant was out of the jurisdiction at the time of the issue of the writ, substitutional service may be ordered if the court is satisfied that he went out of the jurisdiction to evade service: *Re* Urquhart, 24 Q. B. D. 723; see Fry v. Moore, 23 Q. B. D. 395; Watt v. Barnett, 3 Q. B. D. 183 at p. 186; *per* Esher, M.R., Wilding v. Bean, 1891, 1 Q. B. 100, at p. 103; see Jay v. Budd, 1898, 1 Q. B. 12.

The time within which defendant may dispute the plaintiff's claim will run from the date on which service is effected as set forth in the order, or from the date of the publication of the advertisement, whichever is the later: Johnson v. Moffatt, W. N. (1875) 248.

Subpoena.—A witness is not liable to attachment for disobedience to a subpœna served substitutionally pursuant to an order: Barber v. Adams, 16 P. R. 156. Section 115 allows the service of a subpœna by leaving it at the witness' usual place of abode. *Query*, whether an attachment will issue against a witness so served without any effort for personal service or any evidence that it came to the witness' knowledge: See notes under section 115. An order should not be made for substitutional service of a subpœna upon an officer of a litigant corporation: Mills v. Mercer Co., 15 P. R. 281.

Service on Lunatic Defendant.—The new section 42 of The Hospitals for the Insane Act, R.S.O. 1914, c. 295, now provides that in the case of a patient in such hospital, service may be made on the Inspector of Hospitals and Public Charities, if the Inspector is named therein as Committee.

Order for Substitutional Service.—For form of order; see Form 104. See also Crane v. Julilon, 2 Ch. D. 226; Cook v. Dey, 2 Ch. D. 218. In these cases the court refused to give directions as to the time for appearance as the ordinary time allowed for appearance will run from the service of the writ or issue of the advertisement, whichever is the latest in date. When the order is for service out of the jurisdiction it should fix the time for entering defence. The order should prescribe what is to be done instead of personal service; and the plaintiff's proceedings after the order must strictly conform to it, and to the terms which the judge has imposed: Weeks v. Wray, L. R. 3 Q. B. 212.

Setting Aside Order.—An order for substitutional service, and judgment by default obtained thereon, may be set aside on terms: Watt v. Barnett, 3 Q. B. D. 363.

An application may, it seems, be made to set aside the order on affidavits contradicting those on which it was obtained, and not disclosing

Sec. 89.

any defence on the merits: Hall v. Scotson, 9 Ex. 238; Thelwall v. Yelverton, 16 C. B. N. S. 813.

If the order was properly granted it would not be rescinded in consequence of an event which subsequently occurred: Borradaile v. Nelson, 14 C. B. 655.

Service out of Jurisdiction.—Section 75 (2), (3), (4), provides for service of the summons out of jurisdiction.

Service of process, etc., on corporations.

89.—(1) Every summons or process against a corporation, firm or individual whose chief place of business is not within Ontario, and all subsequent papers and proceedings in the action, may be served on the agent of the corporation, firm or individual whose office or place of business as such agent is either within the division from the court of which the summons or process issued, or is nearest thereto.

Interpretation "Agent."

(2) For the purpose of this section the word "agent" shall include,

(*a*) In the case of a railway company a station-master having charge of a station of the company;

(*b*) In the case of a telegraph company, a person having charge of a telegraph office of the company; and

(*c*) In the case of an express company, a person having charge of an express office of the company. 10 Edw. VII. c. 32, s. 89.

Corporation, Firm or Individual.—The provisions of this section originally extended only to corporations not having their chief place of business in the province. Formerly service of a summons or other process or proceedings could not be made upon corporations or persons residing out of but carrying on business within Ontario: *Re* Ahrens v. McGilligat, 23 C. P. 171; Westover v. Turner, 26 C. P. 510; *Re* Guy v. The G. T. Ry. Co., 10 P. R. 372; Berkley v. Thompson, 10 App. Cas. 45; Ontario Glass Co. v. Swartz, 9 P. R. 252; R. v. Lightfoot, 6 E. & B. 822. In 1884, provision was made by sections 2, 3 and 4 of the Division Courts Amendment Act for service of garnishment proceedings against such corporations; in 1885 the provision was extended to "every summons or process issued out of a division court" and to "all subsequent papers and proceedings in the action or proceeding in which the summons or process has been issued." In 1887 the provisions of section 88 (now 76) were passed providing that in cases against such corporations when the cause of action arises partly in one division and partly in another the action might be brought in either division. In 1889 the provisions of this section were made to include "a firm or individual" having its (*sic*) chief place of business without the province; and in the revision of the Statutes in 1897 the section assumed its present form.

The question as to when and how the division courts have obtained jurisdiction in such cases has never apparently been considered. In this respect it has been said that these courts are endowed with greater powers

than the high court has: Russell v. Combefort, 23 Q. B. D. 520; Dobson v. Festl, 1891, 2 Q. B. 92; Heineman v. Hale, 1891, 2 Q. B. 83, and cases cited in notes to section 75. In 1897, the provisions of section 75 were enacted giving to division courts jurisdiction "In cases where it is by this Act provided that a claim may be entered or an action brought, or that any person or persons may be sued" notwithstanding that the residence of the defendant is at the time of bringing the action out of the province of Ontario, and this provision has been held to apply to any action within the competency of the division courts: Hicks v. Jacobs, 19 C. L. T. 88. Sec. 89.

The local agent of a foreign insurance company who has power only to receive and transmit applications was held to be an "agent" within this section: Simpson v. Chase, 14 P. R. 280. But a limited agency for taking orders merely for transmission is not a carrying on business at the agent's office: Grant v. Anderson, 1892, 1 Q. B. 108; see Baillie v. Goodwin, 33 Ch. D. 604; Worcester Banking Co. v. Firbank, 1894, 1 Q. B. 784.

And the term "agent" means at least some person who is an agent of the corporation, who transmits or carries on here, or controls or manages here some part of the business which the defendants profess to do or for which they are incorporated: Murphy v. Phœnix Bridge Co., 18 P. R. 406, 495.

"Place of Business."—Means the possession within the jurisdiction of a place of business held in the name of the firm by a partner or by a person or persons in any pay of the firm: Worcester Banking Co. v. Firbank, 1894, 1 Q. B. 784; Singleton v. Roberts, 70 L. T. 687; Annual Practice 1908, vol. I. p. 650; but upon the facts in Ryckman v. Randolph, 20 O. L. R. 1, it was held that the business carried on by Perkins, in Toronto, in the name of a New York firm, was not a place of business of the latter in Toronto.

To be liable to service in Ontario the company must carry on business in Ontario and the mere fact that the president or any officer happens to reside in Ontario is not sufficient to allow service to be so made: Wilson v. Detroit & Milwaukee, 3 P. R. 37; Murphy v. Phœnix, 18 P. R. 495; Logan v. Bank of Scotland, 1904, 2 K. B. 495; Compagnie-Generale v. Low, 1899, A. C. 431. Where the company does not carry on business in Ontario, service must be made under section 75.

Chief Place of Business.—It has been held that "the home of a company must be taken to be that place which is occupied as such, where their profits come home to them, whence orders emanate and where the chief officers of the company are to be found": *per* Wilde, B., Adams v. The G. W. Ry. Co., 6 H. & N. 404, at p. 409, and this it is submitted is also a good definition of the expression "chief place of business" as applied to a company and that the same definition would be applicable to a "firm or individual": see also Franklin v. Owen, 15 C. L. T. 105, 158, 185; notes to section 72.

An action for damages alleged to have occurred in British Columbia against a railway company whose head office is out of Ontario, but which carries on business within the province may be maintained in this province: Tyler v. The C. P. Ry. Co., 29 O. R. 654. A chartered bank doing business in Ontario is deemed to be resident there for the purposes of the law as well as for the transaction of its business: see 3-4 Geo. V. c. 9, ss. 70, *et seq.* (Dom.); County of Wentworth v. Smith, 15 P. R. 372; but an ordinary foreign corporation, although having an

Secs. 90, 91.

agency in Ontario, is not so resident: Parker v. Odette, 16 P. R. 69; see also Boswell v. Piper, 17 P. R. 257; Braun v. Davis, 14 C. L. T. 194; 9 Man. L. R. 534, and other cases cited in notes to section 179; Le Tellleur v. S. E. Ry. Co., 3 C. P. D. 18; notes to section 72.

Served on the Agent.—Except in the cases enumerated in the sub-sections, it is submitted that the "agent" would mean the person managing the branch establishment.

Office or Place of Business.—The office or place of business must be that which he occupies as such agent, i.e., the branch establishment: see Sewry v. Burke, 16 C. L. T. 322.

Nearest Thereto.—See notes to section 72 (*b*).

Sub-section (2).—The definition here given of the word "agent" is not intended to define the only class of agents that may be served.

A female, married or single, a minor or an alien, could be an agent under this section: see Watkins v. Vince, 2 Stark. 368.

As to service see section 87 and notes thereto.

Postage.

90. The postage on papers required to be served out of the division, and sent by mail for service, shall be costs in the cause. 10 Edw. VII. c. 32, s. 90.

Costs in the Cause.—The costs of all proceedings "which form part of the regular proceedings in the cause" are generally understood as "costs in the cause"; and the party entitled to costs receives them from the opposite party: Cameron v. Campbell, 1 P. R. 173, *per* Burns, J.; see also Pugh v. Kerr, 6 M. & W. 17; Copeland v. Blenheim, 11 P. R. 54.

Postage on Papers.—All papers sent from one division court to another, or to a party to a suit, or to the judge, shall be prepaid and registered, and when papers are sent to the judge postage stamps for return postage must in all cases be enclosed; the postage and registration to be costs in the cause: Rule 57. By the preservation of the registration receipt the clerk is in all cases able to prove the mailing of a letter at the time shown thereby: see Rule 78. Upon being furnished with the necessary postage the clerk is required to answer promptly all enquiries made by parties to suits: Rule 69.

Bailiff *pro tempore.*

91.—(1) Where there is no bailiff or the bailiff is under suspension, the Judge may appoint a bailiff *pro tempore* to perform:

(*a*) All the duties of bailiff; or

(*b*) Any particular duty.

Clerk may act as bailiff.

(2) The clerk may also exercise the powers conferred by clause (*b*).

Duties of Bailiff *pro tempore.*

(3) The person appointed under clause (*a*) of subsection 1 shall perform all the duties required to be performed by a bailiff. 10 Edw. VII. c. 32, s. 91.

Under Suspension.—See section 24 (2).

Secs. 92, 93.

Sureties.—The sureties of the bailiff given under section 26 would not be responsible for the *pro tempore* bailiff appointed under this section: see as to scope of the security given by the bailiff: R.S.O. c. 15, s. 8, and notes to ss. 26, 27, 28.

Clerk to prepare affidavits of service, etc.

92. The clerk shall prepare an affidavit of service of every summons issued out of his court, or sent to him for service, stating how the same was served, the day of service and the distance the bailiff necessarily travelled to effect service, and the affidavit shall be annexed to or indorsed on the summons and shall be sworn to by the bailiff; but the Judge may require the bailiff to be sworn in his presence, and to answer such questions as may be put to him touching any service or mileage. 10 Edw. VII. c. 32, s. 92.

Affidavit of Service of Every Summons.—For necessary formalities of all affidavits see Rules 42-50; Form 16, and notes to s. 77.

If the service is properly made a defect in the affidavit would not invalidate it. A fresh affidavit could be made: see Fee v. McIlhargy, 9 P. R. 329, where it was held that the division court rules are not imperative. But all affidavits should be carefully prepared: see Jacomb v. Henry, 13 C. P. 377. For form of affidavit of service see Form 20.

Distance Necessarily Travelled.—Formerly mileage for less than a mile was *not* chargeable, for the former tariff only provided for "*every mile*" necessarily travelled; but the present tariff provides 15c. "for every mile or fraction of a mile:" Tariff Item 7. Mileage should be calculated from the point at which the officer received the paper. If two or more defendants, the mode of determining the distance travelled is by estimating it first to the place where the first defendant is served, then from there to the next, and so on; and the aggregate distance so travelled is the correct measure. It would be improper to charge mileage to each defendant's place: Corporation of Haldimand v. Martin, 19 U. C. R. 178.

Partners.

One or more persons jointly liable may be sued.

93.—(1) In case of a debt or demand against two or more persons, partners in trade or otherwise jointly liable, who reside in different divisions, or of whom one or more cannot be found, one or more of such persons may be sued or served with process, and judgment may be obtained and execution issued against him or them, notwithstanding that others jointly liable have been sued or served, without prejudice to the right of the person against whom execution issues to demand contribution from any other person jointly liable with him.

Supreme Court Rules.—As to service of partnership firms: s. 226, and notes.

Sec. 93.

Cannot be Found.—This means, cannot be found after due diligence in efforts to find the party: Blue v. Fullerton, Ir. Rep. C. L. 233.

As the fact that the parties reside in different divisions, or that some of them cannot be found, is the foundation of the right to obtain judgment against others, jointly liable, no doubt it would have to be shown by affidavits, or by other proof at the trial of the case.

Debt or Demand.—Section 93 (1), (2), only applies to debts and demands and would not extend to claims for tort, or unliquidated damages.

Set-off.—Where a plaintiff avails himself of the provisions of sub-section (1) and proceeds against only one or more of the several persons jointly liable, the defendant sued may avail himself of any set-off, counterclaim or other defence which would have been applicable if all the persons liable were made defendants.

A plaintiff cannot by suing only one of several persons jointly liable, prevent a set-off, counterclaim or other defence, which all or some would have had, from being set up: Stackwood v. Dunn, 3 Q. B. 822; see Toplis v. Grane, 5 Bing. N. C. 636; and where one partner only is sued he may plead a partnership set-off against a partnership debt: Rice v. Shute, 2 W. Bl. 697. But a debt due from one partner cannot be set-off against a debt due the firm: Gordon v. Ellis, 2 C. B. 821.

Jointly Liable.—A judgment under sub-section (1), against one or more of several joint debtors, even without satisfaction, is a bar to any claim against the others: King v. Hoare, 13 M. & W. 494; even where the judgment is by consent in an action to which the other joint debtor is a party: McLeod v. Power, 1898, 2 Ch. 295; but where judgment is recovered by default against one defendant the action may be proceeded with and a judgment recovered against the others: Dueber Watch Case Co. v. Taggart, 26 A. R. 295; 30 S. C. R. 373. But an unsettled judgment on a cheque given by one joint contractor in respect of the joint debt is no bar to an action against the other joint contractor on the original debt: Wegg-Prosser v. Evans, 1894, 2 Q. B. 101; Wenil v. James, 68 L. T. 54; Wilson v. Balcarres, 1893, 2 Q. B. 422; Robinson v. Geisel, 1894, 2 Q. B. 685; so likewise a judgment on a note given by one joint contractor is no bar: Hough Lithographing Co. v. Morley, 20 O. L. R. 484; nor a judgment against one a bar to proceedings against the other joint debtor who has obtained leave to defend: Dueber Watch Case Co. v. Taggart, 26 A. R. 295; 30 S. C. R. 373; Weal v. James, *supra*. Where the liability is joint and several, or where several persons are independently and collectively bound to the same obligation, the recovery of judgment without satisfaction against one is no bar to an action against the others: Drake v. Mitchell, 3 East 251; 7 ... R. 449; King v. Hoare, 13 M. & W. 494; Bermondsey v. Ramsey, L. R. 6 C. P. 247; *Re* Davidson, 13 Q. B. D. 50; see also 36 Alb. L. J. 245, 265. A partnership debt is not joint and several but merely joint: Campbell v. Farley, 18 P. R. 97; *Re* Hodgson, 31 Ch. D. 177; Kendall v. Hamilton, 4 App. Cas. 516.

Where one or more only of several joint-debtors is sued, he can set up the non-joinder of the other co-defendants, except where the defendants reside in different divisions, or when one or more of them cannot be found.

Judgment against one or more joint-debtors cannot be set aside even with the consent of the judgment debtor, so as to evade the rule, making

it a bar against the others: Hammond v. Schofield, 1891, 1 Q. B. 453; Toronto Dental Mfg. Co. v. McLaren, 14 P. R. 89; see McLeod v. Power, 1898, 2 Ch. 205. Sec. 88.

Contribution.—"Contribution" here means the performance by each of two or more persons, jointly liable, by contract or otherwise, of his share of the liability: Wharton, 177.

It is an equitable right arising in circumstances where two or more persons are subject to a common liability: Johnston v. Wild, 44 Ch. D. 146.

The right exists as between co-sureties: Moorehouse v. Kidd, 28 O. R. 35; in appeal, 34 C. L. J. 381; also between partners or persons otherwise jointly interested in a business venture: McLaren v. Marks, 10 P. R. 451; Lowe v. Dixon, 16 Q. B. D. 544; and between trustees: Lever v. Pearce, W. N., 1888, 105; Butler v. Butler, 14 Ch. D. 329; *Re* Eyton, 45 Ch. D. 458; between company directors: Ramskill v. Edwards, 31 Ch. D. 100; R.S.O. 1914, c. 178, s. 110; between accommodation endorsers of a promissory note, where there is nothing to indicate that the prior endorser is to indemnify the subsequent endorser: Stacey v. Stayner, 7 O. L. R. 684; Macdonald v. Whitfield, 8 App. Cas. 733; Macdonald v. Whitfield, Whitfield v. The Merchants Bank, 27 S. C. R. 94; as between co-contractors, and co-debtors: Bogart v. Robertson, 11 O. L. R. 295; Hoffman v. Crerar, 18 P. R. 473; 19 P. R. 15; as between co-debtors under a judgment: *Re* E. W. A., 1901, 2 K. B. 642. But it does not exist between parties to wilful torts: Corporation of Vespra v. Cook, 26 U. C. C. P. 182; Wilcocks v. Howell, 8 O. R. 576; Moxam v. Grant, 1899, 1 Q. B., at p. 484; Johnston v. Wilson, 44 Ch. D. 146; Palmer v. Wick, 1894, App. Cas. 318.

Where a note was payable in instalments, it was held that one surety who paid an instalment was entitled immediately to contribution from the others: *Re* Macdonald, W. N. (1888), 130. See Molson's Bank v. Heilig, 25 O. R. 503; Ray v. Isbister, 22 A. R. 12; 26 S. C. R. 79.

Release of Surety.—A judgment against one of several joint debtors releases the rest, even if the plaintiff was in ignorance of the liability of the others: Hammond v. Schofield, 1891, 1 Q. B. 453; Toronto Dental Manufacturing Co. v. McLaren, 14 P. R. 89.

Sureties are discharged from their liability if the creditor, without their consent, releases the principal debtor: Mahew v. Crickett, 2 Sw. 185, 193; Bogart v. Robinson, 8 O. L. R. 461; 11 O. L. R. 295; or makes an agreement with him (if it is binding and enforceable, but not otherwise: Rouse v. Bradford Banking Co., 1894, App. Cas. 586), to extend the time for the payment of the debt: Samwell v. Howarth, 3 Mer. 272; Clarke v. Birley, 41 Ch. D. 422; or in any way wilfully alters the equitable rights of the sureties: *e.g.*, by giving up a part of a pledge or security he holds for the debt: Polak v. Everett, 1 Q. B. D. 669; (but not where part of the pledge is lost through the laches of the creditor: Wulf v. Jay, L. R. 7 Q. B. 756; or even through gross negligence by the creditor: Black v. Ottoman Bank, 6 L. T. 763), unless the creditor expressly reserves his rights against the sureties or the rights of the sureties against the principal debtor: Canadian Bank of Commerce v. Northwood, 14 O. R. 207; Holliday v. Jackson, 22 S. C. R. 479; Overend v. Oriental Financial Co., L. R. 7 Ch. 142; McDonald v. Whitfield, 8 App. Cas. 733.

Sec. 83. The same rules apply with reference to accommodation endorsers or other parties to a promissory note, where the whole transaction shows that their real relationship is that of sureties, and the holder of the note was aware of that relationship: Ewin v. Lancaster, 6 B. & S. 571; Bank of Upper Canada v. Ockermann, 15 U. C. C. P. 303; Banque Nationale v. Arnoldi, 2 O. L. R. 624; Overend v. Oriental Financial Co., *supra;* Bogart v. Robertson, 11 O. L. R. 205; and it is also applicable to parties to a bill of exchange: Jones v. Whittaker, 3 T. L. T. R. 723. But it is otherwise if the holder of the note was not aware of the relationship when the dealing took place which released the principal debtor: Banque Nationale v. Betournay, 18 R. L. 175.

Even if the transaction by which the principal debtor is released does not reserve the sureties' rights nor those of the creditor against them, yet if it took place with the knowledge and consent of the sureties (mere knowledge without consent not being sufficient: Polak v. Everett, 1 Q. B. D., at p. 673), they are not discharged: Bogart v. Robertson, 11 O. L. R. 205; which case is also authority for the proposition that although sureties may have become discharged by reason of a release of the principal debtor or by extension of time to him, the legal operation of such release may be restrained by the sureties afterwards affirming their liability: Smith v. Winter, 4 M. & W. 454.

Taking a renewal note from the maker discharges the endorser: Banque Nationale v. Arnoldi, 2 O. L. R. 264; even if the renewal note is a forged one: Merchants Bank v. McKay, 15 S. C. R. 272; or even if the renewal note is payable on demand: Currie v. Misa, L. R. 10 Exch. 153.

Receipt by the creditor of payment of interest for a period beyond the due date extends the time for payment of the principal money and discharges the surety: Ryan v. McKerral, 15 O. R. 460.

Where two or more persons are indebted as principals and afterwards agree between themselves, with the knowledge of the creditor, that one of them shall become the sole principal debtor and the other a surety merely, the same rules will thereafter apply as to the one who becomes a surety: Rouse v. Bradford Banking Co., 1894, App. Cas. 587; Overead v. Oriental Financial Co., L. R. 7 Ch. 142.

If a surety guarantees a series of payments to be made by another at stated periods, the giving of time for one payment releases the surety as to that payment but not as to the other payments: Croydon v. Dickenson, 2 C. P. D. 46.

Mere forbearance to sue or inactivity or even negligence of the creditor does not discharge the surety: Strong v. Foster, 17 C. B. 201; Wilson v. Brown, 6 A. R. 87; Carter v. White, 25 Ch. D. 666.

A release by the creditor of one of several sureties who are severally (not jointly) liable does not discharge the others; but when the sureties are jointly or jointly and severally liable, the release of one discharges the others: Ward v. National Bank of N. Z., 8 App. Cas. 755; Hoffman v. Crerar, 18 P. R. 473; 19 P. R. 15; Bogart v. Robertson, 11 O. L. R. 295; see also notes to section 26, and for subject generally, see Grant on Banking, Canadian Edition, p. 323, *et seq.*

A defendant or co-surety cannot compel an assignment to be made to him of the judgment by the plaintiff, unless the whole of the debt has been paid: *Re* McLean v. Jones, 2 C. L. J. 206; Ewart v. Latta, 4 Man. H. L. 983; National Fire Insce. Co. v. McLaren, 12 O. R. 682; see also Brown v. Gossage, 15 C. P. 20. The right to an assignment can only be enforced by action: Phillips v. Dickson, 8 C. B. N. S. 391; but even

without assignment, the rights of the creditor are possessed by the party who pays him: *Re* McMyn, Lightbown v. McMyn, 33 Ch. D. 575; but cannot be enforced in the name of the creditor without an indemnity: Potts v. Leask, 36 U. C. R. 476; and where defendants are partners, and one of them pays the debt, he can only enforce the judgment to the extent that anything may be found due to him on the taking of accounts between them: London & Can. L. & A. Co. v. Morphy, 14 A. R. 577; Honsinger v. Love, 16 O. R. 170. Sec. 93.

Third Party Procedure.—The Con. Rules under the Ontario Judicature Act, s. 100, as to third party procedure, do not apply to division courts, and no rules have been made under the Division Courts Act providing any machinery for bringing in a third party: see Priory v. City Offices Co., 10 Q. B. D. 504; Clarke v. Macdonald, 4 O. R. 310; Merchants Bank v. Van Allen, 19 P. R. 348. The remedy open to a surety who is sued on the joint liability under the above section to compel contribution by other sureties, is either by a separate action or by having the other sureties added as defendants under s. 97, in order to enable the Judge "effectually and completely to adjudicate upon the questions involved in the action." But in partnership cases the party who obtains a judgment in the division court may apply for leave to issue execution against any other person as being a member of the partnership firm, if liability by the latter is not disputed, or if disputed it has been determined in such manner as the Judge may direct: s. 94 (2).

See further upon the subject of principal and surety, the notes to section 26.

(2) Where a judgment has been obtained against one or more of several partners under the provisions of sub-section 1, and the Judge certifies that the demand proved was a partnership transaction, the bailiff may, under the execution, seize and sell the property of the firm, as well as that of any defendant who has been served. Bailiff may seize property of firm on certificate of Judge.

The Property of the Firm.—The sale of the interest of a person against whom judgment has not been recovered is authorized, and the section must therefore be construed strictly. The Judge should certify the fact that the demand for which he gives judgment has been proved to be "a partnership transaction of the firm of X. & Y."

Every member of a partnership has apparent authority to do for the firm whatever is necessary for the transaction of its business in the way in which that business is ordinarily carried on by other people: Lindley on Part., 5th Ed., 124, 169. This section, however, requires more than apparent authority. The transaction must be strictly one of the partnership.

Several Partners.—The section extends only to actions of debt or demand where partners reside "in different divisions or one or more cannot be found": section 93 (1).

Partners Sued in Firm Name.—Section 93 (1) (2) has no application where partners are sued in their firm name under sections 93 (3) (4), or 94.

Sec. 93.

Service on parties added.

(3) Two or more persons claiming or being liable as co-partners may sue or be sued in the name of the firm of which such persons were co-partners at the time of the accruing of the cause of action.

Partners sued in name of firm.

(4) Where partners are sued in the name of the firm, the summons may be served on one or more of them or at the principal place within Ontario of the business of the partnership, or upon any person having control of the partnership business there and, subject to the provisions of sub-section 6 and 7, such service shall be deemed good service upon the firm, and the affidavit of the service of the summons shall state the name of the person served.

Order to furnish names and addresses.

(5) Any party may, at any time before or after judgment, apply for an order directing a statement of the names and addresses of the persons who are co-partners in any firm which is a party to the action by the firm name, to be furnished in such manner as the Judge may direct.

Their names may readily be obtained at the county registry office where they are required to be registered under R.S.O., 1914, c. 139; and under c. 158, as to limited partnerships; or they may be obtained under section 93 (5).

Where a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm, in truth, sues them individually just as much as if he had set out all their names: *Per* Lindley, L.J., Western National Bank of N. Y. v. Perez, 1891, 1 Q. B. 314; Re Sinclair v. Bell, 28 O. R. 483; Heinemann v. Hale, 1891, 2 Q. B. 83; but he is only entitled to execution against the individuals who have been individually served as partners, and who have not defended: section 94 (*c*). To take advantage of the provisions, it is necessary that the co-partners should be sued in their firm names. To sue "A. B. and C. D. trading as B. & D." would entitle the plaintiff to judgment against A. B. and C. D., but not against the firm as such; and if there should be an undisclosed partner, he would be discharged: Munster v. Cox, 10 App. Cas. 680. Where the firm is sued, judgment must be against the firm: Jackson v. Litchfield, 8 Q. B. D. 474; Adam v. Townend, 14 Q. B. D. 103; and no judgment by default can be signed against the firm until the full time has elapsed for each partner served to put in a defence: Alden v. Beckley, 25 Q. B. D. 543. If one partner files a disputing notice, disputing his liability, judgment cannot be given against the firm till after trial, though the other partners may have been served and are in default; *ib.* Where the firm has been dissolved, the firm name may, nevertheless, be used: Wilson v. Roger, McLay & Co., 10 P. R. 435; *Re* Sinclair v. Bell, 28 O. R. 483; Bank of Hamilton v. Blakesley, 9 P. R. 130; *In re* Wenham, *ex parte* Battams, 1900, 2 Q. B. 698; but by sub-section (6), if the plaintiff is aware of the dissolution, the summons must be served on every person in Ontario sought to be made liable: Fisher v. Linton, 28 O. R. 322. A partner may sue the

firm of which he is a member. Bigelow v. Powers, 25 O. L. R. 28; Allen v. Fairfax Cheese Co., 21 O. W. R. 589; see s. 93 (4). Sec. 93.

If one partner has retired, and the same firm name is still used, it is a question of fact who was intended to be sued: Davis v. Morris, 10 Q. B. D. 436; see *Ex parte* Young; *Re* Young, 19 Ch. D. 124.

The English rules have been held to be inapplicable to foreign firms: Russell v. Cambefort, 23 Q. B. D. 526; Western National Bank of N. Y. v. Perez, 1891, 1 Q. B. 304; Indigo Co. v. Ogilvy, 1891, 2 Ch. 31; Dobson v. Festl, 1891, 2 Q. B. 92; and even where one partner is resident in the jurisdiction, the service upon him is not good service on the firm: Heinemann v. Haie, 1891, 2 Q. B. 83; nor, per Fry, L.J., even upon the partner served: p. 92. In the division court, by virtue of section 89, if the chief place of business of the firm is out of the province, but there is an agent with a place of business "as such" within it, the firm may be sued and service is good if made on such agent. Formerly the service had to be on a partner, and service on a manager was useless; but s. 93 (4) now provides for service on any person having control of the business of the partnership at the principal place of business within Ontario, of the partnership. See *Ex parte* Ide, *Re* Ide, 17 Q. B. D. 755.

(6) In the case of a partnership which to the knowledge of the plaintiff has been dissolved before action the summons shall be served upon every person within Ontario sought to be made liable. When partnership dissolved.

(7) Where a summons is issued against a firm and is served as directed by this section, every person upon whom it is served shall be informed by notice given at the time of service whether he is served as a partner or as a person having control or management of the partnership business or in both characters, and in default of such notice the person served shall be deemed to be served as a partner. Notice of capacity in which person served.

(8) Debts owing from a firm carrying on business within Ontario may be attached under section 146, although one or more members of the firm may be resident out of Ontario, provided that some person having the control or management of the partnership business or a member of the firm within Ontario is served with the attaching order. 10 Edw. VII., c. 32, s. 93. Attachment of debts due by firm.

Co-partners May Sue or be Sued in Firm Name.—Section 93 (3). The original provisions enabling the firm name to be used caused much difficulty both in England and in this province. In Wilson v. Roger, McLay & Co., 10 P. R. 357, Osler, J.A., said: "With the system of registration of co-partnerships which prevails with us I must say that I fail to see the usefulness or convenience, in our practice, of these rules which relate to suing co-partners in the firm name. The occasions must be rare in which a plaintiff can have any difficulty in suing the individual members of the firm."

Sec. 93.

Upon the death of a partner the only liability existing at law is that of the surviving partner, the estate of the deceased partner being only available through the equities existing in favor of the surviving partner; and when the administratrix of the estate of a deceased partner was made a defendant her name was struck out leaving the creditors to pursue their remedy against the estate in a proceeding pending for its administration, concurrently with the action against the surviving partner: Campbell v. Farley, 18 P. R. 97; but see The Trustee Act, R.S.O., 1914, c. 121, s. 15; 19 C. L. T. 122.

Section 93 (3) is practically identical with Con. R. 100, and only applies where, at the time of bringing the action, there are two or more persons claiming as partners: Harris v. Wood, 7 O. W. N. 613. On the death of one of two partners the whole partnership estate vests in the surviving partner, and any action should be brought by him alone, and not in the firm name: *e.g.* "John Harris, sole surviving member of the firm of Harris & Company": *ib.*; and see the authorities there noted.

Where a partner dies before action, and the action is brought against the firm alone in the firm name, the deceased partner is not a party to the action at all so far as his private estate is concerned. If in such an action a partner dies between service of the writ and judgment the estate of the deceased partner is not bound. Unless his personal representative is a defendant, judgment is against the surviving partners and can only be enforced against them and the partnership assets: Ellis v. Wadeson, 1899, 1 Q. B. 714. The personal representative of the deceased partner must, therefore, be added as a defendant in order to bind the deceased partner's private estate: *Ib.*; Phillips v. Homfray, 24 Ch. D. 439; *Re* Shephard, Atkins v. Shephard, 43 Ch. D. 131.

An unincorporated association is not an entity known to the law, and no provision by statute or rule of court having been made to meet the case, it cannot be effectively sued by its adopted name, nor served with process: Metallic Roofing Co. v. Local Union Metal Workers Association, 5 O. L. R. 424; 9 O. L. R., p. 178; but such an unincorporated association, if it is registered by the name of the association pursuant to any statute, thereby acquires legal recognition as a quasi-corporation and may be sued in its registered name: Taff Vale Ry. Co. v. Amalgamated Soc. of Railway Servants, 1901, 1 K. B. 170; 1901, A. C. 426; Duke of Bedford v. Ellis, 1901, A. C. 1. Such an association, even if not registered and so not liable to be sued by its association name, is, nevertheless, liable for its wrongful acts, and can be sued in tort in a representative action in the Supreme Court of Ontario or a county court: Metallic Roofing Co. v. Local Union Metal Workers Association, *supra*, and cases there cited; and it is submitted that under section 226 the same may be done in the division court: See notes to section 71: Fletcher v. Noble, 9 P. R. 255; 3 C. L. T. 360.

Service of Summons in Partnership Cases. — Section 93 (4)—(7). The firm may be served by delivering a copy of the summons to a person who is a partner, with a notice that he is either served as a partner or as a person controlling the business, or in both capacities: section 93 (7). If no notice is served and he is a partner, the service is a good service on the firm, and he is to be considered as being served as a partner: section 93 (7), with the consequence (whether notice is served on him as a partner, or no notice is served) that upon judgment against the firm, execution may be issued against his

individual property as well as that of the partnership: section 94 (c). Or the firm may be served by the delivery of a copy of the summons to the person having control of the firm's business, in Ontario: section 93 (4); and such person must also be served with the notice required by section 93 (7) without which the service is not a good service on the firm: section 93 (4): Gibson v. Le Temps, 6 O. L. R. 690; 8 O. L. R. 707: see form of notice No. 106. This provision is new; and under the former statute service could be made on a partner only: *Ex parte* Ide, *In re* Ide, 17 Q. B. D. 755. The notice is given so that the person served may be made aware whether it is claimed on the part of the plaintiff, that he is served as a partner with the consequences under section 94 (c), or merely for the firm as the person in control of the firm's business. Sec. 93.

If the person served is not a partner, but receives notice that he is served as such, he must file a notice of dispute or defence: s. 94 (c).

Person Controlling or Managing Partnership Business.—What constitutes "carrying on business in Ontario" by a foreigner residing abroad is fully discussed and determined in Ryckman v. Randolph, 20 O. L. R. 1, and the cases there cited. A person performing isolated transactions in Ontario for another, is not carrying on business for the latter. "Carrying on business" is a very different matter from "transacting business": Nelson v. Lenz, 9 O. L. R. 50, and cases cited there; also Balllie v. Goodwin, 33 Ch. D. 604; Heinemann v. Hale, 1891, 2 Q. B. 83; Grant v. Anderson, 1892, 1 Q. B. 108; Worcester Banking Co. v. Firbank, 1894, 1 Q. B. 784.

The same rule will, doubtless, be applicable in considering whether the person served is one "having control of the partnership business" under sub-section (4).

Section 93 (4) is silent as to whether the partner served must be so served in Ontario, but it would seem that service on a partner only temporarily in the province is sufficient, under the principles laid down in Pollexfen v. Sibson, 16 Q. B. D. 792; Shepherd v. Hirsch, 45 Ch. D. 231.

If the partnership was dissolved, to the plaintiff's knowledge, before the action began, all the partners who are intended to be made liable must be individually served: section 93 (6).

The firm may be sued in the firm name even after dissolution: *In re* Wenham, *Ex parte* Battams, 1900, 2 Q. B. 698; but in view of the provisions of sub-section (6), the better way in any case is to sue and serve all the individual partners; for if that is done a member of the firm who is not in Ontario may be served and made liable notwithstanding section 95, which only applies when the judgment is against the firm.

To be a good service on the firm it must be made either:

1. On a partner;

2. Or on a person in control of the business, with notice under section 93 (7);

3. Or, if the firm was dissolved and the plaintiff is aware of it, it must be served on all the partners;

4. Or, if the partners reside in different divisions or some of them cannot be found, one or more of them may be sued leaving out the others who would then be discharged from liability;

Sec. 94.

5. Or, if any of the partners are out of the province the others may be sued and those out of the province are not discharged: section 95.

Service on a defendant firm must be made in one of the modes mentioned in the statute, and it would seem that substitutional service, or service in any other way than that provided, would not be good service: Worcester Banking Co. v. Firbank, 1894, 1 Q. B. 784.

Disclosure of Names of Partners.—Section 93 (5). Either party—plaintiff or defendant—may at any stage of the action be compelled to disclose on demand, the names and addresses of the members of the firm, under section 93 (5). This provision does not apply to actions brought on behalf of a class: Leathley v. McAndrew, W. N. (1875), 259.

Forms of demand, notice of motion, affidavit and order, Nos. 107, 108, 109, 110.

Query: As to the remedy for disobeying the order. It is questionable whether attachment can be issued under section 65: see Pike v. Keene, 35 L. T. R. 341; 24 W. R. 322; and there is no provision similar to former Con. Rule 142, now Con. R. 14 (2), for staying proceedings or striking out the defence as the case may be. But, under s. 226, Con. R. 14 (2) would seem to be applicable to the division courts: see notes to section 226.

Execution against partners,

94.—(1) Where a judgment is against a firm, subject to the provisions of section 95, execution may issue against the property of

(*a*) The partnership;

(*b*) Any person who has admitted in the notice of dispute or defence filed that he is a partner, or who has been adjudged a partner;

(*c*) Any person who has been individually served as a partner with a copy of the summons and who has not filed a notice of dispute or defence.

Leave to issue execution against other members.

(2) If the party who has obtained a judgment claims to be entitled to issue execution against any other person as being a member of the firm, he may apply for leave to do so, and the Judge may give such leave if the liability be not disputed, or, if disputed, after the liability has been determined in such manner as he may direct. 10 Edw. VII., c. 32, s. 94.

Sub-section 2 is taken from former Con. R. 228 (2), now Con. R. 105 (2).

Judgment and Execution against a Firm.—If the summons is issued against the firm the judgment must also be against the firm and not against the individuals comprising it: Jackson v. Litchfield, 8 Q. B. D. 474; Adam v. Townsend, 14 Q. B. D. 103; Flinn v. International Club, 5 T. L. R. 612. Execution may issue on such judgment against all the property of the firm: section 94 (*a*), and also

against the property of any person who has been served with the summons as a partner, if he does not defend the action: section 94 (*c*); or if he by his defence admits himself to be a partner: section 94 (*b*), or if he defends and is adjudged a partner: section 94 (*b*). Sec. 94.

A form of execution under this section, 94 (1), is given in the appendix of forms No. 111.

All the partners may be served with a summons issued against the firm if desired, and on a judgment thereon against the firm each of the individual members would be liable to have execution issued against his individual property as well as against the partnership property; and if they defend they may be adjudged to be members, with the same result: *Re* Frances Handford & Co., 1899, 1 Q. B. 566.

On a judgment against a firm, execution may also be issued against other persons as being members of the firm (in addition to those indicated by section 94 (1), by leave of the judge, under section 94 (2), as to which see notes, *post*.

Adjudged a Partner.—That is when he has defended and been adjudged a partner under 94 (*b*).

Execution by Leave of the Judge.—Under section 94 (2) the judge may grant leave to issue execution against "any other person as being a member of the firm," that is "persons other than those mentioned in section 94 (1), (*b*), (*c*), who are members of the partnership": Gibson v. Le Temps, 6 O. L. R., p. 690. Such person, in order to be liable under this section, must be actually a partner and not merely one who has held himself out as such: Ray v. Isbister, 22 A. R. 16, 263; but see *contra* Davis v. Hyman, 1903, 1 K. B. 854.

If it is desired to fix a responsibility as against a person who is not a partner but who has held himself out as such, the plaintiff should sue the latter individually in an action upon the facts, in which case such person would be held liable: Dominion Express v. Maughan, 20 O. L. R. 310. As to the liability of a person holding himself out to be a partner: *ib*: Castle v. Baird, 1 O. W. N. 403, 15 O. W. R. 273.

The judge in the division court has power to direct in what manner the question whether the person is actually a partner is to be determined, and may or may not direct an issue: this section and Con. Rule 105 (2) are practically identical.

The person sought to be added cannot on the application raise an objection to the validity of the judgment; the only question is whether or not he is a partner: Gibson v. Le Temps, 3 O. L. R. 690; and a registered statutory declaration under R. S. O., 1914, c. 139, signed by the person sought to be added is by section 6 of that statute, made incontrovertible and conclusive: Gibson v. Le Temps, 8 O. L. R. 707. The issue upon such application is said to be whether the person was a partner or held himself out to be a partner in the defendant firm: Davis v. Hyman, 1903, 1 K. B. 854; Gibson v. Le Temps, *supra*; (but see Ray v. Isbister, *supra*) at the time judgment was obtained against the defendant firm; and whether the partnership had been dissolved before action, to the plaintiff's knowledge, in which case the person would not be liable unless he was served with the writ: section 93 (6); and also whether the person is within the provisions of section 95: Davis v. Morris, 10 Q. B. D. 436. For forms of proceedings under this sub-section see No. 112.

If a judgment is obtained under section 93 (1), against one or more of several partners, the bailiff may seize and sell partnership property

Sec. 95. If the judge certifies that the demand *proved* (query: at the *trial*), was a partnership transaction: see section 93 (2), and notes there.

Judgment Summons against Members of a Firm.—It is questionable whether a judgment summons can be issued against a partner on a judgment against a firm of which he is a member: *Re* Young, 19 Ch. D. 124; but see *Re* Reid v. Graham Bros., 25 O. R. 573. The better way is to sue and obtain judgment against all the individual members of the firm, in which case a judgment summons may be issued against all or any of them if necessary.

No person can be adjudged a partner, under this section, unless he be in truth such. Mere holding out will not be sufficient: *Re* Young v. Parker, 12 P. R. 646; Standard Bank v. Frind, 15 P. R. 438. But, where promissory notes are signed by a firm as makers, a person who holds himself out to the payee as a member of the firm, though he may not be so in fact, is liable as a maker: Ray v. Isbister, 26 S. C. R. 79; see also Wigle v. Williams, 24 S. C. R. 713. Judgment against the firm destroys all liability of a person who would otherwise be liable as a nominal partner: Scarf v. Jardine, 7 App. Cas. 345; Ray v. Isbister, 22 A. R. 12; 26 S. C. R. 79; see Van Wart v. Critchley, 17 C. L. T. 316. A judgment creditor is not bound to use against the members of the firm, the special remedies given by this section. He may sue them upon the judgment: Clark v. Cullen, 9 Q. B. D. 355; see Ray v. Isbister, *supra;* Banque Provinciale v. Arnoldi, 2 O. L. R. 624.

Garnishee Proceedings against Co-partners.—The provisions of section 93 (3), allowing proceedings by or against firms, enable the firm name to be used only when they sue or are sued. It does not authorize the use of a firm name when co-partners are proceeded against as garnishees: Walker v. Rooke, 6 Q. B. D., 631; but debts owing from a firm carrying on business in Ontario may be garnished in the manner provided by sub-section 8: see notes to sections 146-162. Under this sub-section the right to attach a debt due by a firm, depends upon whether it carries on business within Ontario; and service must be on some person having the control or management of the partnership business, or who is a member of the firm, within Ontario. A person who transacts occasional business in Ontario for another person who is out of Ontario, does not carry on business there for the other, within the meaning of this sub-section: Nelson v. Lenz, 9 O. L. R. 50.

Effect of judgment against firm.

95. Except as against the property of the partnership, a judgment against a firm shall not render liable, release, or otherwise affect any member thereof who was out of Ontario when the summons was issued, and who has not entered a defence to the action, unless he has been made a party under section 97, or has been served within Ontario after the summons was issued. 10 Edw. VII., c. 32, s. 95.

Render Liable.—That is make him liable to have execution issued against his individual property under section 94 (2).

Release or Otherwise Affect.—This exempts the case of a member indicated from the rule that a judgment against one of two joint debtors releases the other.

Sec. 96.

Persons carrying on business in Ontario under another name.

96.—(1) A person, whether or not a British subject, and whether residing in or out of Ontario, carrying on business within Ontario under a name or style other than his own name, may be sued in such name or style.

Leave to issue required.

(2) Leave shall not be necessary to issue the summons.

Service of summons.

(3) The summons may be served upon the person so carrying on business if he be within Ontario, or at his place of business within Ontario, or, if there are several such places, at the place in or nearest to the county in which the cause of action arose, upon any person having the control or management of the business there, and such service shall be equivalent to personal service on the person so sued.

Notice of character in which person served.

(4) The person upon whom the summons is served shall be informed by notice given at the time of service whether he is served as the person carrying on the business or as the person having the control or management of it or in both characters, and in default of such notice he shall be deemed to be served as the person carrying on the business.

Procuring name and address of person carrying on business.

(5) Any party may, at any time before or after judgment, apply for an order directing a statement of the name and address of the person who is, and of the person who, at the time of the accruing of the cause of action, was carrying on business under such name or style, to be furnished in such manner as the Judge may direct.

Person served to appear in his own name.

(6) The person so sued shall enter a dispute in his own name, but all subsequent proceedings shall continue in such name or style.

Defence under protest.

(7) A person served as the person carrying on the business may enter a defence under protest, denying that he is the person so carrying on the business, but such defence shall not preclude the plaintiff from otherwise serving the person sued or from obtaining judgment in default of defence in the ordinary form by the person so sued.

When person served is not carrying on the business.

(8) Where a summons is served under sub-section 3 on a person having the control or management of but not carrying on the business, a dispute by him shall not be necessary.

Enforcement of judgment, what property exigible.

(9) A judgment or order in the action may be enforced by execution against

Sec. 96.

(*a*) The property of the person so sued, used or employed in or in connection with the business and

(*b*) The property within Ontario of the person so sued if he has entered a defence in the action, or has been adjudged to be the person carrying on the business or has been personally served with the summons within Ontario and has failed to enter a defence.

Issuing execution against person alleged to be carrying on the business.

(10) If the person so sued has not entered a dispute or has not been personally served, or has not been adjudged to be the person carrying on the business, the plaintiff may apply for leave to issue execution against the person within Ontario whom the plaintiff alleges to be the person carrying on the business, and the Judge may give such leave if the liability be not disputed, or, if disputed, after the liability has been determined, in such manner as the Judge may direct. 10 Edw. VII., c. 32, s. 96.

Individual Using a Firm Name.—Formerly an individual who carried on business in a name or style other than his own could not be sued in the division court under that style, there being no provision similar to Con. Rule 231, now 108; but since the addition of section 96 (1) made in the present statute, introducing the same provisions as are contained in Con. Rule 108, such an individual may be sued in the name or style in which he carries on business, but only in reference to transactions connected with such business: McIver v. Burns, 1895, 2 Ch. 630. For instances of such cases and the scope of the section, see St. Gobain v. Hoyermann's Agency, 1893, 2 Q. B. 96; De Bernales v. New York Herald, 1893, 2 Q. B. 96 N.

This section does not authorize him to sue under such name or style, he must sue in his own name: Mason v. Mogridge, 8 T. L. R. 895: British Columbia Furniture Co. v. Tugwell, 20 C. L. T. 144: St. Gobain v. Hoyermann's Agency, *supra;* Russell v. Cambefort, 23 Q. B. D. 526; Lancashire v. Spectator, 29 O. L. R. 293; but the words "& Co." added to his own name in the style of cause in a case in which he sues are mere surplusage, and an amendment should in such case be allowed at the trial as a matter of course: Lang v. Thompson, 16 P. R. 516.

Service of Summons.—The summons is to be served on "the person carrying on the business if he be within Ontario," but if he is not within Ontario it may be served upon the person having the control or management of the business there: sub-section (3); with the notice required in either case, by sub-section (4).

Carrying on Business.—See notes to section 93.

British Subject or not, and Resident in Ontario or not.—This provision is not in the English Rule, and so the authorities under the latter do not apply.

Place of Business Nearest to the County where the Cause of Action Arose.—The distance in case of dispute would be measured in a straight line on a horizontal plane; or "as the crow flies:" Moufiet v. Cole, L. R. 8 Exch. 32. Sec. 97.

Notice to be Served With Summons.—See Form No. 113.

The notice may be served personally or in the manner provided by s. 96 (3).

Judgment.—Service on the person having control or management is equivalent to personal service; and if no defence is entered, judgment may be entered for default and execution issued under s. 96.

Many of the provisions of sections 91-97 are taken from the former Con. Rules 222, 223, now Con. Rules 100-108, and the decisions under those Rules apply here. Full and comprehensive notes on Con. Rules 100-108 are to be found in Holmested's Judicature Act, 4th ed., pp. 489-505.

Adding Parties.

Striking out and adding parties.

97.—(1) The Judge may at any stage of the proceedings, upon such terms as may appear to him to be just, order that the name of the plaintiff, defendant, or garnishee improperly joined be struck out, and that any person who ought to have been joined or whose presence is necessary in order to enable the Judge effectually and completely to adjudicate upon the questions involved in the action be added as plaintiff, defendant, or garnishee.

Substituting or adding plaintiff.

(2) Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Judge, if satisfied that it has been so commenced through a *bona fide* mistake and that it is necessary for the determination of the real matter in dispute so to do, may order any other person to be substituted or added as plaintiff upon such terms as he may deem just.

Consent of party added required.

(3) No person shall be added or substituted as a plaintiff or as a next friend, unless his own consent in writing thereto be filed.

Service on parties added.

(4) A person who is added as a defendant or garnishee, shall be served with a copy of the summons, the original summons being first amended, and the proceedings against him shall be deemed to have been commenced from the date of the making him a party; but if the application to add any person as a party defendant or garnishee be made at the trial, the Judge may make the order in a summary manner upon such

Sec. 97. terms as to him may seem just, and may dispense with the service of a copy of the summons if such person or his agent consents thereto. 10 Edw. VII., c. 32, s. 97.

See also Rule 35.

Adding Parties.—Formerly there appeared to be no power in cases in the division court to add a party defendant: Barber v. Bingham, 20 C. L. J. 65; Building and Loan Assn. v. Helmrod, 19 C. L. J. 250; nor a plaintiff: Stewart v. Moore, 9 N. C. L. J. 82. Now, if the judge considers it necessary for the purpose of settling all the rights and questions involved in the action, that any person or persons should be added as plaintiffs, defendant or as garnishee, it is his imperative duty to make all necessary amendments for that purpose.

The term "plaintiff" includes "primary creditor;" section 2 (*j*); and "defendant" includes "primary debtor," section 2 (*d*).

All parties against whom a remedy is sought ought to be joined, and if any such are omitted they may be added under this sub-section: Edward v. Lowther, 45 L. J. C. P. 417, at p. 419; but if the court can effectively dispose of all questions in the action without adding other parties, it may do so and will refuse to add them: Dalton v. St. Mary Abbotts, 47 L. T. R. 349; Matthews v. Usher, 1900, 2 Q. B. 535; De Hart v. Stevenson, 1 Q. B. D. 313. See also Adams v. Watson Manufacturing Co., 15 O. R. 218; 16 O. R. 2.

A creditor who had obtained a garnishee order against the plaintiff was added as a plaintiff: Wallis v. Smith, 46 L. T. 473; a person to whom defendant had assigned his interest *pendente lite* was added as a co-defendant: Kino v. Rudkin, 6 Ch. D. 160. In an action by shipowners against consignees of cargo, the shippers of the cargo were added as defendants in order that they might counterclaim against the plaintiffs for damages for short delivery: Montgomery v. Foy, 1895, 2 Q. B. 321.

Nonjoinder and Misjoinder.—No action will be defeated by reason of the nonjoinder and misjoinder of parties; and the judge may in every action or matter, deal with the matters in controversy so far as regards the rights of the parties before him: section 97 (1), (2).

Making persons parties to an action whether as plaintiffs or defendants who are not properly parties to the relief claimed is misjoinder; joining too many persons as plaintiffs will not create any practical difficulty. If a person should be improperly joined as a defendant as if he were not properly a party to the relief claimed by the plaintiff, he may move to have his name struck out of the proceedings and thus relieve himself of the expense of defending the action: Carter v. Clarkson, 15 P. R. 379.

Under the above enactments, which are taken from the Chancery General Orders (No. 65), the division court has the same authority in this regard as the court of chancery formerly had; and is required either to pronounce a judgment as between the parties before it without prejudice to the rights of other parties, or add or substitute the absent parties, and if necessary or proper, adjourn the trial: Clifton v. Crawford 18 P. R. 316; and when it is necessary that the absent parties should be added in order that complete justice may be administered as to the parties already before the court the former must be added: Lambert v. Hutchinson, 1 Beav. 277. The court must take one or

other of these courses and the action cannot be dismissed or defeated by reason of misjoinder or nonjoinder of parties: Van Gelder v. Sowerby Bridge Soc., 44 Ch. D. 374; and the power should be exercised upon the principles upon which the old plea in abatement would have succeeded or failed: Wilson v. Balcarres, 1893, 1 Q. B. 422; but if it is not a question of merely the nonjoinder of necessary parties, and the plaintiff is not the person who has a right of action (and does not come within section 97 (2)), then the case is not within the above saving provisions: McCleaghan v. Grey, 4 O. R. 329. Sec. 97.

Either party may apply, or the court may act of its own accord: King v. Rudkin, 6 Ch. D. 160.

Misjoinder of Parties.—If there are two or more plaintiffs, one of whom has no right in connection with the subject matter, his name will be struck out on an application by the defendant to compel the plaintiffs to elect which of them shall proceed with the action: Bank of Hamilton v. Anderson, 8 O. L. R. 153. And where several plaintiffs joined in one action against the defendant for flooding their several properties, the plaintiffs were put to their election as to which should proceed, and the others were struck out. There is in such a case no power to make any conditions whatever, either by restraining the defendant from setting up the Statute of Limitations as to the plaintiffs whose names were eliminated, nor to allow the latter to issue a writ *nunc pro tunc* in order to avoid that statute: Hathance v. Raleigh, 17 P. R. 458. The misjoinder in such case is more than an irregularity and is really an abuse of the process of the court: Smurthwaite v. Hannay, 1894, A. C. 494, 506; so that the plaintiffs struck out have no claim to any privilege, nor can the defendants be put to any disadvantage by it: *Re* Bowden, Andrew v. Cooper, 45 Ch. D. 444, at p. 447; Manby v. Manby, 3 Ch. D. 101; *Re* Greaves, Bray v. Tofield, 18 Ch. D. 551; nor is there power to alter the date of the process and direct its issue *nunc pro tunc*: Clark v. Smith, 2 H. & N. 753; Nazer v. Wade, 1 B. & S. 728; Doyle v. Kaufman, 3 Q. B. D. 7, 340.

If two or more parties are sued in one action upon separate torts, or other causes of action, they are entitled to apply to compel the plaintiff to elect as to which he will proceed against, and the other defendants will be struck out: Sadler v. G. W. R., 1896, A. C. 450; Chandler v. G. T. R., 5 O. L. R. 589; Andrews v. Forsythe, 7 O. L. R. 188; Baines v. Woodstock, 10 O. L. R. 694.

But as against joint tort feasors in a continuing wrongdoing, even though they joined in it at different times, all may be joined: O'Keefe v. Walsh, 1903, 2 Ir. R. 681; Copeland v. Business Systems, 11 O. L. R. 292.

It has been said that these enactments were not intended to confer upon the judge unlimited discretion to remodel proceedings: *per* Mellor, J., Turquand v. Fearon, 4 Q. B. D. 280; and that the object of the provision is not "that a party's case should be so framed as to succeed, but that it should be so framed that it can be adjudicated upon by the court, whether in his favor or against him"; *per* Fry, J., Long v. Crossley, 13 Ch. D. 388.

They are not intended to apply where parties sought to be made defendants are persons against whom the plaintiff did not desire to prosecute any claim and whom the defendant only wishes to add for his own convenience, and it should be applied strictly: Norris v. Beazley, 2 C. P. D. 80 at p. 84; Moser v. Marsden, 1892, 1 Ch. 487; *Re* Birm-

Sec. 97. ingham Land Co. v. London & N. W. Ry. Co., 34 Ch. D. 261; see *Re* Harrison, Smith v. Allen, 1891, 2 Ch. 349, at p. 353.

The authority will, it is submitted, be exercised only on notice to the opposite party: see Tildesley v. Harper, 3 Ch. D. 277.

Adding Defendants.—If the plaintiff has omitted a party whom he might have added originally, he is entitled almost as of course to succeed in an application to add him, upon proper terms. So in an action for wages and wrongful dismissal, several defendants were added, it being doubtful which was the party legally liable: Tate v. Natural Gas Co., 18 P. R. 82; and the assignor of a debt was added in an action against the debtor, so as to recover from the assignor in the event of the debtor being successful: Langley v. Law Society, 3 O. L. R. 245; and in an action against the agent, the principals were added: Honduras Rev. Co. v. Tucker, 2 Ex. D. 301; Massey v. Heynes, 21 Q. B. D. 330; Bennetts v. McIlwraith, 1896, 2 Q. B. 464; and this may be done in any case in which the plaintiff might originally have joined all the parties where the right to redress arose out of one common transaction: Bennetts v. McIlwraith, *supra*.

A defendant may be added at the trial: Gandy v. Gandy, 30 Ch. D. 57; or "at any stage of the proceedings:" section 97 (1); Kino v. Rudkin, 6 Ch. D. 160; but not after final judgment: Atty.-Gen. v. Birmingham Land Cor., 15 Ch. D. 423; Hurst v. Hurst, 21 Ch. D. 278; Durham v. Robertson, 1898, 1 Q. B. 765; Johnston v. Consumers' Gas Co., 17 P. R. 297; though it may be done under special circumstances: Adams v. Watson Manufacturing Co., 15 O. R. 218; 16 A. R. 2; *Re* Mason, Turner v. Mason, W. N. (1883), 134. And a defendant may be struck out after delivery of defence: Vallance v. Birmingham Land Cor., 2 Ch. D. 369.

Where two or more parties are jointly liable and the plaintiff sues only some or one of them, those sued are entitled as of right to have all the others within the jurisdiction added as defendants: Kendall v. Hamilton, 4 App. Cas. 504 and other cases cited, *infra*; but probably not where the other persons reside outside the division in which the original defendant resides: see section 93. See also Wilson v. Balcarres, 1893, 1 Q. B. 423 (C.A.), Wegg v. Evans, 1894, 2 Q. B. 104, 1895, 2 Q. B. 109.

So where an action was brought against the guarantors of a promissory note, and not against the maker who claimed to have a counterclaim for damages against the payee (the plaintiff) the maker of the note was added as a defendant on the application of the guarantors, on the ground that otherwise full justice could not be done between the parties: Reid v. Goold, 13 O. L. R. 51.

Where one joint contractor is sued, he has, subject to the provisions of section 93, the right to have his co-contractor joined as defendant: Kendall v. Hamilton, 4 App. Cas. 504; Campbell v. Farley, 18 P. R. 97; Pilley v. Robinson, 20 Q. B. D. 155; Robb v. Murray, 13 P. R. 397; Gildersleeve v. Balfour, 15 P. R. 293. But if it is shown that any good reason exists for not joining the co-contractor the action may be allowed to proceed without adding him as a defendant: Wilson v. Balcarres 1893, 1 Q. B. 422; Robinson v. Geisel, 1894, 2 Q. B. 685.

A party may be added as a defendant against whom alternative relief is asked: Caston v. Consolidated Plate Glass Co., 26 A. R. 63.

In an action against agents for warranty of authority their principals are proper defendants: Massey v. Heynes, 21 Q. B. D. 330.

When an application to add a party is made by the defendant and opposed by the plaintiff, if the questions involved in the action can be effectively and completely adjudicated upon without adding the party; or if it is not clearly shown that it is necessary, for that purpose, to do so, the application will not be granted: Norris v. Beazley, 2 C. P. D. 80; McCheane v. Gyles, 1902, 1 Ch. 911; Harry v. Davey, 2 Ch. D. 721. Sec. 97.

The provisions contained in section 97 and the rules referred to do not include an application by a person to have himself added as a defendant.

See the review of the cases on this subject in Holmested's Judicature Act, 4th ed., p. 561, *et seq.*

The defendant should raise the objection of misjoinder or want of parties at the earliest possible moment: Sheehan v. Great Eastern Ry. Co., 16 Ch. D. 59; Luke v. South Kensington, 11 Ch. D. 121; or possibly he might object by his notice of defence, and it would then be necessary for the plaintiff to move to add the necessary parties: Nobels Explosives Co. v. Jones, 25 W. R. 653; Lydall v. Martinson, 5 Ch. D. 780. Where an order is not made before trial, it might be made on terms on a motion for a new trial: Adams v. Watson Manufacturing Co., 15 O. R. 218; 16 A. R. 2.

Wrong Person as Plaintiff.—Section 97 (2), (3).

The "real matter in dispute" has reference to the "action commenced," and no order could be made for the addition of a plaintiff who would not be a proper party to that action or to one which the plaintiff in that action could not maintain: Tinning v. Bingham, 16 P. R. 110; New Brewery Co. v. Hannah, W. N. (1877), 35. A mistake in law is within this enactment: Duckett v. Gover, 6 Ch. D. 82; Mason v. Harris, 11 Ch. D. 97, in which the action had been brought by the shareholders of a company instead of the company itself, and the latter was added: The Duke of Buccleuch, 1892, P. 201; where the action was brought in the name of an agent instead of the owner of the cargo: Turquand v. Fearon, 4 Q. B. D. 280; where a new partner had been brought into the firm before action and was inadvertently omitted as a plaintiff: Woodward v. Shields, 32 C. P. 282, in which case the insolvents (assignors) were added, it having been decided by the court that the claim sued on had not legally passed to the assignee (the original plaintiff): Ayscough v. Bullar, 41 Ch. D. 341; where a plaintiff was added, there being a doubt whether the original plaintiff's title to the claim was defective: Hughes v. Pump House Hotel Co., 1902, 2 K. B. 485, where an assignment of his claim had been made by the original plaintiff and it was doubtful whether the right of action was vested in the assignee, and the court having held that the original plaintiff's title was defective, the assignee was added as a plaintiff. There is no difference between adding and substituting a plaintiff: *Ibid.* But there must have been a *bona fide* mistake: Clowes v. Hilliard, 4 Ch. D. 413.

An order may be made at the trial adding as plaintiffs the personal representatives of the original plaintiff who had died after the commencement of the action: Moritz v. Canada Wood Specialty Co., 17 O. L. R. 53.

A co-plaintiff will not be added on the original plaintiff's application if it will prejudice the defendant's rights; *e.g.*, to set up the Statute

Sec. 97. of Limitations against the person proposed to be added: Hudson v. Fernyhough, 61 L. T. R. 722, 822, T. Jour. 253; nor if the effect would be to institute a new action by a plaintiff entitled to sue, in the place of the action brought by the original plaintiff who has no right or claim: Johnston v. Consumers' Gas Co., 17 P. R. 297; Hathaway v. Doig, 6 A. R. 264; Raleigh v. Goschen, 1898, 1 Ch. 73; where liquidators sued in their own name (instead of that of the company) in an action to recover a debt due to the company: Kent v. La Commmaute 1903, A. C. 220.

Cases in which Order may be Made.—If after action brought it is found that some person ought to have been included as plaintiff, as where a new partner has come into a firm before the contract or dealing in question, such person ought to be added as plaintiff: Turquand v. Fearon, 4 Q. B. D. 280. If an action be brought upon a document, *e.g.*, a covenant or guarantee, and it be discovered after action that in order to obtain relief on that document or to have it construed, it is necessary that some other person should be made plaintiff, the addition of such person would be allowed: Ayscough v. Bullar, 41 Ch. D. 341.

Where it appeared that two of the defendants had endorsed a note as sureties to the plaintiff for the makers, he was held to be entitled on payment of the note to the holder to recover against them although the note was made payable to his order, and an order of the judge substituting his name for that of the original holder of the note was upheld: Pegg v. Howlett, 28 O. R. 473; but see Canadian Bank of Commerce v. Perram, 31 O. R. 116; Small v. Henderson, 19 C. L. T. 267.

If an action be brought for debt and it is found that the debt has been assigned (or, if brought by an assignee, that it did not pass under an assignment), it would be proper to add either the creditor or the assignee, as the case might be, so as to determine the real question: Woodward v. Shields, 32 C. P. 282; Walls v. Sault Ste. Marie Paper & Pulp Co., 18 C. L. T. 117; Ostrom v. Sills, 28 S. C. R. 485, 491. See Prittie v. Connecticut Fire Ins. Co, 23 A. R. 449; Dawson v. Graham, 41 U. C. R. 532; McGuin v. Fretts, 13 O. R. 699; Davis v. Reilly, 1898, 1 Q. B. 1. So when an action had been brought upon a promissory note without the authority of the plaintiff who had parted with all interest in the note to a person asking to be substituted as plaintiff, the latter was so substituted upon his written consent being filed on a motion by the defendant to dismiss the action as being brought without authority: Slattery v. Hearn, 1 O. W. N. 938. In such a case, if the original plaintiff were willing and the party legally entitled were really the beneficial owners of the debt, he might be given the conduct of the case: Emden v. Carte, 17 Ch. D. 169.

When plaintiff's claim had been assigned before action and only re-assigned at the time of the trial, it was held to be a proper case for amendment by adding the assignee as a party: Walls v. Sault Ste. Marie Paper and Pulp Co., 18 C. L. T. 117.

The statute and rules do not authorize a plaintiff who has no right to sue to amend by adding as a co-plaintiff the person who really possesses the right: Walcott v. Lyons, 29 Ch. D. 584; Hathaway v. Doig, 6 A. R. 264; Matthews v. Usher, 1900, 2 Q. B. 535. A plaintiff cannot wait until the decision has gone against him and then apply to add a new plaintiff for the purpose of setting up a new and inconsistent case: New Westminster Brewery Co. v. Hannah, W. N. (1877), 35. Nor will a plaintiff be added merely to give the defendant the extra security for costs which it would afford: De Hart v. Stevenson, 1 Q. B. D. 313.

Sec. 97.

Consent of Added Plaintiff.—The written consent of the person proposed to be added must be filed: section 97 (3); and a new plaintiff cannot be substituted for the original plaintiff without the consent of the latter, but the court will, in a proper case, add a plaintiff and give him the conduct of the case: Emden v. Carte, 17 Ch. D. 768; Smith v. Haseltine, W. N. (1875), 250.

The consent of the party proposed to be added as plaintiff must, under the present section, be in writing and be filed with the clerk of the court: section 97 (3); Form 114. It must be signed by the party himself; a consent by a solicitor or agent with his authority is not sufficient, even if he is present when it is done: Fricker v. Van Grutten, 1896, 2 Ch. 649.

There is no exception to this explicit requirement: Besley v. Besley, 37 Ch. D. 648; Bank of London v. Wallace, 13 P. R. 176; Major v. McKenzie, 17 P. R. 18. A person who is interested in the subject matter but who refuses to join as plaintiff, may be added as a defendant: Silber Light Co. v. Silber, 12 Ch. D. 717. The execution of the consent by the plaintiff proposed to be added must be proved by the affidavit of a witness, on the application to add: Turquand v. Fearon, 4 Q. B. D. 280; Mason v. Harris, 27 W. R. 700; Form 115.

The application can only be made by the original plaintiff, under sub-section (2): Gordon v. Carte, 17 Ch. D. 169; Cleeves v. Howard, 4 Ch. D. 413; and must be made on notice to the defendants: Tildesley v. Harper, 3 Ch. D. 277. It may be made at the trial: Mortiz v. Canada Wood Specialty Co., 17 O. L. R. 53.

The scope of sub-section (1) is broader than that of sub-section (2), and parties are more freely added under the former than under the latter: See Smith v. Haseltine, W. N. (1875), 250; Emden v. Carte, 17 Ch. D. 768.

Where Party Appears at the Trial and Admits Liability.—When a person, other than the defendant, as for instance a witness in the case, appears at the hearing and admits that he is the person whom the plaintiff intended to charge, his name may be substituted for that of the defendant if the plaintiff consents: *In re* Henney v. Scott, 8 P. R. 251.

Application to Add or Strike Out a Party.—The application to add or strike out or substitute a plaintiff or defendant may be made to the judge at any time before trial, by motion or notice, or at the trial of the action in a summary manner, or "at any stage of the proceedings:" section 97 (1); Moritz v. Canada Wood Specialty Co., 17 O. L. R. 53.

Application for Order to Amend.—If the amendment is directed or allowed at the trial, no order is necessary. The amendment may be at once made or a minute of it may be entered in the procedure book. It could not be made *ex parte*: Tildesley v. Harper, 3 Ch. D. 277.

The application could only be made by one of the parties to the action: Kino v. Rudkin, 6 Ch. D. 160.

Procedure.—The summons should first be properly amended if the application is made before the trial and such application allowed. In such case the summons must be served on the added defendant, and he

Sec. 97. would have the same rights of defence and time therefor that he would have had if the action had been commenced on the day the judge's order was made: s. 97 (4). Service of the summons on the added defendant may be dispensed with when the order is made at the trial, provided the defendant or his solicitor consents thereto: sec. 97 (4). The costs of the amendment and any postponement of the trial are in the discretion of the judge: s. 170. If the action as against the added defendant would be barred at the time of amendment by the Statute of Limitations he may rely on that defence; section 97 (4) provides that the proceedings against him shall be deemed to have been commenced from the date of the order making him a party.

Where a plaintiff or defendant is substituted, or added, or there is a change of parties under these rules, the procedure book must show the same by proper entries thereof, and if necessary the cause thereafter may be entered in a new place in the procedure book, retaining the original year number of the cause, and all subsequent proceedings are to be carried on under the altered title with the same year number.

Transmission of Interest by Death, etc.—The right of action by or against a person survives to or against the personal representative of the deceased, except in cases of libel and slander: R.S.O., 1914, c. 121, ss. 41-43. An action for injuries to the person survives to the person's executor: Mason v. Peterborough, 20 A. R. 683; and it may now be said that all actions cognizable in division courts survive and continue notwithstanding death or transfer of or by parties, under the above statute. An action for publishing a false and malicious statement causing damage to the plaintiff's personal estate would survive: Hatchard v. Mege, 18 Q. B. D. 771. Such an action is not one of libel or slander: Ratcliffe v. Evans, 1892, 2 Q. B. 524; Dickerson v. Ratcliffe, 17 P. R. 418. By the above statute, a personal representative may maintain an action for all torts or injuries to the person or property; and in case of an action for personal injuries brought by the deceased, such representative is not obliged to commence a new action: Mason v. Peterborough, 20 A. R. 683.

Procedure in Such Cases.—This is provided and described in Con. Rules 300-306. These Rules apply to division courts by section 226 of The Division Courts Act and take the place of the old Con. Rules 225 *et seq.*; see Rules 31, 32.

General Provisions as to Amendment.—The power of amendment now given is most extensive: see s. 104. No proceedings shall be quashed or vacated for any matter of form: s. 228. When a notice of motion has been irregularly given but the opposite party has not been injured by the irregularity, it may be disregarded and the motion heard: Dawson v. Beeson, 22 Ch. D. 504.

"I have no doubt the meaning of the Rule is that the court or judge may, after an irregular proceeding has been taken, either set it aside for irregularity, or amend it, or otherwise deal with it as the court shall think fit: but it is not to be treated as void": per Kay, J., Petty v. Daniel, 34 Ch. D. 180.

A judgment irregularly signed is not a mere non-compliance with the rules, which may be remedied under this rule: Anlaby v. Prætorius, 20 Q. B. D. 764.

Judgment by Default Where Summons Specially Endorsed. Sec. 98.

98.—(1) In actions for the recovery of a debt or money demand, where the particulars of claim, with reasonable certainty and detail, are endorsed on or attached to the summons, hereinafter called a special summons, and a copy of the summons and particulars, with a notice in the prescribed form, annexed to or endorsed on such copy has been duly served, then, unless the defendant has left with the clerk, within eight days after the day of service (where the service is required to be ten days before the return), or within twelve days after the day of service (where the service is required to be fifteen days before the return), a notice to the effect that he disputes the claim, or some part, and how much thereof, final judgment may be entered by the clerk on the return of the summons, or at any time within one month therefrom, or, by order of the Judge, at any time thereafter for the amount claimed in the particulars, or so much thereof as has not been disputed, and execution may issue thereon without prejudice to the right of the plaintiff to proceed for the remainder of his claim.

In proceedings by special summons final judgment entered by the clerk when claim in whole or in part not disputed, etc.

Debt or Money Demand.—When the action is not for a debt or money demand, there is no need for the defendant to give any notice disputing the claim, and judgment cannot be entered under this section, but the case will proceed to trial. A "debt" has been defined to be: "whatever one owes": Rodman v. Munson, 13 Barb. 197; also: "That for which an action of debt will lie—a sum of money due by certain and express agreement. In a less technical sense, any claim for money; in a more enlarged sense, any kind of a just demand": New Haven Saw Mill Co. v. Fowler, 28 Con. 108: see also Barber v. East Dallas, 83 Tex. 147, and Lutimer v. Veader, 46 N. Y. Supp. 823, 829, and 20 App. Div. 418; and a "demand" has been defined as: "Any account upon which money or other thing is, or is claimed to be, due": *per* Dixon, C.J., in Stringham v. Supervisors, 24 Wis. 600, and the words "money demand" as "any demand arising out of contract, express or implied, which from its nature enables the plaintiff to make affidavit that the amount sued for is actually due": Mills v. Long, 58 Ala. 458, 460; and as "any action arising out of contract where the relief demanded is a sum of money": Roberts v. Nodwift, 8 Ind. 339, 341; Brock v. Parker, 5 Ind. 538. A statutory penalty where the amount is fixed or can be readily ascertained has been held to be a "money demand": Ditman Boot and Shoe Co. v. Mixon, 24 South. 847, 848; 120 Ala. 206. In Bank of Hamilton v. Western Assce. Co., 38 U. C. R. 609, Harrison, C.J., held that a claim upon an insurance policy though unliquidated was a "purely money demand" within the section of the Administration of Justice Act, which enabled a plaintiff to proceed at law although his right to recovery was equitable only; but in view of the authorities

Sec. 98. rited below, and of the difference between the scope of that enactment and of the above section, it is submitted that this decision does not enable judgment to be entered under this section if the particulars shew the claim to be for unliquidated damages, even though a specific sum be claimed: Knight v. Abbott, 10 Q. B. D. 11; see also Kelly v. Isolated Risk and F. F. Ins. Co., 26 C. P. 299. The words "debt or liquidated demand" have been considered in the following cases relating to the right to garnish: Alexander v. Thompson, 1 Alta. 501, where it was held that a claim by one partner against another for a specific sum was a "debt or liquidated demand," although an account might be necessary to determine the exact sum due, and semble, also, if the action was for an account and payment of the amount ascertained to be due: Stimson v. Hamilton, 1 W. L. R. 20, holding a claim upon a covenant in a mortgage to secure proceeds of sale of property less a fixed commission came within these words, though enquiry was necessary to ascertain the amount due: Hartt v. Edmonton Steam Laundry, 2 Alta. 130, which decided that a claim against an insurance company under a policy was for unliquidated damages, the loss not having been proved or admitted nor the amount ascertained and therefore did not constitute a "debt or liquidated demand." The words used here, "a debt or money demand," include any claim, legal or equitable, on contract, express or implied, or under a statute, on which a certain sum of money, not being unliquidated damages, is due and payable, though an inquiry be necessary to ascertain the exact amount due: see *Re* Unger v. Canadian Tin Plate Decorating Co., 7 O. L. R. 25; McIntyre v. Munn, 6 O. L. R. 290.

An action for a debt not due would not come within these provisions; nor an action on a bond for a penalty unless conditioned for payment of money: Griswold v. B. B. & G. Ry. Co., 3 U. C. L. J. 115; Star Life v. Southgate, 18 P. R. 151; nor a claim for unliquidated damages: Jones v. Thompson, 1 E. B. & E., 63; Bank of Toronto v. Burton, 4 P. R. 56; Boyd v. Haynes, 5 P. R. 15; Knight v. Abbott, 10 Q. B. D. 11; nor a claim for partly liquidated and partly unliquidated damages, unless the claims are severable: Rogers v. Hunt, 10 Ex. 474; Westlake v. Abbott, 4 U. C. L. J. 46; nor an action for not returning goods let to hire: *per* Tindal, C.J., 3 M. & G. 851; nor an action on a covenant in a lease for unascertained damages: Gowanlock v. Mans, 9 P. R. 270; nor for damages for dilapidation of leased premises: Clarke v. Berger, 33 W. R. 809; nor for double rent against an overholding tenant: Langann v. Ferguson, 29 O. R. 235; nor money held by an executor on sale of property of his testator: Soules v. Soules, 35 U. C. R. 334; nor an action for breach of covenant for title: Kavanagh v. Corp. of Kingston, 39 U. C. R. 415; nor for the balance of purchase money under an agreement to purchase, where defendant refuses to complete the purchase: Leader v. Tod-Heatley, W. N. (1891), 38; nor for any fluctuating sum, such as the amount of rents received by a receiver to be applied by him in payment of interest and arrears: Poulett v. Hill, 1893, 1 Ch. 277; but see Lynde v. Whithman, 1895, 2 Q. B. 180, at p. 187; nor for money payable on a covenant in a chattel mortgage given as a continuing security for future advances: Barber v. Russell, 9 P. R. 433, 442; nor for repayment of moneys paid on a contract which has not been fulfilled: McIntyre v. Munn, 6 O. L. R. 290.

The following causes of action, it is submitted, would come within the provisions of the section: any sum of money certain payable under any covenant, money bond, or parol agreement; any cause of action

wbicb, in the higbar courts, wauld formerly hzve been declared for na Sec. 98.
maney paynhis for goods sold and delivered; goods hargained nnd sold; work dans; maney lent; money pnid; maney bnd nnd received; interest npon maney; accounts stated; iands sold and conveyed; use and occupatian; rent; maney payable on bilis of exchange and promissorv notes; an an award; the price of sbares or stocka sold; freigbt; hire of goods; an n guarantee for tbe payment of a sum certain; carriage af goods; board nnd iadging; agistment of cattle or horses, etc.; premiums of insurance or assessments made hy Mutuai Ins. Co.'s; medicai or other attendance; on a penai stntute wben jurisdiction nat excluded: Brash *qui tam* v. Taggart, 16 C. P. 415; on an insuranee policy where proof of the loss has been filed and the amount ascertained: Hartt v. Edmonton, 2 Alta. 130; in cases where damages liquidated: Strickland v. Williams, 1899, 1 Q. B. 382; on tbe price of goods sold under a guarantee or warranty: Stokes v. Reynolds, 1 O. W. N. 1051, 1099; good-will of premises: faiiure to deiiver specific goods part of an order paid for where property in undelivered goods has not passed and claim is for money had and received: Biggerstaff v. Rowatt's Wharf, 1896, 2 Ch. 93; a cialm for money obtained from tiie piaintiff hy the defendant hy fraudulent misrepresentation: *Re* Mager v. The Can. Tin Plate Dec. Co., 7 O. L. R. 25; but see London Mutual v. McFarlane, 26 O. R. 15; and a claim for an account stated witb interest wouid he within the section: Smart v. N. & D. R. Ry. Co., 12 C. P. 404; see Northern Railway Co. v. Lister, 4 P. R. 120. If interest is claimed the particulars should either stnte the amount or tbe date fram which it is claimed: Bardeii v. Miiier, 7 C. B. 733. The rate of interest need not he stated unless above fivs per cent., which is the legal rate: Adams v. Cax, 10 O. L. R. 96; R. S. C. 1906 c. 120, s. 3; see Allen v. Bussey, 4 D. & L. 430. A judgment may be recovered under this section for interest upon a dishonoured biil even where the biii does not provide for interest as under section 134 of tbe Bliis af Exchange Act, R. S. C. 1906 c. 119, interest is recoverahis as *liquidated* damages: McVicar v. McLaughlin, 16 P. R. 450; Clarkson v. Dwan, 17 P. R. 92; Dando v. Boden, 1893, 1 Q. B. 318, but unless interest is due hy contract express or implied ar by statute it can he claimed as unliquidated damages only and no judgment under this sectian cnn be recovered in respect of it.

The law is not clear wbether ths plaintiff, by including in his particnlars a claim for interest payable as unliquidated damages ar any other claim wbich is nat for ths recovery of a "debt ar money demand," forfeits bis right to have judgment entered under this section, hut it is suhmitted that he daes nat and that he can recover default judgment under this section in respect of tbat part af his claim wbich is for "a debt or money demand" and proceed to triai for the balance. Neither the present Act nor the Rules specificaliy provide for such a case, hut they recognize the right of a plaintiff in certain eases to twa judgments in nn action: secs. 98, 100, and this practice is followed in the Supreme Court, the practice of wbich may be adopted in cases not expressly provided for: see sec. 226. It was formerly held in the high court both in England and Ontario, under the rules relating to specially endorsed writs and default judgments, that no final default judgment could be obtained where a claim for unliquidated damages was included in the claim specially endorsed: Sheha Gold Mining Co. v. Trubshawe 1892, 1 Q. B. 674; Wliks v. Wood, 1892, 1 Q. B. 684; Gold Ores Reduction v. Parr, 1892, 2 Q. B. 14; Solmes v. Stafford, 16 P. R. 78, 264; Hollender v. Ffoulkes, 16 P. R. 175; Munro v. Pike, 15 P. R. 164; Huyck v. Wilson, 18 P. R. 44; the rule had previously been otherwise in Ontnria, sea Huffman v. Doner, 12 P. R. 492;

Sec. 98. Hay v. Johnston, 12 P. R. 596; Mackenzie v. Ross, 14 P. R. 299; these cases were however overruled by the court of appeal in Solmes v. Stafford, *ante*. Since these decisions the Supreme Court rules have been amended, and judgment may be recovered notwithstanding the addition of a claim which is not the subject of special endorsement, and judgment may also be recovered for interest, though claimed as unliquidated damages: see Con. R. 37. It is submitted that the principle of Hay v. Johnston and MacKenzie v. Ross is applicable to the above section 98, as these cases were overruled in Solmes v. Stafford on the sole ground that effect must be given to the word "only" in the former Ontario rule, the wording of which, like the English O. III., r. 6, was "where the plaintiff seeks only to recover a debt or liquidated demand," etc.

An action upon a claim for over $20 for money had and received, the money having been obtained from the plaintiff by the defendant by fraud is an action for a money demand, and within this section: *Re* Mager v. The Canadian Tin Plate Decorating Co., 7 O. L. R. 25; but if the claim is framed upon the fraud it is an action of tort and not within the provisions of this section: London Mutual v. McFarlane, 26 O. R. 15.

It was doubted in Green v. The Hamilton Prov. and Loan Society, 31 C. P. 574, whether surplus money in the hands of a mortgagee after sale of land was a purely money demand, but it has been since held that such money was in the nature of an equitable cause of action for money had and received: Legarie v. The Canada L. & B. Co., 11 P. R. 512. See also Reddick v. Traders Bank, 22 O. R. 449; Stimson v. Hamilton, 1 W. L. R. 20. A claim by a partner against the other members of the firm for his share of a sum of money received by the other partners, is a purely money demand, though it may be necessary to take the whole partnership account: Allen v. Fairfax Cheese Co., 21 O. R. 598; Alexander v. Thompson, 1 Alta. 501.

But for section 61 (*e*), a judgment of another provincial court would be suable under the words used here: Henderson v. Henderson, 6 Q. B. 288; or a judgment of any court of record: Hutchinson v. Gilliespie, 11 Ex. 798; or the judgment of a foreign court: Grant v. Easton, 13 Q. B. D. 302.

Reasonable Certainty and Detail.—This contemplates that each item of the claim should be given, with the dates, so far as reasonably can be done. Such particulars should be given as to disclose clearly to the defendant exactly for what he is being sued: Bickers v. Speight, 22 Q. B. D. 7; and so that, if any future action were brought, he would be able to shew that the matter in question had already been adjudicated upon: Lucas v. Ross, 9 P. R. 251. The first process in actions for the recovery of a debt or money demand under this section must be a special summons: ss. 84, 98 (1); Form 32; and a copy of the particulars must be endorsed on or annexed thereto: ss. 84, 98 (1). For requisites of summons and particulars see notes to sections 83 and 84. For forms of particulars see forms 9-12.

Duly Served.—See notes to sections 85, 86 and 87. As to service on defendant out of the jurisdiction, see section 75. As to service on a foreign corporation having an agent within the jurisdiction, see section 89. As to service on partners, see sections 93-95, and notes thereto.

Within Eight Days.—The day of service is not to be reckoned: see notes to section 77. The judge has no power to extend the time:

notes to section 77. But he could allow a defendant in to defend under section 98 (3) or section 101: see notes to those sections. Sec. 98.

The Return of such Summons.—That is, when the time required to elapse under section 85 has expired, namely, ten clear days when the defendant resides within the county, fifteen clear days when he resides out of the county or when the defendant resides out of the jurisdiction under section 75 (2).

Notice Disputing Claim.—The notice must be in writing: section 82. On filing the notice no fee is payable by the defendant. For forms of notices of defence see Form 13.

A notice disputing the claim or disputing the jurisdiction of the court must state in detail the grounds and the defence, with particulars, and a copy of the notice is to be forthwith transmitted by the clerk to the plaintiff or his agent; and if the notice does not contain such statement of grounds, the clerk may enter judgment for the plaintiff upon the order of the judge: Rule 30: and if the grounds stated are frivolous or without merit the judge may, on plaintiff's application, order the defence to be struck out and judgment to be entered for the plaintiff: *Ib.*

Or Some Part and How Much Thereof.—S. 98. If the notice disputes only a part or admits a part of the claim the clerk must forthwith notify the plaintiff, as provided by Rule 30.

The notice to the plaintiff must be registered if sent by mail: Rule 78.

The former Rules requiring notice to be given by the plaintiff if he intends to proceed for the unadmitted portion of his claim are abrogated, and the case will go to trial for the disputed part, unless there has been payment into court of the amount admitted, under section 112.

Within One Month.—That is one calendar month: Interpretation Act, R.S.O., 1914, c. 1, s. 29 (u). See notes to section 31. If the judgment be not entered within the time specified it cannot be entered afterwards without an order from the judge. It would seem, however, that judgment might also be entered at the sitting of the court, under section 99.

Judgment for Such Part.—The judgment will be for the full amount claimed if the claim is not disputed. If a part of the claim only is disputed judgment may be entered for such part and execution may issue thereon at the instance of the plaintiff, without prejudice to his right to recover for the remainder of his claim. Formerly final judgment for part would have been a bar to the recovery of the remainder: Winger v. Sibbald, 2 A. R. 610. But under the provisions of this section the plaintiff may proceed to judgment and execution for such portion "without prejudice to his right to recover for the remainder."

As to judgment for part on motion for leave to defend see section 100 (3).

Actions on Married Women's Contracts Since 13th April, 1897.—Judgment may be entered against the separate estate of a married woman under this section, if a special summons properly endorsed has been served upon her, and if she does not dispute the

Sec. 98.

elnim: see Scott v. Morley, 20 Q. B. D. 120, 130 (providing the proper form of judgment); Holtby v. Hodgson, 24 Q. B. D. 103; Nesbit v. Armatrong, 12 C. L. T. 43; McMichael v. Wilkie, 18 A. R. 464, 472; *Re* Hamilton v. Perry, 24 O. L. R. 38.

Form of Judgment, No. 116.

Even if the form of judgment entered should be a personnl and not a proprietary judgment, it is probnbly not a nullity: nee Jose v. Fairgrieve, 32 O. L. R. 117; and it may be nmended: *Re* Hamilton v. Perry, *supra*.

In actions on contracts entered into by a married womnn on or after 13th April, 1897, it is not necessary to allege or prove sepnrate estate at the time the contract was entered into or subsequently, but the judgment will be limited to the sepnrate property which she may at the time or therenfter possess or be entitled to; and will be enforceable by process of law against all property which she may therenfter while discovert, possess or be entitled to, except property which she is restrained from nnticipating: R.S.O., 1914, c. 149, ss. 4, 5, nnd nee notes to ss. 100 and 190, *post*.

Summons, particulars and affidavit to be filed.

(2) The judgment shall be in the prescribed form, but shall not be entered until the special summons and particulars with an affidavit of the due service of both have been filed.

Judge may set aside judgment.

(3) The judge may set aside such judgment and permit the case to he tried, on such terms as to him may seem just. 10 Edw. VII., c. 32, s. 98.

Judgment in Prescribed Form.—See s. 2 (k); Form 117; on defnult of defence; on confession: Form 49.

Holidays.—A judgment may be entered on a holidny other than Sunday: Bennett v. Potter, 2 C. & J. 622; 1 L. J. Ex. 258. In this country, the only dny on which no judicinl act can be vnlidly done is the Lord's Day or Sunday: Foster v. Toronto Ry. Co., 31 O. R. 1, but see Harrison v. Smith, 9 B. & Co. 243; see further on this subject, notes to ss. 79 nnd 105.

"Judgment" means the final decision of the court or judge in any action, or the entering of finnl judgment by the clerk under the above section.

Affidavits of Due Service of Both.—See Rules 42-50 for the requirements of affidavits generally. For this affidavit, see form 20.

If judgment were signed on an insufficient affidavit, it might be set aside for irregularity: Levy v. Wilson, 9 C. L. J. 191; but see Potter v. Pickie, 2 P. R. 39. A judgment irregulnrly signed is not a mere non-compliance with the rules which may he remedied under s. 104: Anlaby v. Prætorius, 20 Q. B. D. 764.

Setting Aside the Judgment.—The defendant should shew what facts he relies upon: Merchants' Nat. Bnnk v. Ontario Coal Co., 16 P. R. 87. To set aside a judgment under this section, an affidavit merely stating that the defendant has a good defence on the merits would be insufficient: Whiley v. Whiley, 4 C. B. N. S. 653: Anderton v. Johnston.

8 U. C. L. J. 46; McDonald v. Burton, 2 C. L. J. 190; Wooster Coal Co. v. Nelson, 4 P. R. 343; see Hopton v. Robertson, W. N., 1884, 77; Furden v. Richter, 23 Q. B. D. 124; Hammond v. Schofield, 1891, 1 Q. B. 453; and probably as full an affidavit is necessary as would be required to defeat a motion under section 100 for immediate judgment; see notes to that section; Dobie v. Lemon, 12 P. R. 64; Bourne v. O'Donohoe, 17 P. R. 522; Richardson v. Howell, 8 T. L. R. 445; Patterson v. McLean, 21 O. R. 221. Sec. 98.

An affidavit by plaintiff's solicitor, who did not profess to have personal knowledge, except as he was advised and believed, and who, while referring to the proposed defence, did not undertake to verify the particulars of it, was not sufficient: Piper v. King's Dyspepsia Cure Co., 30 N. S. R. 429; Grent West v. Shields, 15 O. W. R. 166; Logoa v. Grunwoldt, 1909, W. N. 216; Re J. L. Young, Young v. Young, 1900, 2 Ch. 753; and nothing short of an affidavit shewing merits would entitle defendants to come in and defend, or justify the judge to whom the application was made in permitting them to do so: *Ib.*; see also Bigelow v. Doherty, 30 N. S. R. 393; Sands v. Fisher, 30 N. S. R. 185.

If the evidence contained in the affidavit as to the merits is not satisfactory or convincing, the judgment will not be set aside: O'Sullivan v. Murphy, 78 L. T. 213; Ritz v. Schmidt, 12 Man. L. R. 138.

Defendant should also account for his not putting in a notice in time: *per* Cotton, L.J., Atwood v. Chichester, 3 Q. B. D. 725; and especially if a trial has been lost: Arnold v. Robertson, 4 U. C. L. J. 69.

But the judge will let the case go to a trial if the merits are in dispute, as shewn by the affidavits: Wilson v. Mun. Council of Port Hope, 10 U. C. R. 405; Wooster Coal Co. v. Nelson, 4 P. R. 343; Reynolds v. Gallihar Gold Mining Co., 8 C. L. T. 17; or that if the facts sworn to, if proved, would be a good defence: Herrington v. Carey, 7 O. W. N. 473.

It is suggested that a proper form of affidavit would be, in the case of the defendant making the affidavit, thus: "I am advised and verily believe that I have a good defence to this action upon the merits;" and in the case of his solicitor or agents: "The defendant has, as I am informed (or instructed) and verily believe, a good defence to this action upon the merits:" and in both instances shewing the facts or some fact, constituting such good defence. "He need not set out the whole defence with minute particularity:" Whiley v. Whiley, *per* Cockburn, C.J., 4 C. B. N. S. at p. 659.

The affidavit must apply the defence to the particular action, by stating that the defendant has a good defence "herein," or in "this cause," or "in this action," on the merits: Tate v. Rodfield, 3 Dowl. 218; Lane v. Isaacs, 3 Dowl. 652; McGill v. McLean, 1 Cham. R. 6.

It should be made by the defendant, his solicitor or agent, or some person who has been concerned in the cause, in such a way as to make him acquainted with the merits: Rowbotham v. Dupree, 5 Dowl. 557.

In setting aside a regular judgment the court considers the Statute of Limitations a meritorious defence: Maddocks v. Holmes, 1 B. & P. 228; McIntyre v. Canada Co., 18 Gr. 367; Seaton v. Fenwick, 7 P. R. 146; Dobie v. Lemon, 12 P. R. 64. And also infancy: Delafield v. Tanner, 1 Marsh. 391; Cavallier v. Michael, 17 L. T. 290; want of jurisdiction: Hamelyn v. White, 6 P. R. 120.

Sec. 98.

Nor would the court refuse to set aside a regular judgment though bankruptcy was going to be pleaded: Evans v. Gill, 1 B. & P. 52.

A judgment should not be set aside to allow a defendant to set up matters subsequent to it: Schofield v. Bull, 3 U. C. L. J. 204.

The truth of the merits shews by defendant's affidavit cannot be inquired into: Blewitt v. Gordon, 1 Dowl. N. S. 815: Wooster Coal Co. v. Nelson, 4 P. R. 343: Southwick v. Hare, 15 P. R. 222; but see Wilson v. Port Hope, 10 U. C. R. 405, at p. 409: but if contradicted by documents signed by defendant, he will be required to bring money into court: Richardson v. Howell, 8 T. L. R. 445. The court will not try the defence asserted, but affidavits may be received for the purpose of enabling the court to determine how far the defence may be *bona fide*, and *a fortiori*, his applications may be met by documents under his own hand, not explained, in answer shewing that such defence is non-existent: Bourne v. O'Donohoe, 17 P. R. 522.

Where the summons is an action against a firm was served upon the firm, and five days afterwards was served upon an alleged partner, and judgment by default was signed against the firm, and subsequently to the signing of the judgment, but within eight days after the service of the writ upon him, an appearance was entered by the partner: Held, that he was entitled to have the judgment against the firm set aside: Alden v. Beckley & Co., 25 Q. B. D. 548.

Judgment for Too Much or Too Little.—Where a payment on account has been made between the issue of the summons and the entry of judgment, a judgment entered for more than the amount actually due will be set aside: Hughes v. Justin, 1894, 1 Q. B. 667. If too little, see Dewar v. Winter, 12 T. L. R. 54; Saunders v. Hamilton, 23 T. L. R. 389.

A judgment by consent against a company is as binding upon the parties as one obtained after a contest: *Re* South American and Mexican Co., 1895, 1 Ch. 37; but if founded on a contract which it was *ultra vires* of the company to enter into, it will be void: Great North West Central Ry. Co. v. Charlebois, 1899, A. C. 114, reversing Delap v. Charlebois, 26 S. C. R. 221.

Judgment on Counterclaim When Plaintiff Does Not Appear.—If, when the trial is called on, the plaintiff does not appear, or, if the plaintiff's action has been stayed, discontinued or dismissed, and defendant has given notice of a counterclaim or set-off, he may prove such counterclaim or set-off, and have judgment accordingly: Rule 20.

Terms as to Cost or Otherwise.—The plaintiff should, if the judgment is set aside under sub-section (3), be placed as nearly as possible in the same situation as though the action had proceeded in the usual way: Smith v. Blundell, 1 Chitty 226. The terms commonly imposed have been the payment of the costs: Slated v. Lee, 1 Salk. 402; Westlake v. Abbott, 4 U. C. L. J. 46, pleading without delay; and sometimes bringing the money into court: see Watt v. Barnett, 3 Q. B. D. 183; Wade v. Simeon, 13 M. & W. 647; Every v. Wheeler, 3 U. C. L. J. 11; McGregor v. Harris, 9 C. L. T. 504; Wright v. Mills, 60 L. T. 887, but payment into court should not be ordered unless it would be justified on a motion under section 100: Dobie v. Lemon, 12 P. R. 64; see notes to that section.

Sec. 99.

So long as a regular judgment remains it can be enforced: Tait v. Harrison, 17 Gr. 458. Where the plaintiff has obtained judgment irregularly the defendant is entitled *ex debito justitiæ* to have it set aside: Potter v. Pickle, 2 P. R. 391; Bonchler v. Patton, 3 U. C. L. J. 45; and the court has only power to impose terms upon him as a condition of giving him costs: *per* Fry and Lopes, L. JJ., Anlaby v. Prætorius, 20 Q. B. D. 764. But the court may award costs to the defendant on the ground that his motion had been unnecessarily opposed: Imperial Oil Co. v. Deming, 29 N. S. R. 98.

If defendant does not first comply with the terms of the order he cannot take advantage of it.

An order setting aside proceedings must be served forthwith, otherwise the opposite party may treat it as abandoned: Molsons Bank v. Dillabaugh, 13 P. R. 312.

Mere lapse of time is not necessarily a bar to an application to set aside a judgment by default, and when no irreparable wrong will be done a plaintiff, the judgment may be set aside unconditionally: Atwood v. Chichester, 3 Q. B. D. 722; see Beale v. Macgregor, 2 T. L. R. 311; Brown v. Grady, 31 O. R. 73, but delay may be a ground for imposing terms, McVicar v. McLaughlin, 16 P. R. 454.

But though carelessness and delay do not disentitle the defendant to relief, they might afford ground for imposing terms: see Cousins v. Cronk, 17 P. R. 348, *e.g.*, on terms of paying the plaintiff's costs: Herrington v. Carey, 7 O. W. N. 473. And when a debt due to the defendant had been attached, the order setting aside the judgment was made without prejudice to the attachment proceedings: *ib.*

Papers to be filed.—When final judgment is entered the clerk is to file the summons and particulars of claim with the affidavit of the due service of both: section 98 (2).

Judgment by default under s. 100, where final judgment not entered.

99. Where proof is made by affidavit or otherwise of the service of a special summons, and of the particulars of the plaintiff's claim as required by section 100, and judgment has not been entered under the provisions of the said section, the judge may, if the defendant does not in person or by agent appear in open court, as required by the summons, give judgment against him by default, without requiring proof of the plaintiff's claim. 10 Edw. VII., c. 32, s. 99.

Proof.—The expression "proof" here used must mean the sworn statement, in proper form, of such facts as in law shew that proper service has been made. Where a person's property may be affected by a proceeding taken in his absence, it is important that all necessary precedent facts should clearly appear.

By Affidavit or Otherwise. — For form of affidavit see form No. 20.

For formal requirements of affidavits, see Rules 42-50. The affidavit need not contain anything more than the statute and rules require: Baldwin v. Benjamin 16 U. C. R. 54.

It would be good though it stated that service was made on a certain day of the month "instant," without stating the year: R. v. Tomb, 4 U. C. R. 177.

Sec. 99.

As to requisites of service, see notes to section 87. As to service on defendant out of jurisdiction, see section 75, and as to service on a foreign corporation, see section 80.

The words "or otherwise," mean by any other evidence to which the court can look: *per* Cottnn, L.J., Shelford v. Louth & E. C. Ry. Co., 4 Ex. D. at p. 310; *e.g.*, that the facts may be proved by oral testimony or other legal proof of service: Child v. Fitzell, 2 P. R. 202; Davis v. Pearce, L. R. 5 C. P. 435, and the judge would not be justified in acting upon anything less than that.

Special Summons.—See notes to sections 83 and 98. The special summons referred to is provided for by Rule 3 and section 83; Form 32. In all cases, proof is required of the service of the summons and particulars of claim. As to actions which are the subject of special summons, see notes to sections 83 and 98.

Particulars of Plaintiff's Claim.—See notes to section 83.

When claims are entered as, "To balance of account rendered," it is submitted that the judge would not be justified in giving judgment upon them under this section: Wilkes v. R. R. & G. Ry. Co., 2 U. C. L. J. 230; Villeneuve v. Wait, 12 P. R. 505; Hoffman v. Crerar, 18 P. R. 473, 19 P. R. 15; see Smart v. N. & D. R. Ry. Co., 12 C. P. 404.

The rendering of an account, simply, in ordinary transactions, not between merchant and merchant, and unreplied to, does not constitute evidence of a complete admission of debt. In connection with other circumstances it may be some evidence but not of itself sufficient. But even then the account rendered should be produced, or secondary evidence thereof given.

The Judge May.—Ordinarily the word "may" is declared to be permissive: R. S. O. 1914, c. 1, s. 20 (s). When applied to the duties of judicial officers, it is construed as giving a power and not merely a discretion, which power must be exercised upon proof of the facts calling for its exercise: Macdougall v. Paterson, 11 C. B. 755; R. v. Bishop of Oxford, 4 Q. B. D. 525; Cameron v. Watt, 3 A. R. 194: Aitcheson v. Mann, 9 P. R. 473. There might be good reason, however, for a judge refusing to give judgment in the absence of the defendant or of any one on his behalf. A claim beyond the jurisdiction of the court would, of course, furnish a case in point. But there are others, of which the same may be said. Claims for extortionate interest, or otherwise of doubtful character, should not be the subject of judgment by default, if the judge questioned their correctness or had doubts of their honesty. We think in such cases he could refuse judgment by default and call for proof of the claim: see Parker v. Brand, 7 T. L. R. 462.

It is submitted that the rule for a judge to observe in acting under this section is not to incline to a laxity of practice in giving judgment by default on the one hand, nor on the other hand arbitrarily to require proof of the claim by the plaintiff, but to mete out justice by not unnecessarily inconveniencing a plaintiff by requiring proof, nor do injustice to the defendant by a too hasty disposition of the case.

If the Defendant Does Not Appear in Open Court.—The expression "in open court" is evidently intended to mean a visible appearance of the defendant in court, personally or by an agent, and

not the technical appearance, which a notice of dispute has been thought to imply. Sec. 100.

The expression "in open court" as used in the English Debtors Act, 1869, has been held to mean "what any one would take to be a court, with the usual accompaniments of the jury box, the witness box, the judge's seat, and seats for solicitors, counsel and others;" *per* Coleridge, C.J., and not to include the private room of a County Court Judge, though often used by him for hearing causes: Kenyon v. Eastwood, 57 L. J. Q. B. 455.

If a defendant gives notice disputing plaintiff's claim, and does not appear, the plaintiff would be entitled to his costs, including the costs of subpoena or summons to witnesses and service thereof, witness fees and his own expenses as a witness when taxable: Fox v. Toronto & Nipissing Ry. Co., 7 P. R. 157; and other necessary and taxable costs, even of a commission, if costs are awarded by the judgment: Howes v. Barber, 18 Q. B. 588; Fox v. Toronto & Nipissing Ry. Co., *supra*; Browne v. Smith, 1 P. R. 347; Middleton v. Pollock, 4 Ch. D. 49.

It is submitted that a third party would have no right to intervene: see Offay v. Offay, 26 U. C. R. 363.

Consequences and Effect of the Judgment.—Whatever rights the plaintiff would have on a judgment recovered in a contested case, the same are assured to him on a judgment by default under this section.

As to effect generally of judgments in division courts and the subsequent proceedings that may be taken thereon: see notes to section 8, and also notes to sections 173 and 190.

For form of judgment: see form 118.

Motion for judgment.

100.—(1) In any action commenced by special summons for the recovery of a debt or money demand of $25 or upwards, the plaintiff, on an affidavit made by himself or any other person swearing positively to the facts and verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the action, and the reasons why immediate judgment should be granted, may concurrently with the service of the special summons, or at any subsequent time, serve the defendant with a notice of motion, returnable not less than four clear days after service, to shew cause before the judge why the plaintiff should not be at liberty to have final judgment entered by the clerk for the amount of the debt or money demand sought to be recovered, together with interest, if any, and costs. A copy of the affidavit shall be served with the notice of motion. The judge thereupon, if the reasons for immediate judgment appear to be sufficient, unless the defendant or his agent by affidavit or otherwise satisfies him that the defendant has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action, may make an order empowering the clerk to sign final judgment.

Sec. 100.

How defendant may show cause.

(2) The defendant may shew cause by offering to bring into court the amount sought to be recovered, or by affidavit which shall state whether the defence he alleges goes to the whole or to part only, and if to part only, then to what part of the claim. The judge may, if he thinks fit, order the defendant to attend and be examined upon oath, and to produce any books and documents, or copies thereof, or extracts therefrom.

Partial defence.

Judgment for part.

(3) If it appears that the defence applies only to a part of the claim, or that part of the claim is admitted to be due, the plaintiff shall be entitled to have final judgment entered forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, payment of any amount levied, or any part thereof, into court by the bailiff, the taxation of costs or otherwise as to the judge may seem just; and the defendant may be allowed to defend as to the residue of the claim.

Where one defendant has good defence.

(4) If it appears to the judge that a defendant has a good defence, or ought to be permitted to defend, and that any other defendant has not such defence, and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall he entitled to have judgment entered against the latter, and may issue execution upon the judgment without prejudice to his right to proceed with his action against the former.

Terms upon giving leave to defend.

(5) Leave to defend may be given unconditionally, or subject to such terms as to giving security or otherwise, as to the judge may seem just.

Setting aside or varying order.

(6) Within seven days after making the order, and upon good grounds being shewn, the judge may set aside or vary the order upon such terms as to him may seem just. 10 Edw. VII., c. 32, s. 100.

The action must he one in which jndgment hy default conld be signed under section 98; that is, it must be:

1. For the recovery of a debt or money demand, as to which see notes to section 98;

2. The claim must be for $25, or more;

3. The action must have been commenced hy apecial summons;

4. And a special summons must be served; and thia would include service of particulars of claim, and of the notices which are required to entitle the plaintiff to judgment by default under aection 98;

5. The affidavit muat also ahew the facta on which the actiou is hrought and verify the cause of action;

6. And must state the deponent's belief that there is no defence to the action; Sec. 100.

7. And must state the reasons why immediate judgment should be granted.

Formerly a garnishee action would not be within this section: Cameron v. Allen, 10 P. R. 192; but it now is, see secs. 2 (d) (j), 155 (2) (4). Section 100 does not apply to a case where proceedings were taken against the defendant as an absconding debtor, because other creditors have the right to intervene: Offay v. Offny, 26 U. C. R. 363.

Where there is a *bona fide* notice disputing the jurisdiction of the court, the right to give judgment depends upon whether the court has jurisdiction. If it has no jurisdiction, *cadit quæstio*. If the jurisdiction is doubtful the judge may exercise his discretion whether or not to send the case to trial so that *viva voce* evidence may be heard. There seems to be no necessity for a trial in court of such a question. A trial in court is for the purpose of disposing of actions within the jurisdiction and not primarily for the purpose of deciding the jurisdiction. It is submitted, therefore, that on a motion under this section, the judge may dispose of the question of jurisdiction, and if he decides he has none, may, on the application of either party, transfer the case under section 79.

The Plaintiff.—The proceeding is optional with the plaintiff: R. v. S. E. Ry. Co., 4 H. L. Cas. 471; and his making the application or not cannot affect his rights on the merits in any way: see Gill v. Woodfin, 25 Ch. D. 707; Gibbings v. Strong, 26 Ch. D. 66.

On Affidavit.—The affidavit which the statute requires must be made: R. v. Judge of the Marylebone County Court, 50 L. T. 97.

The affidavit must be made by the plaintiff himself or some person who swears positively to the facts and to the cause of action: see Hallett v. Andrews, 42 Sol. Jour. 68; Great West v. Shields, 15 O. W. R. 166; Laws v. Grunwald, 1909, W. N. 216, *Re* J. L. Young, 1900, Ch. 753.

An affidavit by the Toronto agent of the plaintiff's solicitor, stating that he had knowledge of the matters in question and that the defendants were indebted to the plaintiffs as claimed, was held to be insufficient as *non constat* deponent was speaking from his own knowledge: Rogers v. Wood, 3 O. W. N. 1241.

An affidavit by the Ontario solicitor for the plaintiff deposing to his information and belief acquired from the plaintiff's Manitoba solicitor was held insufficient: Lagos v. Grunwoldt (1909), W. N. 216; *In re* Young, 1900, 2 Ch. 753, even when fortified by an affidavit by the Manitoba solicitor, as no reason was given for the belief that nothing had been paid on the Manitoba judgment on which the action was brought in Ontario: Great West Life Assurance Co. v. Shields, 1 O. W. N. 393.

The affidavits must not only verify the cause of action, but also pledge the deponent's belief that there is no defence to the action; Kiely v. Mussey, 6 L. R. Ir. 445; see Bradley v. Chamberlyn, 1893, 1 Q. B. 439; and they must also shew "the reasons why immediate judgment should be granted."

A statement that "I am advised and believe defendant has no defence on the merits" is a sufficient statement that there is no defence:

Sec. 100. Manning v. Moriarty, 12 L. R. Ir. 372; but it should, it would seem, state the sources of knowledge: Rule 45.

The right to obtain judgment in this summary way is an extraordinary one, and all the facts necessary to be shewn and the observance of all the requirements of the statute are conditions precedent to the due making of the order: R. v. Judge Marylebone, C.C., 50 L. T. 97; Lloyd's Banking Co. v. Ogle, 1 Ex. D. 262; Ruanacles v. Mesquita, 1 Q. B. D. 416; Crawford v. Gilmore, 30 L. R. Ir. 238; Sheppard v. Wilkinson, 0 T. L. R. 13. It should not be granted when any real conflict as to matter of fact or any real difficulty as to matter of law arises: *Ib.*; Electric Contract Co. v. Thomson-Houston Co., 10 T. L. R. 103; Ward v. Plumley, 6 T. L. R. 198; Clarkson v. McNaught, 3 O. W. N. 741. Though the defendant might, by distinctly waiving production of the affidavit or the allegation of certain necessary facts and agreeing to the plaintiff's statement of facts, give the judge power to make the order: see *Ex parte* Batters, *Re* Harrison, 43 L. T. 2; *Re* Guy v. G. T. Ry. Co., 10 P. R. 372; and the consent to adjudication could not be withdrawn: Harvey v. Croydon Union Rural Sanitary Authority, 26 Ch. D. 249.

The debt or cause of action must be positively sworn to; there should not be any doubt appearing on the affidavit in that respect. The cause of action must be verified. What will satisfy the section in this respect must depend on the circumstances of each case. The case of Symonds v. Palmer, 1911, 1 K. B. 250, shews how strictly the requirements should be complied with; and see Union Bank v. Aymer, 3 O. W. N. 773.

In addition to other particulars, the affidavit for speedy judgment in the Division Court must shew the "reasons why immediate judgment should be granted."

"The defendant is justly and duly indebted to the plaintiff in the sum of $, as per particulars annexed to the summons herein," has been held to be sufficient: Murphy v. Nolan, 18 L. R. Ir. 468; May v. Chidley, 1894, 1 Q. B. 451. The affidavit need not set out all the particulars.

For form of affidavit, see Form No. 50; of order for judgment, No. 119.

Where the affidavit is defective in form and an application upon it fails in consequence, a second application can be made on fresh materials: Wagstaff v. Jacobowitz, W. N. (1884) 17; Sykes Brewery Co. v. Chadwick, 7 T. L. R. 258; Payne v. Newberry, 13 P. R. 392; and the matter is not made *res adjudicata* by the disposal of the first application; Dombey & Sons v. Pinyfair, 1897, 1 Q. B. 368. Where the claim is for a liquidated amount and by a clerical mistake too small a sum is claimed in the summons and summary judgment has been obtained the summons may be amended so as to claim the correct amount and a further judgment for the balance ordered: Dewar v. Winder, 12 T. L. R. 54; but see Sanders v. Hamilton, 23 T. L. R. 389, 96 L. T. 679, where a divisional court questioned this decision.

Concurrently with the Service of the Summons.—"To concur" means to "join or unite as in one action:" Webster; and the expression used here must imply that the notice of motion for summary judgment may be joined with and served at the same time as the summons and particulars of claim as required in order to obtain judgment under section 98. The application may be made at any time after action commenced and before judgment.

Formerly the application could not be made until after a notice disputing plaintiff's claim had been filed; but under the present section, the notice of motion may be served concurrently with the summons, and judgment may be ordered to be entered before the expiration of the time to defend: McKay v. Talbot, 3 O. L. R. 256. Sec. 100.

The plaintiff should apply for summary judgment within a reasonable time after the service of the summons: McLardy v. Slatenn, 24 Q. B. D. 504. It is submitted that in applying the practice of the Ontario Supreme Court as to summary judgments, the dispute note should be taken as corresponding to the appearance and not to the statement of defence and that, therefore, the plaintiff may apply at any time before trial: see Grand Trunk Ry. Co. v. Toronto, 9 O. W. R. 671, overruling German American Bank v. Keystone Sugar Co., 12 O. L. R. 555. It has been held in the Irish courts that if a plaintiff take a deliberate step to have an action tried by a jury he cannot move for judgment: Stewartstown Loan Co. v. Daly, 12 L. R. Ir. 418; see also Hackett v. Lalor, 12 L. R. Ir. 45; and these decisions have been followed in Woodruff v. McLennan, 11 P. R. 22. McLardy v. Slatenn was however decided after these cases and it is submitted that in a division court a plaintiff may apply at any time before trial even though he has served a jury notice.

Summary judgment may be ordered, notwithstanding the defendant has filed a defence and notice demanding a jury: *Re* Tatham v. Atkinson, 1 O. W. R. 183.

Serve the Defendant with Notice of Motion.—The motion must be made by notice of motion. No other form than that which the statute prescribes would be proper.

The notice could be given by a solicitor or agent for the plaintiff, and even if given without his authority, but in plaintiff's name, it might be ratified by him: Ancona v. Marks, 7 H. & N. 686; Blake v. Walsh, 29 U. C. R. 545; Vanderlip v. Smyth, 32 C. P. 60.

The notice of motion should be served on the defendant personally: see notes to section 87; but substitutional service may be ordered under section 88 which is not now limited to service of "process" merely. In Ward v. Vance, 9 U. C. L. J. 214, Adam Wilson, J., said in regard to service of an attaching order and summons to pay over under the garnishment clauses of the Common Law Procedure Act: "The statute does not require in express terms" (as here) "that there shall be personal service as our King's Bench Act of 1822 did of the *Ca. Re.*, upon the defendant," and, "I am inclined to think that personal service is not imperatively demanded unless in those cases where it is sought,—that is, where it is the purpose and object, to charge the party with a contempt for not appearing to, or for not performing some act required by the writ, rule or order."

If so ordered, sufficient service could be effected by serving defendant's wife at the dwelling house of defendant: Hanna v. Johnston, 3 O. R. 100; Trust & Loan Co. v. Jones, 8 P. R. 65; see, however, Hays v. Armstrong, 7 O. R. 621; or by leaving the notice of motion at the place of residence of the defendant with some grown-up person there dwelling: *Re* Solicitor, 14 Ch. D. 152; Carlisle v. Orde, 7 C. P. p. 459; see also Jones *dem.* Griffiths v. Marsh, 4 T. R. 464; Murray v. G. W. Ry. Co., 6 P. R. 211; R. v. North Riding of Yorkshire (Jus.) 7 Q. B. 154, to the same effect.

Sec. 100.

The case of Hogg v. Brooks, 14 Q. B. D. 475, was decided on the strict language of the lease in question there, and does not impugn the authority of the cases previously cited here.

The following would not be sufficient; service on a clerk of defendant at the defendant's counting house: Rowland v. Vitzetelly, 6 M. & G. 723; Warwick v. Bacon, 7 M. & G. 961; nor by leaving the notice at the club house of the defendant: Davies v. Westmacott, 7 C. B. N. S. 829; nor by leaving it with defendant's warehousemen at defendant's warehouse, that being his place of business: Ibotson v. Phelps, 6 M. & W. 626; nor service on a workman on defendant's premises: Hitchcock v. Smith, 5 Dowl. 248; nor on a housekeeper at a place where several persons are residing without shewing that she had authority to receive papers for defendant: *per* Maule, J., Lewis v. Burton, 7 C. B. 102; nor leaving it with the laundress at defendnat's office: Dodd v. Drummond, 1 Dowl. 381; Keat v. Jones, 3 Dowl. 210; Alanson v. Walker, 3 Dowl 258; Brown v. Wildbore, 1 M. & G. 276; much less with the servant or assistant of the laundress: Smith v. Spurr, 2 Dowl. 231; nor with the landlord or landlady of the house where the defendant lodges: Salisbury v. Sweetheart, 5 Dowl. 243; Biddulph v. Gray, 5 Dowl. 406; Gardner v. Green, 3 Dowl. 343; nor upon a female servant at defendant's lodgings: Price v. Thomas, 11 C. B. 543; nor by putting it under the door or into the letter-box of defendant's office: Strutton v. Hawkes, 3 Dowl. 25; Braham v. Sawyer, 1 D. & L. 466; Consumers' Gas Co. v. Kissock, 5 U. C. R. 542; Grand River Nav. Co. v. Wilkes, 8 U. C. R. 249; McCallum v. Pro. Ins. Co., 6 P. R. 101; nor by throwing it over the fence to defendant's son who refused to have anything to do with it: McGula v. Benjamin, 1 Cham. R. 142.

Where service is made on a domestic servant at defendant's residence, the affidavit of service should shew she is the defendant's servant: Ainsson v. Walker, 3 Dowl. 258. And where it is made on some grown-up person at defendant's residence it should be shewn that such grown-up person was in some way connected with defendant as a member of his family or otherwise; "that she was more than casually there:" *per* Draper, C.J., Carlisle v. Orde, 7 C. P. 459. If served on defendant's wife, the affidavit should shew it, and if on some other person the same should properly be given.

Service on a holiday would be good: Clarke v. Fuller, 2 U. C. R. 99; but not on Sunday: R. v. Leommster, 2 B. & S. 391; see notes to section 105 as to "Holidays." It is very doubtful if service on one of several partners would be good service of a notice of motion against the firm. The Consolidated Rules of practice of the Supreme Court are not applicable: Clarke v. Macdonald, 4 O. R. 310; Bank of Ottawa v. McLaughlin, 8 A. R. 543; Pryor v. City Offices Co., 10 Q. B. D. 504; *Re* McKay v. Talbot, 3 O. L. R. 256; see notes to section 65.

Service on a corporation must be made on the corporation itself through its proper officers. Casual knowledge acquired by one of its officers would not be good service: Société Generale de Paris v. Tramways Union Co., 14 Q. B. D. 424. See also section 89.

By appearing and arguing the question on the merits, without objection, the defendant would thereby waive any defect in the notice or any objection to the sufficiency of the time of service, or even to any notice at all: Park Gate Iron Co. v. Coates, L. R. 5 C. P. 634; R. v. Stone, 1 East, 649; R. v. Shaw, 12 L. T. 470; R. v. Smith, L. R. 2

C. C. 110; Blake v. Beech, 1 Ex. D. 320; R. v. Hughes, 4 Q. B. D. 614; Ward v. Raw, L. R. 15 Eq. 83; R. v. Crouch, 35 U. C. R. 433; R. v. Widdop, L. R. 1 C. C. 3; R. v. Heffernan, 13 O. R. 616; R. v. Hall, 12 P. R. 142; Stoneman v. Lake, 40 U. C. R. 320; see also Dominion Coal Co. v. Kingswell Steamship Co., 30 N. S. R. 397. Sec. 100.

The notice of motion and affidavits should, if possible, be filed with the clerk before the return day: *Re* Rosler, Jones v. Bartholomew, 49 L. T. 442; Sear v. Webb, 49 L. T. 94. For form of notice of motion, see Form 120.

Married Woman.—A personal judgment may be ordered under the section against a married woman, in respect of a debt incurred before marriage: Teesdale v. Brady, 18 P. R. 104; and a proprietary judgment may be ordered against her estate: see cases cited in notes to section 98.

Not Less Than Four Clear Days.—This means that the notice of application for immediate judgment must be served four days at least, that is, excluding the day of service and the day when the motion is returnable before the judge: see cases cited in notes to section 79. In division courts Sundays and other holidays must be reckoned: McKay v. Talbot, 3 O. L. R. 256. Service after two o'clock on Saturday afternoon would not be reckoned as of the following Monday, the Consolidated Rules not being applicable: Clarke v. Macdonald, 4 O. R. 310; Bank of Ottawa v. McLaughlin, 8 A. R. 543; McLean v. Pinkerton, 7 A. R. 490.

Setting Up Defence.—The defendant may, by affidavit or otherwise, *i.e.*, by other admissible evidence, satisfy the judge that he has a good defence: United Founders v. FitzGeorge, 7 T. L. R. 620. The motion for summary judgment is a peculiar proceeding intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay: Jones v. Stone, 1894, A. C. 124.

The intendment is to prevent defences being set up against good faith for the purpose of gaining time; and where there is a fair probability of a good defence to the action on the merits shewn by defendant he ought to be allowed to defend unconditionally: Munro v. Orr, 17 P. R. 53.

One of the methods employed in the higher courts for enabling the defendant to obtain the necessary facts to satisfy the judge is by cross-examining the plaintiff; and there is no discretion to refuse such cross-examination: Kingsley v. Dunn, 13 P. R. 300. There is power in this court to grant cross-examination of the defendant under sub-section (2), but not to cross-examine the plaintiff, and the absence of that means of making out a defence should be considered by the judge on hearing the application. For instance, judgment should not be ordered in an action on a note if the defendant deposed that the note was without consideration, invalid and fraudulent as to the first holders and that he believed plaintiffs were suing on behalf of the first holders, and had notice of the circumstances invalidating the note, although his affidavit did not state the facts as to such notice: Farmers' Bank v. Sargent, 17 P. R. 67; nor in such an action, if the defendant swears he would have a good defence against

Sec. 100. the payee of the note, and that he believes the plaintiff is not a *bona fide* holder for value and gives facts supporting or reasons for entertaining such belief: Bank of Minnesota v. Page, 14 A. R. 347. The sources of knowledge must always be stated: Rule 45, or the affidavit will not be received: Bank of Toronto v. Kelly, 17 P. R. 250; Jones v. Mason, 18 P. R. 442; and, in the case of an individual defendant, an affidavit by the defendant himself ought not to be dispensed with where he can make an affidavit: *per* Cotton, L.J., in Shelford v. South and East Coast Ry. Co., 4 Ex. D. 317 at 319.

But it is not always necessary for the defendant to state the facts of his defence if the court is satisfied that there is a good defence on the merits or that the case is of such a nature that the trial should proceed in the usual way: Farmers' Bank v. Sargent, 17 P. R. 67.

As to what allegations will suffice to meet the application for immediate judgment, see Payanni v. Lookpas (1880), W. N. 109; Monison v. Wright, 1 O. W. N. 727.

It is a valuable and important part of the new procedure that the means should exist of coming by a short road to final judgment where there is no real defence to the action. But it is of at least equal importance that the parties should not be shut out from their defence when they ought to be admitted to defend: *per* Lord Selbourne, Wallingford v. Mutual Society, 5 App. Cas. 693; and the plaintiff should not be allowed to sign judgment merely because the defendant's affidavit does not shew a complete defence: *per* Brett, L.J., Ray v. Barker, 4 Ex. D. 279, at p. 283.

A second affidavit by the defendant may be received, setting up further grounds of defence; but all the grounds of defence should be set up in the original affidavit: Phillips v. Stevenson, 1 O. W. N. 940; and terms may be imposed: *Ibid*; and see the authorities cited in that case.

Defence on the Merits.—The defendant must disclose a defence "on the merits." He should state what his defence is, and should give reasons for thinking the defence substantial: Runnacles v. Mesquita, 1 Q. B. D. 416; Dobie v. Lemon, 12 P. R. 64. If the defendant's affidavits shew a good defence, the court has no discretion and cannot order payment into court: Ray v. Barker, 4 Ex. D. 279. "The very rule itself contemplates that a man is to be let in to defend who can make out a defence:" *per* Brumwell, L.J., Harris v. Bottenheim, 26 W. R. 362. If, however, facts are raised which, although not satisfying the judge that there is a good defence, shew there is a question to be tried, the judge may allow the defendant, either with or without terms, to raise such question, and fight it if he pleases. But the affidavit must condescend upon particulars. "You must give such an extent of definite facts as to satisfy the judge that there are facts which make it reasonable that you should be allowed to raise the defence:" *per* Lord Blackburn, 5 App. Cas. 704; Davis v. Spence, 1 C. P. D. 721; Collins v. Hickok, 11 A. R. 620. If the defendant does not make out a clear defence on the merits, and the judge, in the exercise of his discretion, orders payment into court or security, his order will not be interfered with: Nelson v. Thorner, 11 A. R. 616. If the defendant swears to credits which should be given, it is improper to order him to give security for the full amount and in default to shut him out altogether from the opportunity of reducing the claim: Wallingford v. Mutual Socy., 5 App. Cas. 695. A surety is generally entitled to require the plaintiff to prove his claim: Lloyd's Banking Co. v. Ogle, 1 Ex. D. 262.

Indarsers who deny notice of dishonour may have the question tried: Ontario Bank v. Burke, 10 P. R. 561. An accommodation maker is entitled to have the question of whether the plaintiff gave value tried: Hughson v. Gordon, 10 P. R. 565; so, also, is the maker of a note alleging facts which constitute fraud or illegality: Fuller v. Alexander, 47 L. T. 443; Bank of Minnesota v. Page, 14 A. R. 347; Millard v. Baddeley, W. N. (1884) 96; Wing v Thurlow, 10 T. L. R. 53, 151; Brooks v. Aylmer, 73 L. T. Jour. 80; or where he alleges an agreement to renew, and a tender of renewals pursuant thereto: Federal Bank v. Hope, 6 O. R. 209; Lowden v. Martin, 12 P. R. 496; or where he shews that there is a difficult question of law to be tried: Electric Contract Co. v. Thomson-Houston Co., 10 T. L. R. 163; see Crawford v. Gilmour, 30 L. R. Ir. 238. **Sec. 100.**

In the case of Fuller v. Alexander, *supra*, it was held that, upon a defence of fraudulent misrepresentation, particulars of which were set out, and of which the defendant swore he had reason to believe the plaintiff had notice, the burden of proof that he was the holder in due course was upon the plaintiff, and the defendant was entitled to defend unconditionally; and this case was followed in Farmer v. Ellis, 2 O. L. R. 544.

In an action on a covenant in a mortgage where defendant swore he had a good defence on the merits, and that the mortgage was signed by him on the express understanding that he was not to be personally liable, and his affidavit was supported by another person, and it appeared, moreover, that the blanks in the printed form of covenant had not been filled up, the defendant was allowed to defend unconditionally: Munro v. Orr, 17 P. R. 53; Patterson v. McLean, 21 O. R. 221. Where it appeared on a motion for summary judgment that the special endorsement on the writ was not in conformity with the facts and so failed to verify the claim the court held that no amendment could be permitted upon the motion; nor could judgment be given in accordance with the special endorsement: Clarkson v. Dwan, 17 P. R. 92, 206. But section 104 seems to be wide enough to permit any amendment being allowed.

In an action on a note endorsed by the payees to the plaintiffs, whose manager swore that they were the holders thereof in due course for value, the defendant deposed that he had never received any consideration for the note, that he made it for the accommodation of the payees; that he had heard the local manager of the plaintiffs say that the note was not discounted by them but was simply left with them; that he believed the local manager was aware when he received the note that it was an accommodation note, and was also aware of the arrangement entered into between the company and the defendant at the time the note was made, and that an accountant placed by the plaintiffs in charge of the books of the payees was present when that arrangement was made. He did not state that the local manager had the requisite notice to affect the plaintiffs, nor the grounds of his belief that he had such notice; nor did he state that the accountant referred to had any notice or knowledge of the agreement referred to; nor did he adduce any hearsay evidence to support the defence attempted to be set up: Held that the defendant had not shewn satisfactorily that he had a good defence upon the merits, nor disclosed such facts as should be sufficient to entitle him to defend: Bank of Toronto v. Kielty, 17 P. R. 250. See also Jones v. Mason, 18 P. R. 442. These cases and also the case of Dunnett v. Harris, 14 P. R. 437, cited *post*, were distinguished in Davey v. Sadler, 1 O. L. R. 626. Where a second affidavit by the defendant was filed setting up a different defence from that stated in his first affidavit, some

Sec. 100. reason should be stated why the additional defeace was not set ap at first: McPhillips v. Steveason, 1 O. W. N. 940.

Where the plaintiff relied oa an estoppel, but the defeadaat set ap facts which mada the estoppel debatable, it was held ia tha Privy Coancil that he should have been let ia to defead: Joaes v. Stone, 1894, A. C. 122; and see Wallace v. Stevaason, 2 O. W. N. 166.

Whera in an action on a bill of exchange the defendant's affidavit stated: "I have been informed by the ageat of the Havanaa Cigar Co., by whom the bill of exchaage sued on herein was drawa, and from such iaformatioa I verily believe that the plaintiff herein is aot aad was aot, at the time this actioa was brought, the holder of the said bill of exchaage." Aad ao other facts beiag stated it was held that there was nothiag to satisfy the judge that the defeadaat should be eatitled to defead. On the argument further affidavits were read on behalf of tha defeadant to which plaiatiff repiied and on the facts disclosed in these later affidavits tha defendant was allowed aa opportunity of substantiatiag his defeace on payiag iato court the amonnt of plaintiffs' claim: Baaque d'Hochelaga v. Maritima Ry. News Co., 29 N. S. R. 358.

The judge must, however, exercise his discretion ia each case, thoagh he is bound oa a defeaçe oa tha merits beiag disclosed to his satisfactioa to refuse the order: Sharmur v. Yoaag, 33 Sol. Jour. 155; Thompson v. Marshall, 28 W. R. 220. But where his legal liability is clear, the court will refuse to give leave to defend: Nassaa Press v. Tyler, 70 L. T. 376; Dana v. Mortgage Insurnace Cor., 1894, 1 Q. B. 54; Ontario Bank v. Young, 2 O. L. R. 761.

In an actlon for the price of chattels, defendant's affidavit stated that tho goods had not been delivered, but did not state that the plaintiff had refused to deliver them, summary judgmeat was ordered: Stokes v. Reynolds, 1 O. W. N. 1051, 1099.

Where laad was held hy a trustee for the owaers aad executed a mortgage for their beaefit, which without his knowledga coataiaed a covenant to pay the mortgage debt, the covenant was held aot to he eaforceable agaiast hia personally hy the assignees of the mortgage for value without notice, the remedy beiag restricted to foreclosure proceedlags agaiast the laad: Pattersoa v. McLeaa, 21 O. R. 221.

Where a defeadaat admitted part of the claim, but set up a couaterclaim for a larger amouat, judgmeat was refused: Court v. Sheea, 7 T. L. R. 556; aad where the defeadant shewed a *bona fide* complaint agaiast the plaintiff as a grouad of defeace or couaterclaim leave to defead was givea uacoaditioaally: Ford v. Harvey, 9 T. L. R. 328; United Gutta Percha v. Welch, 14 T. L. R. 154; Re Geaeral Rail Syndicate, 1900, 1 Ch. 365; aad *a fortiori*, where the defence is a set-off: Groom v. Rathbone, 41 L. T. 591; Coamee v. The C. P. Ry. Co., 11 P. R. 222; ualess the counterclaim or set-off be too vague or misty to justify delayiag the plaiatiff: Baak of Ottawa v. Johnstoa, 9 C. L. T. 251; Aagio-Italiaa Baak v. Wells, 38 L. T. 197; Government Co. v Dempsey, 50 L. J. Q. B. 199. Judgmeat may be granted aad execution stayed till after the trial of the counterclaim: Shepherd v. Wilkinson, 6 Times 13; Slater v. Cathcart, 8 T. L. R.; and see Auerbach v. Hamiltoa, 19 O. L. R. 579. But see Hoby v. Birch, 62 L. T. 404. But ia actioas oa bills of exchaage no effect will be givea to the axisteace of a couaterclaim except uader special circumstances: Newmaa v. Lever, 4 T. L. R. 91; but see Thesiger, L.J., ia Angio-Italian v. Davies, 9 Ch. D. 275.

In short, where a defendant shews there is a "fair probability of a defence," unconditional leave to defend ought to be given: Ward v. Plumbley, 6 T. L. R. 198; Carver v. Buccleuch, 33 Sol. Jour. 286; or where a defence is shewn on the merits or facts which upon development or cross-examination amount to a defence, or where an arguable point of law or fact is raised, the power to order judgment should be carefully and sparingly exercised, and never, unless that it can be shewn that the plaintiff may be seriously prejudiced by waiting for the trial: Barber v. Russell, 9 P. R. 433. Sec. 100.

In Runnacles v. Mesquita, 1 Q. B. D., p. 418, Cockburn, C.J., said that "when the defendant goes beyond the mere form of stating that he has a good defence, and states what his defence is, and gives reasons for thinking it substantial and will be sustained by the evidence" he should be allowed to defend unconditionally. And where there is upon the affidavit filed "a direct conflict of evidence and a distinct issue to be tried" it is a very clear case for allowing an unconditional defence: Davey v. Sadler, 1 O. L. R. 626; see also Wilkes v. Kennedy, 16 P. R. 204. The test laid down in Jacobs v. Booth Distillery Co., 85 L. T. R. 262, was whether there is "a triable issue to go before the court or jury," either of law or of fact. If there is a question fairly arguable within this rule the defendant is entitled to have it tried as a matter of right: Canada General Electric Co. v. The Tagona Water and Light Co., 6 O. L. R. 641. Where the defendant swears to facts disclosing a valid defence he has a right to an opportunity to defend, unconditionally: F. J. Castle Co. v. Kouri, 18 O. L. R. 465. The law upon this point was settled by the House of Lords in Jacobs v. Booth Distillery Co., cited *supra;* see also German Bank v. Keystone Sugar Co., 12 O. L. R. 555.

Speedy relief is for "plain and simple cases:" Northern Crown Bank v. Yearsley, 1 O. W. N. 655; or "perfectly plain cases:" Wilson v. National Electrotype Co., 3 O. W. N. 28: Morrison v. Wright, 1 O. W. N. 727; Farmers' Bank v. Big Cities Realty Co., 1 O. W. N. 397; and not for transactions of a complicated character; and if it is not clear that the defendant is liable, summary judgment will not be ordered: Northern Crown Bank v. Yearsley, 1 O. W. N. 655; Charlebois v. Martin, 3 O. W. N. 1155; Wallace v. Stevenson, 2 O. W. N. 166; Niles v. Crysler, 1 O. W. N. 895, 940; Dominion Bank v. Toronto Mica Co., 1 O. W. N. 803; Bank of Hamilton v. Davidson, 4 O. W. N. 749. The scope of the application is referred to in Augustine Automatic Rotary Engine Co. v. DeSherbinin, 4 O. W. N. 834, and cases there cited.

The application cannot succeed if there is a possible defence alleged: McPherson v. United States Fidelity Co., 4 O. W. N. 1140; see also Robinson v. Perren, 7 O. W. N. 43, 105; Canada General Electric Co. v. Dodds, 7 O. W. N. 665. It is only in "a perfectly plain case that summary judgment should be granted:" Niles v. Crysler, 1 O. W. N. 895, 940; Farmers Bank v. Big Cities Realty Co., 1 O. W. N. 397.

Leave to defend unconditionally has been given on the following issues of fact being raised: Where there is a fair dispute as to the meaning of the document on which the claim is based: Bowes v. Caustic Soda Syndicate, 9 T. L. R. 328; whether the plaintiff has performed his part of the contract: Ford v. Harvey, 9 T. L. R. 328; whether the relation of the parties was that of principal and broker or that both were acting as principals: Lindsay v. Martin, 5 T. L. R. 322; where the contract required the goods to be packed for sending abroad and defendants

Sec. 100. claimed they were entitled to deduct expenses of repacking: United Gutta Percha Co. v. Welch, 14 T. L. R. 154; whether defendant was liable as purchaser for the price or as auctioneer for commission: Tobin v. Connolly, 12 Ir. L. T. 138; where in an action on a foreign judgment the defendant pleaded that the judgment was recovered by fraud and deception practised upon the foreign court, although the defendant had appeared and defended the action at the trial in the foreign court: Jacobs v. Beaver, 17 O. L. R. 496.

Where the defence set up in an action for rent had been tried and decided in a previous action for a former gale of rent under the same demise, it was held a plain case for judgment being ordered: Echart v. Henderson, Roller Bearings Co., 1 O. W. N. 859.

Where the facts are not clear and free from doubt, judgment should not be ordered: Stephenson v. Dallas, 13 P. R. 450; Rogers v. Wood, 3 O. W. N. 1241; or, in other words, it must appear to a demonstration on the whole case that the defendant has no defence: Fell v. Williams, 3 C. L. T. 358. Long delay in bringing the action is a factor in the defendant's favor: Martin v. Clarke, 3 O. W. N. 560.

The affidavit of the defendant need not be confined to facts within his knowledge. Where, however, his allegations are made upon information and belief, the sources of knowledge must be shewn: Rule 45; Harrison v. Bottenheim, 26 W. R. 362. Where there is, in the opinion of the judge, something due, he may order judgment to be entered to stand as security until the correct amount be ascertained; but execution should not be issued or levied upon without leave: Wallingford v. Mutual Society, 5 App. Cas. 685; and where the action is upon a solicitor's bill, the order will refer the bill to taxation and order judgment for the amount taxed: Smith v. Edwardes, 22 Q. B. D. 10. A money lender who had charged an usurious discount was, on moving for immediate judgment, limited to five per cent.: Parker v. Bland, 7 T. L. R. 462.

Affidavits in reply should not generally be allowed: Davis v. Spence, 1 C. P. D. 719; Girvan v. Grepe, 13 Ch. D. 174; but, in Rotheram v. Priest, 49 L. J. C. P. 104, an affidavit in reply was allowed; and, where the affidavits in reply are of all those who know of the dealings between the plaintiff and the defendant and negative the defendant's story, the defendant should be ordered to pay the money into court: Dunnet v. Harris, 14 P. R. 437. It was held in Manitoba that anything which could have been pleaded by a defendant under the old statutes of set-off can now be brought forward in answer to an application for leave to sign judgment, and will prevent an order being made allowing judgment to be signed: Manogue v. Mason, 3 Man. L. R. 603. An application to sign judgment against one defendant was refused in the absence of evidence as to the position of the action with reference to the others: Stewart v. Richard, 3 Man. L. R. 610.

Where the defence was that the mortgage sued on was given to stifle a prosecution, judgment was refused: Williams v. Kehr, 1 O. W. N. 210. In an action by solicitors against their client for costs, the amount of which had been ordered to be paid by the defendant to the client in another action by the client, and had been so paid, summary judgment was refused on the ground that the client was entitled to have his solicitor's costs taxed notwithstanding: Gundy v. Johnston, 3 O. W. N. 1601. For other instances, see Canadian Pacific Rw. Co. v. Matthews S. S. Co., 5 O. W. N. 437.

Where a judgment by default of appearance has been irregularly signed, the plaintiff cannot, while insisting on the regularity of his judg-

ment, take the alternative course of moving for summary judgment: Smith v. Logan, 17 P. R. 121, 219. Sec. 100.

Defendant May Bring Money into Court.—A defendant is not entitled to defend upon bringing the money into court, without an affidavit of merits: Crump v. Cavendish, 5 Ex. D. 211; see Rotheram v. Priest, 49 L. J. C. P. 194; Wallingford v. Mutual Society, 5 App. Cas. 685.

If the plaintiff succeeds in the action he is entitled to the money paid into court: Bird v. Barstow, 1892, 1 Q. B. 94. If the defendant succeeds he is entitled to have the money paid out to him, though notice of appeal may be given: Yorkshire Banking Co. v. Bentson, 4 C. P. D. 213. See Runnacles v. Mesquita, 1 Q. B. D. 416; Ray v. Barker, 4 Ex. D. 279.

Defence as to Part.—See section 100 (3). An order may be made for judgment for a part of the claim as to which it appears there is no defence or which is admitted before the motion is finally disposed of, and execution may be issued for such part without prejudice to the plaintiff's right to the remainder of the claim: section 100 (3), (4).

Under section 98 (1), an order of the judge is not necessary if it appears on the defence that it applies only to a part of the claim: see notes to section 98 (1).

It cannot be made a condition of the defence for the remainder that the part admitted be paid: Dennis v. Seymour, 4 Ex. D. 80.

The court may require that execution be not issued even for the part admitted; or that the amount remain in court until the whole dispute be decided, or may refuse judgment so that complete justice may be done: Spears v. Fleming, 36 C. L. J. 166; Barrie v. Toronto & Niagara Power Co., 11 O. L. R. 48. Care should be taken that the defendant will, in no event, be compelled, after paying part, to resort after the final hearing, to execution against the plaintiff.

Defendant May be Examined on Oath.—The order for defendant's examination may be granted either on a formal application before hearing the motion, or to remove doubt from the judge's mind after hearing the material he has before him: Cockerell v. Van Dieman's Land Co., 16 C. B. 261. The order should not be made except during the pendency of the application for judgment and after service of the notice of motion: Traders Bank v. Kean, 13 P. R. 60. Counsel or agents for both parties should have an opportunity of being present and taking part in such examination: Assessment Appeal, 6 C. L. J. 295; and if that opportunity was not accorded, then the depositions should not be received or acted upon: Stephenson v. Dallas, 13 C. P. 450.

The provision in section 100 (2) as to the examination of defendant differs from former Con. R. 490 (now 227). The latter provides that the defendant "may" be examined; while section 100 (2) says the judge "may, if he thinks fit," order such examination. The word "may" is interpreted as permissive: R. S. O. 1914, c. 29, s. 31 (s); and no additional force or meaning is comprehended in the additional words "if he sees fit." It has frequently been held under Con. R. 490 that the plaintiff is entitled as of right to an order for examination of the defendant and the production of documents: Moran v. Thomas, 9 Q. B. D. 643; Met. Board of Works v. Steed, 8 Q. B. D. 415; Kingsley v. Dunn, 13 P. R. 360; Townsend v. Hunter, 3 C.

Sec. 100. L. T. 310; Morrison v. Wright, 1 O. W. N. 727; Farmers' Bank v. Big Cities Realty Co., 1 O. W. N. 397.

Where a discretionary power is conferred, it must be exercised on judicial grounds and not arbitrarily: see notes to section 142 (2); Stroud, 1177.

In case of disobedience of the defendant to attend and submit to examination, if ordered, he could be committed: section 65 and notes; Martin v. Bannister, 4 Q. B. D. 491; or the judge would have power to exercise his discretion to find the affidavit filed on behalf of the defendant on which there had been no opportunity to examine the defendant as to the facts stated therein, unsatisfactory and to grant the order for judgment.

Section 100 (2) provides for the examination of the defendant only and there is no provision for examination of an agent who has made the affidavit. The defendant may be examined, even if an affidavit is made by his agent and not by himself.

The statute makes no provision for the examination of a defendant corporation or any other person than the defendant. A person making an affidavit on behalf of the defendant could not be examined.

Production of Documents.—This provision as to production is independent of that contained in Rule 62, which has a more general application and extends to all documents in the possession, power or control of either party to an action: see notes to section 114. The object in ordering production in this case, it is submitted is merely to satisfy the judge whether the defence is genuine or not. A minute examination or inspection should not be allowed the opposite party, which in the opinion of the judge might prejudice the defendant at the trial. The plaintiff should not be allowed a full discovery of the defendant's evidence in doubtful cases, when he cannot be compelled to make discovery himself: Coyle v. Coyle, 36 C. L. J. 129.

Costs of Examination.—No provision is made for payment of the travelling or other expenses of the defendant in attending to be examined; but it is submitted that the judge may in the order impose pre-payment of the defendant's conduct money as a condition of his attendance. Form of order for examination of defendant, No. 121.

Counsel Fees.—Where a defence is put in disputing a claim for more than $100, and a counsel or solicitor has been retained to make an application under this section and an order is made empowering the clerk to enter judgment a counsel fee may be allowed by the judge under section 171.

Leave to Defend Conditionally.—Where the only question was whether recognized agents of the defendants had exceeded their authority in borowing moneys for the defendant's business, leave to defend was granted conditionally on payment into court: Hong Kong and Shanghai Banking Co. v. Harris, 14 P. R. 437. See also Banque d'Hochelaga v. Maritime Ry. News Co., 29 N. S. R. 358. An order giving the defendant leave to defend upon payment into court within a certain time need not be served: Hopton v. Robertson, 23 Q. B. D. 126 (n): W. N. (1884), 77; Farden v. Richter, 23 Q. B. D. 124; Crunston v. Blair, 15 P. R. 167.

But where the defendant set up, in answer to the motion, that the consideration for the note was the purchase-money of a patent right, and that the note had not the words "given for a patent right" across

the face of it, and that the note was void under the Bills of Exchange Act, 53 Vic. c. 33, s. 30 (4), now R. S. C. c. 119, s. 14; and the plaintiff denied that the note was given for such consideration, it was held that the defendant was entitled to defend unconditionally: Davey v. Sadler, 1 O. L. R. 626. Sec. 101.

Order for Judgment May be Set Aside.—The judge may, within seven days after making the order, set aside the order for judgment upon the application of either party "on good grounds being shewn:" section 100 (6). The grounds upon which the order for judgment would be set aside and the defendant allowed to defend after having had an opportunity of contesting the plaintiff's motion for summary judgment should be of a substantial character. A judgment regularly signed will only be set aside upon an affidavit of merits, that is an affidavit disclosing substantial grounds of defence; and it is not probable that a judge would be satisfied with anything less than this on application to set aside the order. See notes to section 98 (2), (3).

Leave to dispute claim at any time before judgment.

101. At any time before judgment is entered although the time for giving the notice disputing the plaintiff's claim has expired, the Judge, on sufficient grounds shewn, and on such terms as to him may seem just, may give leave to the defendant to dispute the plaintiff's claim, in which case the notice disputing the claim shall immediately be left with the clerk, and also delivered to the plaintiff or sent to him by registered post. 10 Edw. VII., c. 32, s. 101.

Before Judgment is Entered.—If the clerk is in the act of entering up judgment it is not actually entered: Harris v. Andrews, 3 U. C. L. J. 31; see Smith v. Logan, 17 O. R. 121, 219, in which it was held that a judgment in the high court is not complete, valid and effectual until the law stamps representing the fees payable in respect of the proceedings, have been impressed or placed thereon, and an appearance tendered to be filed after all the work of signing judgment by default has been completed except the attaching of the stamps should be received and entered.

Time for Giving Notice has Expired.—See section 98.

On Sufficient Grounds Shewn.

The words "on sufficient grounds shewn" do not mean that the judge has an arbitrary power in this respect. It is imperative, not discretionary, on his part to hear the application: McDougall v. Paterson, 11 C. B. 755; notes to section 142 (2); see also notes to section 100, as to grounds on which defence should be allowed.

On Such Terms, etc.—See note to section 100.

Notice Disputing the Claim.—"Immediately" means "within such time as is reasonably requisite," synonymous with "forthwith;" as to which see notes to sections 24 and 91; Stroud 365.

See Rule 30 as to what the notice must contain.

Secs. 102-104.

Withdrawal of defence.

102. A defendant who has filed a notice disputing the claim may, by notice to the clerk at least six days before the sittings at which the action may be tried, consent that judgment be entered against him for any amount, and the clerk shall immediately notify the plaintiff thereof by registered post, and thereupon the plaintiff shall be entitled to have judgment entered by the clerk as by default for such amount and the costs necessarily incurred. 10 Edw. VII., c. 32, s. 102.

Notice.—All notices required by this Act must be in writing: section 82.

At Least Six Days.—This means clear days: notes to section 100.

Immediately Notify.—See notes to section 101, and to section 20 (2).

As by Default.—See notes to section 98. Under section 98 the clerk can only enter judgment by default after the return day of the summons. Under this section the judgment may apparently be entered as soon as the defence is withdrawn, though the return day may not have arrived: see Turner v. Lucas, 1 O. R. 623; Heaman v. Seale, 20 Gr. 278. For form of notice, see No. 122.

Requisites of notices.

103. Where a defendant or garnishee has given the clerk notice that he disputes the claim, or any other notice of which the plaintiff should be informed before the trial, or where it becomes the duty of the clerk to give notice to any party to an action of any defence, admission, judge's order or other matter of which he should be notified before the trial, the notice shall state the place and time of the sittings of the court at which the action is to be tried. 10 Edw. VII., c. 32, s. 103.

Requisites of Notices.—All notices required by the Act must be in writing: section 82; and must be registered: Rule 78.

Power to amend proceedings.

104. The judge may at any time and on such terms as to costs and otherwise as to him may seem just, amend any defect or error in any proceeding; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question raised by or depending on the proceedings and best calculated to secure the giving of judgment according to the very right and justice of the case. 10 Edw. VII., c. 32, s. 104.

Amendment of Claim.—See notes to sections 83 and 97.

Amendment by Striking out or Adding Parties. — See Rule 35, and notes to sections 97 and 104.

Amendment of Defence.—Where the defendant has omitted to set up a statutory defence under s. 113, he may be allowed to amend: Coburn v. Collins, 56 L. T. 431; Hayward v. Lely, 56 L. T. 418. And if the plaintiff is allowed to amend his claim the defendant is entitled almost as of right to set up any defence: Elmsby v. Harrison, 17 P. R. 424; Brunning v. Oldham, 75 L. T. 602; Hogaboom v. MacCulloch, 17 P. R. 377. Sec. 105.

Amendments should be allowed to either party at any stage of the proceedings: section 104; if it can be done without injustice to the other side; and there is no injustice if the other side can be compensated in costs; and the fact that it causes a mere hardship is not sufficient to prevent the granting of leave to amend: Williams v. Leonard, 16 P. R. 544, 17 P. R. 73: Building & Loan Ass'n v. Poaps, 27 O. R. 476, but an amendment will not be allowed where it would deprive a party of any right of claim or defence, *e.g.*, where a plaintiff seeks to set up a claim that since the commencement of the action has been barred by a Statute of Limitations: Weldon v. Neal, 19 Q. B. D. 394; Lancaster v. Moss, 15 Times 476.

Trial.

105. Where a trial is to be had the defendant shall on the day named in the summons, either personally or by agent, appear in the court to answer, and, on answer being made, the judge shall, without further pleading or formal joinder of issue, proceed in a summary way, to try the action and give judgment; and if satisfactory proof is not given entitling either party to judgment, he may nonsuit the plaintiff. 10 Edw. VII., c. 32, s. 105. Judge may summarily dispose of action or nonsuit plaintiff.

Cases in which a Trial is to be Had.—As to the manner in which the cases to be tried are to be set down, see sections 106 and 140, and Rule 77.

As to the appointment of the times and places at which courts are to be held, see section 10.

Parties Should Appear.—It is not usual to strike out a cause when the parties do not appear at the first call: that is if the court has not been sitting for half an hour, or longer, after the hour appointed for the court; they are commonly 'put aside for the present,' or placed at the 'foot of the list;' but the practice in different courts varies in this particular. At one time, it was held that no one but a barrister or attorney could appear for another in division courts; but the statute now permits "any person" not prohibited by the judge to appear: section 110 and notes.

The Day Named.—Holidays.—The trial cannot take place on Sunday, judicial acts on that day being void at common law: but proceedings which are not of a judicial, but merely ministerial, character taken on Sunday are not void: 2 Cokes Inst. 264, 265; and see *Re* Cooper, 5 P. R. 266; R. v. Winsor, 10 Cox C. C. 305, 322. Other holidays than Sundays are not *dies non juridicus*, and any judicial or other proceeding may lawfully be taken on them: Foster v. Toronto

Sec. 105. Ry. Co., 31 O. R. 1; Gilmore v. Gilbert, 7 N. B. R. 50; Upton v. Phelan, 18 N. B. R. 192; *Ex p.* Cromer, 12 Can. Cr. Cas. 330.

The court will take judicial notice that a certain day was Sunday: Wharton on Ev. 3rd Ed. s. 335.

Judge Shall Try the Action.—It is the duty of the judge to try the cause and give judgment: see sections 141-144, and notes thereto, as to jury cases and also the following pages. If satisfactory proof is not given entitling either party to judgment, he may nonsuit. If the judge has heard both sides, and is of opinion that the defendant has proved his defence, he should give judgment for the defendant. When a case is being tried before a judge without a jury, he should hear the whole case, and not give judgment until all the evidence has been heard. It is different when a case is being tried with a jury; in which case, if the judge is of opinion that there is no evidence to submit to them, he may withdraw the case from their consideration. If the judge is wrong, the case must go back to a jury for a new trial: Baker v. G. T. Ry. Co., 11 A. R. 68; Pryor v. City Offices Co., 10 Q. B. D. 504. "When a judge tries a case without a jury, his position is very different. He has to decide the facts as well as the law:" Macdonald v. Worthington, 7 A. R. 564. If he is wrong, a Court of Appeal, in appealable cases, may reverse him upon the facts or upon the law: but they would have no right to reverse the verdict of a jury, when there was proper evidence to submit to them: Johnson v. Provincial Ins. Co., 27 C. P. 464; Dublin, Wicklow & Wexford Ry. Co. v. Slattery, 3 App. Cas. 1155; Metropolitan Ry. Co. v. Wright, 11 App. Cas. 152; Seaton v. Sheridan, 12 T. L. R. 285; Spencer v. Jones, 13 T. L. R. 174; Webster v. Freideberg, 17 Q. B. D. 736; Commissioner of Railways v. Brown, 13 App. Cas. 133; Hampson v. Guy, 64 L. T. 778; Ferrand v. Bingley Local Board, 56 J. P. 277; Brown v. Commissioner of Railways, 15 App. Cas. 240; Australian Newspaper Co. v. Bennett 1894, A. C. 284; Brisbane v. Martin, 1894, A. C. 249; Dallas v. G. W. Ry. Co., 57 J. P. 584; unless the evidence so strongly preponderates in favor of one party as to lead to the conclusion that the jury in finding for the other party, have either wilfully disregarded the evidence, or failed to understand and appreciate it: Connecticut Mutual F. Ins. Co. v. Moore, 6 App. Cas. 656; Aitken v. McMechan, 1895 A. C. 310; see Bray v. Ford, 1896, A. C. 44.

The judge may in any case postpone the trial, whether it is being tried with or without a jury: section 109.

As to the distinction between cases tried by a judge and cases tried by a jury, see Morrow v. The C. P. R. Ry. Co., 21 A. R. 149: Taylor v. Smith, 1893, 2 Q. B. 65.

Judge May Inspect Subject Matter of Action.—The judge may in his discretion, inspect or order the jury to inspect any property or thing concerning any question which may arise: Con. R. 265, 267.

May Nonsuit the Plaintiff.—The judge may nonsuit the plaintiff, even against his will, *e.g.*, in jury cases: section 104. In other cases, if satisfactory proof is not given to the judge entitling either party to judgment, he may nonsuit the plaintiff: section 105. Giving a literal construction to these words, the judge may possess a larger power to nonsuit than the judges of other tribunals. But it is submitted that the judge should not nonsuit unless there is no evidence upon which five reasonable men might find a verdict for the plaintiff: Ryder v.

Wombwell, L. R. 4 Ex. 32, 39; Giblin v. McMullin, L. R. 2 P. C. 317; Steward v. Young, L. R. 5 C. P. 122, 128; Daniel v. Metropolitan Ry. Co., L. R. 5 H. L. 45; Jackson v. Metropolitan Ry. Co., 3 App. Cas. 193; Avery v. Bowden, 6 E. & B. 953, 974; Moore v. Connecticut Mut. Life Ins. Co., 6 S. C. R. 644. Sec. 105.

Formerly a judge on the trial of an action in the division court had no power to direct the jury to bring in a particular verdict: *Re* Lewis v. Old, 17 O. R. 611; Cowan v. Affie, 24 O. R. 358; or to direct the jury to answer any questions of fact stated by him for the purpose: *Re* Jones v. Julian, 28 O. R. 601. But under 62 Vic. c. 11, s. 9 (now section 144), the judge may now in proper cases direct a nonsuit or dismiss the action, if in his opinion there is no evidence in support of the plaintiff's case which ought to be submitted to the jury; and he may do so either at the close of the plaintiff's case, or after hearing the whole evidence, or after verdict, if he has reserved his decision on the application for a non-suit: see also notes to sections 130 and 144.

The judge may now under section 144 (2) direct the jury to answer any questions of fact stated to them by him and he may even after the jury have rendered their verdict direct a nonsuit or dismiss the action: *Re* Johnston v. Knights, 18 O. L. R. 248; or enter such judgment upon their answers as he may think proper: s. 144 (2). The judge also has power to determine the law and direct the jury thereon: s. 144 (3).

In a case to which a municipality is a party and the jury, if selected in the ordinary way (*i.e.*, as directed by s. 133) would be composed of ratepayers of such municipality, the judge has authority either before or at the trial, to dispense with a jury and direct that the issues shall be tried and the damages be assessed without a jury: section 133 (5).

The judge is bound to hear the whole of the plaintiff's evidence and he cannot non-suit a plaintiff on counsel's opening address to the jury: Fletcher v. London & N. W. Ry. Co., 1892, 1 Q. B. 122; see Brearley v. London & N. W. Ry. Co., 15 T. L. R. 237.

A non-suit should not be granted on a motion for a new trial on a ground which if raised at the trial could have been cured by amendment: Clarke v. Barron, 6 A. R. 309. No more inflexible rule has ever obtained in the courts than that you shall not raise a question after a trial which has not been raised at the time, which question, if it had been raised, could have been answered by evidence on the other side: Victoria Corporation v. Patterson, 1899, A. C. 615, 619.

In an action of contract, a plaintiff may be nonsuited as to some or one of several defendants, though judgment by default has been entered against the others: Benedict v. Boniton, 4 U. C. R. 96; McNab v. Wagstaff, 5 U. C. R. 588; and, if a joint contract, the nonsuit to those defending would enure to the benefit of those who did not defend: *per* Robinson, C.J., at p. 97 of 4 U. C. R.; see also Commercial Bank v. Hughes, 3 U. C. R. 361; 4 U. C. R. 167; Revett v. Brown, 5 Bing. 7, McNab v. Wagstaff, 5 U. C. R. 588. If a defendant moves for a nonsuit and afterwards examines witnesses, the plaintiff is entitled to any benefit which he can obtain from the defendant's evidence: Brock v. McLean, Tay. R. 398; Allen v. Carey, 7 E. & B. 463. A plaintiff may be non-suited on an interpleader issue: Bryson v. Clandinan, 7 U. C. R. 198. There may be a nonsuit after payment of money into court: Gutteridge v. Smith, 2 H. Bl. 374; or after plea of tender: Anderson v Shaw, 3 Bing. 290: Oakes v. Morgan, 8 C. L. J. 248.

Sec. 106.

Formerly the plaintiff might elect to take a non-suit at any time before the decision was recorded; but the provision to that effect in the section 120 in the former statute is now omitted and the plaintiff cannot now insist on a nonsuit, nor can the judge nonsuit the plaintiff except under the conditions mentioned in section 105, *i.e.*, that "satisfactory proof is not given to the judge entitling *either party* to judgment." If the evidence shews that either party is entitled to judgment it must be given accordingly.

Where the judge gave judgment against the defendant at the trial on a summons issued as to the plaintiff by a wrong name, no amendment having been made at the trial, a nonsuit was ordered with costs: *per* Forbes, Co. J., Miller v. Flewelling, 17 C. L. T. 265.

The effect of a nonsuit is that parties are left in the same position, except as to costs, as if the suit had never been commenced. Of course judgment of nonsuit entitles a defendant to his costs unless otherwise ordered: see section 170 (2).

As to judgment of nonsuit on application for a new trial, see section 123 (3) and notes thereto.

Adjournment of Trial.—Adjournment in ordinary cases: s. 109; in garnishee cases: s. 163.

No power of adjournment is conferred in cases where steps are prescribed to be taken without reference to the hearing, as, for instance, application to change the venue under section 77 (2); application for renewal of summons under Rule 7, and application for jury under section 131. See section 109 and notes thereto.

Order in which actions to be tried.

Evidence to be taken down.

106. The clerk shall place all actions in which the sum sought to be recovered exceeds $100 at the foot of the trial list, and the judge shall in such actions, unless an agreement not to appeal has been signed and filed, as provided by section 107, take down the evidence in writing, and leave the same with the clerk, but, in the event of an application for a new trial, it shall be forwarded to the judge by the clerk for the purposes of the application. 10 Edw. VII., c. 32, s. 106.

The Trial List.—Suits for amounts exceeding $100 must be placed at the foot of the list. Under the provision of s. 140, the clerk is to prepare two lists headed "The Judge's List," and "The Jury List." In the jury list and judge's list all cases where the amount claimed does not exceed $100 shall be entered first, and, subsequently, all cases in which the amount exceeds $100 shall be entered in the order in which they were received by the clerk for suit. Appeal cases from justices of the peace: see notes to ss. 125-130, are to be entered at the foot of the (non-jury) list. There should also be a judgment debtor's list: see s. 190. The lists must be divided into and ruled with these headings: (1) The number on the list (to be stated consecutively); (2) the year number of the summons; (3) the style of cause; (4) the nature of the subject of the action, whether for tort, or in replevin, or an interpleader, or a judgment summons, etc.; (5) the amount claimed (if any); (6) the judgment, or order, or disposition made of the case by the judge. These lists can conveniently be

kept in a book, which will form a record of the business done at each sitting of the court. Sec. 107.

Evidence in writing.—Where there is no agreement not to appeal, it is imperative on the judge to take down the evidence in *writing*. As the court on appeal may refuse to consider any question not raised before the judge below, it is suggested that the notes of evidence should be as full as possible and should comprise not only the evidence of the witnesses, but all points of law and all questions respecting the reception or rejection of evidence, and the decision upon any motion for nonsuit, or otherwise, arising at the trial, as fully as notes are usually taken of trials at *nisi prius*: see Williams v. Evans, L. R. 19 Eq. 547; R. v. London (Judge), 7 L. T. 95.

As to agreement not to appeal, see notes to section 107. The omission to take down the evidence would not invalidate the trial of the cause: Bank of Montreal v. Statton, 1 C. L. T. 66; Sullivan v. Francis, 18 A. R. 121. Section 125 (*c*) makes the provisions of this section applicable to interpleader issues; and s. 125 (*a*) to garnishee cases.

The appellate court might dispense with the judge's notes: Morgan v. Davies, 3 C. P. D. 260. And the judgment of the division court might be upheld on other grounds than those on which it proceeded: Chapman v. Knight, 5 C. P. D. 308; but costs might be refused: Page v. Austin, 7 A. R. 1; Garrett v. Roberts, 10 A. R. 650; see further notes to s. 125.

Forms of Oaths to Witnesses at trial, No. 30 (a)-(d).

Form of Affirmation of Witness, No. 30 (e).

Form of Oath of Interpreter, No. 30 (f).

Forms of Oaths to Jurors, No. 30 (g), (h).

Form of Oath of officer retiring out of court, No. 30 (i).

Form of Oath of officer when jury retires, No. 30 (k).

107. An appeal shall not lie if, before the commencement of the trial, there is filed with the clerk an agreement in writing not to appeal, signed by the parties, or their agents, and the judge shall note in his minutes whether such agreement was so filed or not, and the minutes shall be conclusive evidence upon that point. 10 Edw. VII., c. 32, s. 107. Parties may agree not to appeal.

Appeal.—The clauses regulating appeals under this Act will be found in sections 125 to 129 and the general law bearing on the same in the notes to those sections.

Before the Commencement of the Trial.—The "commencement of the trial" is a term of somewhat uncertain meaning. The trial would certainly have commenced if the jury had been sworn; or in a case tried by the judge if any evidence had been given whether oral or otherwise; see R. v. Gibson, 16 O. R. 704.

Agreement in Writing.—The agreement must be "*in writing*" and duly signed and "*filed with the clerk*": Davidson v. Head, 18 C. L. T. 260; 34 C. L. J. 415. The conditions mentioned are essential to prevent an appeal: Smith v. Jones, 22 Q. B. D. 501; Johns v. Williams, 1904, 1 K. B. 600.

As to form of agreement, see Form 123.

Sec. 108.

The agreement must be signed by the parties or their agents. The agreement as given in the forms would not interfere with the right of either party to apply for a new trial, or to take any other proceeding which he would be entitled to take in an ordinary case, except appealing.

The noting by the judge of the signing of the agreement is made *conclusive* evidence of the filing of the agreement. No appeal could, therefore, be entertained when such a note had been made by the judge.

Applies to Interpleader.—This section applies to interpleader proceedings: see section 125 (h); and also to garnishee proceedings: s. 125 (a).

Proceeding in case defendant does not appear.

108. If on the day named in the summons the defendant does not appear, or sufficiently excuse his absence, or if he neglects to answer, the judge, on proof of due service of the summons and particulars, may proceed with the trial in his absence, and, except where the plaintiff's claim is for unliquidated damages in case of the personal service of the summons and of detailed particulars of the plaintiff's claim, the judge may in his discretion, give judgment without further proof. 10 Edw. VII., c. 32, s. 108.

If He Neglects to Answer.—The defendant should make it a point to be at the court not later than the hour fixed for opening the sittings, for if proper service of the summons has been effected, the judge may proceed in his absence.

Judgment Final and Conclusive.—The policy of the law is that there should be only one trial of a cause, and that a verdict or judgment should not be disturbed unless it clearly appears to be wrong: Hooper *v.* Christoe, 14 C. P. 121, *per* Richards, C.J., Arpin v. Regina, 14 S. C. R. 736; Hall v. Kennedy, 8 A. R. 157; White v. Smith, 28 N. S. R. 5. But see The North British & Mercantile Ins. Co. v. Tourville, 25 S. C. R. 177, in which the court allowed an appeal on a mere question of fact against the concurrent findings of two courts, on a sufficiently clear case being made out to the appellate court. The appellate court may draw inferences adverse to those of the trial judge from facts that are not really in dispute: Booth v. Moffatt, 11 Man. L. R. 25.

Where at the trial two of the defendants failed to press their defence and judgment was given against them, but not entered until judgment was finally given against a third defendant, their subsequent application to dismiss the action was refused by the judge, on the ground that the time allowed them for moving for a new trial commenced to run from the trial, and the divisional court held that there was no appeal: Klonard v. Tewsley, 27 O. R. 398.

See also cases cited in notes to sections 123-125.

If there was no provision for granting new trials in the division courts, no power would exist in such courts to do so: R. v. Doty, 13 U. C. R. 398; G. N. Ry. Co. v. Mossop, 17 C. B. 138, *per* Jervis, C. J.

Proof of Due Service.—Formerly judgment could only be entered by default on "personal service" being made; but the present section

has changed the words "personal service" to "due service," and now even where the summons has not been personally served, such as on a claim for less than $15, under section 87, the plaintiff need not prove his claim. As to "proof of due service" see notes to section 87. The plaintiff must prove his claim in an action for "unliquidated damages" as to which see notes to section 98. It is provided that in all cases except where the claim is for unliquidated damages, the judge may "in his discretion" give judgment without further proof. The usual practice is to exercise the discretion. Sec. 109.

109. The judge may adjourn the trial of an action, whether it is being tried with or without a jury, to permit either party to summon witnesses or to produce further proof, or to serve or give any notice necessary to enable him to enter more fully into his case or for any cause which the judge thinks reasonable, upon such conditions as to payment of costs and admission of evidence, or otherwise, as to him may seem just. 10 Edw. VII., c. 32, s. 109. Judge may adjourn hearing of cause.

May Adjourn the Trial.—The judge has a wide discretion under this section. It should be exercised except when an adjournment would work an injustice. If the power of adjournment had not been conferred by statute, it is doubtful if it could be exercised: R. v. Murray, 27 U. C. R. 134; R. v. G. W. Ry. Co., 32 U. C. R. 506; Forbes v. Michigan Central Ry. Co., 20 A. R. 584.

Postponing Trial.—It is submitted that less is required for postponing a trial in the division court than at *Nisi Prius*. The parties cannot always anticipate, without pleadings or discovery, all the evidence that may be required, and the section gives the judge full power to adjourn for further proof or to enable the parties to serve such notices to admit or produce, or other notices, as will cause *all* the facts to be fully brought out. No order need be served, unless by direction of the judge.

A trial will not be postponed at *Nisi Prius* until after the trial of an indictment for perjury, in a matter relating to the cause: Johnston v. Wardle, 3 Dowl. 530.

A trial was put off because a material witness was prevented from attending by fraud of the opposite party: Turquand v. Dawson, 1 C. M. & R. 709.

Terms or Conditions.—Where the defendants applied to postpone the trial, and their defence was of a doubtful character, and they might have examined a witness, who was ill, *de bene esse*, the court refused the postponement, except on condition that money be paid into court: Bank of Hamilton v. Stark, 13 P. R. 213. It is not unusual to require the party applying to admit some matters of formal proof: Brown v. Murray, 4 D. & R. 830; and whatever terms the judge thinks just may be imposed, but extraneous conditions cannot be imposed: Armstrong v. Armstrong, 4 O. W. N. 1340. His discretion in this respect should be exercised reasonably and not capriciously: see notes to section 142 (2).

Sec. 109. If a person allows a witness to leave the country, knowing that his evidence is material, a postponement may be refused: Solomon v. Howard, 12 C. B. 403. A judge has a discretion in refusing the postponement of a case, notwithstanding the absence of a witness: Turner v. Meryweather, 7 C. B. 251. A trial will not be postponed where a witness is in defendant's employ and he has neglected to subpœna him in time and allowed him to leave: Wright v. M'Guffie, 4 C. B. N. S. 441. Unless an endeavour has been made to procure the attendance of a witness, a postponement will be refused: Ward v. Wilkinson, 2 F. & F. 173. If a witness is kept out of the way by plaintiff a trial will be postponed on application of defendant: Duberly v. Gunning, Peake, 97. If witness is out of the country, and it does not appear that there is a likelihood of his returning, the postponement will be refused: R. v. D'Eon, 1 W. Bl. 515. Sometimes the application will be refused if the party applying has conducted himself unfairly, or has been the cause of any improper delay: Saunders v. Pitman, 1 B. & P. 33. The illness of defendant's attorney was held a good cause for postponing a trial: Hayley v. Grant, Sayer, 63; but not where counsel was unprepared: Colebrooke v. Dobbs, 3 Burr. 1319. A party should apply at once, otherwise he might have to pay the costs of the opposite party in preparing for trial; see Dale v. Heald, 1 C. & K. 314; Ward v. Ducker, 5 M. & G. 377. The party obtaining an adjournment on payment of costs should take means at once to have costs taxed: Waller v. Joy, 16 M. & W. 60; Brega v. Hodgson, 4 P. R. 47; but he may abandon the order without being liable for other than costs of the application: Allen v. Mathers, 9 P. R. 477. When application is made on the ground of the absence of a witness, it is not enough to show that the witness is material, and may and probably will give important evidence, or to swear that his evidence will be material and necessary, without showing that it will assist the case of the person making the application: Kerr v. The G. T. Ry. Co., 4 P. R. 303; Cinnamon v. Woodmen of the World, 4 O. W. N. 1042. In Speers v. The G. W. Ry. Co., 6 P. R. 170, it was held, in an action for personal injury, that the inability properly to calculate the damages to the plaintiff, owing to sufficient time not having elapsed from the receipt of the injury, was a sufficient ground for postponing the trial: see Fraser v. London Street Ry. Co., 29 O. R. 411; 26 A. R. 383. The judge may, under this section, *adjourn the hearing of a cause* from the regular sitting of the court to his chambers, within the territorial limits of the division; and such adjournment of the hearing of the cause is in effect, if not objected to by the parties, *an adjournment of the court to hear that cause: Re* Burrowes, 18 C. P. 403.

An application to postpone the trial on the ground of the absence of a material witness is usually granted when the application appears reasonable: Stevens v. Esling, 2 F. & F. 136; Youldon v. London Guarantee Co., 2 O. W. N. 1135; Neville v. Eaton, 2 O. W. N. 1432.

Where the defendant swore he was a necessary and material witness on his own behalf, and that it would be unsafe in his state of health to travel from Ottawa to Winnipeg, it was held that the trial should not have been proceeded with in his absence: Schultz v. Wood, 6 S. C. R. 585; but the party applying must show due diligence or the application may be refused. Stewart v. Gladstone, 7 Ch. D. 394; or he may be ordered to pay the costs of it: McDonald v. McMillan, 22 Gr. 362; but where due diligence has been had, the costs will be made costs in the cause: Brown v. Porter, Knox v. Porter, 11 P. R. 250. See Lydall v. Martinson, 5 Ch. D. 780. An application to postpone the trial may be made in chambers, before the hearing.

Sec. 109.

Costs.—When the adjournment is applied for to add parties, the party applying may be ordered to pay all costs that have been incurred by the case being on the list: Lydall v. Martinson, 5 Ch. D. 780; Smith v. Boyd, 18 P. R. 76. When a party has made diligent attempts to obtain a witness, costs should be in the cause: Brown v. Porter, 11 P. R. 250. Security may be ordered for the whole or part of claim: Bank of Hamilton v. Stark, 13 P. R. 213; but application must be promptly made: McMillan v. McDonald, 22 Gr. 362. Where a trial is postponed without costs, and a settlement is afterwards arrived at, it is beyond the power of the judge to amend his order by ordering payment of costs: Noonan v. Bank of B. N. A., 10 C. L. T. 93. See also Stewart v. Gladstone, 7 Ch. D. 394, and other cases cited *supra*.

Abandoning Order.—Where an order was made for the postponement of a trial on payment of costs, it was held that the defendant was at liberty to abandon it without being liable for other than the costs of the application: Allen v. Mathers, 9 P. R. 477.

With a Jury.—It was evidently intended to remove any doubt as to the power of the judge, in cases where a jury is summoned, to adjourn the trial, and to impose on a party applying for adjournment the payment of the fees of jurymen who may be required to return on another day: see R. v. Hart, 45 U. C. R. 1.

In Grocock v. Edgar Allen & Co., Limited, 4 O. W. N. 1406, it was said that even inexcusable delay of the party applying does not over-ride the principle that "a fair trial is above all other considerations," and the parties applying ought not to be deprived of "reasonable facilities for making out their defence" (Ferguson v. Millican, 11 O. L. R. 35), and the trial was postponed for a limited time: and see Langdon v. Robertson, 12 P. R. 140; Selvewright v. Lees, 9 P. R. 200; Re Gabourie, 12 P. R. p. 254; Perkins v. Fry, 10 O. W. R. 954, cited in Wilkinson v. Hamilton Spectator Co., 2 O. W. N. 644.

A judge may consider it expedient for the interests of justice that the trial of a cause should be postponed; yet not be willing to consider it just to impose on the taxpayers of a county the payment of jury fees in such a case, and by this section, it is submitted, he is empowered to impose the payment of such fees, as well as other costs, on the party making the application.

A party in whose favor the postponement is granted, having acted upon it, or taken advantage of its provisions, is bound by its terms and cannot repudiate any part of it: Griffin v. Dickenson, 7 Dowl. 860; Giraud v. Austen, 1 Dowl. N. S. 703; King v. Simmonds, 7 Q. B. 289; McKenzie v. Stewart, 10 U. C. R. 634.

So that if a party obtained a postponement on payment of costs, he would, unless he abandoned the order, be bound to pay them for he could not take the benefit of the order without its burthen: Richardson v. Shaw, 6 P. R. 296; see also Martin v. McCharles, 25 U. C. R. 279.

The words "upon payment of costs" in the section of the old Act were held to be words of agreement, not mere words of condition, and execution may be issued upon an order in these words: Stuart v. Branton, 9 P. R. 566. The wording in the present section is changed, but the principle of the above case would seem to be applicable to the latter.

A judge could open again an order for adjournment granted by himself, or even rescind it before it was acted on, upon his discovering that he had made it inadvertently, or had been surprised into making it by any perversion or concealment of facts, or from the misconception on

Sec. 110.

his part of the law or facts: Shaw v. Nickerson; Gillespie v. Nickerson, 7 P. C. R. 341; Hughes v. Field, 9 P. R. 127. But after an order has been made and acted upon the judge cannot make an order varying it: Noonan v. Bank of B. N. A., 10 C. L. T. 93.

So long as an order stands unreversed it will be assumed that neither party is dissatisfied with it: Hall v. Brown, 3 P. R. 283.

Should there be any objection to the mode of complying with the order application should be made to the judge who made it for correction: Ross v. Grange, 4 P. R. 180.

Where consent is given to the making of an order, such consent cannot be arbitrarily withdrawn: Harvey v. Croydon Union Rural Sanitary Authority, 26 Ch. D. 240.

Who may act as agents at trial.

110. A barrister or solicitor or any other person not prohibited by the Judge, may appear at the trial or hearing of an action as agent for any party thereto. 10 Edw. VII., c. 32, s. 110.

Who may Appear.—The words "any person" are wide enough to include the case of a woman appearing on behalf of another person: Duck v. Bates, 12 Q. B. D. 79; Stroud, 37; see Beresford-Hope v. Sandhurst, 23 Q. B. D. 79. But the judge cannot direct a counsel fee to be taxed in contested cases under section 171 and Rule 53, unless such agent is a barrister or solicitor: Rule 53. A mandamus will lie to compel a judge to hear an agent, unless he be a person whom the judge has rightly prohibited under section 110: R. v. Assessment Com. of St. Mary Abbotts Kensington, 1891, 1 Q. B. 373. On this subject see Cobbett v. Hudson, 15 Q. B. 988; notes to section 105; see also Lord v. Hall, 8 C. B. 627; Lindus v. Blackwell, 5 C. B. 583; Yates v. Davis, 1 Camp. 485. A party may appear in his own behalf and be a witness in the cause too: Cobbett v. Hudson, 1 E. & B. 11; Davis v. Canada Farmer's Mutual Ins. Co., 39 U. C. R. 452; but a plaintiff or defendant will not be heard in his own case after counsel has addressed the court: Newton v. Chaplin, 10 C. B. 356; and a barrister is in no better position than any one else: *Ib.*

Where defendants appear at the trial by different counsel it is a matter for the discretion of the judge, to be exercised under all the circumstances of the case, whether more than one ought to be allowed to address the jury: Nicholson v. Brooke, 2 Ex. 213; or to cross-examine a witness: Walker v. McMillan, 6 S. C. R. 241.

The agent may act as such in a cause and as a witness as well: Davis v. Canada M. F. Ins. Co., 39 U. C. R. 452, but see remarks as to impropriety of such a course: *Ib.*

An agent or solicitor retained for the conduct of an action has not implied authority, after judgment in favor of his client, to enter into an agreement on his behalf to postpone execution: Lovegrove v. White, L. R. 6 C. P. 440; see Butler v. Knight, L. R. 2 Ex. 112. A counsel or solicitor, generally speaking, has authority to bind a client: Strauss v. Francis, L. R. 1 Q. B. 379; Wilson v. Corp. of Huron and Bruce, 11 C. P. 458; Brown v. Blackwell, 26 C. P. 43; Mooly v. Tyrrell, 6 P. R. 314; Matthews v. Munster, 20 Q. B. D. 141; Vardon v. Vardon, 6 P. R. 736; McDonald v. Field, 12 P. R. 213; Armour v. Kilmer, 28 O. R. 618; Lewis v. Lewis, 45 Ch. D. 281; Huddersfield v. Lister, 1895, 2 Ch. 273; Wibling v. Smundersou, 1897, 2 Ch. 534; see however Watt

v. Clark, 12 P. R. 358; Stokes v. Latham, 4 T. L. R. 305; Sample v. McLaughlin, 17 O. R. 490. Sec. 111.

Or Other Person.—While no one other than a certified barrister or solicitor can recover fees or disbursements in connection with actions in the Supreme or County or Surrogate Court, the above section recognizes the right of a non-professional agent to be employed by any party to an action in the division court, and such agent can doubtless recover *quantum meruit* for his work and services: see Greene v. Reece, 8 C. B. 88; Verinnder v. Eddolls, 45 L. T. 543.

Sections 126 and 127 of the former statute were as follows:

126. Any person may appear at the trial or hearing of any cause, matter or proceeding as agent and advocate for any party to any such cause, matter or proceeding in the Division Courts, except where prohibited under the next section.

127. The judge or acting judge may, wherever in his opinion justice appears to require it, prevent any person from appearing at the trial or hearing of any cause, matter or proceeding in the Court, as agent and advocate for any party or parties to any such cause, matter or proceeding.

Under the old section 127, it would appear a judge could even refuse to allow a barrister or solicitor to appear in a division court case as "agent or advocate;" R. v. Marylebone, C.C., 34 Sol. Jour. 459; but the proper construction of the present section 110 would seem to be that the prohibition has reference only to the words "any other person," and do not extend to a barrister or solicitor. But a barrister or solicitor who brings himself within the provisions of section 217 would be liable to the penalties therein mentioned. The power is not given to prohibit generally but a particular person, at the trial or hearing of an action.

Tender and Payment of Money into Court.

Plea of tender with payment of money into court.

111.—(1) If the defendant desires to plead a tender before action of a sum of money in full satisfaction of the plaintiff's claim, he may do so on filing his defence with the clerk at least six days before the day appointed for the trial, and at the same time paying into court the amount mentioned in the defence: and notice of the defence and payment shall be forthwith sent by the clerk to the plaintiff by registered post, or delivered at his usual place of abode or business.

Amount tendered to be accepted unless plaintiff gives notice.

(2) The plaintiff shall be deemed to have accepted the money in full satisfaction of his claim and all proceedings in the action shall be stayed unless, within three days after the receipt of notice of the payment, he signifies in writing to the clerk his intention to proceed for his claim notwithstanding such defence, in which case the action shall proceed.

When plaintiff does not give notice.

(3) If the plaintiff does not give the notice mentioned in sub-section 2 the money shall be paid to him less $1 to be paid over to the defendant for his trouble.

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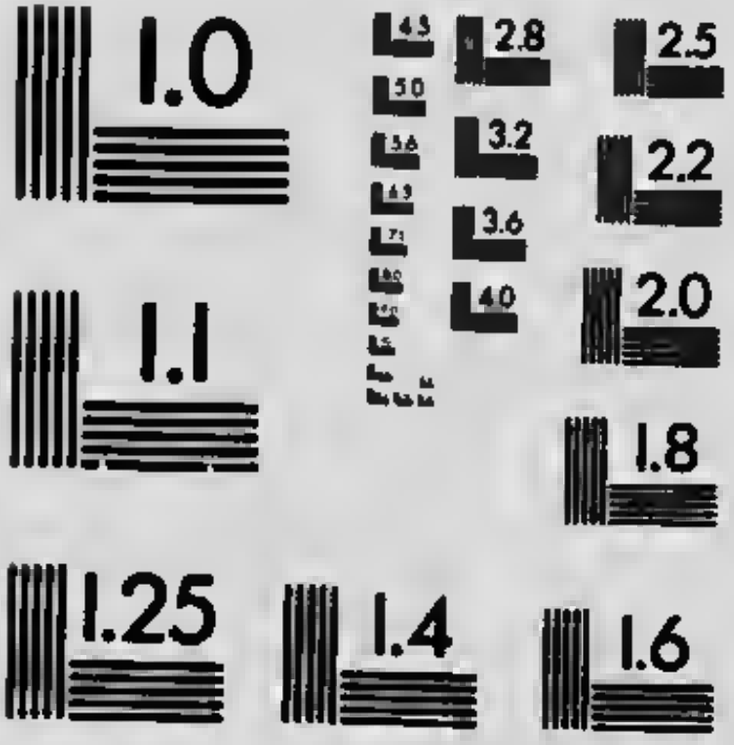

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Sec. 111.

Giving notice after time limited.

(4) The judge may allow the plaintiff to give the notice to the clerk after the expiration of the said three days on such terms as to him may seem just.

Rule as to costs where plaintiff proceeds for balance.

(5) If after tender and payment into court the plaintiff proceeds with the action and does not recover more than the sum paid into court, he shall pay the defendant his costs, charges and expenses, and the amount thereof may be paid to the defendant out of the money so paid in, or may be recovered from the plaintiff in the same manner as money payable under a judgment; but, if the plaintiff recovers more than the sum paid into court, the full amount paid into court shall be applied towards the satisfaction of his claim, and judgment may be given against the defendant for the residue and costs of the action. 10 Edw. VII., c. 32, s. 111.

The section (128) in the former statute limited the application of it to actions for "debt or contract" only, and did not extend to actions of tort or damages; but the words above quoted are omitted from the present section, and there is nothing to prevent its provisions from including claims for damages for torts, in accordance with the more recent decisions; see the leading case of Berdan v. Greenwood, 3 Exch. D. 251; Whalen v. United Telephone Co., 13 Q. B. D. 607; Fraser v. Bell, 13 S. C. R. 546; O'Neil v. Hobbs, 29 O. R. 487.

Payment into Court and Denial of Plaintiffs' Claim.—The history of the practice as to payment into court is to be found in the case of Berdan v. Greenwood, *supra;* in which it is stated by Thesiger, L.J., that "no predelictions in favor of old theories of inconsistent records should induce us to preclude defendants in actions from saying and doing that which as prudent men before action they might reasonably say and do; namely, say that they entirely deny a person's right to sue them, yet pay or offer to pay a sum of money the price of peace and for the prevention of further litigation."

This case practically overruled Spurr v. Hall, 2 Q. B. D. 615; see also Potter v. Home & Col. Ins. Co., cited in the report in Spurr v. Hall, *supra;* Henneli v. Davies, 1893, 1 Q. B. 367. So the defendant may generally in any action for the recovery of money, pay money into court and also deny the plaintiff's right of action: Hawksley v. Bradshaw, 5 Q. B. D. 22, 302; Harper v. Davis, 19 Q. B. D. 70; and he may likewise deny the plaintiff's claim and also plead tender before action and pay money into court: David v. National Assurance Co., 16 P. R. 116.

At Least Six Days.—See notes to ss. 79, 112.

By Whom Tender Must be Made.—The tender need not be made by the debtor himself; it is sufficient if made by his agent or servant, and a tender made by an agent at his own risk of more money than is given to him is good: Reed v. Goldring, 2 M. & S. 86.

To Whom a Tender Must be Made.—A tender to a person authorized to receive payment is sufficient: Goodland v. Blewitt, 1

Camp. 477; Kirton v. Braithwaite, 1 M. & W. 310. So a tender to a managing clerk though he had received orders not to accept it: Moffat v. Parsons, 5 Taunt. 307. So if he refuse, saying he had no instructions: Finch v. Boning, 4 C. P. D. 143, *per* Coleridge, C.J. Sec. 111.

Where a solicitor sends a letter to demand, and the debtor makes a tender to him, it is a good tender, unless the solicitor disclaims his authority at the time; and if the solicitor is absent, a tender to a clerk at his office is sufficient: Wilmot v. Smith, 3 C. & P. 453; Kirton v. Braithwaite, 1 M. & W. 310. But without any previous demand a tender to the managing clerk of the plaintiff's solicitor, who disclaims authority to receive it, is not sufficient: Bingham v. Allport, 1 N. & M. 398; Watson v. Hetherington, 1 C. & K. 36. A tender to the solicitor of the plaintiff, so long as he remains such, is good: Crozer v. Pilling, 4 B. & C. 26; Moody v. Tyrrell, 6 P. R. 314. So also a tender if made to a person in the office of plaintiff's solicitor to whom defendant was referred by a clerk in the office, and who refused the tender only as being too little, without showing who that person was: Wilmot v. Smith, *supra*. A tender to a person in a merchant's place of business, who appeared to be conducting it, is good, though in fact not instructed to receive money: Barrett v. Deere, M. & M. 200. It is otherwise where payment is not connected with plaintiff's business, but quite collateral to it: Sanderson v. Bell, 2 C. & M. 304. Where money was brought to plaintiff's house, and delivered to his servant, who appeared to go with it to his master, and returned saying his master would not take it, it was held to be evidence from which a tender might be inferred: Anon., 1 Esp. 349. A tender of a partnership debt to one of several partners is good: Douglas v. Patrick, 3 T. R. 683. If a man is indebted to several persons in different sums, and when they are all together, tenders them one gross sum sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender: Black v. Smith, Peake, 88. But where a party has separate demands for unequal sums against several persons, an offer of one sum, for the debts of all, will not support the defence that a certain portion of this sum was tendered for the debt of one: Strong v. Harvey, 3 Bing. 304. A tender to an executor may be good, though he has not proved the will, provided he afterwards proves the will and takes upon himself the burthen of administration: Add. on Con., 7th ed., 154.

A tender of part of one entire debt is inoperative: Dixon v. Clarke, 5 C. B. 365.

Mode of Making.—A tender to be strictly legal, should be made in legal coin: Polglass v. Oliver, 2 C. & J. 15, unless it is otherwise provided by the instrument creating or evidencing the debt: Bradburn v. Edinburgh Ins. Co., 5 O. L. R. 657. Up to $10 it may be made in silver; and to 25c in copper: R. S. C. c. 25, ss. 10, 11. Bank notes are a good tender if not objected to: Wright v. Reid, 3 T. R. 554; Tiley v. Courtier, 2 C. & J. 16, note (*c*).

A tender made in the form of a cheque in a letter is good when no objection is made to the quality, but the quantity of the tender, and if the letter contain a request for a receipt to be sent back, it does not vitiate the tender, it not being a condition: Saunders v. Graham, Gow, 111; Jones v. Arthur, 8 Dowl. 442; but see Blumberg v. Life Interests Cor., 1897, 1 Ch. 171; 1898, 1 Ch. 27.

An offer of money by a debtor to a creditor, and a request by the latter for a day's delay before receiving it, on account of an accident, are not a tender and a refusal of the money, and do not discharge the debtor: Jenkyns v. Brown, 14 Q. B. 503.

Sec. 111. **Production of the Money.**—There must be production of the money, or that dispensed with by the express declaration or equivalent act of the creditor: Thomas v. Evans, 10 East, 101; Polglass v. Oliver, 2 C. & J. 17; Dickinson v. Shee, 4 Esp. 68; Matheson v. Kelly, 24 C. P. 598. A tender is not good where the money is not in sight, but the witness supposed it was in a desk and did not see it produced so that it did not appear that if the party was willing to accept the money, it could at once be paid; the money should be at hand and capable of immediate delivery: Glasscott v. Day, 5 Esp. 48. But where more is claimed to be due, it is not necessary to produce the money tendered: Black v. Smith, Peake, 88. Where the facts were found to be that the defendant's attorney called on the plaintiff and said, "I come to pay you £1 12s. 7d. which the defendant owes you," that the attorney put his hand in his pocket, but did not produce the money, the plaintiff said, "I cannot take it, the matter is now in the hands of my attorney," held, not a sufficient tender: Finch v. Brook, 1 Bing. N. C. 253. A tender made with the money twisted up in bank notes in the person's hand, he stating how much and not shown to the party, is good: Alexander v. Brown, 1 C. & P. 288. If the plaintiff says he can't take the money, when an offer is made to go upstairs and fetch it, such offer is a good tender: Harding v. Davies, 2 C. & P. 77; but if it did not appear that the person tendering had the money upstairs, it might not be: Kraus v. Arnold, 7 Moore, 59. In this case, where the defendant ordered A. to pay the plaintiff £7 12s. 0d., and the clerk of the plaintiff's attorney demanded £8, on which A. said he was only ordered to pay £7 12s. 0d., which sum was in the hands of B., and B. put his hand to his pocket with a view of pulling out his pocket-book to pay £7 12s. 0d., but did not do so, by the desire of A., but B. could not say whether he had that sum about him, but swore that he had it in his house, at the door of which he was standing at the time, held that this was not a legal tender, as the money should have been produced to the attorney's clerk: but see Long v. Long, 17 Gr. 251. Where a vendor admits a tender would be fruitless, it is unnecessary: Jackson v. Jacob, 3 Bing. N. C. 869. If a party tells his creditor that he will pay him so much, and puts his hand in his pocket to take out the money, but before he can get it out the creditor leaves the room, and the money is not produced till he is gone, it is no tender: Leatherdale v. Sweepstone, 3 C. & P. 342; Matheson v. Kelly, 24 C. P. 598; see Howell v. Listowel Rink Co., 13 O. R. 476. Where the plaintiff disputes the *quantum* to prove a tender, some money must be proved to have been produced, though it is not necessary to prove the exact sum: Dickinson v. Shee, 4 Esp. 68. A trader who, under a trader debtor summons, had signed an admission of debt, went to his creditor with the amount of it in his pocket in money, and told the creditor that he had come to pay that amount, the creditor said it was of no use, as it was too late, and that the debtor must see the creditor's solicitor; it was held that the production of the money was dispensed with, and that the tender was good: Ex parte Danks, 2 De G. M. & G. 936; see also Reynolds v. Allan, 10 U. C. R. 350; Western Ass'ce Co. v. McLean, 29 U. C. R. 57. Where, on tendering payment of money due upon a mortgage, a receipt was required, and the plaintiff did not object on that ground, but gave a different reason for refusing the money, held a good tender: Lockridge v. Lacey, 30 U. C. R. 494; see also Llado v. Morgan, 23 C. P. 517.

Requiring Change.—A plea of tender of £20 is supported by evidence of the tender of a larger sum, though such larger sum was tendered as the sum which the creditor was to receive, and not as the sum out of which he was to take the £20: Dean v. James, 4 B. & Ad.

547; but a tender of a larger sum, requiring change, is not a good tender of a smaller sum: Robinson v. Cooke, 6 Taunt. 336; Betterbee v. Davis, 3 Camp. 70. A tender of £2 to pay £1 13s. 0d., is good, if the plaintiff objects to receive it only because he is entitled to a larger sum, and not on the ground that he has no change: Cadman v. Laidlaw, 7 D. & R. 289. The defendant owed £108, demanded by the attorney for his creditor; he sent a man, who laid down on the desk one hundred and fifty sovereigns, out of which he desired the attorney to take the principal and interest, but the attorney refused to do so, unless a shop account due from plaintiff to defendant was fixed at a certain amount. Held a good tender of the £108: Bevans v. Rees, 5 M. & W. 306; see also Gretton v. Mees, 7 Ch. D. 839. Sec. 111.

Demand of a Receipt.—Going with money in hand to make a tender and demanding whether the creditor has a receipt stamp, and receiving an answer in the negative, but not offering the money, was held not a tender: Ryder v. Townsend, 7 D. & R. 119. A tender is not good if accompanied by a demand for a receipt in full of all demands: Griffith v. Hodges, 1 C. & P. 419; or where a receipt was demanded that the sum tendered was the balance due: Higham v. Baddely, Gow 213. But if the creditor refuse to receive the money on account of more being due, he cannot afterwards object that a receipt was demanded: Richardson v. Jackson, 8 M. & W. 298. Where the words of a tender were, "I offer you £7 16s. 8d. as the balance of £35, and request a receipt in full," it was held invalid as being conditional: Foord v. Noll, 2 Dowl. N. S. 617. A tender of a quarter's rent, coupled with a demand of a receipt to a particular day, the contest between the parties being whether one or two quarters' rent was due, is not a valid tender: Finch v. Miller, 5 C. B. 428; but the demand of a receipt simply for the amount of money tendered does not invalidate the tender: Lockridge v. Lacey, 30 U. C. R. 494.

In Black v. Allan, 17 C. P. 248, Richards, C.J., said: "As to tender, the later cases seem to lay down where there is anything equivocal in the conduct of the party to whom the tender is made, it is a question of fact for the jury to decide whether the tender be absolute or conditional, and whether the party dispenses with the production of the money or not." See also Tobey v. Wilson, 43 U. C. R. 230.

Under Protest.—A tender of the full amount demanded under protest is good: Manning v. Lunn, 2 C. & K. 13; Scott v. Uxbridge & Rickmansworth Ry. Co., L. R. 1 C. P. 596; Sweny v. Smith, L. R. 7 Eq. 324; Thorpe v. Burgess, 8 Dowl. 602; Greenwood v. Sutcliffe, 1892, 1 Ch. 1; Peers v. Allen, 19 Gr. 98; Greenwood v. Sutcliffe, 1892, 1 Ch. 1.

Tender Too Late.—See Kenny v. Barnard, 2 O. W. N. 470.

Waiver of Tender.—Tender will be dispensed with where the facts and circumstances show it would be a mere idle formality: Cudney v. Gives, 20 O. R. 500; Norman v. McMurray, 1 O. W. N. 1256; Knubb v. McConvey, 1 O. W. N. 1417. But merely claiming too much is not a dispensation unless accompanied by acts which show that if the proper amount were tendered it would not be accepted: Mibbleton v. Scott, 4 O. L. R. 451, and the cases gathered in the judgment in that case, which reversed the judgment in the same case, 3 O. L. R. 26. Where defendants absolutely refused to carry out the contract and denied their obligation to do so, the question whether or not there

Sec. 111. had been a tender by plaintiff was held immaterial: Bently v. Murphy, 2 O. L. R. 665; see also Dulmage v. Leperd, 3 O. W. N. 986; McKay v. Wayland, 2 O. W. N. 471; Snider v. Snider, 2 O. W. N. 1434.

Demand Prior or Subsequent to Tender.—The substance of the defence being that the defendant was "always ready and willing" to pay the debt, the defence will be defeated by showing a demand and refusal prior or subsequent to the tender: Bennett v. Parker, Ir. R. 2 C. L. 89; Poole v. Tumbridge, 2 M. & W. 223, 226, 1 Wms. Saund. 33 *c* (2). The onus of proving the subsequent demand is on the creditor, and if for more than the precise sum tendered it will be bad; Spybey v. Hide, 1 Camp. 181; Rivers v. Griffiths, 5 B. & Ald. 630. And it must be by someone authorized to receive it and grant a discharge: Coore v. Callaway, 1 Esp. 115; even in replevin: Pinm v. Grevill, 6 Esp. 95. A subsequent demand on one of two joint debtors is sufficient; Pelrse v. Bowles, 1 Stark 323. A letter sent by the plaintiff and received by the defendant, demanding the sum tendered is not sufficient evidence of subsequent demand; for at the time of the demand the defendant should have an opportunity of immediately paying the sum demanded: Edwards v. Yeates, Ry. & M. 360. But it was held in Hayward v. Hague, 4 Esp. 93, that a letter demanding a debt sent to defendant's house, to which answer was made that it would be settled, was held sufficient evidence of a demand on the issue of subsequent demand and refusal to a plea of tender. The subsequent adoption of a demand is not sufficient: Story on Agency, section 247.

A proper tender will stop the running of interest if the mortgagor keeps the money ready to pay off the mortgagee: Gyles v. Hall, 2 P. Wms. 377, but not where the tenderer afterwards uses the money and makes a profit on it: Knapp v. Bower, 17 Gr. 695; Pearce v. Morris, L. R. 5 Ch., p. 231.

The refusal of a tender is not such a breach of contract as will support an action: Bank of New South Wales v. O'Connor, 14 App. Cas. 273, 284.

A plaintiff can be nonsuited after a plea of tender, if he does not appear, and in such a case it is the proper course: Anderson v. Shaw, 3 Bing. 290.

Notice of the plea and of payment into court must at once be given by the clerk (on receiving the necessary postage) to the plaintiff: s. 111. The notice may be mailed to the plaintiff's address or sent to his usual place of abode or business: *Ib.* For form of notice: see Form 124.

Form of plea of tender, No. 125.

Payment Out of Court.—The money paid into court under section 111, remains there until after the judgment, to be available for payment of the defendant's costs if he succeeds, unless the plaintiff accepts it in full. But money paid in under sec. 112, is to be paid over to the plaintiff: see Fraser v. Bell, 13 S. C. R. 516; Wheeler v. United Tel. Co., 13 Q. B. D. 612.

In Actions of Detinue.—In an action of detinue the defendant may, with a tender of the subject of the action for the detention of which the action is brought, pay money into court as compensation for damages for the detention thereof, and for injury caused thereto, or either or both, with costs of the action: Rule 39.

The former Rule, 246 (a), regulating the practice when money is to be paid into court in detinue is abrogated, and no substitute is provided. It is submitted the practice provided by s. 111 would be applicable. Sec. 111.

In an action of detinue the plaintiff is entitled to a judgment that the defendant do deliver to the plaintiff the property in question in the action forthwith, and also that the defendant shall pay to the plaintiff the value of the goods in case the same are not returned, and also damages and costs, and the plaintiff is entitled to an execution (Form 127) for the recovery of the goods. For form of judgment: see Form 126. The value of the goods must be ascertained and stated in the judgment: Phillips v. Jones, 15 Q. B. 859.

Rule 39 enables the defendant to defeat the action by a mere tender of the goods without acceptance thereof, and payment of the damages into court. The defendant must pay a sufficient sum to cover the damages into court; and also the costs to date and postage, upon notice to plaintiff thereof, which are made costs in the cause by Rule 54. If the plaintiff recovers no further sum in the action than the sum paid into court, he is liable for the costs incurred after such payment: s. 111 (5). The money cannot be paid out to the plaintiff before trial unless he accepts it in satisfaction. Any costs which are awarded to the defendant are deductible therefrom, and payable to the defendant: s. 111 (5).

Tender of the Subject of the Action.—The rule (39) does not prescribe in what manner the tender is to be made. It is submitted that the tender should be made to the plaintiff personally, or to some person authorized to receive possession of the goods for him. It is submitted that it is not sufficient for the defendant merely to embody an offer to return the goods in his plea of payment into court. No right is given to the defendant to tender a portion of the goods. If a portion is tendered and accepted, of course the plaintiff's right to a judgment for their recovery or their value is at an end; but in the absence of the acceptance by him of any portion of the goods, the whole must be tendered in order to form, with the payment into court, a good defence.

Shall be Stayed.—By section 111 the defendant is permitted to file his plea and pay the amount into court, and the plaintiff has three days, *exclusive* of the day on which he receives the notice (see notes to section 98) to determine whether he will accept or not. Form of notice declining the money paid in, No. 128.

Notwithstanding Rule 84 (which if it has application to this case, only applies to the *duty* of the clerk), it is submitted, that the time does not commence to run against the plaintiff until the actual receipt of the notice: McCrea v. Waterloo M. F. Ins. Co., 26 C. P. p. 438, *per* Galt, J.; 1 A. R. 213; McCann v. Waterloo M. F. Ins. Co., 34 U. C. R. 376. If he gives the notice rejecting the payment, the clerk is at once to give notice to the defendant: Rule 79, and the case is to be tried at the next sitting of the court after the receipt by the clerk of the notice of such rejection.

Judge May Remove Stay.—Prior to the passing of the former Rule 245, upon the omission of the plaintiff to give notice *in writing* of his intention to proceed for the remainder of the claim, the action became at once stayed; and it was questionable, notwithstanding the cases cited in Chevallier v. Ross, 3 O. L. R. 219, whether any power

Sec. 112. existed either to extend the time or remove the stay. Section 111 (4) now permits the judge to extend the time, and takes the place of Rule 245: see notes to the next section.

A verbal notice was insufficient, and prohibition would have been ordered on any attempt to proceed in violation of the statutory stay of proceedings: *Re* McGregor v. Norton, 13 P. R. 223. The stay should be removed in all cases where the plaintiff has all along been desirous of proceeding and the omission to give notice explained and the application for its removal is promptly made.

If necessary, the judge may adjourn the hearing in order that the plaintiff may be able to comply with the practice: s. 109.

Defendant's Costs, Charges and Expenses.—Sub-section (5). "This would include the defendant's expenses of attending on his own behalf, if he did so attend expressly for the purpose of giving evidence on his own behalf, and not to superintend the cause:" Howes v. Barker, 18 Q. B. 588; or such sum as the judge might think proper to order a defendant, though not a witness, under section 170 (3). See Fox v. Toronto & Nipissing Railway Co., 7 P. R. 157, and notes to section 170.

The judge has no discretion or authority to disallow the defendant's costs under this section; the statute arbitrarily determines how they shall be awarded if the decision be for defendant. But if it be in favor of the plaintiff, the money paid into court shall be applied to the satisfaction of his claim, and judgment may be given against the defendant for the balance due and the costs of the suit, according to the usual practice: s. 111 (5). See notes to section 111.

See Rules 40 and 41 providing for an order for the detention, preservation, inspection, surveying or measuring the property, *etc.*

Defendant may pay money into court.

112.—(1) The defendant may, not less than six days before the day appointed for the trial, pay into court a sum in full satisfaction of the plaintiff's claim, together with the plaintiff's costs up to the time of such payment.

Clerk to give notice of payment to plaintiff.

(2) The clerk shall forthwith deliver or send notice of such payment by registered post to the plaintiff, and the sum so paid shall be paid to the plaintiff, and he shall be deemed to have accepted it in full satisfaction of his claim, and all proceedings in the action shall be stayed, unless within three days after the receipt of the notice the plaintiff gives notice to the clerk of his intention to proceed for the remainder of his claim, in which case the action shall proceed.

Notice to be given after three days.

(3) The Judge may allow the plaintiff to give the notice to the clerk after the expiration of the said three days on such terms as to him may seem just.

Plaintiff to pay defendant's costs if no further sum recovered.

(4) If the plaintiff recovers no more than the sum paid into court, he shall pay the defendant all costs, charges and expenses incurred by him in the action after such payment, to be taxed and recovered by the same means as any other sum ordered by the court to be paid. 10 Edw. VII., c. 32, s. 112.

Not Less Than Six Days.—This means clear days: see notes to section 79. Formerly, if he did not pay into court at least six days "before the day appointed for the trial," he could not make the payment afterwards, though the trial be adjourned: Fletcher v. Baker, L. R. 9 Q. B. 372. But by section 109, the judge has power to adjourn the trial and permit either party to give any necessary notice. Section 104 also gives the judge ample powers in this respect. Sec. 112.

The word "defendant" must, in case of an action against two or more, be read "defendants:" Interpretation Act, R.S.O., 1914, c. 1, s. 28 (j).

The English County Court Rules require a defendant to pay money into court, if he desires to do so, at least five clear days before the "return day," and, where a summons was issued on the 14th March, returnable on 15th April, and on 8th April defendants paid money into court, it was held the payment was not too late: Stevens v. Hounslow Burial Board, 61 L. T. 839.

Care must be taken to pay into court enough to satisfy the full claim for damages and costs to the time of paying the money in. Where the amount was 20 cents too little the plaintiff was held entitled to his costs. Interest, if allowable, must be calculated to the time of payment, and not merely to the issue of the summons: Kidd v. Walker, 2 B. & Ad. 705.

Where several matters are included in one suit, payment into court may be made to all: Marshall v. Whiteside, 1 M. & W. 188.

When pleaded to a cause of action which, in a higher court, before the Judicature Act, would have come under the head of indebitatus counts, it admits "that the defendant is liable in respect of some one or more contracts or causes of action stated in the general counts, to the extent of the sum so paid in; and the plaintiff cannot apply that admission to any particular contract he may please to select any more than the defendant:" Taylor on Evid., 7th ed., s. 761. It admits also the validity of every *species* of claim mentioned in the particulars, and that *some* damages are due on *each*: Edgar v. Watson, 1 C. & M. 494. It admits the character in which a plaintiff sues: Lipscombe v. Holmes, 2 Camp. 441, and his sole right to the money sued for: Walker v. Rawson, 5 C. & P. 486; and that the defendants are properly sued jointly: Ravenscroft v. Wise, 1 C. M. & R. 203. It also admits that the action is not brought too soon: Harrison v. Douglas, 3 A. & E. 396; but all such admissions only operate to the amount of the money paid into court: Archer v. English, 1 M. & G. 873. If paid in, on an action on a special count or claim, it admits the contract as charged: Israel v. Benjamin, 3 Camp. 40; McConnee v. London and North-Western Ry. Co., 7 H. & N. 477, and that nominal damages are due on it: Archer v. English, 1 M. & G. 873; Hennell v. Davies, 1893, 1 Q. B. 367; see Coste v. Ford, 1899, 2 Ch. 93; and the defendant cannot be allowed to controvert it: Lloyd v. Walkey, 9 C. & P. 771. Still less will he be allowed to give evidence of facts under this plea, even in mitigation of damages, which, if pleaded before, would have been a bar to the action: Speck v. Phillips, 5 M. & W. 279. In an action for use and occupation, it admits plaintiff's sole title: Dolby v. Iles, 11 A. & E. 335. If paid in on a promissory note payable by instalments, it only admits the amount of instalments as due which the money paid in will cover, and does not preclude the Statute of Limitations being pleaded to the others: Reid v. Dickens, 5 B. & Ad. 499. And where there are several items in the amount claimed, it admits

Sec. 112. that there is some liability, but not that something is due on every item of the account: Stevenson v. Berwick Corporation, 1 Q. B. 154.

It is submitted that payment into court may be pleaded to part of the plaintiff's claim: Charles v. Braaker, 12 M. & W. 743; Brnae v. Thompson, 4 Q. B. 543. Where plaintiff sets out his cause of action in two ways, on either of which he can recover, it is enough to pay money into court on one: Early v. Bowman, 1 B. & Ad. 889; Stafford v. Clark, 2 Blag. 377. Payment into court in actions of tort has the same effect as in actions of contract: see notes to section 111. It admits a cause of action with damages amounting to the sum paid into court; but it does not necessarily admit the cause of action stated in the particulars: Schreger v. Carden, 11 C. B. 851; Robinson v. Harmon, 1 Ex. 850; Story v. Finnis, 6 Ex. 123. If the claim is general and unspecific, although it admits a cause of action, it does not admit the cause of action sued for, and therefore the plaintiff must give evidence of that cause of action before he can recover larger damages than the sum paid into court: Perren v. The Monmouthshire Ry. and Canal Co., 11 C. B. 855. See the report of this case for a general view of the effect of payment into court in different forms of action. If pleaded as to part, and plaintiff fail on the rest, he must pay costs: Rumbelow v. Whalley, 16 Q. B. 397. Generally a defence in denial of the cause of action will be allowed with payment into court: Berdan v. Greenwood, 3 Ex. D. 251, see notes to section 111: and if the clerk receives the money with such a denial, the payment cannot be construed as an admission; Harper v. Davis, 19 Q. B. D. 170. If a person avails himself of payment into court, he cannot afterwards repudiate the effect of it: Cromble v. Davidson, 19 U. C. R. 369, and sections 128-133 of the former D. C. Act.

Under the provisions of former Rule 170, and sections 128-133 of the former D. C. Act, R.S.O., 1897, c. 60, money paid into court in a division court action under either of those sections was held to at once become the plaintiff's: *Re* O'Neil v. Hobbs, 29 O. R. 487; but under the present section when he proceeds with the action money paid in under s. 111 must remain in court until after judgment is given, when any costs awarded the defendant, after payment in, must be deducted therefrom. Where, therefore, in an action for tort, the defendant paid a sum of money into court in alleged satisfaction of the plaintiff's claim and costs, the plaintiff proceeded with the action and judgment was given in defendant's favor, an order made by the judge directing the sum so paid in to be paid out to the defendant was set aside and the amount directed to be paid out to the plaintiff after deducting the costs awarded to the defendant: *Re* O'Neil v. Hobbs, 29 O. R. 487. Whether the point would be so decided under the present section which differs from the old sections 128-133 is questionable.

Where defendant paid $300 into court in satisfaction of the plaintiff's demand and at the same time pleaded tender before action, and that he was now and had always been ready and willing to pay him that sum, it was held that the defence was so framed that the plaintiff, if he desired to take the money out of court, should by reason of former C. R. 419 and 420, have elected to do so before replying or before the time for replying expired. As he did not do so the defendant was thereby absolved from his offer and the money should, in the absence of special circumstances, remain in court to be dealt with when the case was finally disposed of, and that on an appeal by the defendant the latter might contend that the amount recovered should be reduced below $300, notwithstanding the payment into court: Denison v. Woods, 17 P. R.

549; followed in Magann v. Ferguson, 18 P. R. 201; and see also Davis v. National Ass. Co., 16 P. R. at p. 119; Gray v. Bartholomew, 1895, 1 Q. B. 200; Magann v. Ferguson, 18 P. R. 201; Neale v. Reid, 117 L. T. Jour. 292. Sec. 113.

No written plea is necessary under this section as is required under section 111.

As to costs see notes to section 111.

Forthwith.—See notes to section 20 (2). For form of notice, see Form 129. The notice must be sent by registered letter if sent by post: Rule 78; and must be in writing: section 82; and must show the place and time of trial: section 103.

Within Three Days.—See notes to sections 79, 112. Formerly the time could not be extended nor the stay of proceedings removed, and if the prescribed notice were not given within the time specified the trial could not be proceeded with afterwards: McGregor v. Norton, 13 P. R. 223; see Magann v. Ferguson, 18 P. R. 201; but the judge may now remove the stay and allow the action to proceed: section 112 (3). Form of notice accepting money paid into court. No. 73.

If the Plaintiff Recovers.—The word "recovers" as used in s. 112 (4) may, it is submitted, be read as "obtains judgment." The word "recovers" has a technical meaning in law whereby it signifies to recover by action, and by judgment of the court: Wigenn v. Cook, 6 C. B. N. S. 784; Ferguson v. Davidson, 8 Q. B. D. 470; Stroud 660. "But the amount of the verdict is not 'recovered' till judgment can be signed upon it:" *per* Brett, J., Ings v. London & S. W. Ry. Co., L. R. 4 C. P. 17. A plaintiff does not "recover" a sum of money paid in under a successful plea of tender: Jones v. Vane, 29 L. J. Q. B. 169; see Boyls v. Lintott, L. R. 8 C. P. 345; Hewitt v. Cory, L. R. 5 Q. B. 418; Cowell v. The Ammon Co., 6 B. & S. 333.

Set-off and Statutory Defences.

113.—(1) Where the defendant desires to avail himself of the laws of set-off, or of The Limitations Act, or of a defence under any other statute, he shall, not less than six days before the trial, give notice thereof to the plaintiff, or leave the same for him at his usual place of abode or business if within the division, or if the plaintiff lives without the division, shall deliver the same to the clerk; and in case of a set-off the particulars thereof shall be delivered to the clerk and shall accompany the notice to be given to the plaintiff. Defendant to give notice of set-off or other statutory defence.

(2) Except by leave of the judge no evidence of set-off shall be given by the defendant save such as is contained in the particulars delivered. Evidence of set-off.

(3) If the set-off proved exceeds the amount found to be due to the plaintiff, judgment shall be entered for the defendant for the excess, if the excess be an amount within the jurisdiction of the court: but, if the excess be an amount beyond the jurisdic- Provisions if set-off exceeds amount due plaintiff.

Sec. 113. tion of the Court, the judge may order that an amount of the set-off equal to the amount found to be due to the plaintiff be satisfied by the claim, but the adjudication shall not be a bar to the recovery by the defendant in a subsequent action for the residue of the set-off. 10 Edw. VII., c. 32, s. 113.

Set-off, Counterclaim and Statutory Defences.—In case the defendant desires to avail himself of the law of set-off, or of the Statute of Limitations or any other statutory defence provision is here made for it: Skirving v. Ross, 31 C. P. 423.

Particulars must be given: Rule 30; Form 13, stating what statute is relied on.

Statutory Defences.—The defence of the Statute of Frauds is a statutory defence in an action on a contract for the sale of goods of the value of $40; Britton v. Branson, 1898, 1 Q. B. 219; and a defence of "no signed bill" in an action for a solicitor's bill of costs: Lewis v. Burrell, 77 L. T. 620; and also the defence of a bailiff of the division court under sections 293, 294, 295 and 296 (in the former Division Courts Act) which are now embodied in R.S.O., 1914, c. 80, s. 12, as well as all other cases in which the general issue by statute can be pleaded: see Graham v. Newcastle (Mayor), 1893, 1 Q. B. 943; Allwright v. Perks, 8 T. L. R. 235; Kay v. Atherton Local Board, 42 J. P. 792; *e.g.* The Bills of Sales Act: Williams v. Leonard, 10 P. R. 544; The Registry Act: Building & Loan Assn. v. Poups, 27 O. R., p. 470. The defence by an executor, administrator or trustee, of notice to creditors and distribution under R.S.O., 1914, c. 121, s. 50, is a statutory defence of which notice must be given: see Forms of statutory defences No. 13, and notes there. The notice must state what statute is relied upon: *ib.*

Set-off.—Set-off implies the subtraction or taking away of one demand from another opposite or cross-demand, so as to extinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish them both: Waterman on Set-off, p. 1.

The defence of set-off at law was first created by 2 Geo. II., c. 22, s. 13, and 2 Geo. II., c. 24, s. 5, now R.S.O., 1914, c. 324, ss. 5, 6, 7. Division courts are vested with the same powers as the Supreme Court in all matters of set-off. By counterclaim, also, unliquidated damages may now be set up against debts, and debts against damages, and damages against damages. See Gray v. Webb, 21 Ch. D. 802; see also section 65 and notes thereto.

The distinction between set-off and counterclaim is thus defined: "A set-off alleges a liquidated debt due from the plaintiff to the defendant, which balances the liquidated claim of the plaintiff, and shows on the whole account between the plaintiff and defendant nothing is due to the plaintiff. A set-off to an amount equal to the plaintiff's claim is therefore a defence to the action. A counterclaim, which is a creation of the Judicature Act, is on the other hand in the nature of a cross-action by the defendant, which may be made although in respect of, or against a claim for unliquidated damages:" Stooke v. Taylor, 5 Q. B. D. 576, *et seq.*, *per* Cockburn, C.J.; Baines v. Bromley, 6 Q. B. D. 691, *per* Brett, L.J. Gates v. Seagram, 19 O. L. R. 216, in which the history

of the law of set-off and counterclaim, and a review of the authorities, is given. Sec. 113.

This distinction is sometimes material especially with regard to the question of costs, which ought to be disposed of, in case of a counterclaim, as if the parties were the subjects of separate actions: Gates v. Seagram, *supra*, and notes to s. 171. The rights of a defendant with regard to the defence of set-off and counterclaim are discussed in the notes to sections 65, 121.

Notice of Set-off.—Forms 13 (7), 14. The notice, together with the particulars of the set-off, must be given to the plaintiff six clear days (see notes to sections 78 and 112) before the day appointed for the sittings. It may be left for the plaintiff at his usual place of abode or business, if such be within the division; or if living without the division, the notice and particulars, with a copy of same for the plaintiff, must be left with the clerk. The clerk must then give the plaintiff notice through the post, duly registered: Rule 78, with a copy of the particulars of the set-off. This provision extends to counterclaim and statutory defences, as well as to set-off in all cases, except garnishee proceedings, which are provided for by section 157 (2), (3).

If the six days' notice of set-off is not given in time, the judge may extend the time: see notes to section 112. The judge has, of course, power to amend the particulars: see section 104. When anything required by the practice to be done by either party before or during the hearing, has not been done, the judge may adjourn the hearing to enable the party to comply with the practice: section 100.

No proceeding is to be quashed or vacated for matter of form: section 228; and the judge may, at any time, and on such terms as may seem just, amend any proceedings; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question raised by the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case: section 104.

If the defendant's set-off exceeds the plaintiff's demand, judgment is to be given for the defendant for such excess, if the set-off does not exceed the jurisdiction of the court: section 113 (3).

Where Set-off Exceeds the Jurisdiction.—The court has authority under this section to determine the question of the plaintiff's responsibility on a set-off to an amount beyond the jurisdiction. The section was passed to get over the difficulty created by the case of Mead v. Creary, 32 C. P. 1.

Where Counterclaim Exceeds the Jurisdiction.—See section 71. Under section 76 of the former Act, R.S.O., 1897, c. 60, express power was given to deal with a counterclaim involving matter or amount beyond the jurisdiction of the court to the extent of the plaintiff's claim, and the defendant was entitled to use it as a shield against the plaintiff's claim; but no relief exceeding the court's jurisdiction could be given the defendant. Section 76 of the former Act is replaced by section 71 in the present Act, which omits the provisions of the former, giving the power stated; and the only authority now given in the case of a counterclaim beyond the jurisdiction is to transfer the whole case to the Supreme Court or County Court, or

Sec. 113. to strike it out: see section 71 and notes thereto. It would, therefore, appear that matters beyond the court's jurisdiction can only be dealt with in cases of set-off, as provided by section 113 (3), and not in cases of counterclaim.

The court must hold its hand so soon as the plaintiff's claim is equalled by set-off, unless the balance then due is within the jurisdiction: Davis v. Flagstaff Silver Mining Co., 3 C. P. D. 228.

If the balance is in favor of the defendant the judge may give judgment in favor of the defendant for such balance or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case as provided by section 113 (3). The question of costs is not affected, which, in the absence of any order, would follow the event under section 170.

If the plaintiff's action should be discontinued or dismissed after a counterclaim or set-off is set up by the defendant the counterclaim or set-off may nevertheless be proceeded with: Rule 29; see also McGowan v. Middleton, 11 Q. B. D. 464.

Distribution of Assets by Executors, etc.—R.S.O. c. 121, s. 56.

Form of notice of defence, No. 13 (9).

Statute of Limitations.—Form of defence of, No. 13 (4). The Statute of Limitations, R. S. O. 1914, c. 75, Part III, is one of the most usual of statutory defences.

It has been said that "a plea of the Statute of Limitations is now considered a defence on the merits:" Archbold's Prac., 12th Ed. 988: Rucker v. Hannay, 3 T. R. 124; Maddocks v. Holmes, 1 B. & P. 228; Doble v. Lemon, 12 P. R. 64. But see Brigham v. Smith, 3 Ch. Cham. 313. The Statute of Limitations being a defence permitted by law and the real question between the parties being as to the right of the plaintiffs to recover the damages claimed by them, "the very right and justice of the case demands that the plaintiffs should not recover if the statute afforded a bar to their right to do so:" Patterson v. Central Canada Savings and Loan Co., 17 P. R. 470.

The provisions of the Statute of Limitations apply to claims made by way of set-off: R.S.O. 1914, c. 75, s. 59.

Application of the Statute of Limitations.

Rent and Specialties.—An action for rent upon an indenture of demise (*i.e.*, lease under seal); or upon a bond or other specialty (*e.g.*, document under seal), except upon a covenant contained in an indenture of mortgage made on or after 1st July, 1894; or upon a recognizance; must be commenced within twenty years: R.S.O. 1914, c. 75, s. 49 (a), (b), (c). A debt payable under a statute is a specialty, and the limitation is twenty years: Carlyle v. County of Oxford, 30 O. L. R. 413.

An action upon an award where the submission is not by specialty (not under seal); an action for an escape, or for money levied under execution; an action for trespass to goods or land, or upon a simple contract, or upon a debt grounded upon any lending, or contract without specialty, or for debt for arrears of rent, or for detinue, or replevin, or upon the case other than for slander, within six years:

section 49 (d), (e), (f), (g). An action for a penalty, or for dam- Sec. 113.
ages, or for a sum of money given to the Crown or to the person aggrieved, must be commenced within two years: section 49 (h); an action for assault, or battery, or wounding, or imprisonment, within four years: section 49 (j); an action upon a covenant "contained in" a mortgage made on or after the 1st July, 1894, within ten years: section 49 (k); an action for a penalty imposed by a statute, sued for by a person other than the person aggrieved, within one year: section 49 (i).

But these limitations do not extend to any action given by statute where the time for bringing the action is by the statute specially limited: section 49 (2).

Section 49 of the above statute was originally taken from the Imperial statute, 3 & 4 Wm. IV. c. 42, s. 3.

The exception as to covenants in mortgages was introduced in 1894.

Mortgages.—An action on a covenant in a mortgage made before 1st July, 1894, is only barred after twenty years: Allan v. McTavish, 2 A. R. 278; McDonald v. Elliott, 12 O. R. 98; but see Sutton v. Sutton, 22 Ch. D. 511; *Re* Powers, 30 Ch. D. 291; Fearnside v. Flint, 22 Ch. D. 579. When the mortgage was made on or after 1st July, 1894, the action is barred after ten years: sec. 49 (*k*). Time begins to run from the earliest date when the plaintiff can sue, so that when the principal becomes due for default in paying interest, the statute commences to run: Reeves v. Butcher, 1891, 2 Q. B. 509.

Where a foreclosure or redemption suit is between the mortgagee and mortgagor who is liable on the covenant, or his heirs, full arrears of interest to the statutory limit on the specialty, (formerly 20 years, now 10 years) may be allowed: Du Vigier v. Lee, 2 Hare 326; Elvy v. Norwood, 5 De G. & Sm. 240; Howereen v. Bradburn, 22 Gr. 96; Airey v. Mitchell, 21 Gr. 512; Macdonald v. Macdonald, 11 O. R. 187; these cases were discussed in McMicking v. Gibbons, 24 A. R. 586, in which it was held that only six years' arrears could be allowed against a subsequent incumbrancer coming in to redeem; but the law has now been altered by the new statute: R.S.O. 1914, c. 75, s. 18 (2); and interest for six years only can be recovered in other than actions for redemption in which latter cases 10 years' arrears of interest may be recovered.

Where the mortgagor is in possession, a mortgage may be presumed to be satisfied after twenty (now ten) years from the time fixed for payment of the mortgage money: *Doe d.* McGregor v. Hawke, 5 O. S. 496.

When the covenant is to pay the principal on demand, and interest in the meantime, the time does not commence to run until a demand is made: *Re* Brown's Estate, 1893, 2 Ch. 300. The point has not arisen whether a covenant implied in a mortgage under R.S.O. 1914, c. 117, s. 5, is "contained" therein. The English decisions as to the effect of the Real Property Limitation Act, on covenants in mortgages and actions on judgments are not applicable: Allan v. McTavish, 2 A. R. 278; Boice v. O'Loane, 3 A. R. 167; McCullough v. Sykes, 11 P. R. 337; Chard v. Rae, 18 O. R. 371.

Distributive Share on Intestacy.—Formerly under R.S.O. c. 72, s. 9, and c. 133, s. 23, an action for a legacy had to be brought within ten years, and an action for a share on an intestacy within

Sec. 113. twenty years; but these provisions are omitted from the new Statute, R.S.O. 1914, c. 75, and under section 47 of that Act an action against a trustee (including an executor and administrator: section 47 (2)) must be brought within six years unless the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property or the proceeds thereof still retained by the trustee, or previously received by him and converted to his use.

Actions on Judgments.—An action on a judgment of a court of record may be brought within 20 years: Boice v. O'Loane, 3 A. R. 167; see Mason v. Johnston, 20 A. R. 412; Caspar v. Keschie, 41 U. C. R. 599; Price v. Wade, 14 P. R. 351; and the entry of a suggestion by way of revivor will effectually renew the time from which the statute begins to run: Allison v. Breen, 36 C. L. J. 165. But see section 61 (*e*), *ante*, prohibiting actions on certain judgments.

Foreign Judgment.—A foreign judgment is merely a simple contract debt in this province, and is barred in six years: North v. Fisher, 6 O. R. 206; Stewart v. Gurbord, 6 O. L. R. 262; Duplex v. De Roven, 2 Vern. 540; and see McMillan v. Fortier, 2 O. L. R. 231.

Sureties for Public Officers.—Actions upon bonds of suretyship for public officers must be brought within ten years: R.S.O. 1914, c. 15, s. 13.

Penalties.—Actions for penalties under any Dominion or Ontario Statute, two years: Criminal Code, R.S.C. c. 146, s. 1141, and R.S.O. c. 75, s. 49 (h).

Public Officers.—Actions against public officers, including constables and persons administering the criminal law, within six months: R.S.O. 1914, c. 89, s. 13; Criminal Code, R.S.C. c. 146, ss. 1143, 1149, 1150.

Physicians.—Actions against physicians for negligence or malpractice must be brought within one year from the date when in the matter complained of, the professional service terminated: R.S.O. 1914, c. 161, s. 39; Miller v. Ryerson, 22 O. R. 369.

Municipal Corporations.—Actions against a municipality for damages arising from nonrepair of streets within three months: R.S.O. 1914, c. 192, s. 460 (2); Pearson v. York, 41 U. C. R. 378; Brown v. Toronto, 18 O. W. R. 996.

Notice in writing of the accident and cause thereof must be given within 30 days after the happening of the accident in the case of action against a county or township, or within 7 days, if it is against an urban municipality: same statute, section 460 (4), (5), and if two or more municipalities are jointly responsible no action can be brought against any of such municipalities unless the notice has been given to all, section 460 (4). Notice need not be given in the case of death of the injured person and the want or insufficiency of notice is no bar to an action except where the injury has been caused through snow or ice, if the judge considers there is reasonable excuse for such want or insufficiency, and that the defendants have not been prejudiced in their defence, section 460 (5); but both these facts must be found by the Judge and it is not sufficient that the defendants have not been

prejudiced if there is no reasonable excuse for the want or insufficiency of the notice and ignorance of the law is no such excuse: O'Connor v. Hamilton, 8 O. L. R. 391; Denton's Municipal Negligence, p. 260. Sec. 113.

The law on this point seems to be more strictly laid down under section 460 of the Municipal Act than under the Workmen's Compensation Act: Cf. Armstrong v. Canada At. Ry. Co, 14 O. L. R. 560. But no notice need be given if an action can be maintained at common law apart from the provisions of s. 460: Bathurst v. Macpherson, 4 A. C. 256; Minns v. Omemee, 8 O. L. R. 508, and other cases cited in Denton's Municipal Negligence, page 15 *et seq.*

Actions for damages to lands by a municipality, within one year, except in the cases of infants, lunatics and persons of unsound mind: same statute, section 326.

Railways.—Actions against railway companies for damages or injury sustained by reason of the railway within one year in the case of a railway under Provincial authority: R.S.O. 1914, c. 185, ss. 265, 139 (4), which applies also to street railways: section 2 (c); and within one year, in the case of a railway under Dominion authority: R.S.C. c. 37, s. 306, which does not apply to street railways.

Insurance Policies.—As to actions on life policies, see R.S.O. 1914, c. 183, s. 165; and fire policies: R.S.O. 1914, c. 183, s. 194 (24); but the conditions endorsed on insurance policies often fix a different limitation.

Covenants of Indemnity.—A cause of action on a covenant to indemnify only accrues on payment under the indemnity: Ives v. Ives, T. T. 3 Vic.; Collinge v. Heywood, 9 A. & E. 633; Blyth v. Fladgate 1891, 1 Ch. 362.

Fraudulent Concealment and Misrepresentation. — The fraudulent concealment by the defendant of the plaintiff's right of action does not prevent the statute from running: Imperial Gas Co. v. London Gas Co., 10 Ex. 39. But if the cause of action be one over which the Court of Chancery would have had concurrent jurisdiction, the fraudulent concealment of the cause of action would prevent the statute from running: Gibbs v. Guild, 8 Q. B. D. 296; 9 Q. B. D. 59.

In an action for fraudulent misrepresentation the statute begins to run from the time of the misrepresentation, not from its discovery: Dickson v. Jarvis, 5 O. S. 694; but see Gibbs v. Guild, *supra*.

Actions of Account.—All actions of account, or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of such action arose; and no claim in respect of a matter which arose more than six years before the commencement of the action shall be enforceable by action by reason only of some other matter or claim comprised in the same account, having arisen within six years next before the commencement of the action: R.S.O. 1914, c. 75, s. 50.

This section is taken from the Imperial Act, 19 & 20 Vic. c. 97, s. 9.

The Statute of Limitations, 21 James I., c. 16, excepted "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." This exception did not apply to an action of *indebitatus assumpsit*, but only to the action of account or

Sec. 113. to an action on the case for not accounting: Inglis v. Haigh, 8 M. & W. 769; Russell v. Robertson, 1 U. C. R. 235. The phrase "comprised in the same account," means "that would have been comprehended in:" Knox v. Gye, L. R. 5 H. L. 656. Where partnership dealings were closed more than six years before action, an action for an account was held to be barred, notwithstanding a payment to plaintiff's solicitor, without his knowledge, within six years, paid as the full amount due him: Cotton v. Mitchell, 3 O. R. 421.

Effect of Special Statute.—The limitation as to time specially fixed by a statute for the bringing of an action supersedes any general limitation: Cairns v. Water Commissioners of Ottawa, 25 C. P. 551; Trotter v. Corp. of Toronto, 29 C. P. 365; Atty.-Gen. v. Walker, 3 A. R. 195; Sullivan v. Corp. of Barrie, 45 U. C. R. 12; Watson v. Lindsay, 27 Gr. 253; and see R.S.O. 1914, c. 75, s. 40 (2).

Where an English Companies' Act makes calls for shares a specialty debt, it does not thereby become a specialty debt of this province: Barned's Banking Co. v. Reynolds, 36 U. C. R. 256.

Computation of Time.—The time is reckoned exclusively of the day on which the cause of action arose: Freeman v. Read, 4 B. & S. 183; Colvin v. Buckle, 8 M. & W. 680; and it stops on the issue of the summons and during its currency: Turley v. Williamson, 15 C. P. 538.

The Interpretation Act, R. S. O. 1914, c. 1, s. 28 (h), does not apply, and even if the last day of the period is a Sunday or other holiday, it will be too late to issue the summons on the following day: Morris v. Richards, 45 L. T. 210; see Barring on Limitations, 2nd ed. pp. 64-67; Darby & Bosanquet on Limitations, 2nd ed., 95.

For the purposes of the statute the date of the summons cannot be contradicted: Whipple v. Manley, 1 M. & W. 432.

Particular Cases.—A solicitor's bill of costs for services rendered in obtaining judgment will be barred after six years from the entry of judgment: Lizards v. Dawson, 32 U. C. R. 237; and if the action is settled before judgment, the statute will run from the date of the settlement, not from the date of the retainer: Gourley v. McAloney, 29 N. S. R. 319.

In an action against a solicitor for negligence the right of action arises when the negligence was committed, and not when it was discovered by the client: Wood v. Jones, 61 L. T. 551; Armstrong v. Milburn, 54 L. T. 723; Doody v. Watson, 39 Ch. D. 178; Blyth v. Fladgate, 1891. 1 Ch. 362.

The court has authority to prevent a solicitor pleading the statute t a just claim: Dougall v. Cline, 6 U. C. R. 546.

When damage is the gist of the action the time runs from the accrual of such damage: Bean v. Wade, 1 C. & E. 516.

The statute does not begin to run as against a surety claiming contribution until his own liability is ascertained: Wolmerhausen v. Gullick 1893, 2 Ch. 514.

A bill of exchange fell due on 1st Dec., 1875, and an action commenced thereon on 1st Dec., 1881, was held in time: Edgar v. McGee, 1 O. R. 287.

An action of conversion must be brought within six years from the time a cause of action first accrues against the defendant. The fact that the plaintiff had an earlier cause of action for the same chattel against

another person from whom the defendant obtained it, is of no conse- Sec. 113.
quence: Miller v. Dell, 1891, 1 Q. B. 468.

An infant has six years after attaining his majority to bring an action for work and labor performed during his minority: Taylor v. Parnell, 43 U. C. R. 239; 21 James I. c. 16, s. 7; R.S.O. 1914, c. 75, s. 51.

When money is intrusted to another for safe custody until demand, the time does not run until demand, though it is contemplated that the bailee may use the money in business: *Re* Tidd, Tidd v. Overell, 1893, 3 Ch. 154.

Payment of interest on a demand note is evidence of demand, from which time the statute would run: Brown v. Rutherford, 14 Ch. D. 687.

In order to keep a claim alive in the division court, proceedings to renew the summons must be taken within 12 months from its date under Rule 7: see also Manby v. Manby, 3 Ch. D. 101.

When through a mistake by the officers of the court the summons was a nullity, the judge ordered a new summons to issue bearing the same date as the first to save the Statute of Limitations: Foster v. Temple, 5 D. & L. 230. But see Bank of Hamilton v. Baldwin, 28 O. L. R. 175, in which the principles on which amendment should be allowed or refused are elucidated. The court will not renew a summons merely to avoid the Statute of Limitations. Such would be an extension of the statutory period and unjustifiable, unless some good reason is shown for the failure to serve the summons within the time limited by Rule 7: Appleyard v. Mulligan, 3 O. W. N. 943.

Disabilities.—The expression "beyond seas" in 4 and 5 Anne, c. 3, and 21 James I. c. 16, means the same as "out of Ontario" in R.S.O. 1914, c. 75, s. 52, when applied to a defendant served in this province; and to make the statute run in defendant's favor his return from beyond seas must be open and of sufficient duration to enable the creditor, if he had knowledge of it, to bring an action, though such knowledge is not essential: Boulton v. Langmuir, 17 C. L. T. 397; 24 A. R. 618.

In the case of a foreign judgment, if the debtor was not, at the time of the recovery, in this province, nor has been since, the remedy is saved by R.S.O. 1914, c. 75, s. 52; Bugbee v. Clergue, 27 A. R. 96; Stewart v. Gurbard, 6 O. L. R. 262.

Infancy, Lunacy or Absence from Ontario.—If the plaintiff was under the age of 21 years when the cause of action arose, or was then an idiot or lunatic, the time does not begin to run until he is of that age, or becomes sane: R.S.O. 1914, c. 75, s. 51.

An infant is not generally bound by his contract, and may repudiate the contract and recover any money he may have paid on it; *contra* if he has received a valuable consideration for the payment, or has been led into the transaction by exaggerated representations amounting to a fraud: Short v. Field, 32 O. L. R. 398, and cases cited there.

If the debtor was out of Ontario when the cause of action arose, the time begins to run on his return to Ontario: s. 51 *ante;* but the plaintiff's absence from the province does not extend the time; the former section 4 of R.S.O. 1897, c. 72 expressly so providing has apparently been dropped as unnecessary.

Sec. 113.

Where there are two or more joint debtors one of whom is in Ontario, the time is not extended as to him by reason of the others being out of Ontario: R.S.O. 1914, c. 75, s. 53 (1); but the plaintiff may in that case sue and obtain judgment against the joint debtor who is in Ontario without releasing the others: s. 53 (2); see also section 93 (1) of the Division Courts Act.

The fact that the cause of action is one as to which service out of the jurisdiction may be allowed, will not prevent the disability attaching: Musurus Bey v. Gadban, 1894, 2 Q. B. 352. Merely touching Ontario for a temporary purpose would not be a "return:" Gregory v. Hurrill, 1 Bing. 324; but a temporary sojourn, even by a foreigner, would be a "return:" Pardo v. Bingham, L. R. 4 Ch. 786. If the statute commences to run, subsequent disability does not stop it: Rhodes v. Smethurst, 6 M. & W. 351; *Doe d.* Dixon v. Grant, 3 O. S. 511; Wigle v. Stewart, 28 U. C. R. 427.

It would appear to be doubtful whether there is any saving for disabilities when the limitation is provided by a special statute, *e.g.*, a bond for a public officer under R.S.O. 1914, c. 15, s. 13: see Miller v. Ryerson, 22 O. R. 369.

Infancy does not prevent the running of the statute in a case of malpractice by a physician: Miller v. Ryerson, 22 O. R. 369.

Payment or Acknowledgment in Respect of Specialty Debts.—The statute 21 James I., c. 16, contained no provision respecting payments or acknowledgments, but by numerous cases thereon, reference to which is made *infra*, a new promise was inferred from a payment and also from an acknowledgment when such a promise could be inferred. The cases under the statute of James, as modified by R.S.O. 1914, c. 75, are not, therefore, strictly applicable to acknowledgments or payments made with respect to specialty debts, which are provided for by R.S.O. 1914, c. 75, s. 54, formerly R.S.O. 1897, c. 72, s. 9, which was taken from the Imperial Act, 3 & 4 Wm. IV. c. 42, s. 5. The principal point of difference from actions on simple contract debts is that though an acknowledgment of a specialty debt be made under circumstances which preclude a promise to pay from being implied, it will nevertheless be sufficient to give a new starting point to the period of limitation: Moodie v. Bannister, 4 Dr. 432; and will be equally good if not made to the creditor, but to a third party or in answer to a suit against the debtor to which the creditor is not a party: *Ib.*

An acknowledgment by one joint debtor will not keep alive the specialty debt against the others: see R.S.O. 1914, c. 75, s. 56, in which the words "joint debtors" and "joint obligors or covenanters" have been inserted, Cf. the former section, R. S. O. 1897, c. 146, s. 2; nor will a payment by a "person liable, or his agent" keep the debt alive against a joint debtor, as s. 56 is not restricted to the statute of James as was the former section. Formerly such a payment would keep a specialty debt alive: *Re* Frisby, Allison v. Frisby, 43 Ch. D. 106; Barnes v. Glenton, 1898, 2 Q. B. 223; see s.c., 1899, 1 Q. B. 885; even a payment on a collateral security: Slater v. Mosgrove, 29 Gr. 392; and in England an acknowledgment or payment still has such effect: Read v. Price, 1909, 2 K. B. 724.

A tenant for life of land under a devise by the obligor in a specialty, in which the heirs were bound, is a "party liable" within R.S.O. 1914, c. 75, s. 54: Rocdian v. Morley, 1 DeG. & J. 1, and so is an assignee of an equity of redemption: Forsyth v. Bristowe, 8 Ex. 716, and so is a tenant for life of an equity of redemption: Dibb v. Walker, 1893,

2 Ch. 420, nnd a payment hy them will be sufficient to keep alive an action on the covenant. The surety on a joint nnd severnl covennnt mnde hy him and his principnl remains liahle although no pnyment or nckowledgment mny have been made hy him within the statutory period if the principal has paid interest within such period: *Re* Frishy, Allison v. Frishy, 43 Ch. 106. Sec. 113.

Bnt where the liahility of the party making the payment stands upon totally different grounds from thnt of the person sought to be affected therehy, the pnyment will he ineffective ns to the latter: Coope v. Cresswell, L. R. 2 Ch. 112.

Acknowledgment with Respect to Simple Contract Debts.—Section 55 of R.S.O. 1914, c. 75, provides that "no acknowledgment or promise, hy worda only, shnll be deemed sufficient evidence of a new or continuing contract whereby to take out of the operntion of (Pnrt III. of the Act, relating to personnl actions) "nny cnse falling within this provision respecting actions (n) of nccount and npon the cnse; (b) on simple contract or of debt grounded npon any lending or contract without specialty, and (c) of debt for arrears of rent; or to deprive any party of the benefit thereof, unless such nckuawledgment or promise is mnde or contained hy or in some writing signed hy the party chargeable therehy, or hy his agent duly authorized to mnke such nckowledgment or promise." This section is taken from 9 Geo. IV. c. 14, s. 1, nnd 19 and 20 Vic. c. 97, s. 13, nnd R. S. O. (1897) c. 146, s. 1.

The Statute 21 James I. c. 16 made no provision for extending the period of limitation because of nn acknowledgment or pnrt pnyment. The statnte was said to he founded npon the presumption of payment, and that presumption was rebutted hy an admission that the debt was still nwing: Lloyd v. Mnund, 2 T. R. 760, 762; Frost v. Bengough, 1 Bing. 266; 25 R. R. 621; hut this theory seems to be untenahle: see 2 Wm. Saund. 183, 184. The effect of the acknowledgment was that a new promise was inferred based upou the consideration of the aid debt: Phillips v. Phillips, 3 Hare 299; Earle v. Oliver, 2 Ex. 90; hut this view seems to be based upon the exploded doctrine of past considerntion, and is therefore unstahle ground. Sir Frederick Pollock's view is that the statnte was one of procedure only, and that the dehtor might wnive the benefit therehy conferred: see Pollock on Contracts, 5th Ed., pp. 170, 624.

There are, however, many decisions which can be reconciled only with the theory af a new promise.

Te What Causes of Action Acknowledgments Extend.—The Stntute of James, nnd the Ontario Statute af Limitntions prescribe, among others, periods of limitntion for action upon the cnse (which includes nctions for hreach nf contract) and of trespass, detinue, trover, nssault, menace, hnttery, wounding, imprisonment nnd replevin. The doctrine of acknowledgments extends only to actions in which debts are sought to he recovered. "To revive a deht hy promise and take a case out of the statute there must he nn antecedent debt." An acknowledgment of negligence in making on investment on insufficient security will not take a case out of the statute: Whitehead v. Howard, 2 Brod. & Bing. 372; 23 R. R. 471. An acknowledgment is inapplicahle to an action of trespass: Hurst v. Parker, 1 B. & Ald. 92; 18 R. R. 440; or an action of negligence hy an attorney: Short v. McCarthy, 3 B. & Ald. 626, 22 R. R. 503. In such cases the action, if maintainahle at oil, must he on the new promise.

Sec. 113 There are no statutory provisions respecting acknowledgments in actions for penalties, but such actions as concern the trade of merchandise between merchant and merchant, their factors and servants, are not now excepted from the provisions of R.S.O. 1914, c. 75, s. 55.

Sufficient Acknowledgments.—There must be one of three things to take a case out of the statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied, or, secondly, there must be an unconditional promise to pay the debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed: *per* Mellish, L.J.; Mitchell's Claim, L. R. 6 Ch. 828. From a simple acknowledgment a promise to pay may be implied, but if there be an express promise no promise can be implied from the acknowledgment: Meyerhoff v. Froehlick, 4 C. P. D. 63.

The following are instances of sufficient acknowledgments:—

Depositions in another action signed by the debtor: Roblin v. McMahon, 18 O. R. 219; Smith v. Poole, 12 Sim. 17. *Sed quære* whether this rule can be applied to cases not within R. S. O. 1914, c. 75, s. 54.

A promise to have the amount placed to the plaintiff's credit: Jones v. Brown, 9 C. P. 201.

"I will try to pay you a little at a time if you will let me. I am sure I am anxious to get out of your debt. I will endeavor to send you a little next week:" Lee v. Wilmot, L. R. 1 Ex. 364.

"I shall be obliged to you to send in your account made up to Xmas last. I shall have much work to be done this spring, but cannot give further orders until this be done." Again, "You have not answered my note. I again beg you to send in your account, as I particularly require it in the course of this week:" Quincey v. Sharpe, 1 Ex. D. 72.

"I return . . . about Easter. If you send me the particulars of your account, with vouchers, I shall have it examined and cheque sent to you for the amount due, but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim:" Skeet v. Lindsay, 2 Ex. D. 314.

"The old account between us which has been standing over so long has not escaped our memory, and so soon as we can get our affairs arranged we will see you are paid; perhaps in the meantime you will let your clerk send in an account of how it stands:" Chasemore v. Turner, L. R. 10 Q. B. 500.

"Send in your account:" Curwen v. Milburn, 42 Ch. D. 424.

"At present it is utterly out of my power to do anything; I am willing to pay you any reasonable interest to let the matter remain for the present:" Wilby v. Elgee, L. R. 10 C. P. 497.

A request for delay: Collis v. Stack, 1 H. & N. 605; Cornforth v. Smithard, 5 H. & N. 13.

"The best way would be for you to draw for the balance of your money:" Dabbs v. Humphries, 10 Bing. 446.

A promise to remit: Laag v. MacKenzie, 4 C. & P. 463.

"I don't see how it is possible for me to be indifferent on the matter of this debt. If I were able in any way to reduce it further, you may be quite sure I should do so:" *Re Buskin*, 15 R. 117.

"I shall go to my attorneys and pay the debt and settle it:" Triggs v. Newnham, 1 C. & P. 631.

Letters expressing present inability but a desire to pay: Grant v. Cameron, 18 S. C. R. 710; Lee v. Wilmot, 4 H. & C. 469; Dodson v. Mackay, 4 N. & M. 327; Bird v. Gammon, 3 Bing. N. C. 883; Morrell v. Frith, 3 M. & W. 402. Sec. 113.

A letter saying the demand is not a just one, and disputing the amount, but, "I am ready to settle the account whenever" the plaintiff "thinks proper to meet on the business:" Colledge v. Horn, 3 Bing. 119; 28 R. R. 606.

An admission of a debt coupled with a claim that it was discharged by a written instrument which proved not to amount to a legal discharge: Partington v. Butcher, 6 Esp. 66.

Asking an explanation of the items of the account: Sidwill v. Mason, 2 H. & N. 306.

Crediting the amount in a contra account: Waller v. Lacy, M. & G. 54.

A promise to pay interest on the amount claimed: Taylor v. Steele, 16 M. & W. 665.

Inserting the amount of the creditor's claim in a statement of the debtor's affairs given by him to the creditor: Holmes v. Mackrell, 3 C. B. N. S. 789.

Referring a creditor to an assignee for the benefit of creditors: Baillie v. Inchiquin, 1 Esp. 435; but see *Re* Mitchell's Claim, L. R. 6 Ch. 828.

It was considered doubtful on the authorities whether a letter from a surety asking the creditor to sue the principal debtor was a sufficient acknowledgment; Fisk v. Mitchell, 24 L. T. 272; Humpbreys v. Jones, 14 M. & W. 1; until the decision of the Court of Appeal in Stamford v. Smith, 1892, 1 Q. B. 765, set the matter at rest as not constituting an acknowledgment under the statute: King v. Rogers, 1 O. L. R., p. 73.

A debtor endorsing a barred note with his initials and the date: Bourdin v. Greenwood, L. R. 13 Eq. 281.

Giving a bill of exchange to the creditor: *Ex parte* Wilson, 1 Mont. D. & D. 586.

An account stated although the items are all on one side: House v. House, 24 C. P. 526.

An acknowledgment assuming a debt as to which there was a contention that it should be charged against a younger sister and brother is sufficient also for the purpose of the Statute: Lyon v. Tiffany, 16 C. P. 197.

An acknowledgment of an unsettled account on which something is or may be due: Banner v. Berridge, 18 Ch. D. 254; Prance v. Sympson, Kay 678; Curwen v. Milburn, 42 Ch. D. 424, or by recital in a reference of accounts to arbitration: Cheslyn v. Dalby, 4 Y. & C. 238: but see Hales v. Stevenson, 7 L. T. 317, 8 L. T. 798.

Conditional Promises.—If the promise to pay is conditional it must be shown that the condition has been performed: Turner v. Smart, 6 B. & C. 603; 30 R. R. 461; and it is not necessary for the debtor to say that except on performance of the condition he will not pay: Barrett & Sons, Ltd. v. Davies, 91 L. T. 736. The following are instances of conditional promises requiring proof of the happening of the specified event.

"I will pay as soon as I am able:" Seales v. Jacobs, 3 Bing. 638; Tanner v. Smart, 6 B. & C. 603; 30 R. R. 461.

Sec. 119. "As soon as in my power:" Haydon v. Williams, 7 Bing. 163; Hammond v. Smith, 33 Beav. 452;

"Shall remember you as soon as possible:" Gemmell v. Catton, 6 C. P. 57;

"When I may be able to pay you, I cannot now say:" Woodham v. Hollis, 3 L. J. (K.B.) 70;

"I shall be happy to pay as soon as convenient:" Edmunds v. Downes, 2 C. & M. 459;

"If you can recover from G., you can pay yourself thereout:" Ayton v. Rowles, 4 Bing. 105;

"If in funds I would immediately pay the money:" Richardson v. Barry, 20 Beav. 22.

"I will send you a cheque as soon as I can:" *Re* Bethell, 34 Ch. D. 561.

"I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments:" Meyerhoff v. Froelich, 3 C. P. D. 333; 4 C. P. D. 63;

"It will be impossible for me to pay you anything until my son's estate is wound up:" Roblin v. McMahon, 18 O. R. 210;

A recognition of a debt in a submission to arbitration is ineffective if the arbitration proves abortive: Hales v. Stevenson, 7 L. T. 317; 8 L. T. 798.

A statement by an executor that if there were assets the debt should be paid is conditional: Lampman v. Davis, 1 U. C. R. 179.

When the condition is performed, time immediately commences again to run although the creditor is not aware of its performance: Waters v. Thanet, 2 Q. B. 757; Bateman v. Brider, 3 Q. B. 574.

New Time of Payment.—Where the acknowledgment specifies a new time for payment, no promise can be implied to pay at an earlier date, *e.g.*, a promise to pay in two years: Wheatley v. Williams, 1 M. & W. 533; or after taxation of costs: Nichols v. Regent's Canal Co., 63 L. J. Q. B. 641; 71 L. T. 249, 836; Archer v. Leonard, 15 Ir. Ch. R. 267.

But coupling an acknowledgment with a suggestion as to a particular mode of payment will not of itself prevent an absolute promise being inferred: Evans v. Simon, 9 Ex. 282.

To Whom to be Made.—The acknowledgment must be made to the creditor or some person on his behalf: Goodman v. Boyes, 17 A. R. 528; Tanner v. Smart, 6 B. & C. 603; 30 R. R. 461; Rogers v. Quinn, 26 L. R. Ir. 136; Grenfell v. Girdlestone, 2 Y. & C. 662; Fuller v. Redman, 26 Beav. 614; Green v. Humphreys, 26 Ch. D. 474; not to a co-debtor or third person: Stamford Banking Co. v. Smith, 1892, 1 Q. B. 765; King v. Rogers, 1 O. L. R. 73.

An acknowledgment after the creditor's decease to the person who is entitled to and afterwards does take out Letters of Administration is sufficient: Robertson v. Burrill, 22 A. R. 356; Clark v. Hooper, 10 Bing. 480; see Beard v. Ketchum, 5 U. C. R. 114.

By Whom to be Made.—The acknowledgment must be made by the "principal party or his agent:" R.S.O. 1914, c. 75, s. 54; Harlock v. Ashberry, 19 Ch. D. 539.

An acknowledgment by a wife who has been accustomed to act as the husband's agent in purchasing the goods and managing the business

is sufficient: Anderson v. Sanderson, 2 Stark. 204; 17 R. R. 618; 10 R. R. 703; Gregory v. Parker, 1 Camp. 394, 10 R. R. 712. Sec. 113.

An acknowledgment by an executor or administrator is sufficient: Smith v. Poole, 12 Sim. 17; Fordam v. Wallis, 10 Hare 217; and an acknowledgment by one of several executors is good: *Re* MacDonald, Dick v. Fraser, 1897, 2 Ch. 181; Fordham v. Wallis, 10 Hare 217; but see Tullock v. Dunn, Ry. & Mood. 416; 27 R. R. 765; Scholey v. Walton, 12 M. & W. 510; but not an acknowledgment or part payment by an executor *de son tort*: see notes, *post*.

After judgment for administration the personal representative has no right to give an acknowledgment: Philips v. Beal, 32 Beav. 27; see Midgley v. Midgley, 1893, 3 Ch. 282.

A mere advertisement for creditors by a personal representative is insufficient, but if the advertisement states he will pay all debts justly due it may be sufficient: Scott v. Jones, 1 Russ. & Myl. 255; 4 Cl. & F. 382.

An executor *de son tort* cannot make an acknowledgment binding on the rightful administrator: Grant v. McDonald, 8 Gr. 468; Bontwright v. Bontwright, L. R. 17 Eq. 71; Ellin v. Ellis, 1905, 1 Ch. 613; and see cases in Snider's Annotations, p. 258.

Signature.—The acknowledgment must be signed. But it may be at the top of an account in the debtor's handwriting: Holmes v. Mackrell, 3 C. B. N. S. 789.

An unsigned acknowledgment enclosed in a letter written by the debtor's wife was held to be insufficient: Ingram v. Little, 1 Cab. & E. 186.

Must be Made Before Suit.—The acknowledgment must be made before action: Bateman v. Pinder, 3 Q. B. 574; see Lucas v. Dixon, 22 Q. B. D. 357.

Parol Evidence.—Where no amount is specified parol evidence may be given to identify the debt referred to and the amount thereof: Lechmere v. Fletcher, 1 C. & M. 623; 3 Tyr. 450; Dickenson v. Hatfield, 5 C. & P. 46; Hartley v. Wharton, 11 A. & E. 934; Chesiyn v. Dalby, 4 Y. & C. 238; Spickernell v. Hotham, Kay 669; Barwick v. Barwick, 21 Gr. 39.

If the acknowledgment is without date parol evidence may be given to show when it was made: Edmunds v. Downs, 2 C. & M. 459; and if it has been lost, parol evidence may be given of its contents: Haydon v. Williams, 7 Bing. 163; Read v. Price, 1909, 2 K. B. 724.

Parol evidence may be given to show that the facts attending the acknowledgment were such as to negative a promise to pay, as where the parties agreed to a set-off: Cripps v. Davis, 12 M. & W. 159.

The question should be left to the jury as to whether the acknowledgment refers to the debt: Frost v. Bengough, 1 Bing. 267, but if there was only one debt it will be presumed to do so: Barwick v. Barwick, 21 Gr. 39; Evans v. Davies, 4 A. & E. 840.

If the acknowledgment is, owing to extrinsic facts, ambiguous, it may be left to the jury to say whether a promise can be implied therefrom: Lloyd v. Maund, 2 T. R. 760; Linsell v. Bonsor, 2 Bing. N. C. 241; Morrell v. Frith, 3 M. & W. 402; but ordinarily the construction and effect of the acknowledgment is for the judge: Sidwell v. Mason, 2 H. & N. 306; Morrell v. Frith, 3 M. & W. 402.

Sec. 113. **Insufficient Acknowledgments.**—Two tests must be applied to an acknowledgment: First, the acknowledgment must be clear in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference: Secondly, supposing that it is an acknowledgment of a debt which would, if it stood by itself be clear enough, still if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition; because not merely is there found in the words something that expresses less than a promise to pay; but because the words express the lesser in such a way as to exclude the greater: Green v. Humphreys, 26 Ch. D. 474.

The following are instances of insufficient acknowledgments:

"I cannot afford to pay my new debts, much less my old ones:" Knott v. Farren, 4 D. & Ry. 179.

"I will see my attorney and tell him to do what is right:" Miller v. Caldwell, 3 D. & Ry. 267.

"I know that I owe the money, but the bill I gave was on a 3d. receipt stamp, and I will never pay it:" A'Court v. Cross, 3 Bing. 329.

"Send me your bill, and if just I will not give you the trouble of going to law:" Spong v. Wright, 9 M. & W. 629.

"You had better look to Mr. Rogers for payment of that note" (Rogers being a co-maker); or "Do not take any further step till I can hear from Mr. Rogers, to whom I have written concerning the matter:" King v. Rogers, 1 O. L. R. p. 79.

"I thank you for your very kind intention to give up the rent of T. R.," (an estate of his wife, the rent of which was being applied on the debt.) "But I am happy to say at that time, both principal and interest will have been paid in full:" Green v. Humphreys, 26 Ch. D. 474.

"I have a receipt in full of all demands. I shall search for it and let you know in the event of my not being able to find it:" Brydges v. Plumptre, 9 D. & Ry. 746; Birk v. Guy, 4 Esp. 184.

Where a debtor disputed the earlier items in the account, but admitted the subsequnt ones, and enclosed a cheque therefor, no implication of a promise to pay the earlier items could be raised: Brigstocke v. Smith, 1 C. & M. 483; 3 Tyr. 445; 38 R. R. 676.

An unaccepted offer to pay in goods: Cawley v. Furnell, 12 C. B. 291; or land: Young v. Moore, 23 U. C. R. 151; or shares: Lowndes v. Garnett & Moseley Gold Mining Co., 10 L. T. 329.

The insertion of a debt in a bankrupt's statement of affairs: Everett v. Robertson, 1 E. & E. 16; Courtney v. Williams, 3 Hare 539; Ex parte Topping, 4 De G., J. & S. 551; Pott v. Clegg, 16 M. & W. 321.

An offer "without prejudice" if unaccepted: Mitchell's Case, L. R. 6 Ch. 822.

"I acknowledge the receipt of the money, but the testatrix gave it to me:" Owen v. Wolley, B. N. P. 148.

An admission made to a person who at the same time purported to sign a discharge of the debt: Goate v. Goate, 1 H. & N. 29.

Where the fair effect of a letter is that the writer is not certain whether the debt is owing: Collinson v. Margesson, 27 L. J., Ex. 305; McCormack v. Berzey, 1 U. C. R. 388.

An unaccepted proposal offering to set-off a claim of the debtor: Francis v. Hawkesley, 1 E. & E. 1052; see Williams v. Griffith, 3 Ex. 335.

An account stated between the debtor and others though including the creditor's account: Nash v. Hill, 1 F. & F. 198. Sec. 113.

Entries made in debtor's books: Jackson v. Ogg, 1 Johns. 397.

A qualified acknowledgment with a threat to do nothing if the creditor proceeds: Fearn v. Lewis, 6 Bing. 340; 31 R. R. 434.

A statement that he owed nothing, but offering $50 rather than have trouble: Spalding v. Parker, 3 U. C. R. 66.

"The notes are genuine, but I am under the impression they were paid:" Grantham v. Powell, 6 U. C. R. 404.

"I thought that note matter was settled long ago:" Wood v. Tromanhauser, 32 O. L. R. 370.

The debtor's attorney wrote that "the debt has not been paid, but the defendant has no property, and I cannot help the debt being unpaid:" Dougall v. Cline, 6 U. C. R. 546.

An unaccepted offer of a composition: Barnes v. Metcalf, 17 U. C. R. 388; Gibbon v. Bagshott, 5 C. & P. 211.

For further instances see Jupp v. Powell, 1 C. & E. 349; Roberts v. Roberts, 3 C. & P. 206; Re Wolmershausen, 62 L. T. 541; Cassidy v. Firman, 15 W. R. 432; Routledge v. Ramsey, 8 A. & E. 221; Crawford v. Crawford, Ir. R. 2 Eq. 166.

Acknowledgment of Payment by Joint Contractor.—An acknowledgment or part payment by a partner of a partnership debt during the partnership would take the debt out of the statute: Goodwin v. Parton, 41 L. T. 91; 42 L. T. 568; Watson v. Woodman, L. R. 20 Eq. 730; but not after dissolution: Thompson v. Waithman, 3 Dr. 628. See R. S. O. c. 75, s. 56.

The provisions of the above section, s. 56, as to the executors being chargeable on an acknowledgment or payment made by one, mean "personally chargeable:" *Re* Macdonald, 2 Ch. 187, 188; *Re* Hollingshead, 37 Ch. D. 651; and so, under the provisions of the above section, an acknowledgment by one of several joint contractors, or executors or administrators, does not bind the others, so as to make them personally liable; but an acknowledgment of a debt by one executor or administrator as such, keeps the debt alive as against the other executors as such: *Re* Macdonald, *supra*.

Endorsements.—R. S. O. 1914, c. 75, s. 58, is similar to Lord Tenterden's Act (9 Geo. IV. c. 14) s. 3.

An endorsement was formerly admissible as evidence of payment as being a statement made by a deceased person against his pecuniary interest: Briggs v. Wilson, 5 D. M. & G. 12.

An entry or declaration in writing against the pecuniary interest of the deceased in his books or in any other document than that containing the contract is still admissible: Bradley v. James, 13 C. B. 825; but not if made after the debt was barred: *Ib.*; Newbould v. Smith, 29 Ch. D. 882.

Acknowledgment by Part Payment.—A payment to take a case out of the statute of James, and so of the Ontario Limitations Act, must be clear and distinct: Notman v. Crooks, 19 U. C. R. 105. Payments should, in the absence of specific directions by the creditor, be applied on the earlier items of an account, not barred at the time of payment, but before suit had subsequently become so: Cathcart v. Haggart, 37 U. C. R. 47.

Sec. 113. The payment must be made on account of the debt sued for: Morgan v. Rowlands, L. R. 7 Q. B. 493, and cases cited.

Payment of interest revives the principal: Wilson v. Rykert, 14 O. R. 188; but a compulsory payment of interest does not save the statute: *Ib.* The payment must be such as to warrant the jury in inferring an intention to pay the rest: Boultbee v. Burke, 9 O. R. 80; and if the defendant on making a part payment should say that, "he owes the money, but will not pay it," it will not be sufficient unless the jury think the words were spoken in jest: Wainman v. Kynman, 1 Ex. 118.

Payment to an assignor, after assignment of the debt, cannot be used as an acknowledgment in favor of the assignee: Stamford Banking Co. v. Smith, 1892, 1 Q. B. 765. Payment of a dividend by an assignee for the benefit of creditors, and money received by the holder of a note from the maker within six years from the commencement of the action therefor, in payment of goods given before that period by the maker, as security for the note, is not a payment within the meaning of the authorities: Fiskin v. Stewart, 33 C. L. J. 41.

If there are two debts and a payment is made generally, it is for the judge, or if a jury, for them, to say whether or not there is a payment on each of them: Walker v. Butler, 6 E. & B. 506; or they may be appropriated to the whole indebtedness: Cathcart v. Haggart, 37 U. C. R. 47; Stewart v. Gage, 13 O. R 458.

The creditor cannot, without the debtor's knowledge or assent, appropriate a payment to any particular debt to take it out of the statute; but it ought *prima facie* to be taken as paid on the debt not barred: Nash v. Hodgson, 25 L. J. Ch. 186; 6 DeG. M. & G. 474, 482.

The following have been held not to be such payments as are required to take the debt out of the statute: Payment of a dividend by an assignee under the Insolvent Act: Davies v. Edwards, 7 Ex. 22; nor payment by the inspectors of the debtors' inspectorship deed: Ex parte Topping, 34 L. J. Bky. 44; nor payment under a judgment in a defended County Court action: Morgan v. Rowlands, L. R. 7 Q. B. 493; nor payment by the defendant's wife on account where the evidence showed that the husband had expressly forbidden her to make any such payment: Robertson v. McKerrigan, 29 N. S. R. 315. The payment may be made by bill or note: Turney v. Dodwell, 3 E. & B. 136; and it operates from the delivery and not from the falling due of the bill: Irving v. Veitch, 3 M. & W. 90. The part payment must be by the debtor or some one authorized by him, and merely realizing by the creditor on a security is not such payment, as will prevent the running of the statute: Bank of Montreal v. Lingham, 5 O. L. R. 519; 7 O. L. R. 164.

It is not necessary that money should pass if the transaction amounts to payment: Maber v. Maber, L. R. 2 Ex. 153; House v. House, 24 C. P. 526; see Amos v. Smith, 1 H. & C. 238.

If a payment of part is made as the whole amount due, it does not take the rest of the claim out of the statute: Waugh v. Cope, 6 M. & W. 824.

A payment made by a third person on account of the debt to the creditor cannot be appropriated by the latter so as to bar the statute: Waller v. Lacey, 1 M. & G. 54; and see Clark v. Bellamy, 27 A. R. 435. So payment by an executor *de son tort* does not bar the statute: Grant v. McDonald, 8 Gr. 478; Boatright v. Boatright, L. R. 17 Eq. 71; Taylor v. Holland, 1902, 1 K. B. 676, 681; Bradshaw v. Widdington, 1902, 2 Ch. 430, 450; Ellis v Ellis, 1905, 1 Ch. 613; Trust

and Loan v. Stevenson, 21 O. R. 571; 20 A. R. 66; except to the extent of goods which have coma into the hands of such executor, aa to which such executor cannot set up the statute after such acknowledgment: Cook v. Dodds, 6 O. L. R. 608. Part payment can he proved hy the oral admission of the defendant: Cleave v. Jones, 6 Ex. 573; but sea s. c. 7 Ex. 421; or hy his pleadings: Balldon v. Walton, 1 Ex. 617. Sec. 113.

Payment of interest by a devisee for life, on a simple contract debt of his testator is sufficient in an administration action to keep the debt allve agaiast all persons entitled in remainder: Re Hollingshead, Hollingshead v. Webster, 37 Ch. D. 651.

Payment of interest hy a principal on a specialty debt will prevent the bar applying to the liahility of a surety: Allison v. Frisby, 43 Ch. D. 106; hut not where the debt is on a note: Paxton v. Smith, 18 O. R. 178.

Where a pnyment is made hy one of two joint debtors, with tha knowledge and consent of the other, the operation of the statute in favor of the latter is not prevented: Jackson v. Woolley, 8 E. & B. 783.

Where the defendant authorized an agent to offer plaiutiff n part of the debt in discharge of the whole nnd the agent exceeded his authority and paid the sum offered in part discharge, it was held that it did not bar the statute: Linsell v. Bonsor, 2 N. C. 241. But, generally, payment by an authorized agent is payment hy the principal, and the authority is a question for the jury: Roscoe's N. P. 653.

In order to render the crediting of an account against the plaintiff evidence of pnyment hy him of so much on an account due to the plaintiff so aa to take the case out of the statute, it must appear that the defendaut clearly assented to its being considered a payment: Ball v. Parker, 39 U. C. R. 488; 1 A. R. 593.

An executor may, in his discretion, pay a debt barred hy the Statute of Limitations: Lewis v. Rumney, L. R. 4 Eq. 451; Aiston v. Trollope, L. R. 2 Eq. 205; hut not after a judicial decision that it is not recoverable: Midgley v. Midgley, 1893, 3 Ch. 282; nnd any person interested in the estate as a creditor, legatee or next of kin, may set up the statute in an administration suit: Re Wenham, Hunt v. Wenham, 1892, 3 Ch. 59; hut there is no way by which the executor or administrator can be compelled to do so. See further on this subject, notes to section 121, "Executors nnd Administrators."

Where part of plaintiff's own demands stated in his particulars are barred hy the statute, he has a right to place against these the items of credit appearing in his particulars to be beyond six years: Ford v. Spafford, 8 U. C. R. 17.

A debtor unable to pay his debts from his own money, paid within three months of his being adjudged a bankrupt part of a debt barred hy the Statute of Limitations, with the object of renewing the debt and enabling the creditor to prove in the bankruptcy for the balance due. The debt had always been treated by the debtor and the creditor as a subsisting debt, and one which it was intended should he ultimately paid. Held, that there was n sufficient part payment to take the debt out of the statute: Re Lane, Ex parte Gaze, 23 Q. B. D. 74.

Executors.—If a cause of action accrues after the death of a creditor the statute only commences to run on the appointment of an executor or administrator: Grant v. McDonald, 8 Gr. 468; Atkinson v.

Sec. 113. Third Equitable Benefit Society, 25 Q. B. D. 377; Stevenson v. Hodder, 15 Gr. 570; and interest is recoverable for the whole period from the time the cause of action arose: Ib. If the cause of action accrued in the testator's lifetime the statute then begins to run, whether the will is proved or not: Boatright v. Boatright, L. R. 17 Eq. 71; see also Re Hollingshead, 37 Ch. D. 651. An order or judgment for administration of the estate creates a fresh starting point under the Statute of Limitations: Uffner v. Lewis, 27 A. R 242.

The statute does not bar the claim of any executor against the estate of the testator: Emes v. Emes, 11 Gr. 325.

A person entitled to letters of administration of a deceased person may bring an action before obtaining such letters and prevent the Statute of Limitations from being a bar: Trice v. Robinson, 16 O. R. 433: Chard v. Rae, 18 O. R. 375.

Trustees.—The Statute of Limitations applies now to any executors, administrators and trustees, except, (1) where the claim is founded upon any fraud or fraudulent breach of trust to which he was party or privy (*see* Hughes v. Hughes, 6 A. R. 373); (2) where the claim is to recover trust property, or the proceeds thereof, still retained by him or previously received by him and converted to his use: R. S. O. 1914, c. 75, s. 47. Where no existing Statute of Limitations applies, the trustee or person claiming under him, is at liberty to plead the lapse of time as a bar in like manner, and to the like extent, as if the claim had been in an action of debt for money had and received: Ib. Directors who by mistake or carelessness misapply money under their control belonging to the company may, in the absence of fraud, rely on that section: *Re* Lands Allotment Co., 1894, 1 Ch. 616. An action to compel trustees to replace moneys lost through breaches of trust is an action to recover money, and will be barred at the expiration of six years from the breach of trust, or six years from the time the interest of the plaintiff beneficiary became an interest in possession: *Re* Bowden, 45 Ch. D. 444; *Re* Swain, 1891, 3 Ch. 233; *Re* Page, 1893, 1 Ch. 304: *Re* Somerset, 1894, 1 Ch. 231.

An acknowledgment will take the case out of the statute but it must be an acknowledgment of a breach of trust and a liability of the trustee in consequence thereof: Want v. Campain, 9 T. L. R. 254; Stephens v. Beatty, 27 O. R. 75; and, therefore, paying interest received from a mortgagor is not an acknowledgment of a liability for the insufficiency of the investment: *Re* Somerset, 1894, 1 Ch. 231; but payment by a solicitor as the agent of the trustees of moneys as interest on alleged investments will be sufficient: Clark v. Bellamy, 30 O. R. 532.

A tenant for life is barred at the expiration of six years: Stewart v. Snyder, 30 O. R. 110. A new trustee cannot recover from the old trustees for a breach of trust more than six years old, he not being a beneficiary within R.S.O. 1914, c. 75, s. 47 (b): *Re* Bowden, 45 Ch. D. 444. As between trustees time does not begin to run until the liability is established, so that an action for contribution may be brought within six years from the judgment establishing the liability: Robinson v. Harkin, 1896, 2 Ch. 415.

Where trustees have paid out the trust money innocently although to a wrong person for a wrong purpose the Statute of Limitations will be a bar: How v. Earl Winterton, 1896, 2 Ch. 626; or where, though the breach of trust is fraudulent, if they derived no benefit from it and had no knowledge of and were not concerned in it: Thorne v. Heard, 1895, A. C. 495. If the trust money is "still retained" by the

Sec. 113.

trustee, the statute will not be a bar: R.S.O. 1914, c. 75, s. 47. The expression "still retained" means actually in his hands or under his control: Thorne v. Heard, 1893, 3 Ch. 530; 1895, A. C. 495; or not accounted for: Briggs v. Wilson, 24 A. R. 521; Briggs v. Freehold Loan and Savings Co., 26 A. R. 232. Money lent by trustees to a mortgagor in breach of trust, is not converted by one of them, though paid into a bank in which he is a partner, by the mortgagor in part discharge of a debt: *Re* Gurney, 1893, 1 Ch. 590.

The section will not protect a member of a firm where one partner has embezzled trust moneys, entrusted to the firm: Moore v. Knight, 1891, 1 Ch. 547.

Except where R.S.O. 1914, c. 75, s. 48 (1), is applicable, no claim of a *cestui que trust* against his trustees for any property held on an express trust or in respect of any breach of such trust, is barred by any Statute of Limitations: same statute, s. 48 (1); see Cook v. Grant, 32 C. P. 511; Coyne v. Broddy, 15 A. R. 159. And a claim against an agent of a trustee for money received by him with notice of the trust would not be barred: Re Bell, Lake v. Bell, 34 Ch. D. 462.

The above statute, section 48 (1), expressly includes, in addition to the trustee, a person claiming through him, but, apart from this provision, an action by one *cestui que trust* against another to recover money paid to such *cestui que trust* by mistake, is a common law action for money had and received and must be brought within six years: *In re* Robinson, 1911, 1 Ch. 502, but relief could be given if the claim were made in an action in which the court was administering the trust estate and there were assets to which the overpaid *cestui que trust* was entitled by means of which the court could make an adjustment: *Ibid.*

Ratification of Contracts Made by Infants.—A ratification which by the statute is required to be in writing is a ratification of a promise or contract which if enforceable would result in a personal liability. It has been held that an obligation entered into during infancy, if incident to property retained or benefits received after majority, may be ratified by acquiescence or inaction without writing, *e.g.*, a contract to take shares in a company may be ratified by retention of the shares after majority and executing a transfer thereof: *Re* Constantinople and Alexandria Hotels Co., L. R. 7 Ch. 302; and also that a covenant made by an infant on entering the service of an employer not to carry on the same business is ratified in equity by his continuing in the service for eighteen months after he became of age, and a new promise may be inferred: Brown v. Harper, 68 L. T. 488; Cornwall v. Hawkins, 26 L. T. 607; but giving written notice of intention to leave shortly after majority is not a ratification in writing within the statute: Birkin v. Forth, 33 L. T. 532.

The promise or ratification to satisfy the statute must be not merely by acts alone, but in writing: Louden v. Milmine, 14 O. L. R. 534, 15 O. L. R. 53; and to be a sufficient writing it must amount to "an admission of an existing liability" or debt "binding upon the debtor:" Rowe v. Hopwood, L. R. 4 Q. B. 1; *Re* Hodson, 1894, 2 Ch. p. 425; and must be "an enforceable promise:" Maccord v. Osborne, 1 C. P. D. 568; Louden v. Milmine, *supra*. But where property has passed and the infant avails himself of his right to avoid the contract upon the faith of which he obtained the property which he has in his possession at the time of such repudiation, it thereupon re-vests in the

Sec. 114. vendor, and an action will lie for its value: Louden v. Milmine, 15 O. L. R. 53; see also Beam v. Beatty, 3 O. L. R. 345, 4 O. L. R. 554.

A confirmation after majority of part of a marriage settlement is confirmation of the whole: Davies v. Davies, L. R. 9 Eq. 468; Milner v. Harewood, 18 Ves. 277; Edwards v. Carter, 1893, A. C. 360. Acceptance of rent after majority is confirmation of a lease made during infancy: Smith v. Low, 1 Atk. 489; and so would be a mortgage of the property referring to the lease: Story v. Johnston, 2 Y. & C. 586; Lord Advocate v. Wemyss (1899), W. N. 124. Remaining after majority in possession of lands taken in exchange during infancy and afterwards disposing thereof is sufficient confirmation of the exchange: Miller v. Ostrander, 12 Gr. 349; see also Pollock on Contracts 5th ed. 52-73.

Care must be taken also to distinguish the cases where it has been said the infant is liable in equity for falsely representing himself to be of full age. The expression is only a compendious one which must be interpreted with reference to what were the functions of a Court of Equity. An infant who had induced trustees to pay money to him on his false representation as to age would not be allowed to plead his infancy as a bar to a release executed by him: Overton v. Banister, 3 Hare 503; and if he had obtained property on such representation, he might be ordered to redeliver it: Clarke v. Cobley, 2 Cox 173. But the representation does not amount to a contract, nor make the infant liable as on a contract, or for a debt, therefore an infant who obtains a lease by falsely representing himself of age is liable neither on the lease nor for use and occupation: Lempriere v. Lange, 12 Ch. D. 675.

Merely executing a contract, *e.g.*, a mortgage, does not amount to a misrepresentation of age: Confederation Life Assn. v. Kinnear, 23 A. R. 497. See the exhaustive collection of authorities on the Statute of Limitations in Snider's Annotations, pp. 236, 254, *et seq.*

WITNESSES AND EVIDENCE.

Subpœnas.

Parties may obtain subpœnas from clerk.

114. A party may obtain from the clerk of any division court in the county a subpœna with or without the clause for the production of books, papers, and documents, requiring any witness, resident within Ontario or served with the subpœna therein, to attend at a specified court or place before the judge, or an arbitrator appointed by him under the provisions hereinafter contained, and the clerk when requested by a party or his agent shall furnish copies of such subpœna. 10 Edw. VII., c. 32, s. 114.

May Obtain.—Formerly it was necessary to issue a subpœna from the high court in any division court suit when the party proposed to be subpœnaed resided outside the county. But, under this section, a subpœna may be obtained from any division court in the county in which the action is brought, for service on any witness residing or served (even though not a resident) within the province. For form of subpœna, see Form 36. Formerly a witness, even if found in court, might refuse to be sworn unless subpœnaed: Bowles v. Johnson, 1 W. Bl. 36; but under section 116, every person

In court must give evidence if called upon. It seems, however, that any witness is now entitled to be paid for bis expenses and loss of time before giving evidence: *Re* Workingmen's Mut. Society, 21 Ch. D. 831. Sec. 114.

It is very questionable whether or not the subpœna can be issued in blank: Barber v. Wood, 2 M. & Rob. 172; but see *Re* Gerow v. Hoyle, 28 O. R. 405.

The subpœna must name the place of trial: Milson v. Day, 3 M. & P. 333; and the parties to the cause: *Doe d.* Clarke v. Thomson, 9 Dowl. 948.

If notice of change of place is posted up at the place designated in subpœna, witness is bound to attend at the other place: Chapman v. Davis, 1 Dowl. N. S. 239.

It extends to the whole sittings if more days than one: Scholes v. Hilton, 10 M. & W. 15.

The names of all witnesses should be inserted in the original: Mullett v. Hunt, 1 C. & M. 752; and any number may be inserted in it: section 115.

Service of Subpœna.—It was held in Comstock v. Harris, 12 P. R. 17, that a witness ordinarily resident in a foreign country may be served here with a subpœna, and is liable for non-attendance. Section 116 now expressly so provides. If the conduct money paid him is insufficient, he must object at the time of payment.

It need not be personally served but may be left at the "usual place of abode" of the witness: section 115: but if it is intended to hold him liable for contempt or attachment, the subpœna must be personally served by delivering a copy to and leaving it with him, and the original of the document he is required to obey must be shown to him if demanded: Woods v. Fuller, 10 O. L. R. 643; Pitcher v. King, 2 D. & L. 755; Blakely v. Blaase, 12 P. R. 565; see also notes to sections 103, 108 and 114. These requirements must be observed, even if the person served is an attorney or solicitor: Smith v. Truscott, 6 M. & G. 267. In any case, if the witness requires to see the original document at a reasonable time afterwards (see notes to section 115), and is refused, service is defective: Westley v. Jones, 5 Moore, 162. The copy must in all cases be left with, and not merely shown to, the witness: Thorpe v. Gisborne, 11 Moore, 55, *Re* Holt, W. N. (1879) 48; and there must be no mistake in the day: *Doe d.* Clarke v. Thompson, 9 Dowl 948.

Witness Fees.—Service is not effective without the necessary witness fees being paid or tendered: Fuller v. Prentice, 1 H. Bl. 49. The fees include expenses of going to, staying at, and returning from the trial: *Ib.*; Newton v. Harland, 1 M. & G. 956; see Tariff of Witness Fees, Form 3, *post*.

If the attendance of the witness becomes unnecessary by settlement of the case or otherwise, and he is informed of it before expense is incurred, the sum may be recovered back: Martin v. Andrews, 7 E. & B. 1. The fees are fixed by tariff, and no distinction can properly be made in division of parts in amount as to any class of witnesses: Dartnell v. Prescott, 7 U. C. R. 430; except in the case of a witness resident in Ontario, but not then in the county in which the court is situated, who is entitled to witness fees according to the County Court Tariff: section 117; and except in the case of professional or expert witnesses; as to which, see notes to section 115. If a larger

Sec. 114. sum than what a witness is entitled to is *bona fide* demanded, he will not be brought into contempt: Newton v. Harland, *supra*. If a party refuse money tendered him, saying he will pay his own expenses, he is subject to the same consequences as if paid: Gough or Goff v. Miller or Mills, 2 D. & L. 23. The fee need not be tendered to the witness at the time of service; a reasonable time before the sittings is sufficient: Webb v. Page, 1 C. & K. 23. Where a witness had been brought to the place of trial by one party, the other, finding him there, subpœnaed him, it was held that without tender of expenses he could do so: Edmonds v. Pearson, 3 C. & P. 113; and that the witness could not refuse to be cross-examined on that account: *Ib.* In a later case, however, it was held that the party calling him was bound to pay all his expenses: Allen v. Yoxall, 1 C. & K. 315. Service must be made a reasonable time before the trial: Barber v. Wood, 2 M. & Rob. 172. What is reasonable must depend on the circumstances of each case: Mansell v. Ainsworth, 8 Dowl. 689; and is in all cases a question for the court: Barber v. Wood, *supra*. If notice is given witness that cause not yet tried, he is bound to attend, though *after* the day mentioned in subpœna: Davis v. Lovell, 4 M. & W. 678; but see Grantham v. Bishop, 1 C. P. 217; though not sufficient to bring him into contempt: Alexander v. Dixon, 1 Bing. 366. Service may be made any hour of the day or night, but not on Sunday: R.S.O. 1914, c. 56, s. 124 (applicable by section 226, and Rule 2 (7) of the Division Courts Act): R. v. Leominster, 2 B. & S. 391, and cases cited. If the witness be a married woman, the money should be tendered her, and not her husband: Arch. Prac. 12th ed. 351. A witness may also maintain an action for his fees against the party who subpœnaed him, though he refuses to give evidence because such fees are not paid him, and he was thereupon not examined: Hallet v. Menzs 13 East, 15; Pell v. Daubeny, 5 Ex. 955. The solicitor is not responsible unless he agreed to be: Robins v. Bridge, 3 M & W. 114. A witness should be served a reasonable time to allow him to put his affairs in order: Hammond v. Stewart, 1 Str. 510; but urgent domestic business is no excuse: Gough or Goff v. Miller or Mills, 2 D. & L. 23. A summons may be served in a court of justice on a party subpœnaed to give evidence in his own cause: Poole v. Gould, 1 H. & N. 99. Difficulty in serving does not dispense with the necessity of service: Barnes v. Williams, 1 Dowl. 615. If witness paid by both parties, neither can recover it back: Crompton v. Hutton, 3 Taunt. 230. A party to a cause, *about to attend the trial* on his own account, has no right to conduct money or expenses when subpœnaed by the other side: Reed v. Fairless, 3 F. & F. 958. A party to a cause is not entitled to his fees as a witness unless he expressly attended to give evidence on his own behalf, and not to superintend the cause: Howes v. Barber, 18 Q. B. 588, and the affidavit of disbursements should distinctly show that fact: see note at foot of Form 29 of affidavit.

Default of Attendance.—A witness duly subpœnaed and paid proper witness fees, and who makes default without lawful and reasonable impediment, is liable, in addition to any other penalties, to an action for the consequent damage by the person who subpœnaed him: R.S.O. 1914, c. 76, s. 16. He is also liable to fine or imprisonment as provided by the above section 116. A witness should be called on his subpœna: R. v. Stretch, 3 A. & E. 502; Dixon v. Lee, 3 Dowl. 259. But if it can be shown he did not attend, it is sufficient: Goff v. Mills, 2 D. & L. 23. It is a sufficient excuse that he was too ill to attend: *Re* Jacobs, 1 H. & W. 123; Scholes v. Hilton, 10 M. & W. 15; but it

is no excuse that he would have been in time if a previous cause on the list had not unexpectedly gone off: R. v. Fenn, 3 Dowl. 540; and that another person had answered for him and would have fetched him in a few minutes. Before proceedings for contempt can be taken, it must appear that he was a material witness: Thisley v. Porter, 2 M. & W. 822. To sustain an action against witness, if party cannot proceed with trial, it is sufficient without calling jury or otherwise entering on the trial: Lamont v. Crook, 6 M. & W. 615. If a witness has received full fees from one side, and, when served with subpœna on the other, consents to receive a nominal sum, he is still liable to the latter if he does not attend: Betteley v. McLeod, 3 Bing. N. C. 405, but actual damage must be shown in any case: Coulling v. Coxe, 6 C. B. 703; Yeatman v. Dempsey, 9 C. B. N. S. 881. Sec. 114.

Privilege from Arrest.—A witness going to or returning from a trial is privileged from arrest on civil process: Montagu v. Harrison, 3 C. B. N. S. 292; Atty.-Gen. v. Leathersellers Co., 7 Beav. 157; but not from an arrest on criminal process: Lord Wellesley's Case, 2 Rus. & Myl. 639; or for contempt of court: *Re* Preston, 11 Q. B. D. 545, at p. 556.

A warrant for the arrest of a witness issued by a justice in default of distress for non-payment of rates is civil process, and the court, before which the witness is to appear or has appeared, may order his discharge: Hoberu v. Fowler, 9 T. L. R. 6.

Witness in Gaol.—Con. R. 230 applies, the case not being specially provided for by the Division Courts Act or Rules: section 226; and an order may be obtained for the attendance of a witness who is confined in prison. The party requiring him will, however, be ordered to pay all expenses: Spellman v. Spellman, 10 C. L. T. 20. Forms of affidavit and order, Nos. 167-168.

Adverse Witness.—An adverse witness is one who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the court: Coles v. Coles, L. R. 1 C. P. 70. A person whose evidence turns out to be unfavorable to the party calling him, is not, for that reason merely, an "adverse witness": he must, in the opinion of the judge, be adverse in the sense of showing a hostile mind: Greenough v. Eccles, 5 C. B. N. S. 786.

A witness who, in the opinion of the judge, proves "adverse," may be contradicted by other evidence, or, by leave of the judge, an inconsistent statement made at other times may be proved, but the circumstances of such statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statement: R.S.O. 1914, c. 76, s. 20. The discretion of the judge, at the trial, is absolute and cannot be reviewed: Rice v. Howard, 16 Q. B. D. 681.

Where a surgeon had given a certificate of serious injury to a plaintiff and on being called by him contradicted it, and alleged it to be collusively given, he was allowed to be treated as adverse: Martin v. Travellers' Ins. Co., 1 F. & F. 505. And where a witness had given a different statement to the party's solicitor, he was allowed to be treated as adverse, but not with a view to discredit him generally: Faulkner v. Brine, 1 F. & F. 254; Amstell v. Alexander, 16 L. T. 830. But section 20 of the above statute (formerly R.S.O. 1897, c. 73, s. 20) is not intended to apply to the loose statements made with a view to prepare the evidence: Reed v. King, 30 L. T. 290; and by the same section, although a witness may disprove the case of the party calling him, it may nevertheless be proved by other witnesses, such witnesses not being

Sec. 114. called to discredit him, but to contradict him on the material facts: Ewer v. Ambrose, 5 D. & R. 629; Friedlander v. London Assurance, 4 B. & Ad. 103. A party calling an adverse litigant cannot cross-examine him without the leave of the judge: Price v. Manning, 42 Ch. D. 372. See also Coles v. Coles, L. R. 1 P. & D. 70; Bradley v. Richards, 8 Bing. 57.

As to cross-examination of witnesses generally, see R.S.O. 1014, c. 76, ss. 17-20.

Production of Books, etc.—This is called a *duces tecum*. A witness called to produce a document need not be sworn; nor unless made a witness in the ordinary way can he be cross-examined: Perry v. Gibson, 1 A. & E. 48; and if sworn by mistake the same rule applies: Rush v. Smith, 1 C. M. & R. 94. It is incumbent on the witness to bring the "books, papers and documents" with him, and if he does not he is *prima facie* in default: Amey v. Long, 9 East, 473. Having a lien on them was held no excuse for not producing them: Thompson v. Mosley, 5 C. & P. 501, *sed quære*: see Kemp v. King, 2 Moo. & Rob. 437: Doe v. Ross, 7 M. & W. 102; *Ex parte* Paine & Layton, L. R. 4 Ch. 215; nor can he show that the document was not material: Doe v. Keily, 4 Dowl. 273. If a witness who is sworn has a document with him in court, he is bound to produce it, though not served with a *subpœna duces tecum*: Snelgrove v. Stevens, Car. & M. 508; Farley v. Graham, 9 U. C. R. 438. A servant cannot be brought into contempt for not producing books and papers of his master in his possession, which the master will not allow him to bring: Crowther v. Appleby, L. R. 9 C. P. 23, and cases cited; but see Hannum v. McRae, 17 P. R. 567; 18 P. R. 185; see *Re* Emma Silver Mining Co., L. R. 10 Ch. 194. As to corroboration of witness, see Findley v. Pedan, 26 C. P. 483; and recalling him, which is in the discretion of the judge: Gleason v. Williams, 27 C. P. 93.

Inspection of Documents.—The judge may order production and inspection of documents in the control of the opposite party: see Rule 52, *post*.

Under former Rule 87, the application had to be made within four days after the service of the summons. This is omitted from the present Rule 87, and the application may be made at any time.

Privileged Communications.—Certain documents are privileged from production. Without making any attempt at being exhaustive, the following examples may be referred to:

(1) Communications between solicitor and client: "The law as to privileged communications between solicitor and client is very clearly expressed in Gardner v. Irvin, 4 Ex. D. 49: 'It is not sufficient for the parties to say that the letters are correspondence between a client and the solicitor. The letters must be professional communications of a confidential character for the purpose of getting legal advice.' Letters are not necessarily privileged because they pass between solicitor and client. In order to be privileged there must be a professional element in the correspondence:" *per* Lindley, L.J., O'Shea v. Wood, 1891, P. 286, at p. 289; Hamelyn v. White, 6 P. R. 143.

The privilege does not extend to communications to a person who is not acting as solicitor for the party, although he may be a solicitor by profession: Rudd v. Frank, 17 O. R. 758; nor to illegal transactions: Williams v. Quebeada Ry., 1895, 2 Ch. 151: nor to matters based on fraud: Smith v. Hunt, 1 O. L. R. 334.

Sec. 114.

The privilege extends not only to communications to a solicitor but also to an interpreter: *Re* Debarre v. Leverett, 4 T. R. 756; and an agent: Parkins v. Hawkshaw, 2 Stark. 239, between the solicitor and his client; and to the solicitor's clerk: Taylor v. Forrester, 2 C. & P. 196. It does not extend to communication to a physician: Wilson v. Rastall, 4 T. R. 753; nor to a conveyancer: 4 Atk. 525; and a solicitor who puts his name to a document as a witness is bound to disclose all that passed relating to its execution: Crawcour v. Salter, 18 Ch. D. 30; McGee v. The Queen, 3 Can. Exch Ct. R. 304; Hurd v. Moring, 1 C. & P. 372.

The communication is privileged for all time and not merely while the relationship of solicitor and client exists: Cleave v. Jones, 7 Exch. 421; R. v. Cox, 14 Q. B. D. 153; and even if no legal proceedings were contemplated: Hoffman v. Crerar, 17 P. R. 404; McBride v. Ham. Prov., 29 O. R. 161; Minet v. Morgan, L. R. 5 Exch. App. 361.

A communication not made to the solicitor alone is not privileged: R. v. Doroner, 14 Cox C. C. 486.

Letters written by a solicitor's clerk to the client containing references to advice given by the client's solicitor, whom the clerk has consulted, are privileged: Boughton v. Citizens Ins. Co., 11 P. R. 110. Should the solicitor, unknown to the client, have ceased to practice as such, when the communications are made, they will nevertheless be privileged: Colley v. Richards, 19 Beav. 401.

The following have also been held to be privileged communications: Information obtained by the client for the purpose of obtaining his solicitor's opinion thereon: Southwark and Vauxhall Water Co. v. Quick, 3 Q. B. D. 315; information voluntarily given by a third person to the solicitor: Young v. Holloway, 12 P. D. 167; a letter written before action, by the solicitor of the defendant to the plaintiff's solicitor, is not receivable in evidence to prove a fact in issue: McBride v. Hamilton Prov. & Loan Society, 29 O. R. 161.

A statement in an affidavit on production that a certain letter from a firm of solicitors to the deponent was a communication between solicitor and client and was privileged, was held to be sufficient to protect the document from production by way of discovery: Hamelyn v. Whyte, 6 P. R. 143, followed, but doubted, in Hoffman v. Crerar, 17 P. R. 404.

Letters passing between the manager of a branch of a chartered bank, and the manager of another branch of the same bank, were held to be privileged communications: Van Valkenburg v. Bank of B. N. A., 5 B. C. R. 4, following Anderson v. Bank of British Columbia, 2 Ch. D. 644. But no privilege attaches to telegrams in the possession of a telegraph company, and when a telegraph operator was subpœnaed to produce certain telegrams which, upon his examination, he stated had been burnt in accordance with instruction received from the general manager of the company it was held that the manager and operator were guilty of a contempt of court: *Re* Dwight and Macklem, 15 O. R. 148. The operator was the proper person to subpœna to produce the telegrams, as he had control of them and ability to produce them: *Ib.* The manager of a chartered bank is not privileged under the Bank Act from giving evidence as to a customer's account or from producing the bank's books: Hannum v. McRae, 18 P. R. 185; see Parnell v. Wood, 1892, P. 137.

A party himself is not bound to disclose matters as to which his information is derived from privileged communications, the matters not being merely statements of fact patent to the senses: Kennedy v. Lyell, 23 Ch. D. 387; 9 App. Cas. 81.

Sec. 114. (2) Documents relating exclusively to the party's own title or case, or to the evidence by which it is to be established, and not relating also to the title or case of the opposite party.

(3) Documents irrelevant to the questions in the action.

(4) Documents relating to the public service: Bradley v. McIntosh, 5 O. R. 227; Humphrey v. Archibald, 21 O. R. 553; Marks v. Reyfus, 25 Q. B. D. 494.

(5) That portion of a document containing the names of a party's witnesses: Armstrong v. Toronto Ry. Co., 15 P. R. 208; but the report itself, unless obtained for the purpose of submission to a solicitor for advice, or in view of anticipated or threatened litigation, or after litigation commenced, would not be privileged: Betts v. The G. T. Ry. Co., 12 P. R. 80.

Documents Not Privileged.—The following are examples of cases in which documents were held not to be privileged communications: letters passing between a trustee and his solicitor, relating to the trust before action brought, are not privileged as against the *cestui que trust; Re* Mason, 22 Ch. D. 609; *Re* Postlethwaite, 35 Ch. D. 722; communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it: R. v. Cox, 14 Q. B. D. 153; the evidence of solicitors as to statements made to them, by a person in his lifetime, as to his intentions with regard to land, made in the solicitor's office, in the presence of another person not a solicitor, and which was not followed by professional employment: Rudd v. Frank, 17 O. R. 758; a communication made by one of the solicitors in an action, to an arbitrator in the same action: Counce v. The C. P. Ry. Co., 9 C. L. T. 31; a transcript of a shorthand note of evidence and arguments taken at a reference: Rawstone v. Preston Corp., 30 Ch. D. 116; or notes of proceedings in open court: Nicholls v. Jones, 2 H. & M. 588; Robson v. Worswick, 38 Ch. D. 370; telegrams in the possession of a telegraph company, and received for the purpose of transmitting them in the usual course of business: *Re* Dwight v. Macklem, 15 O. R. 148; the books of a chartered bank showing the customer's balance, when relevant to the issue: Hannum v. McRae, 18 P. R. 185; see also Crowther v. Appleby, L. R. 9 C. P. 23; Atty.-General v. Wilson, 9 Sim. 526. Photographs by which a person might be identified in an action in which the identity of such person was disputed were held to be "documents" and not privileged: Fox v. Sleeman, 17 P. R. 492.

Joint Possession.—Documents which are in the joint possession of a party and some person not a party to the action, cannot be ordered to be produced: Kearsley v. Philips, 10 Q. B. D. 465; Kettlewell v. Barstow, L. R. 7 Ch. 686; unless there is no interest which could be affected by their production other than the interest of the parties to the action, in which circumstances they will be ordered to be produced: London & Yorkshire Bank v. Cooper, 15 Q. B. D. 473.

Setting Aside Subpoena.—A subpoena *duces tecum* requiring the production of irrelevant document will be set aside as oppressive: Steele v. Savory, W. N. (1891) 195; 8 T. L. R. 94; see Hannum v. McRae, 17 P. R. 567; 18 P. R. 185.

Competency of Witnesses.—The Evidence Act: R.S.O. 1914, c. 76, ss. 4-9. A witness cannot refuse to answer questions which may tend to incriminate him; but he should object and have his objection

noted, and then the evidence he may give cannot be used against him in any criminal proceeding except for perjury in giving the evidence, but he must answer the questions: *Ib.*, section 7. Sec. 115.

A husband or wife is compellable to give evidence against the husband or wife, but cannot be compelled, but may, if he or she chooses, disclose any communication which may have been made between them: *Ib.*, section 9.

A claim against the estate of a deceased person must be corroborated: *Ib.*, section 12.

Subpoenas in Actions for Flooding Lands may be issued out of any division court in the county or district: R.S.O. 1914, c. 86, s. 8. Form of such subpoena, No. 2 in that statute: see Form 36 (a) *post*.

Excluding Witnesses.—"The judge at the trial shall, at the request of either party, order a witness to be excluded from the court until he is called to give evidence; and also, if the judge deems it expedient, a party intending to give evidence; or he may require such party to be examined before the other witnesses on his behalf; and the judge may, in his discretion, exclude the testimony of any witness or party who does not conform to such order;" Con. R. 254. This rule applies to division courts, being a matter relating to the principles of practice and not provided for by the Division Court Act or Rules: section 226, Rule 2 (7).

The word "shall" in the above Con. R. makes it obligatory on the judge to order the exclusion of witnesses on request of either party; but the authority to exclude a "party" is optional and to be determined on judicial grounds; it being evidently the intention that the judge is either to exclude the party or require him to give his evidence before his other witnesses are called.

115. Any number of names may be inserted in a subpoena, and service thereof may be made by any literate person, personally or by leaving a copy thereof at the usual place of abode of the witness, and proof of such service and of tender or payment of witness fees and mileage, may be received by the Judge, either orally or by affidavit. 10 Edw. VII., c. 32, s. 115. Service of subpoena, by whom made.

Any Literate Person.—See notes to sections 87 and 100 as to mode of service and by whom served, and also notes to section 114.

It is not essential that subpoenas should be served by the bailiff.

Proof of Due Service.—As to proof of service see notes to sections 87, 114.

Usual Place of Abode.—See notes to sections 72 and 114.

Payment of Expenses.—See notes to section 114.

Professional Witnesses.—Disbursements to surveyors, architects and professional witnesses, such as are entitled to specific fees by statute, are to be taxed as authorized by such statute. Land surveyors are entitled to $5 a day in addition to travelling expenses: R.S.O.

Sec. 115. 1914, c. 165, s. 40; architects are entitled to $5 per day and travelling expenses: R.S.O. 1914, c. 17, s. 28. The fees of all other professional men are provided for in the tariff: Form 3; namely: barristers and solicitors, physicians and surgeons, engineers and veterinary surgeons, other than parties to the cause, when called to give evidence of professional service rendered by them, or to give professional opinions, *per diem*, $4.

Expert Witnesses.—Where a witness is required to qualify himself to give an expert opinion, by examination of the person or thing as to which his opinion is asked, or by doing anything else that would require study or preparation, he is entitled to special fees from the party who calls him, and the tariff does not apply; but if the witness is able from the knowledge or skill he possesses to give answers to the questions propounded to him, he is only entitled to the witness fees provided by the tariff or statute: that is, ordinary witness fees for an ordinary witness and professional fees for a professional witness: Butler v. Toronto Multoscope Co., 11 O. L. R. 12.

As to witness fees for witnesses out of the county, see section 117, and notes to same.

A public official called to produce a public or other document is only entitled to the ordinary witness fee, unless the judge otherwise directs: R.S.O. 1914, c. 56, s. 118.

Affidavit of Disbursements.—The clerk shall determine (subject to appeal to the judge) what number of witnesses shall be allowed on taxation of costs; and before allowing disbursements to witnesses, the clerk shall be satisfied that the witnesses attended, and he shall be furnished with an affidavit of disbursements in the form prescribed: Form 29. The clerk should tax the costs where practicable on the day on which the action or matter is tried: Rule 75, section 38 and notes.

No fees should be allowed for any witness who did not actually attend the court. Where it is necessary to keep witnesses in attendance more than one day, the fees for such attendance should be taxed: Alexander v. School Trustees of Gloucester, 11 P. R. 157. Witnesses called to establish something on which the party calling them failed may be disallowed: Latour v. Smith, 13 P. R. 214. The expenses of a witness whose testimony is clearly inadmissible, or whose testimony would not have supported any issue in the case, will not be allowed; but where a large number of witnesses were subpœnaed upon matters which were not gone into at the trial, and therefore the witnesses were not called, but it was shown by counsel's brief what each witness was to be called for, and was expected to prove, and it was sworn that the witnesses were necessary and material witnesses, and were subpœnaed in good faith to substantiate the charges made, it was held that their witness fees should be taxed: *Re* Prescott Election Case, 32 U. C. R. 303.

Where a party to an action is a necessary and material witness on his own behalf, he is entitled to have allowed for himself the same witness fees as if he were not a party: Royle v. Rothschild, 10 O. L. R. 424.

False Affidavit of Disbursements.—Where a party has falsely sworn that witnesses have been paid, and the same are taxed to him and paid to him, he will be ordered to refund the amount: Hornick v. Township of Romney, 11 C. L. T. 329: Harding v. Knust, 15 P. R. 80.

Sec. 118. Penalty for disobeying subpœna or refusing to be sworn.

118.—(1) Every person served with a copy of a subpœna to or for whom at the time of such service a tender or payment of his witness fees and mileage has been made, who refuses or neglects without sufficient cause to obey the subpœna, and every person in court called upon to give evidence, who refuses to be sworn or to give evidence, shall be liable to pay such fine not exceeding $8 as the judge may order, and shall be also liable to imprisonment for any time not exceeding ten days on the order of the judge.

Enforcing payment of fine.

(2) The fine shall be levied and collected with costs, by the same process as a judgment recovered in the court and the whole or any part of the fine, after deducting the costs, shall be applicable, in the discretion of the judge, towards indemnifying the party injured by such refusal or neglect, and the remainder shall form part of the Consolidated Revenue Fund. 10 Edw. VII., c. 32, s. 116.

Witness Fees.—See notes to section 115.

Sufficient Cause.—What is sufficient cause must depend on the circumstances of each case: see notes to section 101.

Every Person in Court.—Any person in court may be called upon to give evidence. But if a person were subpœnaed and not paid his witness fees, and attended notwithstanding, he could not be called upon to give evidence by the party who had not subpœnaed him, unless such witness fees were first paid: see *Re* Working Men's Mut. Society, 21 Ch. D. 831, cited in note to section 114.

Service of a subpœna is only necessary to *compel* attendance, and does not affect the right of a witness to his fees nor the right of a party who called him, if successful and costs allowed, to tax them against his opponent: Fox v. Nipissing Ry. Co., 7 P. R. 157.

To be Sworn (or affirm), etc.—"All witnesses ought to be sworn according to the peculiar ceremonies of their religion, or in such manner as they deem binding on their consciences:" Taylor on Evi., 8th ed. 1179.

The (Ontario) Evidence Act, R.S.O. 1914, c. 76, provides that the oath is to be administered in such form and with such ceremonies as the person taking it may declare to be binding: section 14; and that if the witness objects to take an oath or is objected to as incompetent to do so, and the judge is satisfied that the witness objects to be sworn from conscientious scruples, or on the ground of religious belief or that the taking of an oath would have no binding effect on his conscience, the witness may make an affirmation and declaration which shall be of the same force and effect as an oath: section 15 (1). For forms of various oaths and affirmations, see Form 30.

In R. v. Pah-Mah-Gay, 20 U. C. R. 195, on a trial for murder, an Indian witness was offered, and on his examination by the judge it

Sec. 117.

appeared that he was not a Christian, and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared, however, that he had a full sense of the obligation to do so, and that he and his tribe believed in a future state, and in a Supreme Being, who created all things, and in a future state of rewards or punishment according to their conduct in this life; it was held his evidence was admissible. But by section 15 (1) of The Evidence Act above referred to, a witness is to be admitted and allowed to affirm who has no religious belief, the only effect of which is as to the weight to be given to his evidence.

Not Exceeding Ten Days.—The fine for contempt under section 116 may be imposed by verbal or written order. In addition to the pecuniary penalty, imprisonment may be imposed for a time not exceeding ten days. The amount of the fine and costs may be levied by execution: subsection (2); and see section 222, *post*, and notes thereto; and after deducting the costs it may be made applicable towards indemnifying the party injured by such neglect or refusal; s. 116 (2), and by R.S.O. 1914, c. 76, s. 16, an action will lie for the damage the party may sustain through the witness' default. See ss. 39, 40, as to the disposition to be made of fines.

In *Re* Pollard, L. R. 2 P. C. 120, it is laid down that, "no person should be punished for contempt of court, unless the specific offence charged against him be distinctly stated, *and an opportunity of answering it given to him.*" At page 327 of Maxwell on Statutes, it is said that, "in giving a judicial power to affect prejudicially the rights of person or property, a statute would be understood as silently implying, when it did not expressly provide the condition or qualification, that the power was to be exercised in accordance with the rule of natural justice, that the person liable to be prejudicially affected should first have an opportunity of defending himself: see also Thorburn v. Barnes, L. R. 2 C. P. 384; Bullen v. Moodie, 13 C. P. 126, and 2 E. & A. 370; Nicholls v. Cumming, 1 S. C. R. 395. As to order for imposition of fine, and the entry to be made by clerk, see Forms 130, 131.

Fees to witness out of county.

117. A person served with a subpœna, who is resident in Ontario, but not in the county in which the court is situate, shall be entitled to be paid witness fees and mileage, according to the county court tariff. 10 Edw. VII., c. 32, s. 117.

The county court tariff is provided by Con. R. 676, amended by Con. R. 112 of 24th Dec. 1913, Tariff B, and directs that the allowance to witnesses residing within 3 miles of the court-house is to be $1 per day, and to those more than 3 miles distant $1.50 per day, with travelling expenses according to the sums reasonably and actually paid, but in no case to exceed 20 cents per mile one way. If public conveyance available, only the fares and not mileage will be allowed.

The above section 117 supersedes the tariff provided by the division court rules and Form 3, as to witnesses out of the county.

Commissions to take Evidence. Sec. 118.

118.—(1) If a party is desirous of having at the trial or hearing the testimony of a person residing out of Ontario, the judge, upon hearing the parties, may order the issue of a commission out of and under the seal of the court to a commissioner to take the examination of such person. Power to issue commissions to take evidence.

(2) An order shall not be made for the issue of a commission for taking the testimony of the party applying therefor, or of any person in his employment, unless in the opinion of the Judge a saving of expenses will be caused thereby, or unless it is clearly made to appear that the party or person is aged, infirm, or unable from sickness to appear as a witness. When commission to take evidence of applicant, etc., may be granted.

The practice is governed by Con. R. 279-290: section 118 (6).

Residing out of Ontario.—As to the meaning of the word "residing" see notes to sections 72 and 75.

Judge May Order.—The provision in the former Division Courts Act required the application to be made to the "judge of the county court," and the present section removes any doubt as to the authority of the junior judge to make the order: see section 2 (g).

Neither party is absolutely entitled to a commission. It is a matter of judicial discretion (as to which see notes to section 10), and is not granted as of course but only on reasonable grounds being shown for its issue: Mills v. Mills, 12 P. R. 473; Price v. Bailey, 6 P. R. 256; Vivien v. Mitchell, 13 C. L. J. 198; Berdan v. Greenwood, 20 Ch. D. 761; Laagen v. Tait, 24 Ch. D. 528.

It is a matter of comparison whether it is more convenient that the commission should go, than that the witnesses should be brought to the trial for examination: Grant v. Banque Franco-Egyptienne, cited in 27 W. R. 226; Coch v. Allcock, 21 Q. B. D. 181; Robins v. The Empire, 14 P. R. 488; Thompson v. Henderson, 9 B. C. R. 540.

The court must take care, on the one hand, that it is not granted when it would be oppressive or unfair to the opposite party, and, on the other hand, that a party has reasonable facilities for making out his case when from the circumstances, there is a difficulty in the way of witnesses attending the trial: Coch v. Allcock, 21 Q. B. D. 178; Lewis v. Kingsbury, 4 T. L. R. 626, 639. Form of Order for Commission, No. 56.

Issue a Commission.—Form No. 56 (a). It is to be noticed that under the above sub-sec. (1), a commission under the seal of the court is required to take the evidence of a person residing out of Ontario; but that in cases provided for by sub-secs. (3) and (4) *post*, an order to take the evidence is all that is necessary and no commission is authorized. Form of Order, when no Commission No. 56 (b).

Application for Commission to Take Evidence.—The application should be made as soon as some issue is raised which must be tried, if the action be tried at all: Smith v. Greey, 11 P. R. 38.

Sec. 118. It should be made a reasonable time after defence put in: Brydges v. Fisher, 4 M. & Sc. 458; and if made for the purpose of delay will be refused: Lloyd v. Key, 3 Dowl. 253; Temperance Colonization Socy. v. Evans, 7 C. L. T. 46; or the defendant may be ordered to pay money into court: Sparks v. Barrett, 5 Scott, 402.

In any case, terms may be imposed as justice may require, *e.g.*, giving security for the costs of the execution of the commission: Robins v. The Empire Printing Co., 14 P. R. 488; Coleman v. Bank of Montreal, 16 P. R. 159; or that no greater costs be taxable by reason of the commission than would have been incurred if the witnesses had been subpœnaed: Watt v. Mackay, 5 O. W. R. 170; or other terms: Toronto Ind. Ass. v. Houston, 5 O. W. R. 349; Nadin v. Bassett, 25 Ch. D. 21.

Notice of Application.—Form No. 56 (c). The order for commission can only be made "upon hearing the parties:" sub-sec. (1), and so must be on notice: Doe v. Pattison, 3 Dowl. 35; Holmes v. The C. P. Ry. Co., 5 Man. L. R. 245; Con. Rule 279, which is made applicable by sub-sec. (6), and which provides expressly for the notice of motion and prescribes what it must contain. The notice must state the name and address of the proposed commissioner: Con. Rule 279.

Affidavit for Commission.—Form No. 55. The affidavit should be made by the person best able to speak to the facts: McPherson v. The Riter-Conly Mfg. Co., 35 N. S. R. 429. If not made by the applicant it should show the reason for its not being so made, and the means of knowledge of the deponent; Kidd v. Perry, 14 P. R. 364; and see Rule 45. The affidavit should usually show: (1) The names of the witnesses to be examined: Herman v. Lawson, 3 B. C. R. 353; or at least the name of one witness; but the commission may provide for the examination of unnamed witnesses at a named place: Nadin v. Bassett, 25 Ch. D. 21; Armour v. Walker, 25 Ch. D. 676. In Howard v. Dulari, 11 T. L. R. 451, an order for a commission on an affidavit in which no names were given on the ground that if named the witnesses would be spirited away, was set aside. A commission will be issued notwithstanding the party applying is unable to name all his witnesses: Milliken v. Laurentine Pulp Co., 6 Que. R. 134; and in a proper case a general commission may be issued without naming witnesses: Wright v. Shaddock, 36 C. L. J. 143. (2) That the evidence to be obtained is material to the issue, and that there is a good reason why the witness should not be subpœnaed at the trial: Kidd v. Perry, 14 P. R. 634; Langden v. Tait, 24 Ch. D. 522; Lawson v. Vacuum Brake Co., 27 Ch. D. 137; Armour v. Walker, 25 Ch. D. 637; Coch v. Alcock, 21 Q. B. D. 178; The Parisian, 13 P. D. 16; Fraser v. Nevins, 4 T. L. R. 448. The nature of the evidence should appear sufficiently to disclose that it is material: Morrow v. McDougall, 16 P. R. 129; Kidd v. Perry, *supra*. As to the sufficiency of the affidavit see also Robins v. The Empire Printing Co., 14 P. R. 488. (3) The affidavit should show that the application is made *bona fide* and not for the purpose of delay: Re Boyse, Crofton v Crofton, 20 Ch. D. 760; see Ross v. Woodford, 1894, 1 Ch. 38; Langden v. Tait, 24 Ch. D. at p. 528. When a witness is travelling abroad it should be shown that he will remain at the place to which the commission is directed long enough to allow of its due execution: Singer v. Williams Mfg. Co., 8 P. R. 483.

It need not appear that any effort was made to obtain the attendance of the witness: Norton v. Melbourne, 3 Bing. N. C. 67; or that the defence is true: Westmoreland v. Huggins, 1 Dowl. N. S. 800. It is no conclusive answer that there are witnesses within the jurisdiction

who can swear to the same facts: Adams v. Corfield, 28 L. J. Ex. 317. Sec. 118.
It is submitted that the rule laid down in Jameson v. Jones, 3 Ch. Cham. 98, in this regard, does not apply. It is safer where any injustice to other parties, in the way of delay or expense, or otherwise, can be provided against, to favor the granting rather than the refusing of the application; the main considerations are a full and fair trial and the saving of expense: Robins v. Empire Ptg Co., 14 P. R. 488; Ferguson v. Milligan, 11 O. L. R. 35; Harris v. Wisbart, 1 O. W. N. 503. Although sub-sec. (1) differs from sub-sec. (3) in that the former does not provide that the witness to be examined must be material, it is nevertheless necessary to show that he is. As to who is a material and necessary witness, see notes to sub-sec. (3).

Where a strict cross-examination is necessary of an interested witness, and it cannot be had, according to the law of the country where the commission is to be executed, the court will refuse the application: *Re* Boyse, Crofton v. Crofton, 20 Ch. D. 760; and a commission to examine a plaintiff in New Zealand, was granted on the condition that his deposition should not be read at the trial, if the defendant required him to appear at the trial to be examined and cross-examined: Nadin v. Bassett, 25 Ch. D. 21; but if it is desired to impeach the veracity of a witness by general testimony, this can be done at the trial, and it is no ground for refusing the application: Nordheimer v. McKillop, 10 P. R. 246; and the mere fact that the witness fears cross-examination, is no answer: Carruthers v. Graham, 9 Dowl. 947; but if the witness is interested, and it is not clear that the application is not made to avoid cross-examination at the trial, the application will be refused: Berdan v. Greenwood, 20 Ch. D. 764 (note); Armour v. Walker, 25 Ch. D. 673. Experts should not be examined on commission: Russell v. The G. W. Ry. Co., 3 U. C. L. J. 116; Atty.-Genl. v. Gooderham, 10 P. R. 259; nor even of lawyers, as to a question of foreign law, unless competent men cannot attend without difficulty, or there will be a saving of expense: The Moxham, 1 P. D. 107, 116; and see The Edison Co. v. Hough, 98 L. T. Jour. 374.

Examination of Party Applying. — The word "person" in sub-sec. (1) covers not only the case of a witness who is not a party to the cause, but also that of either party who is a material and necessary witness.

A party who desires a commission for his own examination outside the jurisdiction, should himself make the affidavit of the facts relied on: Tollemache v. Hobson, 5 B. C. R. 216; and if not made by him, it must give cogent reasons, by some one who can speak with knowledge, as to why the party cannot personally attend as a witness: Kidd v. Perry, 14 P. R. 364.

Under a general commission to take evidence of witnesses (without naming them), a party cannot have his own evidence included: Wright v. Shaddock, 36 C. L. J. 143; and a commission to examine M. and others, does not authorize the examination of M. only without amendment: Smith v. Babcock, 9 P. R. 175.

The law does not favor the taking of the evidence of a party applying for a commission, or of any one in his employment, at least in the division courts; and unless the judge is of the opinion that "a saving of expense would be caused thereby, or unless it is clearly made to appear that the party or person is aged, infirm or unable from sickness to attend," the commission cannot be granted: sub-sec. (2).

Sec. 118.

A party living in Ontario was allowed to be examined under commission on his own behalf in an action in a court of British Columbia, it appearing from the affidavits that to do so would cost only one-fourth of the expense of his going to the trial there: Thompson v. Henderson, 9 B. C. R. 540. So although witnesses may be brought to court however far distant they may be, and a party is entitled to the same fees as an ordinary witness however far he may have to travel in order to come to the trial: Boyle v. Rothchild, 10 O. L. R. 442; Tattersall v. People's Life Ass. Co., 10 O. L. R. 537; still if the expense of coming to the court from a distance should be very great, the judge may allow only what it would have cost to take the evidence under commission.

Where a motion is made by the party himself for his own examination, as provided by s. 118 (2), the court must be thoroughly satisfied of the *bona fides* of the application, and that it is not made for the purpose of avoiding cross-examination: Berdan v. Greenwood, 20 Ch. D. 764; Langen v. Tate, 24 Ch. D. 522; Kidd v. Perry, 14 P. R. 364; Light v. Anticosti, 58 L. T. 25; Thomas v. Storey, 11 P. R. 417.

The principles upon which such a commission will be issued were fully discussed in Canadian Ry. Acc. Ins. Co. v. Kelly, 17 Man. R. 645; see also Desiandes v. Saint Jacques, 33 Que. S. C. 380.

A plaintiff who desires to be examined himself must make out a strong *prima facie* case why he should not attend and be examined at the trial: Light v. Anticosti Co., 58 L. T. 25. The fact that the defendant after the service of the summons but before it was known when the trial would take place was within the jurisdiction for the purpose of settling the action is not such a special circumstance as will disentitle him to a commission: New v. Downs, 64 L. J. Q. B. 104; and the fact that the defendant is afraid to return is no ground for refusal: Mills v. Mills, 12 P. R. 473.

And in an action against defendants resident in Ontario but who removed to the N. W. Territories after the action had been begun, intending to permanently reside there, they were held by the Ontario Court of Appeal to be entitled to have their evidence taken under commission: Ferguson v. Millican, 11 O. L. R. 35.

A party applying may obtain a commission to examine a co-plaintiff or co-defendant: Wilson v. McDonald, 13 P. R. 6.

Considerations for the Court on Application for Commission.—If the evidence is material and necessary, a foreign commission will be granted upon the defendant's application, notwithstanding the delay may greatly inconvenience the plaintiff, the paramount consideration being that there should be a fair trial: Ferguson v. Millican, 11 O. L. R. 35; Harris v. Wishart, 1 O. W. N. 503.

That it would cause delay is however a factor for consideration, and a commission has been refused where it would cause inconvenient delay, if the party has not applied with diligence and the other party would be thereby prejudiced: Stewart v. Gladstone, 7 Ch. D. 394; Temperance Col. Soc. v. Evans, 7 C. L. T. 46.

If there is no special reason shown why the opposite party resident abroad should have to personally appear to give evidence, a commission will be granted: Armour v. Walker, 25 Ch. D. 673. As to the further considerations moving the court on applications for commissions, see Light v. Anticosti, 58 L. T. 25; Mills v. Mills, 12 P. R. 473; Kenley v. Wakley, 9 T. R. 571; Porter v. Poulton, 15 P. R. 318.

A commission to examine a foreign defendant will be granted more readily than a commission to examine a foreign plaintiff: Ross v. Wood-

ford, 1894, 1 Ch. 38; New v. Byrns, 71 L. T. 681. A plaintiff is to be considered as a defendant with reference to a counterclaim: Levi v. Edwards, 5 O. W. R. 83. Sec. 118.

Order for Second Commission.—If the first commission proves abortive, a second will be ordered: Fisher v. Izatarny, E. B. & E., 321; and also where the witness admits that he did not fully disclose the facts on the first commission: Rogers v. Manning, 8 P. R. 2. In Crowther v. Nelson, 7 T. L. R. 653, Wills, J., said: "It is a very unusual thing to grant a second commission, and it ought never to be allowed except upon substantial grounds." An order for a second commission was granted on terms as to payment of costs: Gill v. Ellis, 5 B. C. R. 137.

Concurrent Commissions.—Commissions were granted for the examination of witnesses in three different places concurrently: Western Bank of New York v. Koppel, 8 T. L. R. 286.

Unless the order otherwise directs, the evidence is to be taken *viva voce:* Con. Rule 280; Watson v. McDonald, 8 P. R. 354; and that is the usual practice.

The commission should be taken out promptly. If it is not, the depositions might not be received in evidence: Ponsford v. O'Connor, 5 M. & W. 673; see Watts v. Anderson, 5 Man. L. R. 291.

A copy of the interrogatories should be annexed to the commission if the examination is not to be *viva voce.*

In framing interrogatories leading questions should not be put, and may be struck out at the trial if objected to by the opposite party: Alcock v. Royal Ex. Ass. Co., 13 Q. B. 292; but not necessarily: Small v. Nairn, 13 Q. B. 840; Lockwood v. Bew, 10 P. R. 655.

There is no power at the instance of the opposite party to strike out or modify interrogatories prepared by the examining party. The latter may frame them as he pleases, taking the risk of the evidence being rejected in whole or in part by the judge at the trial: Toronto Ind. Ex. Ass. v. Houston, 9 O. L. R. 527.

Order for Commission.—The order will be made to suit the circumstances of each case: Mills v. Wellbank, 3 Scott, N. R. 177. The time and place and manner of examination should be fixed: Greville v. Stultz, 11 Q. B. 997; see also Simms v. Henderson, 11 Q. B. 1015; but see Farrel v. Stephens, 17 U. C. R. 250; but will be waived by the appearance of the opposite party to cross-examine: Howkins v. Baidwin, 16 Q. B. 375; Darling v. Darling, 9 P. R. 560.

A time for return of commission is usually fixed in the order, but it can be extended: Clinton v. Peabody, 7 M. & G. 399. The order usually contains a stay of proceedings, but only for a limited time: Forbes v. Wells, 3 Dowl. 615.

Procedure.—If either party wants to use a document in the hands of the opposite party he must give notice to produce it: Cunliffe v. Whitehead, 3 Dowl. 634; and the examination should, if possible, be conducted upon the same rules as at *Nisi Prius: Ib.* If a document is produced which the witness refuses to part with for good cause, to be stated in the deposition, a copy or extract certified by the commissioners to be true and correct is to be annexed to the depositions: Con. R. 284. A party cannot abandon an interrogatory in part: Wheeler v. Atkins, 5 Esp. 246.

Sec. 118. **Two Days' Notice** of taking the evidence under the commission must be served on the opposite party or his agent, as required by sub.-sec. (5), with a copy of the order; otherwise depositions would not be received (2 Starkie's Evl. 264), as the opposite party has the right to cross-examine: *Ib.;* Attorney-General v. Davison, McClel. & Y. 160. The right to cross-examination of the opposite party or his agent is expressly given by sub-sec. (5), which supersedes Con. Rule 280 in regard to the notice.

Where the interests of a witness might be affected by the examination, it was held that he was entitled to have counsel present, upon the examination to protect his interests: Dominion Bank v. Bell, 13 P. R. 471.

The commission need not be indorsed with the style of cause nor need the evidence be annexed to it, and it should be so framed as to bind all parties to be examined, and particularly as to the mode of administering oaths to Jews or others: Frank v. Carson, 15 C. P. 135.

Unless otherwise ordered the examination is to be *viva voce*: Con. R. 280 (1), and that is the usual course.

Where under an order to take evidence on interrogatories the evidence was taken *viva voce*, it was suppressed: Watts v. Anderson, 5 Man. L. R. 291; Mulligan v. White, 5 Man. L. R. 40. See Con. R. 281 for the practice where the evidence is to be taken upon interrogatories.

The witness is to be examined under oath, affirmation or otherwise, in accordance with the law of the country in which the commission is executed: Con. Rule 282, by which the commissioner is authorized to administer the oath, etc.: see Forms of Oaths, etc., Form 30.

The questions and answers are to be taken down in writing: Con. Rule 280; and must be signed by the witness and the commissioner, unless the evidence is taken in shorthand: Con. Rule 286; and must be transmitted (with the commission: Con. Rule 287), in a cover under the seal of the commissioner, to the clerk of the court: Con. Rule 287. If there are two commissioners the depositions may be signed by one of them: Melville Mutual, etc. v. Driscoll, 11 S. C. R. 183.

Taking Evidence in Shorthand.—This is provided for by Con. Rule 285, which see with notes, *post.*

Interpreter.—Taking the evidence through an interpreter in the case of a witness who does not understand the English language, is provided for by Con. Rule 283.

Compelling the Attendance of Witness.—The attendance of the witness, and answering questions, may be enforced under the provisions of R. S. C. c. 145, ss. 41-46; and this extends to the case of the examination of a party being examined as well as to a witness: Kirchoffer v. The Imperial L. & I. Co., 7 O. L. R. 295.

Opening the Commission.—The commission is to be opened at the trial, or it may be opened before the trial at the instance of either party, without any order, by the officer to whom it is returned, on two clear days' notice to the parties interested: Con. Rule 289. Form of Notice, No. 56 (d).

Objections.—Evidence improperly taken may be rejected at the trial: Lumley v. Gye, 3 E. & B. 114. The reception of improper evidence should, however, be objected to on the examination, and if

received, the objection should be noted in the notes of the witness's testimony. Advantage may then be taken of it, but not otherwise: Robinson v. Davies, 5 Q. B. D. 26; see Watts v. Anderson, 5 Man. R. 291. When the commission was not returned to the office mentioned in the order, it was held no objection to the evidence: Stevenson v. Rae, 5 C. P. 406. An opening in the envelope not large enough to let out any of the papers is no objection: Frank v. Carson, 15 C. P. 135. A commission produced at the trial in an envelope open at both ends, but otherwise unobjectionable was received: Graham v. Stewart, 15 C. P. 169. Sec. 118.

The Rule requires the envelope containing the commission and evidence to be under the seal of the commissioner (Con. Rule 287), and if not so, the depositions cannot be read: Redford v. McDonald, 14 C. P. 191.

Entitling defendant's name in the cause in the commission as "William" instead of "Samuel," held fatal, and the taking of evidence a void proceeding: Graham v. Stewart, 15 C. P. 169.

If no objection is made before the examiner it might have the effect of waiving the right afterwards to object to the admissibility of the objectionable part at the trial: Robinson v. Davies, 5 Q. B. D. 26; see also Cutler v. Wright, W. N., (1890) 28. A mere irregularity in taking the deposition would be the subject of special application to the judge to have it suppressed, but it would not be an objection to its admissibility at the trial: Grill v. Iron Screw Collier Co., L. R. 1 C. P. 600.

A person who acts under a commission, which contained specific directions as to the mode of return, cannot afterwards object that certain formalities prescribed by the statute, but not by the commission, have been omitted: Frank v. Carson, 15 C. P. 135; Heyland v. Scott, 19 C. P. 165.

Objections to commission if not taken, are waived: Farrel v. Stephens, 17 U. C. R. 250; Walton v. Apjoha, 5 O. R. 65. Change of the day for the examination held no objection, in Comstock v. Galbraith, 21 U. C. R. 297; Comstock v. Tyrrell, 12 C. P. 173. A contraction in the name of a witness in the return of the commission is no objection: *Ib.* Although there are written interrogatories it is no objection that the commissioner put the questions *viva voce*: Grill v. General Iron Screw Co., L. R. 1 C. P. 600; but if any interrogatory is not put, the evidence will be rejected: Melville Mut. M. & F. Ins. Co. v. Driscoll, 11 S. C. R. 183.

The fact that the depositions of a witness appeared to have been sworn to when signed, or immediately afterwards, and the objection was taken that he should have been sworn before the examination; it was held that if there was anything at variance with the instructions in this, it was an irregularity of which there should have been notice and which should have been moved against in Chambers: Wurzburg v. Andrews, 28 N. S. R. 387.

Objections to the evidence taken are not waived by cross-examining the witness after the raising the objection, nor by omitting to object after the commission returned upon an application to send it back for a proper return, nor upon a further application to extend the time for the return. Waiver, as a general rule, is doing something after an irregularity committed, when the irregularity might have been corrected before such act was done. It might consist, too, of lying by and allowing the opposite party to take a fresh step in the case: Watts v. Anderson, 5 Man. L. R. 291.

Sec. 118.

If the witness is examined and the return despatched by the commissioner within the time limited for the execution of the commission, the necessary delay in transmission back does not constitute an objection: Darling v. Darling, 9 P. R. 560; Jackson v. Hughes, 1 O. W. N. 478.

The commission may be ordered to be returned to the commissioner for correction, when defectively executed: *Doe d.* Kelly v. Hunt, 1 P. R. 44.

The party who issued the commission is not bound to put it in at the trial, but the opposite or any party may do so if he chooses: Richardson v. McMillan, 18 Man. R. 359; and the judge may allow either party to put in a part of the evidence: Marks v. Marks, 13 B. C. R. 161.

Costs.—See sub-sec. (7) and notes thereto, *post*. See also Con. R. 288 as to participation of parties in the costs of a joint commission.

Con. Rules under the Judicature Act.—The provisions of Con. Rules 277-290, so far as the same are applicable, are to apply to commissions issued under section 118. These Rules are set out in the notes to section 118 (6). The order need not set out the particulars contained in Con. Rules 277-290, but every order shall be read as if it contained the same: Con. R. 290.

Examination of witnesses whose attendance at trial cannot be obtained.

(3) If it is made to appear to the judge that a material and necessary witness residing in Ontario is sick, aged, or infirm, or that he is about to leave Ontario, and that his attendance as a witness cannot be procured, the judge may make an order appointing a suitable person to take his testimony.

Forms of affidavit and order, Nos. 17, 17 (1).

Attendance at Court Cannot be Procured.—In order to found an application under this section the following circumstances must concur: (1) That the person proposed to be examined is a material and necessary witness residing within the province; (2) That such person is either (*a*) sick, (*b*) aged, (*c*) infirm, or (*d*) is about to leave Ontario; (3) That in consequence of the existence of one or more of these facts the attendance at court of such witness cannot be procured.

A material witness is one whose evidence is pertinent to the question to be tried and of importance to the person calling him.

A necessary witness is one whose evidence is so important that it would not be prudent or safe for a party to proceed to trial without it.

As a rule the application should not be granted until defendant has put in his defence: Smith v. Greey, 16 P. R. 531; Morrow v. McDougall, 16 P. R. 129.

The application should not as a rule be *ex parte*: McKenna v. Everitt, 2 Beav. 188; Anderson v. Anderson, 1 Ch. Cham. R. 291; Hope v. Hope, 3 Beav. 317, 323; Early v. McGill, 1 Ch. Cham. R. 100, 257; Bidder v. Bridges, 26 Ch. D. 1; Thomas v. Storey, 11 P. R. 417.

But, unlike sub-section (1), there is nothing in sub-sections (3) or (4) to prevent an order being so made if necessary, and where

the witness is dangerously ill or over seventy years of age, the Supreme Court of Ontario has generally granted the order *ex parte*: see Bellamy v. Jones, 8 Ves. 31; McKenna v. Everitt, 2 Beav. 188; Oliver v. Dickey, 2 Ch. Cham. R. 87; Crippen v. Ogilvy, 2 Ch. Cham. R. 304; Bidder v. Bridges, 26 Ch. D. 1, *per* Selborne, L.C., at p. 9. Sec. 118.

The evidence of the witness must not, however, be taken *ex parte*: Warner v. Mosses, 16 Ch. D. 100; and the examination of a witness conducted by one party without notice to his opponent is irregular and inadmissible as evidence: Stephenson v. Dallas, 13 P. R. 450. Where the proposed evidence would be inadmissible no purpose would be served in granting the order, and it would probably be refused: Fisher v. Bernell, 1 Dowl. N. S. 565; or would not support any issue to be tried: Jones v. Tobin, 4 Bing. N. C. 123; Speeding v. Young, 16 C. B. N. S. 824; Galloway v. Keyworth, 15 C. B. 228.

Where the court below had refused to admit the evidence of a particular witness, and the refusal was appealed from, the appellate court allowed the evidence of the witness, who was dangerously ill, to be taken *de bene esse* upon an undertaking as to costs: Treasury Solicitor v. White, 55 L. J. P. 79.

The application should be made within a reasonable time after notice of defence: Brydges v. Fisher, 4 M. & Sc. 458, and other cases cited in notes, *ante*.

The names of the witnesses sought to be examined should be stated in the affidavit: Gunther v. M'Tear, 1 M. & W. 201; Norton v. Lord Melbourne, 3 Bing. N. C. 67, and cases cited in notes, *ante*.

The order must state the names of the witnesses to be examined: Warner v. Mosses, 16 Ch. D. 100.

Sometimes it may be necessary to state upon what facts it is proposed to examine the witness: see Barry v. Barclay, 15 C. B. N. S. 849; see notes, *ante*.

In an action under Lord Campbell's Act, an order was made for the examination before trial, on behalf of the plaintiff, of the only witness to the accident which occasioned the death of deceased. It was provided that the examination should not be used at the trial, unless the plaintiff was unable to procure the attendance of the witness: Elliott v. The C. P. Ry. Co., 12 P. R. 593.

An affidavit by a person having knowledge of the facts would be sufficient. If a solicitor were employed, he or his managing clerk would ordinarily be able to make the necessary affidavit: McHardy v. Hitchcock, 17 L. J. Ch. 256; Elmsley v. Cosgrave, 6 P. R. 164; Lloyd v. Henderson, 6 P. R. 254; Baker v. Jackson, 10 P. R. 624.

Where an application was made on the ground that the parties concerned all lived abroad, and that the surviving witness to be examined was greatly afflicted with gravel, the order was made, although the affidavit only stated the witness was upwards of 60 years old: Fitzhugh v. Lee, Ambl. 65.

Sub-section (3) authorizes the examination of a material and necessary witness residing in Ontario but about to leave the province, if his attendance at the trial cannot be procured.

The Court of Chancery always allowed the examination *de bene esse* of a witness about to go abroad: Bowa v. Child, 3 Sim. 457; McIntosh v. The G. W. Ry. Co., 1 Hare. 328; McKenna v. Everitt, 2 Beav. 188; Grove v. Yonag, 3 DeG. & S. 307; see also Warner v. Mosses, 16 Ch. D. 100.

Sec. 118.

But if it is in the power of the party applying to detain the witnesses till they have been examined in the ordinary course, the order will not be made: East India Co. v. Naish, Bunb. 320. Under the terms of the sub-section it is necessary to show that the witness' "attendance at the trial cannot be obtained."

It is doubtful whether the fact that a witness is in a state of pregnancy, or about to be delivered of a child, is a cause for granting the order; see R. v. Wellings, 3 Q. B. D. 426. At all events, on applications founded on pregnancy of the witness, an affidavit of a competent person should be produced showing that the delivery would probably happen about the time fixed for the trial, or so near as to render the attendance of the witness perilous: Abraham v. Newton, 8 Bing. 274; see also R. v. Inhabitants of Huddersville, 7 E. & B. 794.

An order may be granted where a witness is so unwell that there is no probability of his being able to attend the trial: Pond v. Dimes, 3 M. & Sc. 161; Bellamy v. Jones, 8 Ves. 31; Jephson v. Greenaway, 2 Fowl. Ex. Pr. 102.

The affidavit o a medical man should generally be produced in such cases; Davis v. Lowndes, 7 Dowl. 101; Duke of Beaufort v. Crawshay, L. R. 1 C. P. 699; or else his certificate or opinion should be verified by affidavit; but the affidavit of the solicitor of his information and belief, with grounds thereof, was held sufficient: Baker v. Jackson, 10 P. R. 624.

It is not necessary, generally, for the defendant to swear to merits when the application is made on his part, nor that it is not made for the purpose of delay: Baddeley v. Gilmour, 1 M. & W. 55.

Disobedience to the order may be punished by attachment: see subsection 6; also section 65: Martin v. Bannister, 4 Q. B. D. 491; Richards v. Cullerne, 7 Q. B. D. 623; Waddell v. McGinty, 2 Ch. Cham. 442; Barber v. Adams, 11 P. R. 156; Hannum v. McRae, 18 P. R. p. 200; *Re* Armstrong, 1892, 1 Q. B. 327.

There is no provision for the production of books, papers and documents on such examination, but no doubt production would be ordered: see Con. R. 284, 508. By Rule 284, copies of documents produced by the witness and certified by the commissioner may be annexed to the deposition.

The examiner has no discretion as to the materiality of the questions put, unless upon matters which would clearly and palpably not be evidence: Surr v. Walmsley, L. R. 2 Eq. 439; but he should note any question objected to: Richardson v. Davies, 5 Q. B. D. 26.

In Wright v. Wilkin, 4 Jur. N. S. 804, it was said that the court would not delegate to the examiner the power of treating a witness as hostile so as to authorize the examination to be conducted in the nature of a cross-examination by the party calling him, but Lord Cairns, L.C., in Obisen v. Terrero, L. R. 10 Ch. 129, strongly disapproved of this ruling and pointed out that if a witness or his counsel thought that he was being unfairly dealt with he might refuse to answer a particular question, and upon that refusal the matter might be brought before the court, who would decide whether the examiner was pursuing a proper course or not in allowing a witness to be treated as hostile: as to hostile witnesses, see Itice v. Howard, 16 Q. B. D. 681; Buckley v. Cooke, 1 K. & J. 29.

The examiner's room is not a public court and he must exclude other persons than those entitled to be there if requested by either party: *Re* Western of Canada Oil Lands, etc., Co., 6 Ch. D. 109; see Rich v. Stark, 8 C. L. T. 191; Hands v. Upper Canada Furniture Co., 12 P. R. 292.

The statute requires two days' notice of the time and place of examination to be served upon the opposite party: sub-sec. (5). Sec. 118.

The fact that the judge has made the order directing the evidence to be taken by an examiner is sufficient to enable the party obtaining the order to put the depositions in evidence, saving all just exceptions: Ryan v. Devereux, 26 U. C. R. 100.

An order only for the examination, and not a commission, is to be issued under sub-sections (3) and (4).

(4) An order may also be obtained for the examination of a witness who resides in a remote part of Ontario, and at a great distance from the place of trial, if it be made to appear that his attendance cannot be procured, or that the expense of his attendance would be out of proportion to the amount involved in the action, or so great that the party desiring his attendance should not, under the circumstances, be required to incur the same. Examination of witness residing at a distance from place of trial.

(5) A copy of the order, with two days' notice of the time and place of the examination, shall be served upon the opposite party, or his agent, who may appear, and cross-examine the witness. Service of order.

Remote Part of the Province.—These words are of relative import. No definite meaning can be given to them. They must be construed in relation to the circumstances of the case. Mere distance alone would not govern. Worcester defines "remote" as "distant in place, time or connection; far; far off; not near; not nigh." The residence of a witness may be considered as "remote" from the place of trial although the actual distance may not be great. The season of the year at which the court is to be held, the accessibility to the place of trial, the facilities of travel by rail or steamboat, the expense which the witness would be put to, the time of his absence from home, the convenience of travel to and from the place of trial, should all be considered in defining the word "remote" as "distant in time, place or connection." The same may be said of the expression "great distance from the place of trial." It is an expression which must be construed *relatively*. Like "gross" negligence, it is simply remoteness after all: see Wilson v. Brett, 11 M. & W. 113; Beal v. South Devon Ry. Co., 3 H. & C. 337; Grill v. General Iron Screw Co., L. R. 1 C. P. p. 612.

A witness who resides in a "remote part" may be examined although temporarily at a place not remote: Hyland v. Canadian Development Co., 9 B. C. R. 32.

The affidavit must show "clearly" why the witness cannot be procured or what the expense of his attendance would be, so that the judge may infer that it would be out of proportion to the amount involved in the action, or so great as to be practically prohibitive.

The evidence must be taken and returned and may be used in the same manner as under section 118 (1).

Sub-section (5) applies to commissions issued under sub-secs. (1), (3) or (4) and requires two days' notice of the time and place of examination, with a copy of the order, to be served upon the opposite

Sec. 118. party or his agent; see also Con. R. 280, *post*. If the notice were not given and the opposite party did not attend on the examination the evidence would be rejected: Steinkeller v. Newton, 9 C. & P. 313. But it is not necessary that he should exercise the power of cross-examining the witness; all that is required is that he shall have the opportunity of doing so: Caxenove v. Vaughan, 1 M. & S. 4; and his right to take part in the examination might possibly be waived by giving notice that he would not do so: McCombie v. Anton, 6 M. & G. 27.

Rules made applicable to commissions.

(6) The provisions of the Rules of the Supreme Court, so far as the same are applicable, shall apply to every commission or order issued under the authority of this section.

This sub-section applies to all commissions and orders issued under sub-sections (1), (3) and (4).

Con. Rules of the Supreme Court of Judicature, so far as they apply, are as follows:

277.—(1) Where the testimony of a person who is residing out of Ontario is required and for any reason an order under Rule 271 is not sufficient, the court may order the issue of a commission for the examination of such person.

278. If a party for whose examination an order has been made or a commission has issued refuses to attend before the examiner or commissioner, judgment may pass against him.

[Either party to a cause is liable to be called as a witness by his opponent: R.S.O. 1914, c. 76, s. 6; and Con. Rule 278 applies to a party for whose examination a commission or order has been obtained under section 118 (1), (3) or (4) for the examination of an opposite party.]

279. The notice of motion for a commission to take evidence shall state the name and address of the commissioner proposed.

280.—(1) Unless otherwise directed, the examination shall be upon oral questions to be reduced into writing and returned with the commission, and notice of the execution of the commission shall be given to the opposite party, if, within the time prescribed by the order, he gives the name and the address of a person resident within two miles of the place where the commission is to be executed, on whom such notice may be served.

[The latter part of the above Con. Rule 280 (1) is inapplicable to division courts, section 118 (5) providing for the notice and its service.]

(2) If no agent is named or the name or address given proves to be illusory or fictitious or if the party so notified fails to attend pursuant to the notice, the commission may be executed *ex parte*.

281. Where the examination is to take place upon written interrogatories, the interrogatories in chief shall be delivered to the opposite party 8 days before the issue of the commission; and the cross-interrogatories shall be delivered to the opposite party within 4 days after the receipt of the interrogatories in chief; and in default of cross-interrogatories being so delivered, the commission may be executed without cross-interrogatories.

282. The witnesses shall be examined on oath, affirmation, or otherwise in accordance with the law of the country in which the commission is executed. Sec. 118.

[See notes to section 118 (1): and forms of oaths, etc., there referred to.]

283. Where a witness does not understand the English language the commission shall be executed with the aid of an interpreter nominated by the commissioner, and sworn to interpret truly the questions to be put to the witness, and his answers thereto, and the examination shall be taken in English.

Form of Oath of Interpreter.—No. 30 (f). A witness who speaks two or more languages, but does not understand the English language, may be examined in the language which he best understands; but if he can be communicated with in English it must be done; and the opposing counsel may first question the witness in English to test him as to his ability to understand it: R. v. Wong On, 2 Can. Cr. Cas. 343; and the opposing counsel may if he chooses cross-examine without an interpreter if the witness has any knowledge of that language: s. c.

284. If a witness produces a book, document, letter, paper or writing, and refuses for good cause, to be stated in his deposition, to part with the original, a copy or extract, certified by the commissioner, shall be annexed to the deposition of the witness.

285. The depositions may be taken in shorthand either by the commissioner or a shorthand writer duly sworn.

286.—(1) Unless the examination is taken in shorthand the depositions shall be subscribed by the witness and by the commissioner.

(2) Where taken in shorthand it shall not be necessary that the depositions be read over or signed by the person examined unless counsel attending on the commission so desires.

Taking Evidence in Shorthand.—The commissioner may either take it in shorthand himself or he may employ a stenographer: Con. Rule 258.

If the commissioner employs a stenographer the latter must first be sworn: Con. Rule 258: Form of oath No. 30 p. When not taken in shorthand the depositions must be signed by the witness and the commissioner: Con. Rule 286 (1). But if taken in shorthand the depositions need not be read over or signed by the witness, unless any of the parties so desire: Con. Rule 286 (2); but the commissioner is to sign them.

If there are two commissioners the depositions may validly be signed by one only: Melville Mutual, etc. v. Driscoll, 11 S. C. R. 183.

287. The commission, interrogatories, depositions and any documents or certified copies thereof or extracts therefrom, referred to therein, shall be sent to the proper officer, on or before the day named in the order for commission, enclosed in a cover under the seal of the commissioner; and the same or certified copies thereof may be given in evidence, saving all just exceptions, without any other proof of the absence from Ontario of the witness therein named than an

Sec. 118. affidavit of the solicitor or agent of the party as to his belief of such absence.

288. Where the opposite party desires to join in the commission and examine witnesses on his own behalf thereunder, each party shall in the first instance pay the costs of the commission consequent upon the examination of his witnesses.

289. A commission when returned shall, at the request of either party, be transmitted for use at the trial and may be opened at the trial or before trial at the instance of either party by the officer to whom it is returned on two clear days' notice to the other party.

290. Every order for a commission shall be read as if it contained the particulars mentioned in the next preceding ten rules and shall not set forth the same, but may contain any variations therefrom, and any other directions, which the court seem fit to make.

(7) The costs of the issue, transmission, execution and return of any commission issued or order made under the provisions of this section shall be in the discretion of the judge, who may allow a sum in gross therefor; and the costs may be added to any other costs to be paid to the party entitled thereto, and may be recovered in like manner as the ordinary costs of an action. 10 Edw. VII., c. 32, s. 118.

Costs.—Formerly costs were taxed on the County Court scale, but now the amounts and the method of arriving at them are in the discretion of the judge: s. 118 (7). Such discretion must be exercised judicially: see notes to section 10; Stroud, 216.

Generally if the examination is not used no costs of it should be allowed: McMillan v. McMillan, 8 C. L. J. 285; Curling v. Robertson, 7 M. & G. 525; Ridley v. Sutton, 1 H. & C. 741; Dominion, Etc., Co. v. Stinson, 9 P. R. 177. But where a witness was so old and infirm that it was prudent to take his examination, but he was afterwards able to attend the trial, the plaintiff was allowed both the costs of the examination and of his attendance at the trial, and the expenses of the journey of the son of the witness and his attendance upon him in giving evidence, in consequence of the age and infirmity of the witness, were also allowed: Duke of Beaufort v. Earl of Ashburnham, 13 C. B. N. S. 598.

Unless some special ground appears for ordering otherwise, the costs of the examination will usually be made costs in the cause: Prince v. Samo, 4 Dowl. 5; McMillan v. McMillan, 8 C. L. J. 285.

When the evidence taken on commission was not used at the trial, owing to admissions by the plaintiff on his examination as a witness being substantially the same as the depositions taken on the commission, the costs of executing the commission were allowed, notwithstanding that such evidence was not used at the trial: Rondot v. Monetary Times Printing Co., 18 P. R. 141.

Commissioners have a lien on commissions for their fees: Peters v. Beers, 14 Beav. 101; and a barrister has a lien for his fees on commission: Smith v. Hailen, 2 F. & F. 678.

Books of Accounts, Affidavits, etc., as Evidence. Sec. 119.

Judge may receive in evidence plaintiff's or defendant's books of account.

119. In an action for a debt or money demand of not more than $25, and in case of a defence of set-off or of payment so far as the same extends to $25, the judge, on being satisfied of their general correctness, may receive the plaintiff's, defendant's or garnishee's books as evidence, and may also receive as evidence the affidavit of any party or witness resident out of the county, but may require the party or witness to answer written interrogatories upon oath. 10 Edw. VII., c. 32, s. 119.

Debt or Money Demand.—The words "not being for tort" in the old section are omitted as surplusage; an action for tort is not a "money demand:" see notes to sec. 98; and see *Re* Mager v. The Canadian Tin Plate Dec. Co., 7 O. L. R. 25, on this subject.

Not More than $25.—The old section read "being under $25."

The present section is also amended to include a garnishee; the word "plaintiff" including "primary creditor:" sec. 2 (j).

Books of Account as Evidence.—The judge must first be satisfied of the "general correctness" of the books, and if he is it is then permissible to receive them. The experience of most judges is that the evidence of well kept books, in which the original entries are made in regular order, is of the most reliable and satisfactory character. Books of account may also be used to refresh the memory in other cases than those provided for in the section: Taylor on Evi., 8th ed. 1198-1206; or as entries made by a deceased person against his pecuniary or proprietary interest: Higham v. Ridgway, 3 Sm. L. C. Edson ed. 1607: Taylor on Evi. 8th ed. 588; or in the usual course of business and made contemporaneously with the acts to which they relate: Price v. Torrington, 1 Sm. L. C. Edson ed. 566; Taylor on Evi. 8th ed. 612-624; or in actions between master and servant, tradesman and shopman, banker and customer, or co-partners, when the opposite party has had ample opportunities from time to time for testing the accuracy of the entries: Taylor on Evi. 8th ed. 704.

But a witness will not be allowed to look at a copy of a memorandum which he made six months after the original entry in order to refresh his memory: Jones v. Stroud, 2 C. & P. 196. When counsel puts a paper into a witness's hands for the purpose of refreshing his memory the opposite counsel has a right to see it and cross-examine or re-examine upon it without being bound to read it in evidence: R. v. Ramsden, 2 C. & P. 603.

Under the general law an entry or record made by a person since deceased, in reference to some particular act or business which it was his duty to transact, and where it was his duty to make such entry or record of it, is receivable in evidence in favor of or against either party: see the leading case of Price v. Earl of Torrington, 1 Salk. 285, 1 Smith's Leading Cases, 6th ed. 290; Smith v. Blackley, Q. R. 2 Q. B. 326, in which the authorities are fully discussed; also Massey v. Allen, 13 Ch. D. 558; Poloni v. Gray, 12 Ch. D. 411, 5 App. Cas. 623.

Affidavit.—To save expense this provision has been introduced. The witness must be "resident" without the county. As to what con-

Sec. 119. stitutes "residence," see notes to section 72. "Affidavit" includes "affirmation:" Rule 2 (4); R.S.O., 1914, c. 76, s. 15.

Written Interrogatories, Etc.—The right of cross-examination is here recognized: Attorney-General v. Davison, McCiel. & Y. 160; but only by *written* interrogatories, for which it would seem a commission or order would have to be issued under s. 118.

INSPECTION, PRESERVATION, AND DETENTION OF PROPERTY.

Con. R. 370: The court may upon the application of any party and upon such terms as may seem just, make any order for the detention or preservation of property being the subject of the action or for the inspection of any property, the inspection of which is necessary for the proper determination of the question in dispute; and for all or any of the purposes aforesaid, may authorize any person or persons to enter upon or into any land or building in the possession of a party and may authorize any samples to be taken, or any observation to be made, or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence: Con. R. 370.

(2) The court may also on notice to any person not a party to the action make an order authorizing entry upon or into any lands or building in the possession of such person for the purposes of such inspection: Con. R. 370 (2).

The judge may inspect any property or thing in question: Con. R. 265, 266; and may order a view by the jury: Con. R. 267.

The above rules are applicable to division court cases: s. 226; Rule 2 (7).

Any Party to an Action.—Inspection cannot be obtained under this rule by defendant against another when no right is in question between them in the action. The application need not, however, in all cases be by plaintiffs against defendants, or *vice versa*, but it must be by and against parties between whom there is some right to be adjusted in the action: Shaw v. Smith, 18 Q. B. D. 193; see also Brown v. Watkins, 16 Q. B. D. 125.

Detention and Preservation of Property.—Where a defendant alleged that jewellery, the subject of the action, belonging to a third party, had been deposited with him as security for a debt, it was ordered to be deposited in court: Velati v. Braham, 46 L. J. C. P. 415. Where, in an action for the return of diamonds deposited with the defendant, the latter refused the option of bringing the value of them into court, an order was made for their delivery to the court within forty-eight hours: Ridpath v. Zacher, 9 T. L. R. 538. Where the property, which is the subject matter of the action, is being damaged, the plaintiff may be appointed receiver and manager: Hyde v. Warden, 1 Ex. D. 309. An order might also be made commanding a defendant to do an act necessary for the preservation of the property in question: Strelley v. Pearson, 15 Ch. D. 113; and where in the event of an appeal by an appellant being successful, success would be useless, the fund was protected; in the meantime an order was made containing an injunction pending the appeal: Polini v. Gray, 12 Ch. D. 438. But this could not now be done in Division Courts, the right to grant injunctions in such courts being expressly prohibited: section 65 (2).

Sec. 119.

Inspection of Property.—Liberty may be given to the plaintiff to enter on the defendant's land and dig up soil for the purpose of discovering the course of a drain, the subject of the action: Lumb v. Beaumont, 27 Ch. D. 356. Where a defendant refused to accept a shipment of butter, and claimed to hold sample tubs as a separate purchase and refused to give them up, an order was made authorizing the plaintiff and his witnesses to enter upon the defendant's lands and buildings to make observations of them: Munn v. McConnell, 7 C. L. T. 169.

Where, however, in an action complaining of a nuisance, proof of the nuisance could be obtained from external sources, an application to inspect the defendant's works to ascertain how the nuisance was occasioned, was refused: Barlow v. Bailey, 18 W. R. 783. In Lewis v. Earl of Londesborough, (1893) 2 Q. B. 191, documents in the possession of the opposite party were ordered to be placed in the custody of an officer of the court, and the applicant was given leave to take photographs of them, the photographing to be done in the presence of the opposite party. In an action for overdue instalments of subsistence, money payable by a syndicate formed for working an invention of the plaintiff, inspection of the article invented in course of construction was refused: Burton v. War Ordinance Syndicate, 8 T. L. R. 246.

An order for inspection of the subject matter of an action will not be made if the defendant has neither possession nor property in the same, and the person having such possession or property is not before the court: Reid v. Powers, 28 Sol. Jour. 653; Garrard v. Edgar, 37 W. R. 501.

Experiments.—Applications authorizing experiments to be tried have been made chiefly in patent cases which are generally beyond the jurisdiction of division courts: R. v. Halifax C. C. Judge, (1891) 2 Q. B. 263; see notes to section 61. The court may, under the rule, employ independent expert evidence to give advice upon which the court may form its judgment: Con. R. 268: Badische v. Anilin and Soda Fabrik v. Levinstein, 24 Ch. D. 156.

Costs.—The plaintiff may be ordered to pay the costs of the inspection of defendant's property in any event: Mitchell v. Darley Main Colliery Co., 10 Q. B. D. 457.

Terms.—The party who obtains the possession of any property under an order made pursuant to this rule may be required to enter into an undertaking not to deal with it except under the direction of the court, and to abide by any order which the court may think fit to make as to damages or otherwise: Taylor v. Eckersley, 2 Ch. D. 302.

SECURITY FOR COSTS.

Proceedings may be stayed by order of the judge until security is given to the defendant for the costs of defence, under circumstances which would justify an order being made in the Supreme Court of Ontario: Fletcher v. Noble, 9 P. R. 257, which decided that security be ordered under what is now section 226 (1) and Rule 2 (7), which make the general principles of practice of the Supreme Court applicable in cases not expressly provided for by the Division Courts Act.

Security for costs may be ordered in the Supreme Court:—

(1) Where the plaintiff resides out of Ontario: Con. R. 373 (*a*); Allcroft v. Morrison, 19 P. R. 59; (2) A plaintiff ordinarily so resident must give security, though he may be temporarily resident within Ontario: Con. R. 373 (*b*).

Sec. 119.

Resides Out of Ontario.—An incorporated company "resides" in Ontario if it is incorporated and has its head and controlling office within the province and its business is carried on there; and security will be ordered to be given by a company incorporated and having its head office out of Ontario, even if it has agents acting in its business interests in Ontario, if it has not sufficient property within the province: Ashland v. Armstroag, 11 O. L. R. 414. See, also, Neshit v. Gaina, 3 O. L. R. 420; Saart v. G. T. R., 1 O. L. R. 200; Cicchetto v. Guelph, 1 O. W. N. 435, on the question what is *residence*.

Security for costs may be ordered against a plaintiff residing abroad in an interpleader suit or proceeding: Bruce v. Ancient Order of United Workmen, 11 O. L. R. 633.

In an action by an infant residing in Ontario by his father suing as next friend and also personally, the father residing abroad, security for costs was ordered: Felgate v. Hegler, 9 O. L. R. 315; McBain v. Waterloo Mfg. Co., 8 O. L. R. 620.

Where the plaintiff, who for many years had lived in Ontario, was the agent in Detroit of an Ontario company, his wife and the members of his family residing in Ontario where he visited them at intervals for brief periods, it was held that he "resided" in Ontario: Moffatt v. Leonard, 6 O. L. R. 383.

Where there are several defendants not having joint interests, and some of them reside out of Ontario, the latter will be required to give security for costs: Irving v. Clark, 12 P. R. 29; Smith v. Silverthorn, 15 P. R. 197.

(3) Where the plaintiff has brought another action or proceedings for the same cause which is pending in Ontario, or in any other country: Con. R. 373 (c); Campbell v. Elzier, 16 P. R. 449.

(4) Where the plaintiff or any person through or under whom he claims has had judgment or order passed against him in another action or proceeding for the same cause in Ontario or in any other country, with costs, and such costs have not been paid: Con. R. 373 (d).

(5) When the plaintiff sues as an informer or seeks to recover any penalty given to any informer or person who sues for the same under any statute or law in which a penalty is given to any person who sues for the same, either for his sole benefit, for the benefit of the Crown, or partly for his benefit and partly for the benefit of the Crown, and the defendant swears that, in his belief, the plaintiff or informer is not possessed of property sufficient to answer the costs of the action in case a judgment is rendered in favour of the defendant, and that he (the applicant) has a good defence to the action upon the merits as he is advised and believes: Con. R. 373 (e).

(6) Where the action is brought by a nominal plaintiff: Con. R. 373 (f). So in an action brought in the name of an insolvent person for the benefit of some other person, security will be ordered: Boice v. O'Loane, 7 P. R. 350; R. v. Rainey Lake Lumber Co., 11 P. R. 314; Clark v. St. Catharines, 19 P. R. 205; Delaney v. McLellan, 13 P. R. 63; Cowell v. Taylor, 31 Ch. D. 34.

(7) Where under the provisions of any statute, the defendant is entitled to security for costs: Con. R. 373 (i).

So in an action against a justice of the peace or against any person "for any act done in pursuance or execution of any statute or of any public duty or authority, or in respect of any alleged default in the execution of any such statute, duty or authority, the defend-

ant may at any time after the service of the writ upply for security for costs: R.S.O. 1914, c. 80, s. 16. Sec. 119.

The application must be on notice and an affidavit of the defendant, as required by section 16 (2).

Forms of notice, affidavits and order, Nos. 71 (a), 71 (b) and 71 (c). Form of bond, No. 71.

Affidavits controverting the defence will not be received, nor will any nice questions of law, or any reasonable question of fact be dealt with on the applications: Southwick v. Hare, 15 P. R. 222; Lancaster v. Ryckman, 15 P. R. 199; Bartram v. London Free Press, 18 P. R. 11; Paladino v. Gustin, 17 P. R. 553; Macdonald v. World, 16 P. R. 324; Titmarsh v. McConnell, 1 O. W. N. 208.

The affidavit in support of the application may be made by the "defendant or his agent:" R.S.O. 1914, c. 89, s. 16 (2), and the defendant's solicitor is such "agent" by whom the affidavit may be made: Robinson v. Morris, 15 C. L. R. 649. But when the affidavit made by an agent on behalf of the defendant did not show the grounds for his belief in the truth of statements not based on his own personal knowledge, as required by Rule 45, nor set out facts justifying the conclusion that the defendant had a good defence on the merits, or that the grounds of action were trivial or frivolous, the application was refused, but with leave to apply again on better material on payment of costs: Robinson v. Morris, 15 O. L. R. 649; Simpson v. Ross, 5 Terr. L. R. 485; and a supplementary affidavit supplying the defect was held not receivable in Kerr v. Suter, 6 Terr. L. R. 255.

If the claim is of such a character that the case cannot go on it to a jury against the defendant as a public officer (*e.g.*, where he is not sued in his capacity of a public officer), he cannot claim the protection of the statute, although he shews by affidavits that his sole connection with the matter complained of was in his public capacity: Parkes v. Baker, 17 P. R. 345.

Where a claim and counterclaim arise out of different transactions, so that the counterclaim is really a cross-action, the defendant if he is resident out of the province, may be required to give security for the plaintiff's costs of the counterclaim; and if the only dispute remaining is upon the counterclaim, it is only right that such security should be ordered: Sykes v. Sacerdoti, 15 Q. B. D. 423.

Claimants in garnishee and interpleader proceedings, resident out of the jurisdiction, may be ordered to give security for costs: Canadian Bank of Commerce v. Middleton, 12 P. R. 121; Tomlinson v. Land and Finance Corporation, 14 Q. B. D. 539.

Where both parties were resident out of the jurisdiction, security was ordered to be given by both: *Re* La Compagnie Générale, 1891, 2 Ch. 451, at p. 458.

Security for costs may be ordered to be given by a defendant with reference to his counterclaim: Levi v. Edwards, 5 O. W. R. 83.

The foregoing Rules apply to garnishee and interpleader cases; the word "action," including garnishee proceedings, and proceedings for relief by interpleader: Con. R. 3 (b); and section 2 (1) (a) of the Division Courts Act; and the words "plaintiff" including primary creditor and "defendant" including primary debtor: section 2 (1) (j) (d).

Sec. 120.

A defendant setting up a counterclaim arising out of a different transaction from the subject of the plaintiff's claim is liable to give security for costs, being considered really the plaintiff in a separate action: Sykes v. Sacerdoti, 15 Q. B. D. 423; Lake v. Haseltine, 55 L. J. Q. B. 2050. But not where the counterclaim arises out of the same transaction as the plaintiff's claim: Mapleson v. Nasine, 5 Q. B. D. 144; Neck v. Taylor, 1893, 1 Q. B. 560; New Fenix Co. v. General Accident T. & L. Ass. Co., 1911, 2 Q. B. 910: Molson's Bank v. Sawyer, 19 P. R. 310.

Next Friend of Infant Plaintiff.—If out of jurisdiction the next friend will be required to give security: see cases cited in Holmested's Judicature Act, 4th ed., p. 879.

Form of Security.—The order should prescribe the kind of security to be given. It is suggested that it should provide that, if given by bond, it should be made in favour of the defendant, and filed with the clerk, after being approved by the judge, or by the defendant's solicitor, and, if by deposit of a sum of money, it should be paid into court. It should also provide that the bond or the money should be subject to the further order of the judge.

Before whom affidavits may be sworn.

120.—(1) Affidavits may be sworn before a clerk or deputy clerk, or before a justice of the peace, notary public or commissioner for taking affidavits.

Affidavits sworn before agents not to be used.

(2) An affidavit sworn before the agent of the party on whose behalf it was made, or before the clerk or partner of such agent, shall not be used. 10 Edw. VII., c. 32, s. 120.

Affidavits.—As to affidavits generally, see Rules 42-50, and notes to sections 75 and 99.

The heading of an affidavit is merely descriptive and not an allegation of fact: Hood v. Cronkite, 4 P. R. 270; *Re* Green, 15 C. L. J. 35.

The name of the court and style of cause should appear in affidavit: Rule 43; Allman v. Kensall, 3 P. R. 110; Swift v. Jones, 6 U. C. L. J. 63; Hart v. Ruttan, 23 C. P. 613; *Re* Sharpe, 2 Ch. Cham. 67; McDonald v. Cleland, 6 P. R. 289; Scott v. Mitchell, 8 P. R. 518. The judge could, however, receive the affidavit notwithstanding defects: Rules 46, 48, 50; and see R. S. O. 1914, c. 40, s. 40.

The description of the residence of a deponent in an affidavit must be that residence which exists at the time of the swearing of the affidavit: Button v. O'Neill, 4 C. P. D. 354.

This section expresses the different persons who only have the right to take affidavits in the division courts. All affidavits taken by persons other than those mentioned in this section would be void, unless sworn out of the province, when they may be sworn before any of the persons enumerated in The Ontario Evidence Act, R. S. O. 1914, c. 40, s. 38. See section 75 (3) and notes thereto.

Notary Public.—See The Notaries Act, R. S. O. 1914, c. 160.

Commissioner for Taking Affidavits.—See R. S. O. 1914, c. 77, ss. 9, 10.

An affidavit sworn before the solicitor or agent of the party on whose behalf it was made, or before the clerk or partner of such solicitor or agent, cannot be used: section 12 (2); Rule 50. Sec. 121.

"Affidavit" includes affirmation and declaration in the cases of persons allowed by law to affirm or declare, instead of taking an oath: R.S.C. 1914, c. 1, s. 29 (b); Rule 2 (4); see also notes to section 116, *ante*.

Judge's Decision.

121. The judge shall, in court, openly, and as soon as may be after the trial, pronounce his decision; but if he is not then prepared to pronounce a decision he may postpone it until it is convenient for him to give the same, and he shall then send it to the clerk, who shall forthwith enter the judgment and by registered post notify the parties or their agents thereof. 10 Edw. VII., c. 32, s. 121. Judge may give judgment instanter, or postpone judgment.

See section 63, *supra*.

Pronounce His Decision.—"Decision" here means the judicial disposal of the case which the judge has heard. The legislature has evidently taken the same view as Jessel, M.R., did.—"That a judge's decision is best when the facts are fresh in his mind"—by declaring that he should pronounce a decision in a case tried before him "openly and as soon as may be;" marginal notes "instanter." By section 63, this is to be done in a summary way "agreeable to equity and good conscience." See also notes to section 18.

A judge cannot alter his decision at will: Jones v. Jones, 5 D. & L. 628; Irving v. Askew, L. R. 5 Q. B. 208, but he may do so before he enters it: Canadian Land & Emigration Co. v. Dysart, 9 Q. R. 495, 512. See also *Re* St. Nazaire Land Co., 12 Ch. D. 88, 91; Rathbone v. Michael, 20 O. L. R. 503.

If, however, "the court finds that the judgment as drawn up does not correctly state what the court actually decided and intended" it may be amended: Mitchell v. Sparling, 1 O. W. N. 297; The Recepta, 1893, p. 255; and where the judge, by a mere slip so obvious that no one could be misled by it, directed judgment to be entered for the defendant instead of the plaintiff, it was amended in the presence of the solicitors who appeared for both parties at the trial: The North American Life Ass. Co. v. Collins, 9 O. L. R. 579; and see Mitchell v. Sparling, 1 O. W. N. 297.

Sundays and Holidays.—Judicial proceedings on Sunday are prohibited by Con. Stat. U. C. 1859, c. 104, which is still in force in Ontario: Attorney-General v. Hamilton Street Ry., 1903, A. C. 524; 7 Can. Cr. Cas. 326; see also R. S. C. c. 153, s. 14.

Other holidays are not *dies non juridici*, and in Ontario, the only day on which no judicial act can be validly done is Sunday: Foster v. Toronto Ry. Co., 31 O. R. 1; followed by the Court of Appeal in *Re* Schumacher and Town of Chesley, 21 O. L. R., p. 528; see also notes to section 21.

Until it is Convenient.—Formerly it was necessary for the judge to "name a subsequent day and hour" for delivery of judgment "in

Sec. 121. writing at the clerk's office," and it was held that that provision had to be carefully observed, otherwise prohibition might follow any subsequent attempt to give judgment: see Forbes v. The Michigan Central Ry. Co., 20 A. R. 584, at p. 589; *Re* Burrowes, 18 C. P. 493; *Re* Tipling v. Cole, 21 O. R. 276; *Re* Wilson v. Hutton, 23 O. R. 20; see also McPherson v. McFee, 21 O. R. 280, 411; Bank of Ottawa v. Wade, 21 O. R. 486.

But this section relieves the judge from what was found to be a duty often overlooked. He may now simply reserve judgment and send the same, when ready, to the clerk, who is bound forthwith to enter judgment without prior notice to the parties.

Notify the Parties.—This is to be done by the clerk: see Rule 78 as to the mode of giving notice.

In the event of the resignation or death of the judge before he delivers judgment, there must be a new trial *ab initio*: Clark v. Traske, 1 O. L. R. 207.

It is questionable whether the provision for deferring judgment applies to garnishee cases. The corresponding section (150) in the R.S.O. 1887, contained the words "in any case heard before him," and it was held in *Re* Tipling v. Cole, 21 O. R. 276, that these words applied as well to the judge's decision in garnishee cases as in other cases; and it was pointed out in Hobson v. Shannon, 27 O. R. 115, that because of these words, that case was distinguished from the Topling case. In the present section 121, the words quoted are omitted, so that the grounds given for the decision in the Topling case are taken away.

Interest.—The allowance or disallowance of interest is frequently a matter for consideration at the trial. The following enactments bear on the question:

(1) THE JUDICATURE ACT, R.S.O. 1914, c. 56, s. 34.

Interest shall be payable in all cases in which it is now payable by law, or in which it has been customary for a jury to allow it: This section was originally 7 Wm. IV. c. 3, s. 20. The concluding clause is not in the English Statute, 3 and 4 Wm. IV. c. 42; and see McCullough v. Clemow, 26 O. R. p. 467; and City of Toronto v. Toronto Ry. Co., 7 O. L. R. 78; s. c., 1905, A. C. 33, for examples of the application of that clause, etc. At common law interest was not payable on ordinary debts unless by agreement or mercantile usage; nor could damages be given for non-payment of such debts: Higgins v. Sargent, 2 B. & C. 348; Page v. Newman, 9 B. & C. 378; Foster v. Weston, 6 Bing. 709; but an implied contract to pay interest may be raised from the dealings between the parties, as where the debtor has been in the habit of paying interest upon such or similar securities: *Ex parte* Williams, 1 Rose, 399; Newell v. Jones, 4 C. & P. 124; and a partner could not be charged interest on an overdrawn account: Rhodes v. Rhodes, Johns. 653; 6 Jur. N. S. 600; see Rishton v. Grissell, L. R. 10 Eq. 393; but a surety could charge interest on a sum he had been compelled to pay: Petre v. Duncombe, 2 L. M. & P. 107; 15 Jur. 86; Wellington County v. Wilmot Township, 17 U. C. R. 82; Hitchman v. Stewart, 3 Drew. 271; *Ex parte* Bishop, 15 Ch. D. 400; and so might an agent who had advanced money for his principal in mercantile business: Bruce v. Hunter,

3 Camp. 467; and where, but for the breach of his agreement, the defendant would have become liable for a debt bearing interest in an action for such breach, interest may be awarded: Rhoades v. Selsey, 2 Beav. 359; McIntosh v. G. W. Ry. Co., 4 Giff. 606; s. c. 2 Mac. & G. 74; Lond. Chat. & Dover Ry. Co. v. S. E. Ry. Co., 1892, 1 Ch. 120; 1893, A. C. 429; Marshall v. Poole, 13 East. 101; Farr v. Ward, 3 M. & W. 25. Sec. 121.

An account stated does not of itself entitle the creditor to interest on it as a matter of law; and it is not so chargeable unless a fixed time for payment was agreed upon, or a demand for payment was subsequently made, or unless the accounts and dealings between the parties shew that in adjusting the same they have been in the habit of adding interest: George v. Green, 13 O. L. R. 189; 14 O. L. R. 578; but a jury might allow such interest as damages: s.c.

Interest, apart from contract, is not a matter of right: Independent Cordage Co. v. The King, 13 O. L. R. p. 627; Pleaderleith v. Parsons, 13 O. L. R. 619.

Money due on an account stated will not bear interest except payable on a particular day or by usage shewn in the account: Nichol v. Thompson, 1 Camp. 52 (a); Pinhorn v. Tuikington, 3 Camp. 468; Chaille v. York, 6 Esp. 45; or the account stated is for money lent, or between merchant and merchant: Binney v. Headricks, 2 W. Bl. 761; or the action is upon an award of a sum payable at a certain time: Towsley v. Wythes, 16 U. C. R. 139; Churcher v. Striager, 2 B. & Ad. 777; or is a liquidated demand for work done: Smart v. Niagara and Detroit Co., 12 C. P. 404; or is for wages: McCullough v. Newlove, 27 O. R. 627; or is for money improperly retained by a sheriff: Michie v. Reynolds, 24 U. C. R. 303; or improperly used in his business by an agent: Landman v. Crooles, 4 Gr. 353; but where, though an agent's accounts were found to be inaccurate, there was no fraudulent dealing with the money, nor any wilful withholding of accounts or fraudulent falsification of them, interest was disallowed: Turner v. Burkinshaw, L. R. 2 Ch. 488; *Re* Kirkpatrick, Kirkpatrick v. Stevenson, 10 P. R. 4.

The general manager of a company was held chargeable with interest on money which he withdrew from the company in the erroneous belief that he was entitled to it as salary under a resolution of the shareholders: Earle v. Burland, 6 O. L. R. 327.

In practice, interest is much more frequently allowed by our juries than English authority would seem to warrant. In this case the court struck the interest out of the verdict: Spence v. Hector, 24 U. C. R. 277.

On the trial of any issue, or any assessment of damages upon any debt or sum certain payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable: R.S.O. 1914, c. 56, s. 35 (3). The contract must ascertain the sum and the time; the certainty of both must appear from the contract, but if all the elements of certainty appear by the contract, and nothing more is required than a mathematical computation to ascertain the exact sum or the exact time for payment, that will be sufficient: Merchants Shipping Co. v. Armitage, L. R. 9 Q. B. 99; Lond. Chat. & Dover Ry. Co. v. S. E. Ry. Co., 1892, 1 Ch. 120, 144, 148; 1893, A. C. 429; McCullough v. Clemow, 26 O. R. 467; but not if the debt or its due date have to be ascertained by some act to be performed: Sinclair v. Preston, 31 S. C. R. 408. The case of Duncombe v. Brighton Club & Norfolk Hotel Co., L. R. 10 Q. B. 371, must be treated as not good law. A mere application for a loan till a fixed day, but containing no

Sec. 121. obligation to repay, is insufficient, though the loan is made on the terms of the application: Taylor v. Holt, 3 H. & C. 452. The allowance of interest is discretionary: Hill v. South Staffordshire Ry. Co., L. R. 18 Eq. 170. The statute is not applicable to cases where a recovery is sought, not against a defendant personally, but against his estate; and except under extraordinary circumstances, upon particular grounds suggested, of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity: Snarr v. Badenach, 10 O. R. 131.

Interest is not allowed upon a claim which is not for a debt or money demand; *e.g.*, for damages under a bond the amount of the damages not being ascertained until judgment: Benn v. Beattie, 3 O. L. R. 345; 4 O. L. R. 554; Sinclair v. Preston, 31 S. C. R. 408. In an action on a bond conditioned for the payment of a less sum than a penalty, payable on a fixed date, interest was allowed although interest was not mentioned: *Re* Dixon, Heynen v. Dixon, 1899, 2 Ch. 561; 1900, 2 Ch. 561.

In the case of an agreement for a lease, the lessees having gone into possession and enjoyment of the demised premises under the agreement, but the lessors delayed making a title, interest was not allowed in an action for arrears of rent except from the time the lessees had made a good title: *Re* Canadian Pac. Ry. Co. v. Toronto, 5 O. L. R. 717; 1905, A. C. 33.

If payable otherwise than by virtue of a written instrument at a certain time, interest may be allowed from the time when a demand of payment is made in writing informing the debtor that interest will be claimed from the date of the demand: R.S.O. 1914, c. 56, s. 35 (2).

Demand held sufficient, see Mowat v. Londesborough, 4 E. & B. 1; Mildmay v. Methuen, 3 Drew. 91; *Ex parte* Lintott, L. R. 4 Eq. 184; Edwards v. G. W. Ry. Co., 11 C. B. 588; *Re* Overend, Gurney & Co., Barron's case, L. R. 3 Ch. 784. A claim of interest on the summons was held to be an insufficient demand: Rhymney Ry. Co. v. Rhymney Iron Co., 25 Q. B. D. 146; but in Irwin v. Victoria Harbor (unreported, but referred to in Holmested's Judicature Act, 4th ed., 197), it was held that the endorsement on the writ of summons claiming interest, was a sufficient demand. If, however, the claim does not specifically ask for interest, the bringing of the action for the debt is not a demand within the above provision: London v. S. E. Ry. Co., 1893, A. C. 429.

The word "writing" in the above statute includes words printed, painted, engraved, lithographed, photographed or reproduced by any mode in a visible form: R.S.O. 1914, c. 1, s. 31 (hh).

A printed notice in the heading of an account rendered that interest will be charged, is not a demand within this provision: *Re* Edwards, 63 L. T. 453; but where the debtor has been in the habit of paying interest on accounts so rendered, there is an implied contract to continue to do so: *Re* Anglesea, 1901, 2 Ch. 548.

Interest in such cases as the foregoing may be recovered, however, under R.S.O. 1914, c. 56, s. 34.

Where a party has continuing money transactions with another without any rate of interest being mentioned, but statements of account are rendered from time to time, including interest at rates therein mentioned, and no objection is taken, but payments are made to cover the interest so charged, such rates being reasonable, these circum-

stances are evidences of an agreement to pay the rates charged: Clark v. Baillie, 19 O. L. R. at p. 563. Sec. 121.

Money held in hand by a third person pending an interpleader between other parties as to which of the latter is entitled to the money, bears interest at the legal rate of five per cent., as the holder could have paid the money into court and so got rid of the responsibility: Adams v. Cox, 10 O. L. R. 190.

The demand creating a claim for interest must be in writing: Ingils v. Wellington Hotel Co., 29 C. P. 387. A solicitor may give notice that he will claim interest on his bill of costs delivered to his client from the date of the notice: Berrington v. Phillips, 1 M. & W. 48; *Re* McClive, 9 P. R. 213.

In actions for conversion of goods for trespass *de bonis asportatis*, the jury may give interest in the nature of damages, over and above the value of the goods at the time of the conversion or seizure; and in actions on policies of insurance, may give interest over and above the amount recoverable thereon: R.S.O. 1914, c. 56, s. 35 (3). As to when interest ceases in such cases, see Peruvian Trans. Co. v. Dreyfus, 1892, A. C. 166.

Interest need not be claimed nor special damage laid: Paine v. Pritchard, 2 C. & P. 558. On a policy of insurance interest can only be allowed for the wrongful detention of money which ought to have been paid; and when, for want of administration, there was no person clothed with a legal title to the money, interest was disallowed: Webster v. British Empire Mut. Life Ass. Co., 15 Ch. D. 169; Toronto Savings Bank v. Canada Life Ass. Co., 14 Gr. 509.

Compound interest is never allowable except by express or implied contract: Ferguson v. Fyffe, 8 Cl. & F. 121; Atwood v. Taylor, 1 M. & G. 279; Daulel v. Sinclair, 6 App. Cas. 181; and see Imperial Trusts Co. v. New York Security & Trust Co., 10 O. L. R. 289, on the question what is a sufficient stipulation to enable the creditor to recover interest on interest *post diem*.

Where payments are made and not specifically appropriated to the principal, they may be applied first in reduction of interest: McGregor v. Gaulin, 4 U. C. R. 378; Bettes v. Farewell, 15 C. P. 450; Ross v. Perranit, 13 Gr. 203; Barnum v. Turnbull, 13 U. C. R. 277; Cummings v. Usher, 1 P. R. 15.

(2) THE BILLS OF EXCHANGE ACT, R.S.C. c. 119.

Where a bill is dishonoured, the holder may recover from any party liable on the bill, and the drawer who has been compelled to pay may recover from the acceptor, and an indorser who has been compelled to pay may recover from the acceptor, or from the drawer or from a prior indorser, the amount of the bill, with interest from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in an other case and the expense of noting and protest: sections 134, 135; see London Universal Bank v. Clanearty, 1892, 1 Q. B. 689; Lawrence v. Willcocks, 1892, 1 Q. B. 696.

On a bill of exchange, expressed to be with interest, interest runs from its date, or if undated from its issue: R.S.C. c. 119, s. 28 (3).

Interest is not allowed in an action to recover money paid by mistake: Barber v. Clark, 20 O. R. 522; 18 A. R. 435; Johnston v. The King, 1904, A. C. 817.

Sec. 121.

Independently of the above or any enactments, courts of equity have always allowed interest upon a debt wrongfully withheld: Spatali v. Constantinide, 20 W. R. 823. So interest was allowed on gales of rent unpaid under a lease wrongfully repudiated by the lessee: Fitzgerald v. Mandas, 21 O. L. R., p. 314. Interest is payable by a purchaser or appropriator of land from the time he takes possession; and this will include interest on the amount to which the person whose land is appropriated is entitled in respect to other lands not appropriated but injuriously affected by the appropriation: *Re* Macpherson and City of Toronto, 26 A. R. 351; 30 S. C. R. 321; *Re* Davies and James Bay Ry. Co., 20 O. L. R. 534.

In England a County Court judgment does not bear interest: R. v. Judge of Essex, C. C., 18 Q. B. D. 704; but a division court judgment probably bears interest under section 8, but certainly, if execution is resorted to for collection of a judgment, interest may be levied under section 173 (2). Under section 122 (2), unless the judge otherwise orders, no sum is payable on a judgment or order until fifteen days after the decision is rendered, except judgment be entered by default under section 98 or summarily under section 100.

Unless otherwise ordered by the court, a verdict or judgment of the high court bears interest from the time of the rendering of the verdict or the giving of the judgment, as the case may be, notwithstanding that the entry of judgment shall have been suspended by any proceedings in the action whether in the court in which the action is pending or in appeal: R.S.O. 1914, c. 56, s. 34 (4); see McLaren v. Canada Central Ry. Co., 10 P. R. 328; Talbot v. Canadian Colored Cotton Co., 17 C. L. T. 336.

The following statutes govern contracts respecting interest:—

(3) THE INTEREST ACT, R.S.C. c. 120.

1. This Act may be cited as the Interest Act.

2. Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon.

3. Except as to liabilities existing immediately before the seventh day of July, one thousand nine hundred, whenever any interest is payable by the agreement of parties or by law, and no rate is fixed by such agreement or by law, the rate of interest shall be five per centum per annum.

4. Except as to mortgages on real estate, whenever any interest is, by the terms of any written or printed contract, whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of five per centum per annum shall be chargeable, payable or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent.

5. If any sum is paid on account of any interest not chargeable, payable or recoverable under the last preceding section, such sum may

be recovered back or deducted from any principal or interest payable under such contract. Sec. 121.

INTEREST ON MONEYS SECURED BY MORTGAGE ON REAL ESTATE.

6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money, and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

7. Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in such statement.

8. No fine or penalty or rate of interest shall be stipulated, taken, reserved or exacted on any arrears of principal or interest secured by mortgage on real estate, which has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrear; Provided that nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear.

9. If any sum is paid on account of any interest, fine or penalty not chargeable, payable or recoverable under the three sections last preceding, such sum may be recovered back, or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal.

10. Whenever any principal money or interest secured by mortgage on real estate is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, then, if, at any time after the expiration of such five years, any person liable to pay or entitled to redeem the mortgage tenders or pays, to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under the provisions of the four sections last preceding, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage: Provided that nothing contained in this section shall apply to any mortgage upon real estate given by a joint stock company or other corporation, nor to any debenture issued by any such company or corporation, for the payment of which security has been given by way of mortgage on real estate.

11. The provisions of the five sections last preceding shall apply only to moneys so secured by mortgage executed after the first day of July, one thousand eight hundred and eighty.

Sec. 121.

(4) THE MONEY-LENDERS ACT, R.S.C. c. 122.

1. This Act may be cited as the Money-Lenders Act.

2. 'Money-lender' in this Act includes any person who carries on the business of money-lending, or advertises, or announces himself, or holds himself out in any way, as carrying on that business, and who makes a practice of lending money at a higher rate than ten per centum per annum, but does not comprise registered pawnbrokers as such.

3. This Act shall not apply to the Yukon Territory.

4. This Act shall not apply to any loan or transaction in which the whole interest or discount charged or collected in connection therewith does not exceed the sum of fifty cents.

5. Nothing in this Act shall operate to increase the rate of interest that may be recovered in any case where by law the rate is fixed at less than twelve per centum per annum.

6. Notwithstanding the provisions of the Interest Act, no money-lender shall stipulate for, allow or exact on any negotiable instrument, contract or agreement, concerning a loan of money, the principal of which is under five hundred dollars, a rate of interest or discount greater than twelve per centum per annum; and the said rate of, interest shall be reduced to the rate of five per centum per annum from the date of judgment in any suit, action or other proceeding for the recovery of the amount due.

7. In any suit, action or other proceeding concerning a loan of money by a money-lender the principal of which was originally under five hundred dollars, wherein it is alleged that the amount of interest paid or claimed exceeds the rate of twelve per centum per annum, including the charges for discount, commission, expenses, inquiries, fines, bonus, renewals, or any other charges, but not including taxable conveyancing charges, the court may re-open the transaction and take an account between the parties, and may, notwithstanding any statement or settlement of account, or any contract purporting to close previous dealings and create a new obligation, re-open any account already taken between the parties, and relieve the person under obligation to pay from payment of any sum in excess of the said rate of interest; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it, and may set aside, either wholly or in part, or revise, or alter, any security given in respect of the transaction.

8. The *bona fide* holder, before maturity, of a negotiable instrument discounted by a preceding holder at a rate of interest exceeding that authorized by this Act, may nevertheless recover the amount thereof, but the party discharging such instrument may reclaim from the money-lender any amount paid thereon for interest or discount in excess of the amount allowed by this Act.

9. The principal of any sum of money, originally under five hundred dollars, due and payable before the thirteenth day of July, one thousand nine hundred and six, in virtue of any negotiable instrument given to a money-lender, or of any contract or agreement entered into with such money-lender in respect of money lent by him, shall not, from and after the said date, bear a rate of interest greater than twelve per

centum per annum; and from and after the said date no rate of interest greater than five per centum per annum shall be recovered upon any judgment, rendered before the said date, upon any such negotiable instrument, contract or agreement for the payment of money lent by a money-lender, and which allows a greater rate than five per centum per annum. Sec. 121.

10. In the case of any such negotiable instrument made before the thirteenth day of July, one thousand nine hundred and six, and maturing after the said date, and in the case of any such contract or agreement made before the said date and to be performed thereafter, the foregoing provisions of this Act shall apply only from the date of maturity or performance, as the case may be.

11. Every money-lender is guilty of an indictable offence and liable to imprisonment for a term not exceeding one year, or to a penalty not exceeding one thousand dollars, who lends money at a rate of interest greater than authorized by this Act.

(5) THE BANK ACT, 3-4 Geo. V. c. 9.

The banks named in Schedule A to the Act, and all banks incorporated after 1st January, 1912: see sections 2 (h), 3; are entitled to take interest or discount at a rate not exceeding seven per cent. per annum, and may take the same in advance, but cannot recover any higher rate: section 91.

Other "banks," so called, are only entitled to the rate of interest provided by The Interest Act, *supra*.

(6) The Loan and Trust Companies Act, R.S.O., c. 184.

Section 34 provides that these companies may take the same rates of interest as may be taken by individuals.

Section 35 provides for cases in which the payments of principal and interest are blended, and for regulation of fines, etc.

Post Diem Interest.—Where there is no express contract to pay interest after the principal money becomes due, interest will be allowed only as damages and will be limited to five per cent. which is made the legal interest by the Interest Act *supra*: Dalby v. Humphrey, 37 U. C. R. 514; St. John v. Rykert, 19 S. C. R. 278; Powell v. Peck, 12 O. R. 402; 15 A. R. 138; Grant v. Peoples L. & D. Co., 17 A. R. 85; 18 S. C. R. 262; R. v. G. T. Ry. Co., 2 Ex. C. R. 132; Bigga v. Freehold L. & S. Co., 26 A. R. 232; see Freehold L. & S. Co. v. McLean, 2 West. L. T. 143; Jackson v. Richardson, 1 N. B. Eq. 325. If there is a sufficient stipulation in the contract for payment of *post diem* interest at the contract rate it will be binding: Pringle v. Hutson, 19 O. L. R. 652; and see St. John v. Rykert, 4 A. R. 213; 16 S. C. R. 278; Powell v. Peck, 12 O. R. 492; 15 A. R. 138; Peoples Loan Co. v. Grant, 18 S. C. R. 262; but in the case of money secured by mortgage of real estate, such stipulated *post diem* interest, or any fine or penalty, on arrears of principal or interest, must not exceed the rate payable on principal money not in arrear: R. S. C. c. 120, s. 8, *supra*.

The rate of *post diem* interest payable under contract for such interest is further controlled by The Money-Lenders Act, R. S. C. c. 122, ss. 6, 9, 10, above quoted, in the classes of cases there provided for.

Sec. 121. **Compound Interest.**—Can only be allowed on special contracts therefor or in a contract providing for it by necessary implication: Saskatchewan L. & H. Co. v. Leadlay, 1 O. W. N. 228.

Where a contract is to pay principal money and interest, and a judgment is recovered thereon, the contract is merged in the judgment, and interest can only be recovered on the judgment; and the rate will be five per cent.: Florence v. Drayson, 1 C. B. N. S. 584; McKay v. Fee, 20 U. C. R. 268; *Re* European Central Ry. Co., 4 Ch. D. 33; Hanford v. Howard, 1 N. B. Eq. 241; and this is so even when the contract expressly calls for a stated rate of interest until the debt is paid: St. John v. Rykert, 4 A. R. 213; 10 S. C. R. 278; Hutton v. Federal Bank, 9 P. R. 586; see section 173 (2); but where there is a separate covenant to pay interest so long as the principal shall remain due, judgment may be recovered from time to time for the difference between the interest, at the rate specified in the contract, and the rate paid under the judgment: Popple v. Sylvester, 22 Ch. D. 98.

Where G., at the request of the mortgagor, paid the principal and interest due on a mortgage and took an assignment of it, it was held that, in the absence of an express agreement, no interest was chargeable upon the sum paid for interest when the mortgage was assigned: Thomas v. Girvan, 1 N. B. Eq. 257. See London Loan Co. v. Manley, 26 S. C. R. 443.

Interest on the amount of an award does not begin to run until notice of the award has been given to the defendant: Huyck v. Wilson, 18 P. R. 44.

Except in the cases provided for by sections 5, and 9, of The Interest Act above cited, where an excessive rate is paid after maturity, the excess cannot be recovered back or applied in reduction of the principal: Hutton v. Federal Bank, 9 P. R. 568; Stewart v. Ferguson, 31 O. R. 112.

Exceptions.—The provisions of The Interest Act, and The Money Lenders Act, as above quoted, cannot be waived, even by an explicit agreement to that effect in the contract: Dunn v. Malone, 6 O. L. R. 484; but those statutes do not apply to:

(1) A pawnbroker, who may take 1 per cent. per month on each 50 cents advanced up to $20, and five cents for every $4 per month when the sum lent exceeds $20: R.S.C. c. 121, ss. 3, 4. And by the Ontario Pawn Brokers Act, R.S.O., 1914, c. 176, s. 10, a pawnbroker may take five cents for the ticket, if the loan is less than $20, or ten cents if it exceeds that sum.

(2) A chartered bank may take, reserve or exact any rate of interest or discount not exceeding 7 per cent. and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank: R.S.C. c. 29, s. 91; and such interest cannot be compounded: see Montgomery v. Ryan, 16 O. L. R. 75.

Judgments Against Executors and Administrators.

Definition.—An administrator is one appointed by the Surrogate Court to administer the estate of a deceased person.

An executor is a person appointed as such by the last will of a deceased person, and who takes out probate of the will. An executor "acting in his own wrong" is one who is neither executor nor administrator and who intermeddles with the goods of the deceased or

does any other act chnracteristic of the office of executor nnd thereby makes himself what is called in law an executor of his own wrong, or more usually an executor *de son tort*: Williams on Executors, 10th ed., 183. Sec. 121.

Executor De Son Tort.—The question whether a party has made himself an executor *de son tort* is one of mixed law and fact. Very slight interference with the goods of the deceased will make a person an executor *de son tort;* and in deciding the question the jury find the facts, and the court says whether these facts constitute an executorship: Padget v. Priest, 2 T. R. 97; 1 R. R. 440; Haacke v. Gordon, 6 U. C. R. 424: Williams on Executors, 10th ed., 183.

A person who takes goods of a deceased under a fair claim of title is not an executor *de son tort:* Merchants' Bank v. Monteith, 10 P. R. 467.

An executor *de son tort* cannot by any act give a new start to the Statute of Limitations: Grant v. McDonald, 8 Gr. 478: Taylor v. Holland, 1902, 1 K. B. 676. 681: Bradshaw v. Widdington, 1902, 2 Ch. 430, 450; Trust & Loan Co. v. Stevenson. 21 O. R. 571, 20 A. R. 66; Buckley v. Barber, 6 Exch. 164, 183; but such an executor is answerable for the debt so acknowledged to the extent of the goods of the deceased come to the hands of such executor, and judgment to that effect may be given: Cook v. Dodds, 6 O. L. R. 608.

A purchaser of goods from an executor *de son tort* is not subject to the liability of such an executor: Merchants' Bank v. Monteith, 10 P. R. 467; but the seller must be really acting as executor and the party with whom he deals must have fair reason for supposing he has authority to act as such: Mountford v. Gibson, 4 East 411; 7 R. R. 509; Thomson v. Harding, 2 F. & B. 630; Buckley v. Barber, 6 Ex. 164: Williams, 195.

An executor *de son tort* is only liable for assets which have actually come into his hands: Williams, 191, 194 (o); but he cannot set up a debt due to himself as against the claims of other creditors: Williams, 193.

An executor *de son tort* is not within sections 62 (d) (1), giving extended jurisdiction to division courts, where the amount is ascertained by the signature of the person whom, as executor or administrator, the defendant represents: In re Day v. McGill, 10 O. L. R. 408.

An infant is not liable for a devastavit as an executor *de son tort:* Young v. Purvis, 11 O. R. 597.

The rule which prevailed in equity before the Judicature Act, now applies, and an action may be begun before the plaintiff has obtained letters of administration or probate, if he qualifies before the trial: Dini v. Fauquier, 8 O. L. R. 112.

Action by Creditor, etc.—In an action against the personal representative upon a claim against the estate of a deceased person, the claim, if disputed, must be corroborated by other evidence than that of the claimant: R.S.O. 1914, c. 76, s. 12. As to the nature of the corroboration required see Redford v. McDonald, 18 A. R. 167; Davis v. Walker, 5 O. L. R. 173; Thompson v. Conlter, 34 S. C. R. 261; Re Curry, 32 O. R. 150; Re Jelly, Union Trusts Co. v. Gamon, 6 O. L. R. 481; O'Connor v. O'Connor, 5 O. W. R. 10. Comparison of hand writing of deceased may furnish sufficient corroboration: Thompson v. Thompson, 4 O. L. R. 442. The corroboration is only required in regard to the original debt: the claim for interest may be allowed without corroboration: Secor v. Gray, 3 O. L. R. 34. That the corroborative evidence is

Sec. 121. by a person who is interested is no objection: Balzold v. Upper, 4 O. L. R. 116. The corroboration is only required in regard to claims which arose against deceased in his lifetime, not to claims arising against his estate after his death: McClinaghan v. Perkins, 5 O. L. R. 129.

Devastavit.—A party suing executors or administrators may charge in the summons (Form 9) that the defendant has had assets and has wasted them, stating in the particulars the amount of assets alleged to have been left by the deceased, and the manner in which the assets have been wasted.

To form 9 should be added a statement to the following effect, according to the facts: "The plaintiff says that the deceased left assets to the amount of $, and that the defendant wasted them in the following manner: [*By applying them to his own use; or by not calling in money invested on a mortgage, the security of which was insufficient (giving particulars)*; or *by investing moneys on personal security (giving particulars)*; or *by investing moneys on unauthorized security (giving particulars)*; or *by loaning the sum of $ to A. B., his co-executor, who has failed to return the same.*"]

An executor *de son tort*, as well as an executor or administrator, is liable if he wastes or applies to his own use any part of the estate of a deceased person: R. S. O., 1914, c. 121, s. 60.

Definition of Devastavit.—Devastavit is defined as a mismanagement of the estate and effects of the deceased in squandering and misapplying assets contrary to the duty imposed on them for which executors or administrators shall answer out of their own pockets as far as they had or might have had assets of the deceased: Williams on Executors, 10th ed., 1434. An executor may pay a debt which is barred by the Statute of Limitations: Hill v. Walker, 4 K. & J. 166; Stahlschmidt v. Lett, 1 Sm. & G. 415; Lewis v. Rumney, L. R. 4 Eq. 451; but one co-executor may set up the statute even if the other does not: Midgley v. Midgley, 1893, 3 Ch. 282.

An executor or administrator may retain assets for a debt due to himself although it is more than six years old: Williams, 79. But if the assets are no longer in the possession and control of the executors, he cannot afterwards recover them to satisfy a debt he claims to be due him by the deceased: In re Starr, Starr v. Starr, 2 O. L. R. 769.

The remedy in such cases is to apply for an administration order, and after that is obtained the executors cannot vary the rights of the parties, or give an acknowledgment to take a debt out of the Statute of Limitations: Williams, 10th ed., 1440, 1441.

No one can insist on the Statute of Limitations being set up as a bar to a debt incurred by the executor or trustee himself for the benefit of the estate: Budgett v. Budgett, 1895, 1 Ch. 202.

And if on competent advice he pays a claim *bona fide* made against the estate the money paid is not, on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator *de bonis non* a right of action to recover it back: Mayhew v. Stone, 26 S. C. R. 58. But it is clearly his duty not to waste an estate not his own, which he is administering for the benefit of others, in satisfying demands that are equally untenable at law and in equity. If the liability is claimed under a contract not enforceable by reason of the Statute of Frauds, there is no debt or liability which he would be justified in paying: Re Rowson, 20 Ch. D. 358; Re Williams, 27 O. R. 405; see Williams on Ex. 10th ed., 798, 1439.

Sec. 121.

Deficiency of Assets.—By R.S.O., 1914, c. 121, s. 53, all debts of a deceased are now payable ratably if there is insufficient to pay all in full. Paying one creditor in full would therefore, be, as a general rule, an admission by the executor that he had assets sufficient to pay all creditors: Bank of British North America v. Mallory, 17 Gr. 102; Chamberlen v. Clark, 1 O. R. 135; 9 A. R. 213. If he is sued and does not defend, on the ground that assets are deficient, he will be guilty of a devastavit to the amount of the excess over the ratable share which the creditor would have been entitled to: Taylor v. Brodie, 21 Gr. 607. If he knows of the deficiency, it seems he cannot recover the excess from the creditor who received more than his proper share: Doner v. Ross, 19 Gr. 229; but if he believed there would be no deficiency, he is entitled to recover the excess back as money paid under a mistake of fact: *per* Burton, J.A., Chamberlen v. Clark, 9 A. R. 281. But see Leitch v. Molsons Bank, 27 O. R. 621, in which it was held that an administratrix after advertising for creditors, and assuming from the claims filed that assets were sufficient, paid a creditor in full, she, by the provisions of the above statute, was discharged from further liability, and had no *locus standi* to maintain an action to recover the excess. See also Taylor v. Brodie, 21 Gr. 610. If the executor is insolvent and a creditor has received from him, or from the estate, either with or without proceedings, more than his proper share, the other creditors will be entitled to a direct recovery from him of the excess: Chamberlen v. Clark, 1 O. R. 135; 9 A. R. 273; Bank of British North America v. Mallory, 17 Gr. 102. See also "An Executor's Defence of Law," 10 C. L. T. 277.

Advertisement for Creditors.—If an executor has advertised for creditors, pursuant to R.S.O., 1914, c. 121, s. 56, and has sufficient to pay all claims of which he has notice, and pays them in full, but another creditor subsequently appears, and his claim would, if it had been known, have created a deficiency, the executor may plead his notice to creditors and distribution of the assets, and will, upon proving these facts, be entitled to succeed: same statute, s. 56 (1). The creditor would not, however, be without remedy, but might compel the other creditors to refund ratably the amount which they received in excess of the amount which would have been payable to them had all the claims been known to the executors: same statute, section 56 (2): Clarke v. Chamberlain, 1 O. R. 135; 9 A. R. 273; Leitch v. Molsons Bank, 27 O. R. 621; Stewart v. Snyder, 30 O. R. 110; Uffner v. Lewis, 27 A. R. 242; but without interest: Boys' Home v. Lewis, 3 O. L. R. p. 209.

Proceedings on Deficiency Appearing.—If the executor is sued, and knows or believes the assets will be insufficient for the payment of all the claims in full, he should plead the deficiency. In the Supreme Court administration could then be ordered, but the division courts have no power to order administration. The only course to be adopted in a division court suit is for the creditor either to refrain from proceeding with the action and allow the executor to distribute the assets, without going to the expense of an administration suit, or, in the event of his persisting with the suit, for the judge to stay the proceedings for a limited time, to enable the executor to apply for an administration order under Con. R. 608. The administration order would operate as a judgment in favour of all creditors, and all debts would be paid ratably.

Sec. 121.

Foreign Creditors.—Ths claims of creditors living out of the jurisdiction must be taken into nccount in ascertnining whether or not there is a deficiency: Milne v. Moore, 24 O. R. 456; Re Kloebe, 28 Ch. D. 175.

Judgment on Devastavit.—Where the defendant is charged with wnste in the summons, nnd the judge is of opinion that the defendant has wasted the assets, ths judgment will he that the deht, or damages and costs, shall be levied of ths goods of the testator (if any), nnd if not, of the goods of the defendnnt to an amount not exceedlng the amount so wasted. For form of judgment see Form 132.

Levied of the Goods of the Tostator.—It is important for au executor or ndministrator who has uot in his hanus assets to satisfy the deht upon which an action is hrought agalnst hlm to plead either a totai administration or partiai administration of all assets whiich came to his hands, or a denial that any assets cams to his hnnds, or a deficiency of assets, or a notice to creditors, etc., ns indicated, for it was said, prior to the Judicature Acts, that a judgment against an executor or administrator, whether hy default or on demurrer, or upon verdict upon any plea pleaded hy the executor or sdministrator, except *plene administravit* (he has fuiiy adminlstered), or admitting assets to such a sum and *riens ultra* (nothing beyond), wns conclusive upon him that he had nssets to sntisfy such judgment: 1 Wms. Saund. 219 (h); Williams on Executors, 10th ed., 1583; but that if the executor pleaded either a general or special p*lens administravit*, he was liable only for the amount of assets proved to be in his hands, and judgment agalnst an executor on a verdict upon p*lene administravit* was only an ndmission of nssets to ths extent of assets proved to be in his banda: *ibid;* Cousins v. Paddon, 2 C. M. & R. 558, and the Judicaturs Act has not altered the form of judgment in auch cases: Lince v. Faircloth, 14 P. R. 253. If, therefore, judgment be given against the executor where he has omitted to plead p*lene administravit*, and execution is issued ngainst the goods of the deceased and is returned *nulla bona*, an actlon will then lie upon the judgment against the executor suggesting a devnatsvit, and in thnt actlon he cannot plend thnt he has no assets, and judgment will therefore go agalnst him personally, aithough there may not hnve been any netnal waste of nssets: Erving v. Peters, 3 T. R. 685; 1 R. R. 794. In that case Lord Kenyon, C.J., said: "It seems extraordinary thnt the judgment in the first action should not be a judgment de *bonis propriis*, if the executor be llnble at all events, wherens the judgment is ns to the deht *de bonis testatoris*, and as to the damages d*e bonis testatoris et si non de bonis propriis;*" hut the principle is put by Mr. Justice Buller in these words: "The simple question is, whether an executor or administrator who hns no effects in his hands belonging to the testator, nnd will not tske advantage of that defence at the proper time, shnll he permltted to do it afterwards. Now, it is a universal principle of law that if s pnrty do not avsil himself of the opportunity of pleading matter in har to the original action, he cannot afterwards plead it either in any action founded on it or in a *scire facias*."

Judgment Quando Accidorint.—Where the defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, snd the plsintiff proves his demand, and the defendant proves the administration alleged, the judgment should he to levy the costs of proving the demand of the goods of the

testator, if any, and if not, of the goods of the defendant, unless the judge otherwise orders; and, as to the whole or residue of the demand, judgment of assets when they shall have come into his hands; the plaintiff to pay the defendant's costs of proving the administration of assets. Sec. 121.

Where the defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, but the defendant does not prove the administration alleged, the judgment shall be to levy the amount of the demand, if such amount of assets is shown to have come to the hands of the defendant, or such amount as is shown to have come to them, and costs, of the goods of the testator, if any, and, if not, as to costs of the goods of the defendant; and as to the residue of the demand, if any, judgment of assets when they shall have come into his hands.

By taking judgment of assets *in futuro*, the plaintiff admits that the defendant has fully administered to that time: 2 Wms. Saund. 219, *note* (2). On a judgment in this form a summons may afterwards be issued calling upon the executor to appear touching the allegation of the receipt by him of further assets. The evidence upon this summons will be confined to proof of the executor's receiving assets at a period subsequent to the judgment: Taylor v. Holman, Buller's N. P. 169; Mann v. Quin, 6 T. R. 1.

Costs When Defendant Succeeds.—Where the defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, and proves the administration alleged, the judgment shall, in case of total administration, be for assets when they shall have come into his hands, and in case of partial administration for such amount as is shown to be in his hands of the goods of the testator, and as to the residue of the demand for such goods when they shall have come into his hands, and the plaintiff shall pay the defendant's costs of proving the administration of assets, unless the judge shall otherwise order.

When judgment is given against an executor or administrator for assets when they shall have come into his hands, and he has not failed in any defence he has set up, he cannot be made liable personally for costs, but should obtain his costs (if any) from the plaintiff. The plaintiff will be entitled to judgment for such costs as were necessarily incurred in obtaining judgment, to be paid out of the assets of the debtor when they shall have come to the hands of the executor or administrator.

Where a defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, but does not prove the administration alleged, and has not established any other ground of defence, the judgment should be to levy the amount of the demand, if so much assets is shown to have come to the defendant's hands, or so much as is shown to have come to them, and costs, of the goods of the testator, if any, and if not, as to costs, of the goods of the defendant; and as to the residue of the demand, if any, judgment of assets when they shall have come into his hands.

Scire Facias After Judgment Quando Acciderint.—On a judgment against an executor or administrator, that the amount be levied upon assets of the deceased, when they shall have come into his hands, the plaintiff or his personal representative, may issue a summons (Form No. 132 (6), and if it appears that assets have come

Sec. 122. to the hands of the executor or administrator since the judgment, the judge may order that the debt, damages and costs be levied of the goods of the testator, if any, and if not, as to the costs, of the goods of the defendants, and the party applying, may charge in the summons that the executor or administrator has wasted the assets of the testator or intestate, and the judge may, if it appears that the party charged has wasted the assets, direct a levy to be made, as to the debt and costs of the goods of the testator, if any, and if not, of the goods of the defendant.

In charging a devastavit of assets which have been received since the judgment, it is necessary for the plaintiff to give particulars of the assets alleged to have been received, and of the manner in which they have been wasted. If it appear that the executor or administrator has received some assets, but that the same are insufficient to satisfy the judgment, the judgment will be for the plaintiff as to the assets received, and *quando acciderint* as to the residue of the debt: Williams on Executors, 10th ed., 1595.

Notice to Creditors.—In case an executor or administrator pleads his notice to creditors and distribution of assets, he must give notice of such defence, and that there has been a proper audit of the accounts of his administration: s. 113 (1).

A proper notice to creditors is one such as would be inserted by the Supreme Court in an administration action. It must give notice that after a certain date creditors who do not send in claims will be excluded from participation: Stewart v. Snyder, 30 O. R. 110. The advertisement should be inserted in one or more newspapers at or near the place or places where the deceased lived or carried on business, and if there is reasonable ground for supposing there are foreign creditors a notice should be advertised in the foreign country also: Wood v. Weightman, L. R. 13 Eq. 434; Newton v. Sherry, 1 C. P. D. 246; *Re* Bracken, 43 Ch. D. 1; Daniels' Ch. Pr., 6th ed., 1014. It is not necessary to insert the advertisement in the *Ontario Gazette*: *Re* Cameron, Mason v. Cameron, 15 P. R. 272, unless the localities in which the creditors reside are unknown: Stewart v. Snyder, 30 O. R. 110.

Costs Where Plaintiff Fails.—In actions by executors or administrators, if the plaintiff fail, the costs shall, unless the judge shall otherwise order, be awarded in favor of the defendant.

Executors or administrators instituting actions are subject to the same rules as to costs as they would be if they were suing in their own right: Daniels' Ch. Pr., 6th ed., 1175: Macdonald v. Bulfour, 20 A. R. 404. In most cases it will be proper to order that the costs should be levied of the goods of the deceased, if any, and, if not, of the goods of the executor or administrator.

Judgment Against Married Woman.—See notes to sections 98, 100, 190.

Revivor of judgment by or against executors, etc.: section 179.

Forms of affidavits to revive such judgments, Nos. 27, 28.

Judge may direct times and proportions in which judgment shall be paid.

122.—(1) The judge may order the times and the proportions in which any sum and costs recovered by judgment shall be paid, having regard to the provisions of section 124.

Sec. 123.

(2) Unless otherwise ordered, execution shall not issue within fifteen days after the entry of judgment, but the judge may order the amount of the judgment or any instalment thereof to be paid into court. 10 Edw. VII., c. 32, s. 122.

Execution not to issue for fifteen days after judgment.

May Order Time or Times.—If made at the time of judgment this order forms part of it: Robinson v. Gell, 12 C. B. 191; Ely v. Moate, 5 Ex. 918. When any order is made for the payment of any debt, damages, costs or other sum of money the same shall be made payable at the office of the clerk: Rule 74.

As to committal for default in payment of such instalments, *In re* Kay v. Corry, 8 O. L. R. 45; also s. 191 and notes.

Within Fifteen Days.—These provisions only apply to judgments given by the judge on the trial and not to judgments by default under section 98, nor to summary judgments under section 100.

Every judgment is to be entered by the clerk in the Procedure Book: Rule 74; and section 122, sub-section (2) prohibits the issue of execution before fifteen days from such "entry." In cases where the judge reserves his decision the time elapsing between the date of the decision and the "entry" of judgment by the clerk in the Procedure Book would, it is submitted, be excluded from the fifteen days. The day of the "entry" by the clerk would also be excluded: Radcliff v. Bartholomew, 1892, 1 Q. B. 161, and notes to section 100.

New trial.

123.—(1) Upon application made within fourteen days after the trial, or where the decision is not given at the trial after the mailing of the notice of the decision to the party applying, and upon good grounds being shown, the judge may grant a new trial upon such terms as he thinks reasonable, and in the meantime may stay proceedings.

Extending time for application.

(2) If reasonable excuse for the delay is shown to the satisfaction of the judge, the application may be made at any time within fourteen days after the expiration of the first mentioned fourteen days.

Judgment on application for new trial.

(3) Instead of granting a new trial, the judge may pronounce the judgment which in his opinion ought to have been pronounced at the trial, and may order judgment to be entered accordingly. 10 Edw. VII., c. 32, s. 123.

New Trials.—Application for new trial may be made *viva voce* and determined on the day of the hearing, if both parties be present; but otherwise shall be in writing and show briefly the grounds on which it is made, which grounds, if matters of fact requiring proof, shall be supported by affidavit: Rule 65. The granting of a new trial without an affidavit is not, however, a ground for prohibition: Fee v. McIlhargey, 9 P. R. 329. The rule is directory only: *Ib*; Carter v. Smith, 4 E. & B. 696; see Jones' Trustee v. Gittens, 51 L. T. 599. For form of application, see Form 105.

Sec. 123.

A mandamus may issue to compel a judge to hear an application for a new trial: *Re* Moore v. Farquhar, 15 C. L. T. 108.

If made elsewhere than at the hearing a copy of the application and of the affidavit must be served on the opposite party or his solicitor or agent or left at his usual place of business if in the division; if without the division then with the clerk: Rule 65 (a), who is required to transmit the same *forthwith* to the opposite party: Rule 84. The original application and affidavits, and an affidavit of service thereof, must be left with the clerk within the fourteen days, who is required forthwith on receiving the fees and necessary postage to transmit all the papers in the suit to the judge: Rule 65 (h).

The delivery to the clerk of the notice and affidavits of service operate as a stay of proceedings until the judge's final decision on the application is communicated to the clerk, "unless the judge shall otherwise order:" Rule 65 (h). See also further provisions of Rule 65.

When the evidence has been taken in writing under section 106, the clerk must forward the same to the judge: section 106.

Care should be taken to comply with all of the requirements of the rules: see also McKenzie v. Keene, 5 U. C. L. J. 225. As to new trial in interpleader proceedings, see section 215 (5).

Within Fourteen Days.—The application must be made (that is, delivered to the clerk: Rule 65 (h)) within 14 days. This means exclusive of the day of entering judgment: see notes to section 77: Radcliffe v. Bartholomew, 1892, 1 Q. B. 161. Should the trial take place on the 1st of the month, the application must be complete and delivered to the clerk not later than the 15th of the same month. But where the judge postpones judgment under section 121, the 14 days do not begin to run until the mailing of the notice of the decision to the party applying: s. 123 (1); *Re* Moore v. Farquharson, 15 C. L. T. 103.

Where, at the sittings, a case was "adjourned for the plaintiff on payment of costs within ten days, otherwise judgment for the defendant," the fourteen days within which the application can be made for a new trial, the costs not being paid, does not commence to run until the expiration of the ten days, for until then there is no judgment: Thompson v. McCrea, 31 O. R. 674.

Time May be Extended.—The time for making the application may now be extended for a further period of fourteen days "if reasonable excuse for the delay is shown:" s. 123 (2); but cannot be further extended, and a new trial cannot be granted on an application made after the expiration of the time limited: *Re* Nerlick v. Marks, 31 O. R. 677. According to this authority a judge has no jurisdiction to set aside a judgment after the expiration of the time above mentioned, for irregularity or even for fraud. See also Mitchell v. Mulholland, 14 C. L. J. 55; Bell v. Lamont, 7 P. R. 307; *Re* Foley v. Moran, 11 P. R. 316; Soules v. Little, 12 P. R. 533; Bland v. Rivers, 19 O. R. 407; *Re* McLean v. Osgoode, 30 O. R. 430.

Where a judge has decided an application for a new trial and refused to grant it, his authority is at an end; he cannot afterwards grant it on fresh material: Moxon v. London Tramways Co., 60 L. T. 248; s. c. 37 W. R. 132; see The G. N. Ry. Co. v. Mossop, 17 C. B. 130; Ceke v. Jones, 4 L. T. 306; The Recepta, 1893, P. 255.

Where the plaintiff is accidentally absent from the court at the moment the case is called, and it is dismissed, there being no trial, the

judge may dispense with notice of motion, and grant an order *ex parte*, directing the case to be restored to the docket and to be tried at the next sittings: *Re* Backhouse v. Bright, 13 P. R. 117, and cases there cited. Sec. 133.

The application for a new trial is not a waiver of defendant's right to object to the jurisdiction: *Re* Evans v. Sutton, 8 P. R. 367.

A plaintiff cannot now insist on or take a nonsuit: see notes to s. 105.

The withdrawal of a juror does not put an end to the cause. If there has been a breach of the terms on which the juror was withdrawn, the court may re-try the action: Thomas v. Exeter, Etc., Co., 18 Q. B. D. 822; Norburn v. Hilliam, 22 L. T. 67: and so if the judge has decided that he has no jurisdiction, but afterwards concludes that his decision was erroneous, he may grant a new trial: Lister v. Wood, 23 Q. B. D. 229.

As to application defective in form, see Follett v. Sacco, 11 O. W. R. 377.

Grounds for Granting New Trial.—What are "good grounds" for granting a new trial is a question for the judge, and his decision will not be reviewed on prohibition, even where he finds misconduct of the jury, without any evidence to warrant it: Moxon v. London Tramways Co., 60 L. T. 248; affirmed in appeal *sub nom.* R. v. Greenwich, C. C. Judge, 37 W. R. 132. But in appealable cases his finding might be set aside, and the judge should not, in unappealable cases, grant a new trial upon other grounds than would be sufficient if his finding were subject to appeal. A new trial should never be granted, except upon grounds which would be sufficient in the supreme court: Murtagh v. Barry, 24 Q. B. D. 632; *i.e.*, that some miscarriage of justice would ensue unless granted: Jenkins v. Morris, 14 Ch. D. 684; Grieve v. Molsons Bank, 8 O. R. 162.

The following are grounds for granting a new trial:

1. Improper admission or rejection of evidence.
2. Improper nonsuiting of the plaintiff.
3. Misdirection or non-direction of the jury.
4. Perverse verdict, or verdict against weight of evidence.
5. Verdict too small or too great.
6. Surprise and discovery of new evidence.
7. Improper conduct of opposite party, or of the jury.

The judge has also power to grant a new trial on the ground that his judgment was wrong either in law, or in fact, upon the evidence before him.

Misdirection or Non-Direction.—At common law, upon any improper admission or rejection of evidence or any misdirection, in point of law, of the jury, a new trial was granted, but the modern rule in the supreme court is that a new trial cannot be granted on these grounds, unless "some substantial wrong or miscarriage" has taken place. This principle of practice may be adopted by the judge in court: see section 226.

A new trial will not be granted for the improper admission of evidence unless objected to at the trial: Campbell v. Beamish, 8 U. C. R. 526; Eyre v. Highway Board, Etc., 8 T. L. R. 648: and if it could be shown that there was sufficient evidence, independently of the evidence

Sec. 133. improperly admitted, a new trial would be refused: Appleton v. Lepper, 20 C. P. 138; Dundas v. Johnson, 24 U. C. R. 547; Cooley v. Smith, 40 U. C. R. 543; but if the judge commented to a jury on the inadmissible evidence as important, a new trial should be granted: Bank of Hamilton v. Isaacs, 16 O. R. 450.

Misdirection can only be in point of law, not on a matter of fact; and the objection must be taken at the trial: R. v. Fick, 16 C. P. 379; Taylor v. Ashton, 11 M. & W. 401. A judge may tell the jury his own opinion: Dougherty v. Williams, 32 U. C. R. 215; Smith v. Dart, 14 Q. B. D. 105. It is unusual, however, to do so, as the jury is the sole tribunal upon the questions of fact, and are sworn to decide upon the evidence according to their own judgment.

Where the judge misdirects the jury as to the burden of proof, a new trial will be ordered: Kingston v. Kingston, 1897, A. C. 500.

If the judge improperly refuses to charge the jury in respect to any particular matter which counsel wishes to have submitted, it amounts to non-direction: Turner v. Burns, 24 O. R. 28; Griffiths v. Boscowitz, 18 S. C. R. 718; but see Renner v. Edmonds, 30 O. R. 676.

To tell a jury to ask themselves, "If I were the plaintiff, how much ought I to be paid if the company did me an injury?" is not a proper direction: Hesse v. St. John Railway Co., 36 C. L. J. 212.

Non-direction is only a ground for a new trial, where the verdict is against the weight of evidence: G. W. Ry. Co. v. Braid, 1 Moo. P. C. 101; 9 Jur. N. S. 339.

Where the judge leaves a question to the jury, which he ought to decide himself as a point of law, a new trial should not be granted unless the objection was taken at the trial: *Doe d.* Strickland v. Strickland, 8 C. B. 725.

As to setting aside a judgment on the ground that it was obtained by fraud, see *Re* Nerlich v. Marks, 31 O. R. 677.

Improper Nonsuit.—Where a nonsuit is set aside in a case tried by a jury, the defendant is entitled to a new trial for the purpose of calling evidence; but where the action is tried by a judge, he is not so entitled, and the judge may enter judgment under sub-section (3) *supra*, for the plaintiff: Macdonald v. Worthington, 7 A. R. 531.

A nonsuit may be ordered in a jury case: s. 144, and notes thereto; also notes to ss. 61 and 105.

Verdict Against Evidence.—Where there is evidence upon which the jury might reasonably find the verdict, a new trial will not be granted: Webster v. Friedeberg, 17 Q. B. D. 736; Metropolitan Ry. Co. v. Wright, 11 App. Cas. 152; Jones v. Spencer, 70 L. T. 536; Commissioners of Railways v. Brown, 13 App. Cas. 133; Phillips v. Martin, 15 App. Cas. 193; see Grieve v. Molsons Bank, 8 O. R. 162; Malcolmson v. Hamilton P. & L. Socy., 19 A. R. 619; Heintzman v. Graham, 15 O. R. 137; Ferrand v. Bingley, 8 T. L. R. 70; Reckett v. G. T. Ry. Co., 13 A. R. 184; Logg v. Elwood, 14 A. R. 496; Brisbane v. Martin, 1894, A. C. 249; Australian Newspaper Co. v. Bennett, 1894, A. C. 284; Jackson v. G. T. R., 2 O. L. R. 689; 32 S. C. R. 245.

Where the credibility of a witness was left to a jury and they found a verdict against his evidence, although his credit had not been impeached by any evidence, a new trial was refused: Lacey v. Forrester, 3 Dow. 668. A new trial should not be granted merely because the judge is dissatisfied with the verdict: Solomon v. Bitton, 8 Q. B. D.

176; Murtagh v. Barry, 24 Q. R. D. 632; Wilcox v. Howell, 5 O. R. 360; Fraser v. Drew, 30 S. C. R. 241; and see Webster v. Friedeberg, 17 Q. B. D. 736. Sec. 123.

Verdict too Small.—A new trial will be granted where the jury have manifestly not considered all the elements of damage: Phillips v. London & S. W. Ry. Co., 5 Q. B. D. 78; but it is unusual to grant a new trial in any action of tort on the ground of the smallness of the damage; Mostyn v. Coles, 21 [illegible] L. Ex. 1d

Verdict too Great.—Where the damages awarded are excessive, the court might formerly have reduced them with the consent of the plaintiff alone, without granting a new trial: Pollard v. Lawes, 12 Q. B. D. 358; Massie v. Toronto Ltg. Co., 11 O. R. 1; [illegible] Curran v. Grand Trunk Ry. Co., 25 A. R. 402; Fraser v. London Street Ry. Co., 29 O. R. 411; 26 A. R. 383; Easton v. Brantford Elec. Ry. Co., C. P. Divl. Ct., 20th Nov., 1897; see Crepar v. Hobler, 11 P. R. 283; Jenkins v. Morris, 14 Ch. D. 674; but these and later cases to the same effect have been overruled by the House of Lords in Watt v. Watt, 1905, A. C. 115; and unless both parties consent, the court cannot reduce damages. But where the verdict is right except as to the amount of damages, the court may order a new trial on that question alone: Hockley v. Grand Trunk Ry. Co., 6 O. W. R. 57. In actions on contract a new trial will be granted if it is clear that the damages are excessive: Berry v. Da Costa, L. R. 1 C. P. 331; Lamkin v. South-Eastern Ry. Co., 5 App. Cas. 352.

In cases of tort, however, a new trial will not be granted on the ground of excessive damages, unless a very clear case is made out: Lathbury v Brown, 10 Moo. 106. And it is not usual to disturb a verdict upon this ground: Praed v. Graham, 24 Q. B. D. 53; Sornberger v. The C. P. Ry. Co., 24 A. R. 263; Ferguson v. Township of Southwold, 27 O. R. 66; McCullough v. Anderson, 27 O. R. 73 (note).

Surprise.—Surprise may be a ground for a new trial, but the party applying must have adopted all reasonable and proper precautions for properly presenting and proving his case. It may consist of the absence of solicitor, counsel or witnesses, or on the ground of testimony being contrary to expectation, or of false or mistaken evidence: see Kitchen v. Murray, 16 C. P. 69; Martin v. Corbett, 7 P. C. R. 160; Livingstone v. Gartshore, 23 U. C. R. 166; Chadd v. Meagher, 24 C. P. 54; Riding v. Hawkins, 14 P. D. 560; Townley v. Jones, 29 L. J. C. P. 299; Ruahton v. Grand Trunk Ry., 6 O. L. R. 425. But a new trial will not be granted unless the court is satisfied that the verdict is substantially wrong: Thorpe v. Stallwood, 1 D. & L. 34.

The Discovery of New Evidence may be ground for a new trial but it must be shown that all the relevant facts were not before the court or jury on the trial: May v. Len, 104 L. T. Newspaper, 357; Synod v. De Blaquiere, 10 P. R. 11; Anderson v. Titmas, 36 L. T. 711; Rowe v. The G. T. Ry. Co., 16 C. P. 500; Downey v. Patterson, 38 U. C. R. 513; Howarth v. McGugan, 23 O. R. 396; see Trumble v. Horton, 22 A. R. 51.

But there should be a reasonable probability that a different verdict will be reached in the second trial: Anderson v. Titmas, 36 L. T. 711.

The fresh evidence must be material, and nearly or quite conclusive, and the fact that it could not have been produced at the former trial should be shown: *Ib.*; Rowe v. The G. T. R. Ry. Co., 16 C. P. 500; Downey v. Patterson, 38 U. C. R. 513; Howarth v. McGugan, 23 O.

Sec. 123. R. 396; and that it is not merely corroborative of that given at the trial: Trumble v. Horton, 22 A. R. 51.

There should be an affidavit showing a good cause of action, or defence on the merits, which can be sustained on a new trial, and stating the grounds for the application: Moore v. Hicks, 6 U. C. R. 27; Moore v. Gurney, 22 U. C. R. 209; Dow v. Dickenson, W. N. (1881), 52. Where the action is of a penal character, the court will not grant the plaintiff a new trial except on account of a mistake or misdirection of the judge: Stinson v. Scollick, 2 O. S. 217; Root v. Woodward, 1 U. C. R. 311; or that the verdict is in contravention of law: Atty.-Gen. v. Rogers, 11 M. & W. 670. The court will rarely grant a new trial where an issue charging a party with a criminal offence is found in his favor: Gould v. British Am. Ass. Co., 27 U. C. R. 473; but see McMillan v. Gore Dist. M. F. Ins. Co., 21 C. P. 123.

Where the jury answered all the questions submitted by the judge, but their findings were insufficient to justify a verdict for either party, a new trial was ordered, each party to bear his own costs of appeal and new trial: Fradenburgh v. Haskins, 12 A. R. 257; Manitoba Free Press Co. v. Martin, 21 S. C. R. 518; Canadian Pacific Ry. Co. v. Cobban, 22 S. C. R. 132; Cowans v Marshall, 28 S. C. R. 161; see also St. Denis v. Baxter, 13 O. R. 41; 15 A. R. 387.

Misconduct.—Attempting to dissuade a witness from giving evidence is such misconduct on the part of a juror as would justify the granting of a new trial: Laughlin v. Harvey, 24 A. R. 438.

Misconduct on the part of the jury must be "such as to satisfy the court that the verdict has been determined on without that grave and serious deliberation, that right exercise of judgment, and that total absence from all partiality, so necessary to the proper execution of the important duties of jurymen:" see Chitty's Archibald, 14th ed. 737.

Where the plaintiff was proved to have conversed with members of the jury, and either personally, or by another in his interest, treated them to drink, a new trial was ordered: Stewart v. Woolman, 26 O. R. 714; see also Tiffany v. McNee, 24 O. R. 551.

And where handbills reflecting on the plaintiff's character were distributed in court and shown to the jury on the day of the trial, a new trial was ordered, though the defendant denied all knowledge of the handbills: Coster v. Merest, 7 Moo. 87; but the circulation amongst the jurors of a newspaper containing comments calculated to prejudice the fair trial of the action, was held not to be a ground for a new trial when the parties had knowledge of the fact and did not object at the trial: Tiffany v. McNee, 24 O. R. 551. If one side is taken by surprise by a fraudulent trick on the part of the other side a new trial will be granted: Anderson v. George, 1 Burr. 353; Hewlett v. Cruchley, 5 Taunt. 277.

An appeal by counsel to the local prejudices of the jury was held to be a ground for a new trial: *per* Robertson, J., Forwood v. City of Toronto, 22 O. R. 362; but when that objection was not taken at the trial a new trial was refused: Sornberger v. The C. P. Ry. Co., 24 O. R. 263. See also *Re* Nerlick v. Marks, 31 O. R. 677.

The fact that one of the parties has been denied his right of challenge under section 137, *post*, which allows two peremptory challenges to each party in division court cases (instead of four such challenges allowed in other courts), and which allows also that either party may challenge any juror for cause; or that he was allowed in spite of protest, more challenges than he was entitled to, is a ground for new trial: Empey v. Carscallen, 24 O. R. 658.

Where a new trial is granted, if the order is not appealed from, the question determined by it cannot be re-argued on appeal from the judgment pronounced on the new trial: Journal Printing Co. v. Maclean, 23 A. R. 324. Sec. 123.

Staying Proceedings.—The filing the application and papers is a stay of proceedings until the judge's final decision on the application, unless the judge otherwise orders: Rule 65 (b).

Judgment Which Ought to Have Been Pronounced.—Formerly any mistaken view of law or fact, by the judge, could only be remedied by granting a new trial: Pryor v. City Offices Co., 10 Q. B. D. 504. Instead of granting a new trial, the judge may pronounce the judgment which in his opinion ought to have been pronounced at the trial, and may order the judgment to be entered accordingly: s. 123 (3). It is submitted that on an application for a new trial, the judge cannot enter a judgment (other than a non-suit which was applied for at the trial, under section 144 (1)), against the finding of the jury who tried the case; unless the findings of the jury were in answer to questions of fact stated to them under section 144 (2), in which case he could enter such judgment upon their answers as in his opinion may be proper: s. 144 (1), (2), and which opinion he may reconsider on the application for the new trial. Notwithstanding section 123 (3), there would still seem to be only three courses open to the judge on an application for a new trial in a jury case, namely: (1) To dismiss the application; (2) to enter a nonsuit; (3) to direct a new trial. The judgment entered on the verdict of the jury cannot be altered. But at the trial he may determine, after having heard the evidence, whether there is in law any evidence to support the plaintiff's case, which ought to be submitted to the jury to pass upon, and if not he may direct a nonsuit or dismiss the action: section 144 (1).

Where the parties had agreed to accept the verdict of a majority of the jury it was held that the judge had power to entertain an application for a new trial as the agreement meant no more than that they agreed to accept the verdict of a majority as equivalent to an unanimous verdict: Groom v. Shuter, 69 L. T. 293. A nonsuit should not be granted on a motion for a new trial on a ground which if raised at the trial could have been cured by amendment: Clarke v. Barron, 6 A. R. 309; Victoria Corporation v. Patterson, 1899, A. C. 615.

Proceedings Upon and Subsequent to Application.—If the application be refused, or if the party applying fail to comply with the terms imposed by the judge, the proceedings in the suit shall be continued as if no application had been made: Rule 65 (f).

The judge may hear the application at the next sittings of the court or at such other time or place as he may appoint: Rule 65 (e). It is imperative on the judge to hear the application for a new trial, and a mandamus may issue if he should refuse to do so: Moore v. Farquhar, 15 C. L. T. 103. The party in whose favor the judgment has been given should immediately after replying to the application take out an appointment if he wants to have the matter disposed of speedily. The decision of the judge shall be delivered to the clerk or transmitted to him by mail, and such clerk shall notify the parties thereof by mail or otherwise and if a new trial be granted, the suit shall be tried at the next sitting of the court, unless the judge shall otherwise order: Rule 65 (e). The notice by the clerk if sent by mail should be registered: Rule 78.

Form of clerk's notice, No. 74.

Sec. 124.

Order May be Made Conditional.—The judge has authority to grant the new trial on such terms as he thinks reasonable; and the costs are entirely in his judicial discretion. It is submitted that he may, in his discretion, make it a condition of granting a new trial that it shall take place before a jury, whether the first trial took place before a jury or not; but if either party required a jury to try the case in the first instance, he will be entitled to another jury, on depositing the necessary fees for summoning such jury. The former Rule 283 (c) so expressly provided. It seems to be doubtful whether the expenses of a jury in a new trial are taxable against the opposite party. Formerly the law was that the costs of jury could not be taxed against the opposite party: *Re* Lewis v. Old, 17 O. R. 615; but the act was so amended by 57 Vic. c. 23, s. 6 (afterwards incorporated with section 162 of R.S.O. c. 60), as to make the deposit required "costs in the cause;" but in the present section 130, the words "costs in the cause" are omitted; so that there is not now any provision making the costs of the jury costs in the cause, except in the case of a jury called under section 142. It would seem, therefore, that the decision in *Re* Lewis v. Old, *supra*, would now apply.

Execution not to be postponed for more than 50 days.

124. Except where a new trial is granted, the issue of execution shall not be postponed for more than fifty days from the service of the summons, without the consent of the party entitled to the same; but if it is proved to the satisfaction of the judge that a party is unable, from sickness or other cause, to pay the debt or damages recovered against him, or any instalment thereof ordered to be paid, or that for any other reason the issue of execution should be further postponed, the judge may stay the judgment, order or execution for such time and on such terms as he thinks fit, and so from time to time until it is proved that the cause of disability has ceased. 10 Edw. VII., c. 32, s. 124.

New Trial.—See notes to section 123.

Not More Than Fifty Days.—This excludes the day of service: Young v. Illegon, 6 M. & W. 49; McCrae v. Waterloo M. F. Ins. Co., 26 C. P. 437; 1 A. R. 218. In fixing the time of payment the date of the service of the summons should always be observed. Unless consented to, the judge has no power to postpone the execution more than fifty days from the date of service of the summons, except for cause proven or by consent.

Monthly Instalments.—Under section 122, the judge may order the judgment to be paid by instalments.

Execution may be amended so as to make it conform to the judgment: Glass v. Cameron, 9 O. R. 712.

If it is Proved.—That is by affidavit or affirmation: see notes to sections 77, 87 and 149, and Rules 42-50.

Sickness or Other Cause.—From "sickness or other cause," applies only to causes *ejusdem generis* which would prevent the defend-

ant from exercising his industry and so acquiring means to pay. Mere proof of inability to pay is not sufficient to enable the judge to exercise his discretion: Attenborough v. Henschel, 1895, 1 Q. B. 833: see Sandiman v. Breach, 7 B. & C. 99, *per* Tenterden, C.J.; Kitchen v. Shaw, 6 A. & E. 729, *per* Denman, C.J.; Farquharson v. Imperial Oil Co., 29 O. R. 206, as to the rule of construction in similar cases. Sec. 125.

For Any Other Reason.—These words are new; and confer upon the judge a wider authority and discretion than he had under the former provision for postponing the issue of execution beyond the fifty days.

The power given to the judge under this section is extensive and unusual, and should be sparingly and cautiously used: 8 U. C. L. J. 264. "The judge *may* suspend or stay execution, implying the exercise of judgment, not arbitrary discretion, but judicial discretion, in view of all the facts. We have no hesitation in saying that the practice of granting *ex parte* suspensions is a monstrous perversion of the true meaning of the clause, and a gross violation of the vital principle of justice:" 9 U. C. L. J. 177. It was held that the court could not restrain a plaintiff from levying his debt out of any one of several defendants he pleased: Zavitz v. Hoover, M. T. 2 Vic.; nor will the plaintiff be compelled to proceed against the goods of several defendants *in succession* first exhausting one, and then levying upon the goods of another: Com. Bank v. Vankoughnet, 1 Cham. R. 260.

It was decided under the corresponding section (153) of the Act of 1887, which did not contain the words under consideration, that the court or judge had not the power to delay a plaintiff's proceedings on an execution to enable defendants to institute an action, and to acquire a position in which they may apply to set-off the judgment to be recovered by them against plaintiff's judgment: Lynch v. Wilson, 9 U. C. L. J. 242, *per* Draper, C.J.; Mason v. Cooper, 15 P. R. 418; see also Freeland v. Brown, 9 U. C. L. J. 299; Maw v. Ulyatt, 7 Jur. N. S. 1300; s. c. 5 L. T. 251; Johnson v. Lakeman, 2 Dowl. 646; Thompson v. Parish, 6 C. B. N. S. 685.

In acting under this section the plaintiff should have notice of the application, and a copy of the affidavit on which it is grounded served upon him, and he should be called upon to show cause against granting a stay in the execution: 8 U. C. L. J. 264; see 6 U. C. L. J. 205; see also notes to section 77, which are applicable to the present section.

The notice may be for any reasonable time, there being no specific provision in that regard.

But if the plaintiff should be present no notice or summons to show cause would be necessary: Baird v. Story, 23 U. C. R. 624; Watt v. Ligertwood, L. R. 2 Scotch App. 367 (n).

APPEALS.

125. Subject to the provisions of section 107, an appeal shall lie to a Divisional Court from the decision of the Judge at or after the trial, or upon an application for a new trial, except in cases where a new trial has been granted— Appeals to Divisional Court.

(a) In an action or garnishee proceeding where the sum in dispute exceeds $100, exclusive of costs;

Sec. 125.

(*b*) In interpleader where the money or the value of the goods or chattels claimed or proceeds thereof exceed $100, or where the damages claimed by or awarded to either party against the other or against a bailiff exceeds the sum of $60;

(*c*) Where the parties consent to an appeal; or

(*d*) Where the effect of the decision is to determine that any general assessment made by a mutual insurance company is invalid; but the company, unless the Divisional Court otherwise directs, shall pay the respondent's costs of the appeal between solicitor and client on the county court scale in any event. 10 Edw. VII., c. 32, s. 125.

As to appeals from orders transferring cases to the Supreme Court of Ontario, made under section 69 (1), see sub-section (2) of that section.

Appeal.—The right of appeal in any form exists only when it is given by statute either expressly or by necessary implication; and the procedure to be employed must be laid down: R. v. Hanson, 4 B. & Ald. 521; R. v. Stock, 8 A. & E. 405; R. v. Ipswich Rec., 8 Dowl. 103; Sandbank v. Staffordshire Ry., 3 Q. B. D. 4; R. v. London, J. J., 25 Q. B. D. at p. 381; Superior v. Montreal, 3 Can. Cr. Cas. at p. 381; R. v. Ouimet, 14 Can. Cr. Cas. at p. 137. The conditions prescribed by the statute must be strictly complied with before the appellate court can have jurisdiction: R. v. Joseph, 6 Can. Cr. Cas. 144; R. v. McLeod, 6 Can. Cr. Cas. 23; R. v. The Dolliver Mountain M. & M. Co., 10 Can. Cr. Cas. 405. The creation of a new right of appeal requires legislative authority: Atty.-Gen. v. Sillem, 10 L. T. R. 434; and where that right is so conferred it is in the absence of any other statutory provision, the only one that can be taken: Thomas v. Hilmer, 4 U. C. R. at p. 528; Pattypiece v. Mayville, 21 C. P. 316; *Re* Newton, 8 Jur. N. S. 495.

Subject to Section 107; Agreement not to Appeal.—See notes to that section, which provides that the parties may agree not to appeal.

Who May Appeal.—Obviously a party to the cause may appeal. The section (354) in the former Division Courts Act unnecessarily so stated. That section also applied to the terms "party to the cause" and "appellant" the definitions given by the County Courts Act, which have also been omitted from the present section.

The word "party" is defined in the revised division court rules to mean "a party to a suit or proceeding, and shall include every person served with notice of or attending any proceeding, although not named in the summons or particulars of claim:" Rule 2, (2); and the Judicature Act, R.S.O. 1914, c. 56, s. 2 (o), gives the same definition.

A holder of a mechanics' lien, notified to come in and prove his claim under R.S.O. 1887, c. 126, s. 28, was formerly within the rule, but the division courts have no jurisdiction in such cases under the present statute governing them: see R.S.O. 1914, c. 140, s. 31.

Ordinarily parties to a cause are merely the original parties in an action: Beswick v. Boffey, 9 Ex. 315; Mason v. Wirral Highway Board, 4 Q. B. D. 459. In Cameron v. Allen, 19 P. R. 192, it was held that garnishee proceedings are grafted upon a cause and are merely attached thereto; therefore a garnishee is not "a party to a cause:" In Henderson v. Rogers, 15 P. R. 241, it was held that a person brought into a garnishment proceeding as the person entitled to the fund attached, is a party within section 52 of the County Courts Act, R.S.O. c. 55, now R.S.O. 1914, c. 59. Sec. 125.

An appeal by parties to garnishee proceedings is expressly allowed by section 125, sub-section (*a*), the provision regarding such proceedings having been first introduced by 51 Vic. c. 10. Sub-section (*b*) also provides for an appeal from the decision of the judge in interpleader proceedings.

Decision of the Judge.—See section 121 and notes thereto.

It is submitted that an appeal will lie from an order that the plaintiff be at liberty to sign judgment under section 100; see The F. J. Castle Co. Limited v. Kouri, 18 O. L. R. 462, and cases cited therein. Such an order is necessarily final, and so is a "decision" within the meaning of section 125: see notes to section 121.

An appeal to a divisional court is expressly provided by The Public Schools Act, R.S.O. 1914, c. 266, s. 105, from the decision of the judge in the division court, in an action under section 62 (5) of the Division Courts Act and The Public Schools Act, *supra*, s. 87 (6), to recover a public school teacher's salary.

And in a similar action to recover a high school or collegiate institute teacher's salary (brought under section 50 (4) of the High Schools Act, R.S.O. 1914, c. 268, and see section 62 (5) of the Division Courts Act.)

In an action to recover the salary of a separate school teacher under s. 62 (5) of the D. C. Act and s. 54 of the Separate Schools Act, R.S.O. 1914, c. 270, it is provided in s. 54 of the latter Act that there shall be an appeal "as provided by this Act;" but no appeal is so provided therein. It is submitted however that an appeal will undoubtedly be available in such cases under the general clause for appeals in the Division Courts Act, s. 125, in cases in which the amount in dispute exceeds the sum of $100.

No appeal lies from the decision of a judge acting as a *persona designata*: *Re* Simpson and Clafferty, 18 P. R. 402; Hopkins v. Can. Nat. Ex. Assn., 5 O. W. N. 639; 6 O. W. N. 71; and see R.S.O. 1914, c. 79, s. 4; and cases cited.

The principle is discussed in *Re* Rush, 10 C. L. T. 184; and see Holmested's Judicature Act, 4th ed., 1100, *et seq.*

An appeal does not lie from an order of the judge imposing a fine, under section 218 (1), for an assault on a bailiff or his assistant while in execution of duty: Lewis v. Owen, 1894, 1 Q. B. 102.

If a case is referred to arbitration there is no appeal: Mayer v. Farmer, 3 Ex. D. 235; nor would the consent of parties make any difference: McColl v. Waddell, 19 C. P. 213. But the judge may refer the case back to the arbitrators: section 167.

Where a judgment is obtained by fraud, appeal is not the remedy: Flower v. Lloyd, 6 Ch. D. 297; 10 Ch. D. 327.

Sec. 125.

It was held that there was no appeal against a judgment entered by a county court judge *pro forma* in order to expedite an appeal: Chapman v. Withers, W. N. (1887) 235.

No appeal will lie from an order of a judge directing the clerk to sign judgment which, without such order, he should have signed: Barr v. Clark, 8 C. L. T. 30; 5 Man. L. R. 130.

The appeal given here would not apply to orders for committal under section 191: Rackham v. Blowers, 15 Jur. 758; Copeland-Chatterson Co. v. Business Systems Co., 16 O. L. R. 481.

An appeal lies from an order putting a defendant into contempt under section 217; see McGregor v. McDonald, 7 C. L. T. 20.

Under the former sections 154 and 156 an appeal could not be taken directly from the judge's decision upon the trial, but an application had first to be made in the division court for a new trial, and then there could be an appeal whether the new trial had been granted or refused: Pole v. Bright, 1892, 1 Q. B. 602: Coté v. Halliday, 17 C. L. T. 53; Norton v. Bertie Sch. Tr., 17 O. L. R. 413; but the present section 125 allows an appeal directly "from the decision of the judge at or after the trial, or upon an application for a new trial;" and if a new trial is granted there is no appeal until the judge has decided the case again upon the new trial.

Sum in Dispute.—The "sum in dispute upon the appeal" (see old section 154) was held to be the amount claimed in the particulars, and not that amount less the sum recovered at the trial: Petrie v. Maeban, 28 O. R. 504, affirmed in appeal at p. 642; though in determining the "amount in controversy" on an appeal in a high court case from the divisional court to the court of appeal, the sum recovered in the action, not the amount claimed by the plaintiff, decides the right of appeal: see Allan v. Pratt, 13 A. C. 780: Hunt v. Taplin, 24 S. C. R. 459.

But the above cases were considered in Lambert v. Clark, 7 O. L. R. 130, in which it was held that upon an appeal *by the defendant* "the amount in dispute upon the appeal" under the then section 154, was to be understood as the amount recovered and not the amount claimed by the plaintiff, the court distinguishing the case from Petrie v. Maeban, *supra*, on the grounds that the latter case was an appeal by the plaintiff, who claimed $100 and interest, but had been allowed $35 only, and that the $35 allowed was as much in dispute upon the appeal as the amount not allowed; but that where the appeal was by the defendant the expression "the amount in dispute *upon the appeal*" necessarily meant the sum the defendant would have to pay under the judgment in the division court and not the amount of the plaintiff's claim.

The present section 125 excludes the words "upon the appeal" with the probable intention of giving an appeal to either the plaintiff or defendant where the *original claim* in the action is over $100, the words "amount in question" being considered to mean the amount in question *in the action* and not *upon the appeal*.

The fact that the sum in question with interest subsequently accrued, exceeds $100, will not give a right to appeal: Foster v. Emory, 14 P. R. 1.

The fact that prohibition may be granted does not necessarily deprive a party of his right to appeal: Sweetland v. The Turkish Cigarette Co., 47 W. R. 511; *Re* Rochon, 31 O. R. 122.

The provisions of the English County Court Act are different from those of this Act. Under the English Act an appeal cannot be taken

except on questions of law, or the improper admission or rejection of evidence, and for that purpose the Act of 1888, section 121, supersedes the requirement that the judge shall take a note of any questions of law raised at such trial or hearing, and of the facts in evidence in relation thereto and of his decision thereon, and of his decision in the action or matter. His decision upon the facts cannot be reviewed: Cousins v. Lombard Bank, 1 Ex. D. 404; and any point of law intended to be ruled upon must be raised in the inferior court: Rhodes v. Liverpool Com. Inv. Co., 4 C. P. D. 425; Clarkson v. Musgrave, 9 Q. B. D. 386; Smith v. Baker, 1891, A. C. 325. Sec. 125.

Under our statute, the appellate court has the right to review the decision of the division court on questions of fact as well as of law.

Under Ord. LIX., Rule 8, English County Courts, the Court of Appeal may order the examination of witnesses when no notes have been taken of the evidence in the court below, but care ought to be taken to prevent fresh evidence being given, so that such appeal should not become practically a new trial: *Re* The Crescent, 68 L. T. 556.

See note to section 108, and see also Arpin v. The Queen, 14 S. C. R. 736; Schwersenski v. Vineberg, 19 S. C. R. 243; City of Montreal v. Lemoine, 23 S. C. R. 390, and cases cited *infra*.

When an Appeal Lies.—Prior to 1895, an appeal could be taken from the division court direct to the court of appeal, and an unsuccessful defendant in a division court suit was better off than he would have been in the Supreme Court, for "he could promptly and with little expense secure the highest opinion in the province by having recourse to the court of appeal": *per* Falconbridge, J., Gregg v. Adams, 9 C. L. T. 311; 10 C. L. T. 2. But by 58 Vic. c. 47, s. 1, and afterwards by 4 Edw. VII. c. 11, s. 2, the tribunal for hearing such appeals was changed to a divisional court, and such is the present provision under section 125. The right to appeal depends upon statutory provisions, and if they are not complied with, the appeal cannot be heard: North Ontario Election Case, Wheeler v. Gibb, 3 S. C. R. 374; Owen v. Sprung, 28 O. R. 607; Johnson v. Petrolea, 17 P. R. 332; Gilmour v. McPhail, 16 P. R. 151; McCarron v. Metropolitan Life Ins. Co., 35 C. L. J. 421; Smith v. Hay, 35 C. L. J. 421.

It is submitted that no appeal will successfully lie against the reasonable exercise of the judicial discretion of the judge: Goodeu v. Cluff, 13 Q. B. D. 694; Virtue v. Hayes, 9 C. L. T. 207; Nelson v. Thorner, 11 A. R. 616; Geary v. Saxton, 28 N. S. R. 278; Ferguson v. Reid, 33 N. S. R. 580; Smith v. City of St. John Ry. Co., 28 S. C. R. 603; Inchmaree v. The Austria, 6 Can. Ex. C. R. 178, 218. In Manning v. Ashall, 23 U. C. R. 302, the appeal was against the granting of a new trial because "the verdict was against evidence, or at all events against the greater preponderance of evidence." Draper, C.J., in delivering the judgment of the court said: "The decision involved no point of the law, strictly speaking, and certainly does not decide the questions which were argued before us. We think we should not give effect to an appeal from a decision of a judge of a county court on a point like this which is so truly an exercise of discretion by one who, having presided at the trial, and seen and heard the witnesses, is in a much more favorable position to decide correctly than this court can be:" see also Williams v. Jones, 34 Ch. D. 120; Bazett v. Morgan, 24 Q. B. D. 48; Platt v. G. T. Ry. Co., 12 P. R. 380; Jones v. Tuck, 11 S. C. R. 197; R. v. Richardson, 8 O. R. 651; Eureka Woollen Co. v. Moss, 11 S. C. R. 91; but see R. v. Mercer, 11 P. R. 477.

Sec. 135. But it was decided in Gates v. Seagram, 19 O. L. R. at p. 226, by the Court of Appeal, that an appeal lies "when the discretion has been exercised upon an erroneous principle or upon a misapprehension of the facts; in other words where there has been no real exercise of judicial discretion."

Upon the principle laid down in this case, in which the appeal was allowed upon a question of costs which were in the discretion of the judge (as in the division court under section 170), an appeal will lie upon such question in a case in which the subject matter of the suit exceeds $100, and the judge at the trial proceeds upon an erroneous principle as to costs: see Goodman v. Blake, 19 Q. B. D. 77; Metropolitan Asylum Dist. v. Hill, 5 A. C. 582; Wamsley v. Smallwood, 11 A. R. 439; McCausland v. Quebec Fire Ins. Co., 25 O. R. 330; so where the judge acts on the assumption that his discretion is excluded: Bew v. Bew, 1899, 2 Ch. 467. See also Knickerbocker v. Ratz, 16 P. R. 191; Archibald v. deLisle, 25 S. C. R. 1; Campbell v. Wheler, 17 P. R. 289, where it was held that the court would not interfere with an order as to costs unless the judge acted in error as to the law or the facts. The cases are fully cited in Holmested's Judicature Act, 4th ed., p. 263. The following additional cases also illustrate the proposition stated, as to appeals from matters generally which are in the judicial discretion of the judge: Golding v. Wharton, 1 Q. B. D. 374; Weston v. Rodwell, 3 Ch. D. 380; Huggons v. Tweed, 10 Ch. D. 359; Ormerod v. Todmorden, 8 Q. B. D. 664; Swindell v. Birmingham Syndicate, 3 Ch. D. 127.

Upon an appeal from the decision of a county court in England, in an action for dilapidations, the case, without saying what the evidence given was, stated that the judge told the jury that it was not like an action for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises with the particulars in their hands, and therefore would be able to judge whether and to what extent the plaintiff had made out his case. The court directed a new trial: Smith v. Douglas, 16 C. B. 31.

Judgment in Appeal.—Section 128 (1) provides that the divisional court may dismiss the appeal or give any judgment and make any order which ought to have been made, or grant a new trial, or give such order or direction to the court below touching the decision or judgment to be given in the matter as the law requires; and upon receipt of such order, direction and certificate the court below shall proceed in accordance therewith.

Where a case has been tried by a jury, if there is any evidence by which the verdict can reasonably be supported, the court cannot, it is submitted, do anything but grant a new trial and cannot give a final judgment for the appellant: Jonas v. Adams, 20 L. J. Q. B. 397; Connecticut Life Ins. Co. v. Moore, 6 A. C. 644; Toulmin v. Miller, 12 A. C. 746, and notes to sections 105 and 123. An appellant court exercises different functions in dealing with cases tried without a jury and those tried with a jury. In the former, the court exercises the same jurisdiction over the facts as the trial judge: in the latter, the court cannot be substituted for the jury: Phœnix Ins. Co. v. McGee, 18 S. C. R. 61, 73.

The English Order LVIII., r. 4, applying to the court of appeal differs from the above section 128 (1) in that the former includes a proviso, not in s. 128 (1), that the "court of appeal shall have power to

draw inferences of fact," and give any judgment which ought to have been made. But even under the English Order above mentioned, Halsbury, L.C., in Toulmin v. Miller, 12 A. C. 740, said he disagreed with the doctrine that the court had power to give a judgment which was inconsistent with the findings of the jury, as that would be to do away with the right to trial by jury. See also Yorkshire Banking Co. v. Beaton, 5 C. P. D. 127; Hamilton v. Johnston, 5 Q. B. D. 263; Williams v. Mercier, 9 Q. B. D. 337; 10 A. C. 1; Waddell v. Blockey, 10 Ch. D. 419. Sec. 135.

But upon an appeal from the findings of a judge who has tried the case without a jury the appellate court has the right and duty to consider the evidence; and if it appears from the reasons given by the trial judge that he has misapprehended the evidence or failed to consider a material part of it, and the evidence which he has believed when fairly considered as a whole leads to a clear conclusion that his findings are erroneous, it is the duty of the appellate court to reverse the findings: Beal v. Michigan Central Ry. Co., 19 O. L. R. 502. It is also the duty of the appellate court in non-jury cases to review the inferences of fact of the trial judge and to reverse the judgment if those findings are incorrect: Fleuty v. Orr, 13 O. L. R. 59.

Where judgment has been given for the plaintiff on the verdict of a jury, the court has power to dismiss the action or order a nonsuit, if, upon hearing the evidence for the plaintiff, he reserves his decision on an application then made: see sections 105, 144 (1); Fuller v. Cleveley, 17 Jur. 730.

Where an appeal was dismissed because no counsel appeared, the court allowed the case to be restored to the paper the following term on an affidavit that the appellant's counsel had been prevented from attending by dangerous illness in his family: McAllister v. Cushing, 8 C. L. T. 447; 26 N. B. R. 62.

A case once decided on appeal would not, it is submitted, be reconsidered: Thellusson v. Rendlesham, 7 H. L. Cas. 429.

An appellate court may vary the judgment of the court below, in favor of a respondent although he has not appealed: Attorney-Gen. v. Simpson, 1901, 2 Ch. 671; Chalioner v. Lobo, 1 O. L. R. 292, 32 S. C. R. 505; also Toronto Junction v. Christie, 25 S. C. R. 551, in which cross-relief was granted on appeal without cross-appeal; but see *contra* Stephens v. Chausse, 15 S. C. R. 379, and National Society v. Gibb, 1900, 2 Ch. 280, in which it was held that where there is a claim and counterclaim, cross-relief will not be given on an appeal by one of the parties in favor of a respondent who has not appealed.

General Principles of Appeal.—An appellate court does not reverse the decision of a court below it, simply because it might on the facts have come to a different conclusion. The appellate court sees that the inferior court is clearly wrong before reversing its decision: Keena v. O'Hara, 16 C. P. at p. 438, *per* Richards, C.J.: The Picton, 4 S. C. R. 648; Ryan v. Ryan, 5 S. C. R. 466; Grassett v. Carter, 10 S. C. R. 107; Prentice v. Consolidated Bank, 13 A. R. 69; Symmington v. Symmington, L. R. 2 Sc. App. 424; Berdan v. Greenwood, 20 Ch. D. 769; How v. London & N. W. Ry. Co., 1892, 1 Q. B. 39; see Gorman v. Dixon, 26 S. C. R. 87; Montreal Gas Co. v. St. Laurent, 26 S. C. R. 176; White v. Smith, 28 N. S. R. 5; Raisville v. The G. T. Ry. Co., 25 O. R. 242; 29 S. C. R. 201, and cases there cited.

Sec. 135. But an appellate court may draw inferences adverse to those of the trial judge from facts that are not really in dispute: Booth v. Moffatt, 11 Man. L. R. 25; Pudsey v. Manufacturers' Accident Ins. Co., 29 N. S. R. 124; see s. c. 27 S. C. R. 374; Hamilton Manufacturing Co. v. Victoria Lumber Co., 16 C. L. T. 209. And if a sufficiently clear case is made out the court may allow an appeal on mere questions of fact: *Ib.*; North British and Mercantile Ins. Co. v. Tourville, 25 S. C. R. 177.

The Supreme Court has almost always refused to interfere with the verdict of a jury when there was any evidence to warrant it and particularly when the finding of the jury has been affirmed by the divisional court and the court of appeal: Grand Trunk Ry. Co. v. Rainville, 29 S. C. R. 201; affirming 25 A. R. 242; but when it appears that a gross injustice has been occasioned to the appellant, and there is evidence sufficient to justify findings to the contrary, the concurrent findings of both courts below will be reversed on appeal: City of Montreal v. Cadieux, 29 S. C. R. 616; Hamilton Manufacturing Co. v. Victoria Lumber Co., 16 C. L. T. 209.

The court may also take questions of fact into consideration, and if it clearly appears that there has been an error in the admission or appreciation of the evidence by the court below, its decision may be reversed or varied: Lefountain v. Benudoin, 28 S. C. R. 89.

The appellate court will not interfere with the amount of damages assessed by the judgment appealed from, if there is any evidence to support it: Montreal Gas Co. v. St. Laurent, 26 S. C. R. 176; The City of St. Henri v. St. Laurent, 26 S. C. R. 176. Nor will such court give effect to mere technical grounds of appeal against the merits, when there has been no surprise or disadvantage to the appellant: Gorman v. Dixon, 26 S. C. R. 87.

In a case tried without a jury, if evidence has been improperly admitted, the appellate court may yet reject it and maintain the verdict if the remaining evidence warrants it: Merritt v. Hepenstall, 25 S. C. R. 150.

A purely technical objection to a party's right of action, which had not been made in the court below, and could have been met by evidence, would not, it is submitted, be entertained in appeal: Bank of Bengal v. Fagan, 7 Moo. P. C. 61; Kay v. Marshall, 8 C. & F. 245; Midland Banking Co. v. Chambers, L. R. 4 Ch. at p. 400, *per* Selwyn, L.J.; Macdougall v. Knight, 14 App. Cas. 194; Proctor v. Parker, 12 Man. L. R. 528; R. v. Poirier, 19 C. L. T. 378; nor a point as to which it is not clear beyond doubt that the facts, if fully investigated, will support it: Connecticut Mutual Fire Ins. Co. v. Kavanagh, 1892, A. C. 473; Flatt v. Waddell, 18 O. R. 539; Victoria Corporation v. Patterson, 1899, A. C. 615; but a substantial question, upon the construction of the document, or upon facts either admitted or proved beyond controversy, though not raised at the trial or on the motion for new trial, must be entertained on appeal: Gray v. Richford, 2 S. C. R. 431; but if the appeal is allowed on a point not raised below, the appellant may be disallowed costs: Garrett v. Roberts, 10 A. R. 650.

Where the evidence shows a total absence of foundation for the conclusion at which the judge has arrived, his decision will be reversed on appeal: British Industry L. Ass. Co. v. Ward, 17 C. B. 644: McLeod v. Chetwynd, 19 C. L. T. 345.

An order need not be formally drawn up on the application for a new trial before appealing: *Re* Jones, 4 P. R. 317.

An appeal would not, it is submitted, be entertained, not on the ground of the merits of the party's case, but upon a mere formal defect

in procedure on the part of the opposite party: *Ex parte* Kennington, 8 Jur. N. S. 1111. Sec. 125.

A question of practice would not be appealable: R. v. Stubbs, 1 Jur. N. S. 1115.

An appeal does not lie from an order of the judge dismissing an application for a new trial on a question or issue tried by the judge upon oral evidence in division court chambers as to satisfaction of a judgment in the division court: Johnston v. Galbraith, 18 C. L. T. 58. It was also held in that case that the plaintiff could not on the appeal move in the alternative for prohibition as the latter motion must be made to a judge in chambers.

The death of a respondent would not deprive the appellant of his right of appeal: Hemming v. Williams, L. R. 6 C. P. 480; but possibly the suit might have to be revived.

The Supreme Court has jurisdiction to give leave to add the personal representative of the party so dying, and the application need not be made to the division court: Blakeway v. Pattershall, 1894, 1 Q. B. 247; see Blair v. Asseline, 15 P. R. 211.

Consent to an Appeal.—It is somewhat difficult to believe that the legislature intended to give the right to appeal in all cases, no matter how little was involved; but there appears to be no escape from that conclusion on the wording of section 125 (c). When the parties consent to an appeal, it would appear that the judge is bound to take down the evidence in writing: section 106.

Quære.—Whether an appeal lies by consent in garnishee proceedings? Section 125 (c) does not declare that the consent need be in writing, and in the absence of such provision a written consent would be unnecessary: R. v. Salop (Jus.), 4 B. & Ald. 626; R. v. Surrey (Jus.), 5 B. & Ald. 539; R. v. Huntingdonshire (Jus.), 10 L. J. M. C. 127; R. v. Lincolnshire, (Jus.), 3 B. & C. 548; R. v. Nicol, 40 U. C. R. 76; *Ex parte* Butters, *Re* Harrison, 14 Ch. D. 265; see also Wycott v. Campbell, 31 U. C. R. 584.

It would, however, be advisable and may be held to be essential in all cases that a formal written consent should accompany the papers to the Court of Appeal. For form of consent, see Form 134.

Appeal in Interpleader Proceedings.—The words of this section providing for an appeal in interpleader are very similar to those of the English County Courts Act, 1888 (51 & 52 V. c. 43, s. 120).

The proceedings in interpleader, being merely collateral, no right of appeal existed under the statute of 1880, which first gave an appeal: *Re* Turner v. Imp. Bank of Canada, 9 P. R. 19; Bank of Montreal v. Statten, 1 C. L. T. 66.

The bailiff should not return, but on the contrary should retain his execution in the original action until the disposal of the appeal: Angell v. Baddeley, 3 Ex. D. 49.

Money Claimed.—The appeal is given where the money claimed, or the value of the goods, or the proceeds thereof exceeds $100; *or* where the damages claimed or awarded, under section 215 (3), against either party or the bailiff exceed $60. The value of the goods *and* the amount of damages cannot be added together so as to make an appealable case. The value of the goods may be $100 and the damages $60, and yet there will be no appeal: White v. Milne, W. N. (1887), 256; 58 L. T. 295; Lumb v. Teal, 22 Q. B. D. 675.

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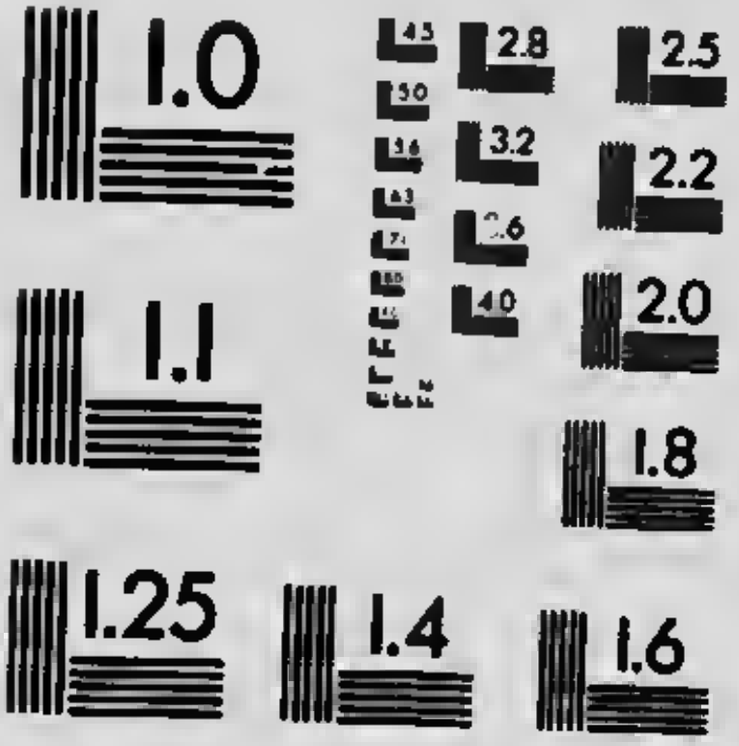

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Sec. 195.

It is questionable whether appeal lies by consent in interpleader proceedings, unless the requirements of the statute as to value or amount are complied with: see Collin v. Lewis, 20 Q. B. D. 20; Coulson v. Spiers, 9 P. R. 491; Hamlyn v. Betteley, 6 Q. B. D. 63.

"It is by no means clear that section 121" (now 106) "applies to interpleader:" *per* Osler, J.A., Sullivan v. Francis, 18 A. R. 122. By the Division Court Act, R.S.O. 1897, c. 60, s. 161, a.-s. 2, section 121 (now 106) was made applicable to such proceedings; but section 161 (2) is omitted from the present statute.

The statute makes no provision for appraisement of goods seized on execution, as it does in attachment cases, under section 201, and the question is, who is to determine the value of the goods? Is it the bailiff who makes the seizure, or the judge who tries the interpleader issue, or the clerk? The "value" is not upon the goods that may be seized or otherwise taken by the bailiff, but only on those concerning which the interpleader proceedings are to be had.

Where among the papers returned was a list of goods bought by the claimant at an auction sale, it was assumed by the appellate court that the figures opposite to each article represented the price: Sullivan v. Francis, 18 A. R. 121.

Proceeds of Goods.—There can only be an interpleader in the division court for the proceeds of goods, where the claim is made to such proceeds, and if a claim is laid to the goods seized, there could not, without the consent of parties be an issue in respect of the proceeds of them: Reid v. McDonald, 26 C. P. 147.

It is submitted that the words "proceeds," as here used, would mean the *gross* amount received by the bailiff on sale of goods. Wharton defines the meaning of the word to be "the sum, amount or value of goods, etc., sold or converted into money." See Jones v. Parcell, 11 Q. B. D. 430.

Money paid by the claimant under protest to obtain possession of his goods would be proceeds thereof within the meaning of the section: Smith v. Critchfield, 14 Q. B. D. 873.

It was doubted whether, in interpleader proceedings, an appeal would lie from a decision of a judge in the division court on the question of damages: Fox v. Symington, 13 A. R. 296; but this sub-section now makes provision for appeal in such cases.

Cross Appeal.—The respondent may, without any notice, ask for more than his judgment gives him by way of cross-appeal: Hutson v. Vailliers, 19 A. R. 154. But see Glines v. Cross, 12 Man. L. R. 442. If the appellant may then abandon the appeal, he would, nevertheless, on the respondent proceeding with his cross-appeal, be entitled to urge his original contentions: The Beeswing, 10 P. D. 18; but see Pickering v. Toronto Ry. Co. 16 P. R. 144.

Appeal on Counterclaim.—It is submitted that section 125 will include the right to appeal in respect to a decision upon a counterclaim amounting to more than $100. Such a claim is really a separate action: Gates v. Sengram, 19 O. L. R. 216.

See section 2 (1) (a); Smith v. Gill, 1896, 2 Q. B. 166. Upon this point, see also Frankel v. Grand Trunk Ry. Co., 3 O. L. R. at p. 705, where it was held that an appeal lies to the Supreme Court in a high court action upon a counterclaim amounting to more than $1,000, irrespective of the amount of the plaintiff's claim.

Secs. 126, 127.

Staying Proceedings.—Upon the appeal being set down the execution of the judgment appealed from is *ipso facto* stayed pending the appeal unless otherwise ordered by the court appealed to: s. 128 (3). The appeal must be set down to be heard two clear days before the first sittings of the divisional court which commences after the expiration of thirty days from the decision complained of: section 128 (1).

Reviewing the Evidence on Appeal.—When witnesses have not been heard in the presence of the judge, but their depositions were taken before a commissioner, a court of appeal may deal with the evidence more freely than if the trial judge had heard it, or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it: Maizard v. Hart, 27 S. C. R. 510; reversing 29 N. S. R. 340.

Mutual Insurance Appeals.—S. 125 (*d*). This provision merely enables the company to carry on a suit to an appeal as a test case, at its own cost of both parties as between solicitor and client. An appeal in this case lies, even if the amount in dispute is less than $100.

Fresh Evidence on Appeal.—The divisional court has authority to receive further evidence on the question in dispute upon the appeal; and the principles and limitations in connection with that authority are fully discussed in Rathbone v. Michael, 20 O. L. R. 503.

Agents for service where right to appeal.

126.—(1) Where an appeal lies, each party shall, before or at the trial, leave with the clerk a memorandum in writing of the name and place of abode of some person resident within the county town upon whom the notice of appeal, and all other papers thereafter requiring service, may be served for him, and service upon such person, or, in his absence, at his place of abode, shall be sufficient; and, in the event of failure to leave such memorandum, all papers requiring service upon the party so failing may be served upon the clerk, or left at his office, and the clerk shall forthwith send, by registered post, all papers so served upon him, to the person entitled thereto.

Case of Judicial District.

(2) This section shall not apply to a Provisional Judicial District. 10 Edw. VII., c. 32, s. 126.

Notice of Appeal.—Notice of appeal is to be given to the respondent when the appeal is set down: see section 128 (1).

Agent for Service.—Where either party fails to appoint an agent for service under this section, service of all papers may be made on the clerk of the court. The section requires the clerk to forward such papers by registered letter. Section 49 (1) requires prepayment of the fees for transmission to the clerk.

Certified proceedings, etc., to be furnished by the clerk.

127. The clerk shall, at the request of the appellant, or his agent, certify under his hand to the clerk of the central office at Osgoode Hall, Toronto, the summons with all notices indorsed thereon, the claim, and any notice of defence, the evi-

Sec. 127. dence and all objections and exceptions thereto, and all motions or orders made, granted, or refused therein, together with such notes of the judge's charge as may have been made, the decision when in writing, or the notes thereof, and all affidavits and other papers in the action, the whole hereinafter called the appeal case; and the clerk shall furnish to the parties, when required so to do, copies of the proceedings so certified, or such part thereof as may be required, and for every copy he shall be entitled to receive five cents for every one hundred words. 10 Edw. VII., c. 32, s. 127.

Certified Under His Hand.—The papers here enumerated would include all the original and other papers in the suit. It is imperative on the clerk to furnish to the parties copies of proceedings on payment of his fees. The request to the clerk to transmit the original papers and to furnish copies need not be in writing, but had better be so, in order to prevent mistakes. For forms of certificate, see Form 79.

After the clerk has certified the copy of proceedings he could not alter nor add to the same: Warner v. Riddiford, 4 C. B. N. S. 180, unless sent back to him for that purpose: London & N. W. Ry. Co. v. Grace, 2 C. B. N. S. 555.

Five copies of the evidence must be delivered to the Registrar of the Appellate Division when setting down the appeal: Con. R. 494, or as soon as received from the stenographer (if one is employed): Con. R. 494 (2).

In appealable cases the judge, unless the parties have agreed not to appeal under s. 107, is bound to take down the evidence in writing: s. 106; but the right of appeal is not lost because the judge omits to take down the evidence: Sullivan v. Francis, 18 A. R. 121; Bank of Montreal v. Statten, 1 C. L. T. 66; see Seymour v. Coulson, 5 Q. B. D. 359; Wohlgemuthe v. Coste, 1899, 1 Q. B. 501; and if the evidence in such a case cannot be agreed on or otherwise supplied, the appellate court may order a new trial: Davidson v. Head, 18 C. L. J. 260; 34 C. L. J. 415.

Where there are in existence notes of the evidence taken by the judge, they must be certified to the appellate court: Lumb v. Teal, 22 Q. B. D. 675, at pp. 678-680.

It is the appellant's right under the statute to have the evidence taken down by the trial judge, so that the Appellate Court may itself form an opinion of the correctness or otherwise of the decision appealed from; and if the evidence is not forthcoming, the court will order a new trial, so that it may be done: Smith v. Boothman, 4 O. W. N. 801.

"Notes of evidence" are not "the evidence" which the judge is required to take down, unless such notes are so full as to show the substance of what was said: Barrett v. Phillips, 33 O. L. R. 203.

A mandamus would lie on refusal to supply judge's notes: see R. v. Sheffield, Co.Ct.J., 5 T. L. R. 303.

A judge is *bound* to do all that is legally required of him to facilitate an appeal: Irving v. Askew, L. R. 5 Q. B. 208. Where a judge dies the new judge may proceed to complete the appeal: McCallum v. Cookson, 5 C. B. N. S. 498.

The judge's decision should be stated publicly and the reasons for it, before the certification of the papers and not sent afterwards to the appellate court: Brown v. Gugy, 2 Moo. P. C. N. S. 341; but the court will not refuse to receive a certificate of the judge if there are no notes of evidence: *Re* Sullivan v. Francis, 18 A. R. 121. The certificate should not be made *ex parte*, but should be settled in the presence of both parties: *Re* Ryan v. Simonton, 13 P. R. 209. See also notes to s. 128. Sec. 128.

Procedure upon appeal from division court.

128.—(1) The appellant shall, within two weeks after the date of the decision complained of or within such other time as the judge may order, file the appeal case with the proper officer of the Supreme Court, and shall set down the appeal to be heard at the latest two clear days before the first sittings of a divisional court which commences after the expiration of thirty days from the decision complained of, and shall give notice thereof and of the appeal, stating the grounds thereof, to the respondent, his solicitor or agent, at least seven days before the commencement of such sittings, and the divisional court shall have power to dismiss the appeal or to give any judgment and make any order which ought to have been made, or to grant a new trial, and shall give such order or direction to the court below touching the decision or judgment to be given in the matter as the law requires, and may award costs in its discretion, which shall be certified to and form part of the judgment of the court below, and upon receipt of such order, direction and certificate the court below shall proceed in accordance therewith.

Powers of Divisional Court on appeal.

(2) The divisional court shall be deemed to be seized of the appeal if and when the appeal case is filed; and, subject to Rules of the Court, may extend the time for setting down the appeal and for giving notice thereof and of the appeal, and for doing any act or taking any proceeding in or in relation to the appeal; and may, if the appeal case is incomplete or inaccurate, direct the same to be amended or to be sent back to the clerk for amendment; and may also allow the notice of appeal to be amended.

Stay of proceedings.

(3) Where the appeal has been set down to be heard, the execution of the judgment appealed from shall be stayed pending the appeal, unless otherwise ordered by a judge of the Supreme Court. 10 Edw. VII., c. 32, s. 128.

Within Two Weeks.—This means *fourteen* days. When a statute provided that notice of appeal was to be given "within one week" before such appeal was to be heard, and notice was given on the 22nd for the 29th it was held insufficient: R. v. Sweeney, 2 Ir. L. R. 278; see also

Sec. 128. notes to section 123. If the decision were given on the 1st, the case might be set down on the 15th of the same month. And see Paul v. Rutledge, 16 P. R. 146; Owen v. Sprung, 28 O. R. 607. The appellate court has no jurisdiction to extend the time for filing the certified copy of the proceedings, or "appeal case," as required by section 128; s. 128 gives that authority to the judge of the court below: see McCarron v. Metropolitan Life Ins. Co., 35 C. L. J. 421; Owen v. Sprung, *supra;* Whalen v. Wattie, 16 O. L. R. 249; Smith v. Hay, 35 C. L. J. 421; *Re* Rogers v. McFarlane, 19 O. L. R. 622; and when the junior judge refused to extend the time within which the copies should be filed the divisional court could not grant relief, even when the delay was caused by the clerk's neglect to furnish the certified copies in time; but an application might be made to the senior county court judge, unless the junior judge changes his mind and signs the certificate: Owen v. Sprung, 28 O. R. 607. The county court judge alone has power to extend the time to file the appeal case: Johnston v. The Town of Petrolia, 17 P. R. 332; see also the News Printing Co. v. Macrae, 26 S. C. R. 695; Kirby v. North British & Mercantile Ins. Co., 1896, 2 Q. B. 99, and cases cited in notes to section 131. It would seem that the county court judge not only has power to extend the time but that this power may be exercised at any time in a proper case. The appeal must be entered before the day mentioned in the notice of it: Donovan v. Brown, 4 Ex. D. 148.

When the proceedings have been filed, section 128 (2) provides that the divisional court is to be deemed (*i.e.*, "conclusively considered:" *Re* Rogers v. McFarlane, 19 O. L. R. 622) to be seized of the appeal and the case becomes subject to the Con. Rules of the Supreme Court of Ontario, and the divisional court may extend the time for setting down the appeal and giving notice and for doing any act or taking any proceeding in connection with the appeal, and may amend the appeal case or send it back for amendment, and may amend the notice of appeal. This is in accordance with the cases decided under the old Act: see Smith v. Port Colborne B. C. Trustees, 1 O. L. R. 195.

The Divisional Court has no authority to amend the claim sued on: Bellamy v. Porter, 28 O. L. R. 572.

Where the appellant had duly filed the appeal case in the proper time but had set down the appeal to be heard at a sittings of the divisional court which commenced *before* instead of *after* the expiration of 30 days from the decision complained of and had neglected to give notice, the divisional court held that while the appellant had the privilege of setting the case down for the first sittings which commenced after the 30 days mentioned, yet it is not improper for him to set it down for an earlier sitting (Lees v. Ottawa, 31 O. R. 567); and leave was given by the divisional court to set the case down for a later sitting and give the notice required: Smith v. Colborne B. C. Trustees, 1 O. L. R. 195.

Where, however, the appeal case had been filed in time but the case had not been set down or notice given and a sitting of the divisional court which commenced after the 30 days had passed, and afterwards another appeal case had been filed and notice given for a still later sittings of the court, the appeal was quashed: Heize v. Shanks, 1 O. L. R. 48; see also Bradley v. Wilson, 8 O. L. R. 184, where the setting down of the appeal and giving notice within the time mentioned in the old statute was held to be a condition precedent to the jurisdiction of the appellate court; but under the present section 128 (2) the divisional court now has jurisdiction over the case as soon as the appeal case is filed and may extend the time for taking any of the other proceedings in the appeal.

If any mistake should be made in transmitting or copying the appeal case and filing it, there would appear to be no objection to an abandonment of the proceedings and taking them afresh, provided it could be done within the prescribed time or that the county court judge extended the time for so doing: see R. v. W. R. Yorkshire (Jus.), 3 T. R. 778; Norton v. London & N. W. Ry. Co., 11 Ch. D. 118; Owen v. Sprung, 28 O. R. 607; and cases cited *supra*. Sec. 128.

The appeal will not be considered as set down until the papers are certified and filed, and if it should be placed upon the divisional court list improperly it will be quashed: *Ib*; see also Paul v. Rutledge, 16 P. R. 140; Gilmour v. McPhail, 16 P. R. 151.

The Date of the Decision.—The time begins to run from the day on which the decision, oral or written, was pronounced or delivered, if done at the trial. If delayed until a day stated, the judgment delivered on that day would be the formal delivery of it: Rathbone v. Munn, 18 L. T. 856; *Re* Burrows, 18 C. P. 493; *Re* Smith v. O'Reilly, 7 P. R. 364.

The time counts from the day of delivering judgment in open court: Hickey v. Stover, 11 P. R. 88; or if not so delivered, it was held to be the day on which formal judgment was signed: Wallace v. Bath, 7 O. L. R. 542.

The words of the section are "after the date of the decision complained of, or within such further time as the judge may order:" s. 128; and under a similar provision in the County Courts Act it was held that this did not mean the actual date of the delivery of the decision but the date when the parties were notified of it: Fawkes v. Swazie, 31 O. R. 256; and in Mason v. Irwin, 15 O. L. R. at p. 89 it was said that the words "from the date of the judgment" were not material, and that the dictum in Fawkes v. Swazie "commends itself to reason and should be followed," and that the objection that the appeal was not in time because not set down within two weeks of the date of the judgment had "no substance and should be overruled;" see also Allan v. Place, 13 O. L. R. 148, to a similar effect.

A judge cannot by post-dating his judgment extend the time for appealing: Wilberforce v. Sowton, 39 L. T. 474; see Brown v. Shaw, 1 Ex. D. 425; Hemmiag v. Blanton, 42 L. J. C. P. 158; 21 W. R. 636; Richardson v. Silvester, 29 L. T. 395; Barker v. Palmer, 8 Q. B. D. 9.

Parties will be bound by the case made by the papers, certified by the clerk, and will not be allowed to travel out of it: Watson v. Ambergate, etc., Ry. Co., 15 Jur. 448; Williams v. Evans, L. R. 19 Eq. 547; Rhodes v. Liverpool Com. Inv. Co., 4 C. P. D. p. 427, *per* Coleridge, C.J.; R. v. City of London Court Judge, 70 L. T. 505.

The respondent will be equally bound by what appears in the certified proceedings, even though not correct; but probably the court in appeal would, if any inaccuracy were shown to it, either refuse to hear the appeal: Yorke v. Smith, 21 L. J. Q. B. 53, or send it back for correction: Thornwell v. Wigner, L. R. 6 Ex. 87; where the "result of the evidence" only was returned to the Court of Appeal: see also Sullivan v. Francis, 18 A. R. 121; Mahon v. Inkster, 6 Man. L. R. 253.

Consolidated Rules.—Under section 154 of the former Division Courts Act the Consolidated Rules as to appeals from the county courts were made the basis of practice on appeals from the division courts. This provision is omitted from the present Act; but while the Division Court Act and Rules govern the practice up to and including the filing

Sec. 128. of the appeal case, the subsequent proceedings are governed by the Con. Rules of practice in the Supreme Court, which is then seized of the case, including powers of amendment, extension of time, etc.: section 128 (2); and see Smith v. Port Colborne B. C. Trustees, 1 O. L. R. 195, *supra;* Hunter v. Puterson, 2 O. W. N. 61, and cases there cited. The Con. Rules referred to are Nos. 491-498.

The appellant court will grant an extension of time for giving the notice of appeal even after the time has elapsed where there has been a slip in practice, if the justice of the case so requires, and if no injury will be occasioned to the opposite party which cannot be compensated for by costs or otherwise: Ross v. Robertson, 7 O. L. R. 494, in which case the considerations involved in the granting of an extended time are discussed: Hunter v. Patterson, 2 O. W. N. 61; see also Rae v. Port Arthur, 7 O. L. R. 737, where an extension of time was refused.

Notice of Appeal.—Notice of setting down the appeal for argument and the grounds thereof must be served at least seven days before the commencement of the sittings at which the appeal is to be heard: section 128 (1); C. R. 492. "At least seven days" means clear days, excluding both the day of service and the date of the commencement of the sittings: see notes to section 123.

Reasonable certainty only would be required in the notice, and it should not be criticised too closely or construed too strictly: R. v. West Houghton, 5 Q. B. D. 300, *per* Denman, C.J., at p. 302; *Re* West Jewell Tin Mining Co., Little's Case, 8 Ch. D. 806.

A notice of appeal not stating to what court was held sufficient: Taylor v. Delaney, 3 O. L. R. 380.

It may be signed by the appellant's solicitor: R. v. Middlesex (Jus.), 1 L. M. & P. 621, or in the appellant's name by the clerk to his solicitor, with the appellant's authority: R. v. Kent (Jus.), L. R. 8 Q. B. 305.

In strictness, perhaps, it need not be signed at all: R. v. Nichol, 40 U. C. R. 76.

The "grounds" of appeal must be stated in the notice: section 128 (1); Con. R. 493. A general statement that the judgment was erroneously made would perhaps be insufficient: Torrence v. McPherson, 11 U. C. R. 200.

It was held that where the notice stated that the appellant was not guilty of the offence it was a compliance with the Act, as it meant that all the ingredients of the offence were disputed: R. v. Newcastle-upon-Tyne (Jus.), 1 B. & Ad. 933.

Any grounds of appeal could be set out in the notice in ordinary and concise language, and the appeal should be heard if it substantially informed the opposite party of the grounds intended to be relied on; see note to section 78.

It is submitted that the omission of the grounds of appeal should not prevent its being heard, such being for the information of the appellate court, and not a condition precedent to hearing the case: Evans v. Matthews, 26 L. J. Q. B. 166: Grant v. The G. W. Ry. Co., 8 C. P. 348; Smith v. Muirhead, 13 U. C. R. 9; *Ex parte* Bromley, *re* Redfearn, 12 L. T. 783; Richardson v. Silvester, 29 L. T. 395.

If one of the grounds of appeal is misdirection or non-direction of the jury, the notice should state how and in what manner the judge misdirected or failed to direct the jury: Furlong v. Reid, 12 P. P. 201; Pfeiffer v. Midland Ry. Co., 18 Q. B. D. 243.

For form of notice, see Form 135.

Where there is a fatal objection to the right of appeal, the respondent should apply to quash the appeal, and not wait until the hearing to urge such objection to its competency; otherwise he will be allowed only the costs of a motion to quash: see Tronson v. Dent, 8 Moo. P. C. 420; O'Sullivan v. Lake, 16 S. C. R. 636. Sec. 128.

If a party appeals from a judgment in his favor claiming relief in consistent with that granted by the judgment appealed from, and, pending the appeal, proceeds upon the judgment and attains the relief granted thereby, his appeal will, on motion, be quashed: International Wrecking Co. v. Lobb, 12 P. R. 207. A party cannot accept the benefit of an order and then endeavor, by an appeal, to reject a burdensome provision: Pearce v. Chaplin, 9 Q. B. 802.

Setting Down the Appeal.—It must be set down to be heard at the latest two clear days before the sitting of the divisional court at which it is to be heard, viz., the first sittings after the expiration of thirty days after the decision complained of: s. 128 (1); or within such further time as the divisional court may allow: s. 128 (2). The time may be extended by the appellate court on such terms as may be just: section 128 (2) and notes.

Enforcing the Judgment.—The judgment of the appellate court may be deposited by either party with the clerk of the Division Court, and upon being so deposited, the judgment may be enforced as if it had been made by such Division Court: section 128 (1). Section 128 (1) provides that the Division Court shall proceed in accordance with the order, direction and certificate of the Divisional Court. It is evidently intended that the formal order of the Divisional Court or a certified copy thereof is the "judgment" to be deposited.

If the order of the Divisional Court be that judgment shall be entered for either party, then the judgment shall be entered accordingly, and the successful party shall be at liberty to proceed on such judgment as on a judgment of the Division Court: section 128 (1). The clerk should make the necessary entry in the procedure book on the deposit of the order, and the judgment will then be of the same force and effect as if originally given in the Division Court.

New Trial After Appeal.—If a new trial is ordered, the action is to be tried at the next sittings of the Division Court, unless the judge otherwise orders: Rule 65 (e).

Costs of Appeal. — Costs are usually allowed to the successful party, unless there is something exceptional in the circumstances: Eddy v. Ottawa City P. Ry. Co., 31 U. C. R. 576; *Re* Shaver v. Hart, 31 U. C. R. 609; Herbert v. Park, 25 C. P. 57; Wambold v. Foote, 2 A. R. 579; Winger v. Sibbald, 2 A. R. 611; Connybeare v. Farries, L. R. 5 Ex. 16; Ashby v. Sedgwick, L. R. 15 Eq. 245; Booth v. Turle, L. R. 16 Eq. 182; and the fact that the judge below had *ex mero motu* made an erroneous adjudication, is not a ground for departing from the rule: Mills v. Hamilton St. Ry. Co., 17 P. R. 74.

But where the point is not raised in the court below, costs may be disallowed: Kelly v. Ottawa St. Ry. Co., 3 A. R. 616, 627; Garratt v. Roberts, 10 A. R. 650; Cooper v. Cooper, 13 App. Cas. 88; Drescbel v. Auer Incandescent Light Mfg. Co., 28 S. C. R. 268; Tollemache v. Hobson, 5 B. C. R. 223.

See also on the question of costs: Harrison v. Cornwall Mineral Ry. Co., 18 Ch. D. 334; Robinson v. Drakes, 23 Ch. D. 98; Long v.

Sec. 129. Haacock, 12 A. R. 156; Whiting v. Hovey, 12 A. R. 119; *Re* O. C. S., 1904, 2 K. B. 161; Whalen v. Wattie, 16 O. L. R. 249.

As to costs of application to extend the time, see Bodine v. Howe, 1 O. L. R. 208; McGuire v. Corry, 1 O. L. R. 590.

The costs are "to be certified to and form part of the judgment of the court below:" s. 128 (1).

The costs of appeal could not be recovered by process of the Supreme Court: see Phillipps v. Phillipps, 5 Q. B. D. 60; McArthur v. Southwold, 8 P. R. 27.

As between parties to the suit, only $15, including counsel fee, and the "actual disbursements" are taxable to the successful party; yet as between solicitor and client, the county court tariff is adopted: section 129.

Costs.—S. 129. Should the court omit to provide for costs when giving judgment, it might afterwards do so, even though the order should have been issued: Hardy v. Pickard, 12 P. R. 428; Fritz v. Hobson, 14 Ch. D. 542, but see Taylor v. Great Northern Ry. Co., L. R. 1 C. P. 430. When the appeal is struck out on the ground that there is no jurisdiction to hear it, the divisional court may award costs: Coté v. Halliday, 17 C. L. T. 53; Sato v. Hubbard, 6 A. R. 546; Teskey v. Neil, 15 P. R. 546; Crowther v. Boult, 13 Q. B. D. 680; Dis. Urban Sanitary Authority v. Aldrich, 2 Q. B. D. 179. Should the appeal be abandoned the costs would be payable by the party abandoning it: Charlton v. Charlton, 16 Ch. D. 273.

If the respondent appears and the appellant does not, the appeal will probably be dismissed with costs: Sherburne v. Middleton, 9 Cl. & F. 72; Scanlan v. Usher, 8 Cl. & F. 561; Smith v. Durant, 9 H. L. Cas. 192; Berry v. Exchange Trading Co., 1 Q. B. D. 77.

Taxable costs on appeal.

129. The costs taxable between party and party of and incidental to an appeal shall be the actual disbursements, and no greater amount over and above actual disbursements than $15, inclusive of counsel fee; the costs of an appeal between solicitor and client, shall be taxable on the county court scale. 10 Edw. VII. c. 32, s. 129.

The following is a summary of the proceedings on appeals, with references to the forms:—

The appellant is to:

1. Request (Form 134) the clerk of the court to certify (Form 79) and to transmit to the clerk of the Central Office, Supreme Court of Ontario, Osgoode Hall, Toronto, all the original papers in the action, including particularly the evidence taken down by the judge: section 127;

2. Procure five copies of the evidence, and have the same transmitted with the other papers above mentioned: Con. R. 494; or as soon as the copies of evidence can be procured from the stenographer, if one has been employed: Con. R. 494 (2);

3. Within two weeks after the date of the judge's decision (which time may be extended by the county judge), file the appeal case (*i.e.* the papers transmitted as above stated) with the Registrar of the Appellate Division: section 128 (1);

4. Set down the case to be heard at the latest two clear days before the first sitting of the Divisional Court, which commences after the expiration of thirty days from the date of the decision: section 128 (1); the Divisional Court "commences" its sittings once in each month; Sec. 129.

5. Give notice of the appeal (Form 135) at least seven days before the commencement of the sittings of the Divisional Court, stating the grounds of appeal: section 128 (1).

After the appeal case is filed, as mentioned in above paragraph 3, the Divisional Court (not the county judge) may extend the time for setting down the appeal, and for giving notice of appeal, or for doing any act or taking any proceeding, and is solely seized of the appeal: section 128 (2).

The notice of appeal and all other papers may be served in the manner stated in section 126 (1); and if served on the clerk of the Division Court (on failure of either of the parties to leave with the clerk the name and place of abode of some person upon whom the same may be served, as required by setion 126 (1)), the clerk is to forthwith send the papers so served on him to the person entitled to them, by registered mail: section 126 (1); see also Rule 84.

APPEALS TO DIVISION COURTS UNDER SPECIAL ACTS.

Appeals from Justices' Convictions.—This appeal is provided by the Canadian Criminal Code: R.S.C. c. 146, ss. 749 to 760; and by 8-9 Edw. VII. c. 9, (Dom.) amending ss. 750, 751 (n) of the Cr. Code; and by the further amendment by 3-4 Geo. V. c. 13, s. 26 (Dom.); as follows:

749. Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made by a justice for the payment of money or dismissing an information or complaint, any person who thinks himself aggrieved by any such conviction or order or dismissal, the prosecutor or complainant, as well as the defendant, may appeal,—

(*a*) in the province of Ontario, when the conviction adjudges imprisonment only, to the Court of General Sessions of the Peace; and in all other cases to the Division Court of the division of the county in which the cause of the information or complaint arose;

(As to other provinces, see the further sub-sections.)

This enactment applies to appeals from convictions under Dominion statutes only; appeals from convictions under Ontario laws being provided for by the Ontario statute which is referred to *post*.

Unless Otherwise Provided.—When any particular statute providing a penalty or punishment for its infringement also provides a mode of appeal differing from that under consideration, the appeal so provided, and not that under the above section, will govern; but in all other cases of prosecutions under the Cr. Code or any other Dominion statute, the appeal will be in accordance with sections 749 *et seq.* And even when a particular mode of appeal is expressly provided by the particular statute, such portions of sections 749 *et seq.* of the Criminal Code as are not inconsistent with such special Act (e.g. in regard to notices and other procedure, if not provided by the special Act) are to be followed: R. v. McIntosh, 2 Can. Cr. Cas. 114.

Sec. 122. So the appeal provided by the Fisheries Act, R.S.C. c. 45, s. 105, to the Minister of Marine and Fisheries does not take away the right of appeal under the above sections of the Criminal Code, but is in addition to it: R. v. Townsend, 5 Can. Cr. Cas. 143.

Who May Appeal.—The expression "person who thinks himself aggrieved" is to be construed according to its ordinary acceptation: Robinson v. Curry, 7 Q. B. 465; but there must be legal grounds for so "thinking:" Harrup v. Bayley, 6 E. & B. 218. So a person who has pleaded guilty is not a party aggrieved in so far as the facts relating to his guilt or innocence are concerned, and he is estopped from denying his guilt; that is, as to the fact that he did the act complained of; but he may nevertheless appeal from the conviction on the ground that it is bad in law or upon some other legal objection: R. v. Brook, 7 Can. Cr. Cas., 216; but an appeal will not be allowed after a plea of guilty, merely to revise the punishment, unless the magistrate acted oppressively: R. v. Rowman, 2 Can. Cr. Cas. 89. So a defendant convicted of the breach of a by-law upon a plea of guilty cannot appeal on the ground that the by-law is *ultra vires*, such objection not being taken before the magistrate, even although the defendant did not then know of the invalidity of the by-law: R. v. Bowman, *supra;* and see Rogers v. Cavanagh, 27 C. P. 537; R. v. Poirier, 19 C. L. T. 378. The word "person" in this section includes bodies corporate, etc.: Code 2 (13).

Appeal to the Division Court.—If the punishment on conviction is "imprisonment only," (meaning not merely the imprisonment which follows upon default of payment of a fine) the appeal must be made to the General Sessions; but if the justice dismissed the case, or if the order is for the payment of money or a fine (with or without imprisonment in default of payment) then the appeal is to the division court: Code 749 (a).

To What Court.—The appeal must be taken to the "division court of the division in the county in which the cause of information or complaint arose:" s. 749 (a). The appellant must show that he has appealed to the court having jurisdiction, and should give evidence accordingly, unless it appears on the face of the proceedings before the justice. A book is kept by the clerk of the peace recording the boundaries of the division courts: s. 17, *ante;* and a copy certified by the clerk of the peace, is admissible as evidence: R. S. O. 1914, c. 76, s. 29; 7 U. C. L. J. 177: see notes to s. 17, *ante.* A certified copy of this record should be put in at the trial of the appeal with evidence showing the locality in which the offence was committed, to be within the division.

Scope of Section 749.—The appeal allowed by this section of the Code only applies to convictions, orders or dismissals made under the Summary Convictions clauses of the Criminal Code, Part XV.: but by section 797 of the Code an appeal was also allowed from a conviction or order by a recorder, magistrate, etc., on the summary trial in Ontario, Quebec and Manitoba of any of the indictable offences mentioned in section 773 (a) or (f) of the Code. By the amendment to the Code by 3-4 Geo. V. c. 13, s. 27, section 797 in the Code of 1906 is repealed and a new section 797 is substituted, providing that appeals from summary trials of offences mentioned in s. 773 (a) or (f) should only be taken where the case had been tried by two justices

of the peace: Rex v. Dubuc, 22 Can. Cr. Cas. 420. Inasmuch as none Sec. 129.
of these offences is triable summarily in Ontario, Quebec or Manitoba before two justices of the peace, the new section 797 only applies to other provinces than those above named, and in the latter there is now no appeal from a summary trial before any functionary, of any of the offences indicated.

Waiver of Right to Appeal.—Making an application to quash the conviction waives the right to appeal: Denault v. Robblean, 8 Can. Cr. Cas. 850; R. v. Townshend (No. 2), 6 Can. Cr. Cas. 519; and by section 749 of the Code a person who appeals by way of "case stated" is to be deemed (*i.e.*, "conclusively considered:" *Re* Rogers v. McFarland, 19 O. L. R. 622) to have abandoned the right to appeal finally and conclusively.

Voluntary Payment of a Fine.—This also waives appeal: R. v. Neuberger, 6 Can. Cr. Cas. 142; but if it is paid under compulsion or under protest, however slight, appeal is not waived; as when the defendant said he "would see further about it" when he made the payment: *Ex* Mason, 13 B. C. C. P. 315; and so when the defendant paid the fine and at the same time asked for information as to the time allowed for appeal: R. v. Tucker, 10 Can. Cr. Cas. 217; and if the fine is paid under compulsion of issued to distress: R. v. Tucker, *supra*.

When No Appeal Lies.—There is no appeal from an order by a justice requiring a party to find sureties to keep the peace: R. v. Mitchell, 13 Can. Cr. Cas. 344.

Death of Parties.—The appeal does not abate by the death of the informant: R. v. Fitzgerald, 1 Can. Cr. Cas. 420.

Procedure on Appeal.—This is governed by the Dominion Statute, 1909, c. 9, s. 750, and 1913, c. 13, s. 26, amending the Criminal Code, as follows:—

"750. Unless it is otherwise provided in the special Act,—

"(*a*) if a conviction or order is made more than fourteen days before a sittings of the court to which an appeal is given, such appeal shall be made to that sittings: but if the conviction or order is made within fourteen days of a sittings, the appeal shall be made to the second sittings next after such conviction or order;

"(*b*) the appellant shall give notice of his intention to appeal by filing in the office of the clerk of the court appealed to, a notice in writing setting forth, with reasonable certainty, the conviction or order appealed against, and the court appealed to, within ten days after the conviction or order complained of, and by serving the respondent and the justice who tried the case each with a copy of such notice;

[NOTE: This sub-section (*b*) was substituted by the statute of 1913, c. 13, s. 26.]

"(*c*) the appellant, if the appeal is from a conviction or order adjudging imprisonment, shall either remain in custody until the holding of the court to which the appeal is given, or shall within the time limited for filing a notice of intention to appeal, enter into a recognizance in form 51 [NOTE: Form 136 (2), *post*], with two sufficient sureties

Sec. 129. before a county judge, clerk of the peace or justice for the county in which such conviction or order has been made, conditioned personally to appear at the said court and try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as are awarded by the court; or if the appeal is from a conviction or order whereby a penalty or sum of money is adjudged to be paid, the appellant shall within the time limited for filing the notice of intention to appeal, in cases in which imprisonment upon default of payment is directed either remain in custody until the holding of the court to which the appeal is given, or enter into a recognizance in form 51 [NOTE: Form 136 (2), *post*], with two sufficient sureties as hereinbefore set out, or deposit with the justice making the conviction or order an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and, in cases in which imprisonment in default of payment is not directed, deposit with such justice an amount sufficient to cover the sum so adjudged to be paid, together with such further amount as such justice deems sufficient to cover the costs of the appeal; and upon such recognizance being entered into or deposit made, the justice before whom such recognizance is entered into or deposit made shall liberate such person if in custody;

[NOTE: No recognizance is necessary where the appeal is by the prosecutor on a dismissal of the case; all that is required is the deposit with the justice of the probable costs of appeal.]

"(d) in case of an appeal from the order of a justice pursuant to section six hundred and thirty-seven for the restoration of gold or gold-bearing quartz, or silver or silver ore, the appellant shall give security by recognizance to the value of the said property to prosecute his appeal at the proper sittings of the court, and to pay such costs as are awarded against him."

Notice of Appeal.—Form 136 in appendix hereto. A notice of the intention to appeal must be given in writing: section 750 (h). The definition of "writing" is given in the Interpretation Act (Dom.), R.S.C. c. 1, s. 34 (31); and s. 2 (42) of the Cr. Code. A wholly typewritten notice is "a notice in writing:" R. v. Bryson, 10 Can. Cr. Cas. 398.

The notice should be signed by the appellant, or by his solicitor: R. v. Nichol, 40 U. C. R. 76; R. v. Kent JJ., L. R. 8 Q. B. 305; but section 750 (h) does not expressly require it to be signed, and signature has been held not to be essential: R. v. Bryson, 10 Can. Cr. Cas. 398, and cases cited there.

The notice should be addressed to the respondent and to the justice who tried the case: section 750 (h) (amended); but even if not addressed to any person, if it is personally served on the respondent and justice, it would nevertheless meet the requirements of the statute: see R. v. Essex JJ., 1892, 1 Q. B. 490; Doe v. Wrightman, 5 Esp. 5; R. v. Davitt, 7 Can. Cr. Cas. 514. It was held in Cragg v. Lemarsh, 4 Can. Cr. Cas. 426, and some other Canadian cases, that as the form then prescribed by the Criminal Code of 1892 was addressed to the prosecutor, and as that statute required that form to be used or one to the same effect, the decisions under the English statute (which prescribed no form of notice) did not apply. The present section 750 omits the form mentioned and the reasons for the decision in Cragg v. Lemarsh do not now apply, and the English authorities

above referred to. which held that the notice of appeal need not be addressed to any person, if personally served, now govern the question: see R. v. Jordan, 5 Can. Cr. Cas. 438, and cases cited there, and in the same volume at p. 161; also R. v. Davitt, 7 Can. Cr. Cas. 514, and notes there. Sec. 129.

Section 750 (h) requires the notice to state with reasonable certainty the conviction or order appealed against and the court appealed to. This and other requisites of the notice are essential to the due lodgement of the appeal. A notice of appeal purporting to be from a conviction for "looking on" is not a good notice of appeal from a conviction for "playing" in a common gambling house: R. v. Ah Yin, 6 Can. Cr. Cas. 63, 9 B. C. R. 319. It is not requisite that the notice should state that the appellant is a "person aggrieved:" R. v. Jordan, 5 Can. Cr. Cas. 438; The King v. McKay, 21 Can. Cr. Cas. 211.

Service of Notice of Appeal.—The notice must be served on the respondent and on the justice or justices who tried the case: amended section 750 (h) of the Code, *ante*. Nothing is stated in the statute as to whether the service must be personal, but it would seem to be ordinarily required to be so served: section 750; Olson v. Cameron, 12 Can. Cr. Cas. 193, and cases there cited; R. v. Oxfordshire JJ., 1893 2 Q. B. 149; Paley on Convictions, 8th ed., 382. But where it was found to be in fact impossible to serve the respondent personally owing to circumstances entirely beyond the appellant's control, as where the respondent had left the country and could not be found, and the notice was served on the solicitor who had appeared for the prosecutor before the magistrate; the court, after reviewing all the authorities, heard the appeal: Wells v. McSherry, 1913 1 K. B. 20. Where it is impossible to effect personal service by reason of the respondent keeping out of the way, or for any like reason, it is in the nature of the case necessary that the right to appeal should not be practically abrogated at the will of the respondent. But all efforts reasonably within the appellant's power must be made to effect personal service; and if that is impossible, the facts must be proved, so that the court may see that by the mode of service actually made, *e.g.*, on some person connected with the respondent's business or residence or otherwise that the notice is likely to have come to the respondent's knowledge. It may be advisable in such case to serve a second copy on the justice, stating that it is "for the respondent who cannot be found," as well as on the other persons above indicated.

Where the jurisdiction to make a conviction is given to two justices sitting together and not to one justice, both justices must be served: The King v. Edelston, 17 Can. Cr. Cas. 155, and cases there cited.

Formerly, by section 750 (h) in the Code of 1906, a further notice stating the grounds of appeal had to be served at least five days before the hearing of the appeal; and under a similar provision in the English statute, it was held that no other grounds than those stated in the notice could be considered: R. v. Boultbee, 4 A. & E. 498; but by the Act of 1909, c. 9, amending the Cr. Code and providing a new section 750, the requirement of the old section 750 (h) for giving a notice of the grounds of appeal are omitted and no grounds of appeal need now be stated.

Service on Sunday would be void: see notes, *ante*, "Holidays."

Sec. 129.

Contents of the Notice.—The notice must state the "court appealed to:" section 750 (h); and a notice merely stating to what judge and place the appeal would be made, but not stating that it was to the next sittings of the court, nor when that would be, was held not sufficient: R. v. Brimmacombe, 10 Can. Cr. Cas. 169; but a notice stating that it was given for the next sittings of the court to be held at the place where the court was to sit, naming it, but giving a wrong date for such sittings, was held to be sufficient, the wrong date being surplusage: Ulirick v. Daum, 2 N. W. T. Rep. 328.

The notice of appeal must be for the first ensuing sittings of the division court, if such sitting is "more than 14 days" after the conviction; or if the conviction is on a day less than 14 days before the sittings, then for the second sittings of the division court: Cr. Code, s. 750 (n). If the notice should be given for an earlier sitting than that required by this section, the notice would be void and the court would have no jurisdiction to hear the appeal: R. v. Caswell, 3 U. C. R. 303.

Sitting of the Court.—The term "sitting of the court" refers to the sitting fixed by law, and not to a sitting which has begun within 14 days and been adjourned till after the lapse of that period: R. v. Bombardier, 11 Can. Cr. Cas. 217.

Fourteen clear days is meant, excluding the date of the conviction and the day of the sitting of the Appellate Court: R. v. Johnston, 13 Can. Cr. Cas. 179.

Thus, if the conviction or order is made on the 1st October, a notice of appeal for a sitting of the court on the 15th October would be for too early a sitting and would be invalid.

Notice of Appeal Must be Filed and Served.—The notice must be filed in the office of the clerk of the division court and also served on the respondent, as well as on the justice who tried the case, "within ten days" after the day on which the conviction or order was made: section 750 (h). The day following that on which the justice's decision was given will be the first day to be counted, and the day of filing and serving the notice will be excluded: Radcliffe v. Batholomew, 1892 1 Q. B. 161.

Sundays and holidays are included in the time counted; but if the period of ten days expires on a Sunday or other holiday, it will not count, and the time will extend to include the day following which is not a holiday: R.S.C. 1906, c. 1, s. 31 (h); and if the time should expire on Dominion Day or Victoria Day and that day should also be Sunday, the statute makes the following day a holiday also and the time would extend to include the day after that: R.S.C. 1906, c. 106: c. 107. Statutory holidays are enumerated in R.S.C. 1906, c. 1, s. 34 (11), and see *ante* "Holidays;" and see Rex v. Trottier, 22 Can. Cr. Cas. 102.

A notice of appeal sent by mail to the clerk of the court appealed to in time for him to receive it at his post office on the tenth day is too late, if by reason of his office being officially closed on that day, he did not receive it till the day following: Rex v. Green, 22 Can. Cr. Cas. 155.

The period of "ten days after the conviction or order complained of" commences to run from the time the justice announced his decision and made his adjudication, and not from the time when he

made out the formal record of conviction, which he could do at any time afterwards: R. v. Derbyshire JJ., 7 Q. B. 193; *Ex p.* Johnston, 3 B. & S. 947; The King v. Langlois, 20 Can. Cr. Cas. 183. Sec. 129.

The time for appealing from a judgment begins to run when the order for judgment is put in intelligible shape, so that the parties may clearly understand what they have to appeal from, and not from the entry of formal judgment: Koksilah Quarry Co. v. The Queen, 5 B. C. R. 600.

There is no authority to extend the time for giving notice of appeal: R. v. Middlesex JJ., 14 L. J. M. C. 139; R. v. Solop JJ., 8 A. & E. p. 173; R. v. Thornton, 11 Can. Cr. Cas. 71; R. v. Dolliver, 10 Can. Cr. Cas. 405; R. v. White, 19 Can. Cr. Cas. 156.

Owing to the change made in the wording of s. 750 (h) in the Cr. Code of 1906, by the amendment and substitution of a new section 750 (h) by the statute of 1913, c. 13, s. 27, the Supreme Court of Saskatchewan held that the notice of appeal need only be filed within the ten days and may be served afterwards in time to perfect the appeal: Rex v. McDermott, 23 Can. Cr. Cas. 252. But, for the reasons stated in the notes by the editor of the cases referred to (p. 254) it seems that upon a correct interpretation of that section of the statute the notice of appeal must be served and filed within the ten days after the date of the conviction.

The giving of notice of appeal and its filing and serving within the time limited are conditions precedent to the jurisdiction of the appellate court and if not done in accordance with the statute giving the right of appeal thereupon, the appeal is not duly lodged and the court has no jurisdiction in the matter, except to award costs under section 755; and the defect cannot be waived or cured: R. v. Middlesex, JJ., 1 M. & S. 446; Alderson v. Pallester, 70 L. J. K. B. 935; R. v. Dolliver, 10 Can. Cr. Cas. 405; R. v. Joseph, 11 Que. R. 211.

Recognizance on Appeal.—Form No. 136 (2), in appendix hereto; Form 51 in appendix to the Cr. Code referred to in section 750 (c) of the Cr. Code Amendment Act of 1909, c. 9, *ante*. If the punishment awarded by the justice is by imprisonment, only, the recognizance must be given, within the ten days limited for filing notice of appeal: s. 750 (c), or if not given within such ten days, the appellant must remain in custody until the holding of the appellate court; viz., the Court of General Sessions, to which court only can such appeal be taken; a deposit of money will not suffice. But if the appeal is from a conviction imposing a fine, or from an order for the payment of money (with imprisonment in default of payment) the appellant must remain in custody, or he may, within the ten days limited for filing the notice of appeal, either enter into the recognizance or deposit with the justice who tried the case a sum of money sufficient to cover the amount adjudged to be paid and also such further sum as the "justice deems sufficient" to cover the costs of the appeal; but, if imprisonment in default of payment is not directed, no recognizance is required, but the appellant must deposit a like sum, and of course he not being in custody, there is no need of his being discharged. In Rex v. McDermott, 23 Can. Cr. Cas. 253, the Supreme Court of Saskatchewan held that the recognizance on an appeal from a conviction directing payment of a fine and costs and in default imprisonment, need not cover the fine and costs; but for the reasons stated in the notes of the editor to that report, it is clear that the recognizance must cover the fine and costs as well as the

Sec. 129. probable costs of the appeal. In the cases mentioned in sub-section (d) of section 750 (respecting mined minerals), the recognizance must include a further amount, and contain the further clause, there stated. The recognisance on appeal may be entered into before the county judge, clerk of the peace, or any justice for the county: section 750 (c). It cannot be taken before a justice for another county, and if so taken the appeal cannot be heard: R. v. Johnston, 8 Can. Cr. Cas. 123; R. v. Robinet, 16 P. R. 49. In cases where a deposit is allowed, it must be made with the justice who tried the case: s. 750 (c), who should transmit it to the clerk of the appellate court: section 757. The recognizance mentioned must be "entered into," or the deposit must be made where that is allowed by the statute, within ten days from the conviction: s. 750 (c). The clause in this section limiting the time within which the recognizance or deposit is required to be made is new, and many of the reported decisions on the question as to the time when the recognizance must have been entered into under the former statutes, are now inapplicable. Care must be taken to "enter into" the recognizance or make the deposit, as the case may be, within the period of ten days, as it is jurisdictional, the statute giving the right to appeal only on the conditions prescribed by it. The time cannot be extended nor can the objection be waived: *Re* Kwong Wo, 2 B. C. R. 336; Kent v. Olds, 7 U. C. L. J. 21; *Re* Myers v. Wonnacott, 23 U. C. R. 611; Bestwick v. Bell, 1 Terr. L. R. 193; R. v. Crouch, 35 U. C. R. 433. The authority of the court depends expressly and entirely upon section 751 of the Cr. Code, 1906, which says that the court is "thereupon" (*e.g.* upon all the requirements of section 750, including the recognizance or deposit, being strictly complied with) "to hear and determine the matter of appeal:" see R. v. Joseph, 11 Que. R. 211, 6 Can. Cr. Cas. 144 and notes there.

If however the recognizance is "entered into" or the money deposited with the justice within the proper time (ten days) and in the proper manner, it may be transmitted by the justice to the clerk of the division court afterwards, provided it is in the possession of the court when the appeal is to be heard; or even after an adjournment for judgment if the judge permits it: see cases *post* under "Transmission of Papers." The statute does not make it a condition of the appeal that it should be transmitted to the division court within the ten days provided for "entering into" the recognizance, or "depositing" the money. The omission of the justice to transmit the recognizance or deposit to the appellate court does not affect the appellant's right to proceed with the appeal; such transmission being beyond his control and being within the duty of the justice cannot prejudice the appellant's rights: The King v. McKay, 21 Can. Cr. Cas. 211; see also Wills v. McSherry, 1913 1 K. B. 20. And the fact that the justice has not transmitted to the court the full amount deposited is no objection to the appeal: Rex v. Walsh, 22 Can. Cr. Cas. 145. There must be two sufficient sureties: section 750 (c); in addition to the party or parties appealing: R. v. Joseph, 6 Can. Cr. Cas. 144. An affidavit of justification by the sureties may be attached to the recognizance (Form 136 (3)): but although convenient, it is not essential, as the statute requires the functionary who takes the recognizance to see that the sureties are "sufficient"; and he may require them to justify on oath before him: Cragg v. Lamarsh, 4 Can. Cr. Cas. 246. The justice has no authority to refuse to take the recognizance on the ground of the insufficiency of the notices required by

the statute; that is a matter entirely for the appellate court to deal with: R. v. Carter, 24 L. J. M. C. 72; R. v. Slavin, 28 U. C. R. 557. The sureties should be residents of the county, but they need not be freeholders; it suffices if they have enough property of any kind: R. v. Lyon, 9 C. L. T. 6. The omission of any material part of the recognizance will invalidate the appeal; so if it omits to state that the appellant is to appear "personally" before the appellate court: *Ex parte* Sprague, 8 Can. Cr. Cas. 109; but the omission of the words "try such appeal" is immaterial if the appellant actually appears: R. v. Tucker, 10 Can. Cr. Cas. 247. A clerical error in the recognizance whereby the amount of the appellant's personal obligation was omitted, although filled in as to the sureties, was held not to deprive the appellate court of jurisdiction to hear the appeal: The King v. Koogo, 9 Can. Cr. Cas. 56. Sec. 129.

Transmission of Papers to the Division Court.—Section 757 of the Cr. Code requires the conviction or order appealed from to be transmitted to the clerk of the division court before the time the appeal is to be heard: R. v. Rondeau, 9 Can. Cr. Cas. 523; but this is directory only, and its omission will not defeat the appeal, provided the conviction and papers are before the court during the hearing, or even after an adjournment for judgment if allowed by the judge: *Re* Ryer v. Plows, 46 U. C. R. 206; R. v. Williamson, 13 Can. Cr. Cas. 195; Harwood v. Williamson, 14 Can. Cr. Cas. 76.

The recognizance remains in force for the purposes of continuances or adjournments of the trial in the appellate court: Rex v. Trottier, 22 Can. Cr. Cas. 102.

Procuring Attendance of Witnesses.—Cr. Code, ss. 971-976. The subject is discussed in R. v. Gillespie, 16 P. R. 155; but it is submitted that section 974 of the Criminal Code clearly authorizes the summoning of witness from any place in Canada, upon a subpœna issued out of the division court, for the purposes of this appeal.

The Hearing; and Powers of the Court.—The following sections of the Criminal Code apply:

751. The court to which such appeal is made shall thereupon hear and determine the matter of appeal and make such order therein, with or without costs to either party, including costs of the court below, as seems meet to the court, and, in case of the dismissal of an appeal by the defendant and the affirmance of the conviction or order, shall order and adjudge the appellant to be punished according to the conviction or to pay the amount adjudged by the order, and to pay such costs as are awarded, and shall, if necessary, issue process for enforcing the judgment of the court.

2. In any case where a deposit has been made as provided in paragraph (c) of section 750, if the conviction or order is affirmed, the court may order that the sum thereby adjudged to be paid together with the costs of the conviction or order and the costs of the appeal, shall be paid out of the money deposited, and that the residue, if any, shall be paid to the appellant; and if the conviction or order is quashed the court shall order the money to be repaid to the appellant.

[Note.—This subsection is that provided by the statute of 1909, c. 9, s. 751.]

Sec. 129.

3. The court to which such appeal is made shall have power, if necessary, from time to time, by order endorsed on the conviction or order, to adjourn the hearing of the appeal from one sittings to another, or others, of the said court.

4. Whenever any conviction or order is quashed on appeal, the clerk of the peace or other proper officer shall forthwith endorse on the conviction or order a memorandum that the same has been quashed.

5. Whenever any copy or certificate of such conviction or order is made, a copy of such memorandum shall be added thereto, and shall, when certified under the hand of the clerk of the peace, or of the proper officer having the custody of the same, be sufficient evidence, in all courts and for all purposes, that the conviction or order has been quashed.

752. When an appeal against any summary conviction or order has been lodged in due form, and in compliance with the requirements of this Part, the court appealed to shall try, and shall be the absolute judge, as well of the facts as of the law, in respect to such conviction or order.

2. Any of the parties to the appeal may call witnesses and adduce evidence whether such witnesses were called or evidence adduced at the hearing before the justice or not, either as to the credibility of any witness, or as to any other fact material to the inquiry.

3. Any evidence taken before the justice at the hearing below, certified by the justice, may be read on such appeal, and shall have the like force and effect as if the witness was there examined if the court appealed to is satisfied by affidavit or otherwise, that the personal presence of the witness cannot be obtained by any reasonable efforts.

753. No judgment shall be given in favour of the appellant if the appeal is based on an objection to any information, complaint or summons, or to any warrant to apprehend a defendant issued upon any such information, complaint or summons, for any alleged defect therein in substance or in form, or for any variance between such information, complaint, summons or warrant and the evidence adduced in support thereof at the hearing of such information or complaint, unless it is proved before the court hearing the appeal that such objection was made before the justice before whom the case was tried, and by whom such conviction, judgment or decision was given, nor unless it is proved that notwithstanding it was shown to such justice that by such variance the person summoned and appearing or apprehended had been deceived or misled, such justice refused to adjourn the hearing of the case to some further day, as in this Part provided.

754. In every case of appeal from any summary conviction or order had or made before any justice, the court to which such appeal is made, shall, notwithstanding any defect in such conviction or order, and notwithstanding that the punishment imposed or the order made may be in excess of that which might lawfully have been imposed or made, hear and determine the charge or complaint on which such conviction or order has been had or made, upon the merits, and may confirm, reverse or modify the decision of such justice, or may make such other conviction or order in the matter as the court thinks just, and may by such order exercise any power which the justice whose deci-

sion is appealed from might have exercised, and may make such order as to costs to be paid by either party as it thinks fit. Sec. 129.

2. Such conviction or order shall have the same effect and may be enforced in the same manner as if it had been made by such justice.

3. Any conviction or order made by the court on appeal may also be enforced by process of the court itself.

755. The court to which an appeal is made, upon proof of notice of the appeal to such court having been given to the person entitled to receive the same, whether such notice has been properly given or not, and though such appeal has not been afterwards prosecuted or entered, may, if such appeal has not been abandoned according to law, at the same sittings for which such notice was given, order to the party or parties receiving the same such costs and charges as are thought reasonable and just by the court, to be paid by the party or parties giving such notice.

2. Such costs shall be recoverable in the manner provided by this Act for the recovery of costs upon an appeal against an order or conviction.

756. If an appeal against a conviction or order is decided in favour of the respondents, the justice who made the conviction or order, or any other justice for the same territorial division, may issue the warrant of distress or commitment for execution of the same, as if no appeal had been brought.

757. Every justice before whom any person is summarily tried, shall transmit the conviction or order to the court to which the appeal is by this Part given, in and for the district, county or place wherein the offence is alleged to have been committed, before the time when an appeal from such conviction or order may be heard, there to be kept by the proper officer among the records of the court.

2. The conviction or order shall be presumed not to have been appealed against, until the contrary is shown.

3. Upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence.

4. In any case when a conviction or order is required by this Part after appeal to be enforced by any justice the clerk of the court to which the appeal was had or other proper officer shall remit such conviction or order and all papers therewith sent to the court of appeal excepting any notice of intention to appeal and recognizance to such justice to be by him proceeded upon as in such case directed by this Part.

758. If upon any appeal the court trying the appeal orders either party to pay costs, the order shall direct the costs to be paid to the clerk of the peace or other proper officer of the court, to be paid over by him to the person entitled to the same, and shall state within what time the costs shall be paid.

759. If such costs are not paid within the time so limited, and the person ordered to pay the same has not been bound by any recog-

Sec. 129. nisance conditioned to pay such costs, the clerk of the peace or his deputy, on application of the person entitled to the costs, or of any person on his behalf and on payment of any fee to which he is entitled, shall grant to the person so applying, a certificate that the costs have not been paid.

2. Upon production of the certificate to any justice in and for the same territorial division, such justice may enforce the payment of the costs by warrant of distress, and in default of distress may by warrant commit the person against whom the warrant of distress has issued, for any term not exceeding one month, unless the amount of the costs and all costs and charges of the distress and also the costs of the commitment and of the conveying of the party to prison, if the justice thinks fit so to order, are sooner paid.

3. The said certificate shall be in form 52 and the warrants of distress and commitment in forms 53 and 54 respectively.

[NOTE.—See these forms in the appendix to the Cr. Code, in which necessary changes may be made.]

760. An appellant may abandon his appeal by giving to the opposite party notice in writing of his intention six clear days before the sitting of the court appealed to, and thereupon the costs of the appeal shall be added to the sum, if any, adjudged against the appellant by the conviction or order, and the justice shall proceed on the conviction or order as if there had been no appeal.

The Hearing of Appeal.—Upon the appeal coming on to be heard it is for the appellant to prove due service of the notice of appeal: see notes, *ante*, "Service of Notice of Appeal." It should also be proved that the "cause of complaint" arose within the division of the division court appealed to, unless it so appears on the face of the proceedings: s. 749 (a). As to the recognizance or deposit: see notes, *ante*, "Recognizance on Appeal."

Proof of Service of Notice of Appeal.—There is nothing in the Criminal Code providing for the mode of proof of such service. In Rex v. Curran, 22 Can. Cr. Cas. 388, it was held by the judge of a District Court of Saskatchewan that proof of service by affidavit is sufficient, on the ground that such proof is not a matter of record of the court. In Wills v. McSherry, 1913 1 K. B. 20, an affidavit was received of service on a solicitor who had appeared for the prosecutors before the magistrate and that personal service was impossible as they had left the country and could not be found.

On the other hand oral proof would seem to be required in order to identify the persons served as those required by the statute and to permit cross-examination: see Pahkada v. Hannuksda, 20 Can. Cr. Cas. 247; Rex v. Curran, *supra*, at p. 391. The production of the witness to prove service may be impracticable or expensive. The affidavit of service should identify the justice or justices served as those who made the conviction or order: *Re* Lake, 42 U. C. R. 206; R. v. Shrewsbury, JJ., 11 A. & E. 159; R. v. Lancashire, JJ., 11 A. & E. 144; and see Pahkada v. Hannuksda, 20 Can. Cr. Cas. 247; Rex v. Curran, 22 Can. Cr. Cas., at p. 391.

A form of affidavit: Form 136 (1), is given *post*, and should show such facts as will satisfy the court that due service was made upon the proper persons and identify them.

Upon such proof it is then for the prosecutor to address evidence to establish the offence: Whiffen v. Bligh, 1892 1 Q. B. 362; R. v. Sur-

rey, JJ., 1892 2 Q. B. 721. For this purpose the depositions of any wit- Sec. 129.
ness taken before the justice may be read with the same effect as if the witness were examined in court; but before this can be done the judge must first be satisfied "by affidavit or otherwise that the personal presence of the witness cannot be obtained by any reasonable efforts:" Code 752 (3). Form of affidavit, No. 136 (4), in appendix. As to what would constitute "reasonable efforts," see R. v. Nelson, 1 O. R. 500; Tomlinson v. Gostley, L. R. 1 C. P. 236; *Re* Hibbut v. Schlibroth, 18 O. R. 399; *Re* Turner, 1897 1 Ch. 536; *Re* Kay, 1897 2 Ch. at p. 519; R. v. Bellamy, 1899 1 Ch. 800.

If the witness is ill or absent, or is dead, the fact must be proved by some person who has actual knowledge of it, and not merely by hearsay: Beaufort v. Crawshay, L. R. 1 C. P. 699; Davis v. Lowndes, 7 Dowl. 101. The whole case is open on appeal; and witnesses may be called on both sides, whether they were called before the justice or not; the case being tried by the judge *de novo*: Code 752 (2); see R. v. Washington, 46 U. C. R. 221; R. v. Baird, 13 Can. Cr. Cas. 240; R. v. Edmonson, 13 Can. Cr. Cas. 202; R. v. Lizotte, 10 Can. Cr. Cas. 316; McLellon v. McKinnon, 1 O. R. 2 8; R. v. Ouimet, 14 Can. Cr. Cas. at p. 141; R. v. Curran, 22 Can. Cr. Cas. 389; see R. v. Dunlap, 22 Can. Cr. Cas. 245, and cases referred to there; R. v. Gregg, 22 Can. Cr. Cas. 51; R. v. Barker, 21 Can. Cr. Cas. 267.

In fact it is only an appeal so called, and not really an appeal but a new trial or rehearing, and the burden of proof is on the prosecution: R. v. Farrell, 21 O. L. R. 546; R. v. Surrey, JJ., 1892 2 Q. B. 721; and none of the limitations applicable to appellate courts apply.

Jury.—The statute providing for the appeal makes no provision for a jury to try the appeal, but requires the judge to "hear and determine" it; and the sections of the Division Courts Act as to juries do not apply. Except by express enactment so declaring, a jury forms no part of the constitution of the court appealed to: The Queen v. Malloy, 4 Can. Cr. Cas. p. 121.

Order on Appeal, etc.—Forms 136 (5), 136 (6). If the appeal is from a conviction and is simply dismissed without variance, the court must order the appellant "to be punished according to the conviction or to pay the amount adjudged by the order" of the justice and to pay such costs as are awarded: Cr. Code s. 751. In such case the conviction or order affirmed should be enforced by warrants issued by the convicting justice (or some other justice having the same territorial jurisdiction: Cr. Code s. 756) "as if no appeal had been brought": code s. 756; and not by process of the appellate court: Collette v. The King, 16 Can. Cr. Cas. 281, the usual forms of warrants, 39-44, in the appendix to the Cr. Code, being used. The costs of the appeal in such case are to be paid out of the deposit: Cr. Code 751; or enforced under the recognizance; or if no recognizance was given (Cr. Code s. 759) payment of the costs may be enforced either by the justice's warrants above mentioned (suitable words being added thereto), on a certificate of the clerk of the appellate court: Form 52 to the Cr. Code (with the necessary changes: Collette v. The King, *supra*), or by similar warrants to Forms 53 and 54, issued by the clerk of the division court: Code sections 751, 754.

If, however, the judge makes a different judgment from that of the justice, the process to enforce it should be issued by the division

Sec. 129. court clerk under the judge's order, using Forms 53 and 54 in the Cr. Code (Forms 136 (7), 136 (8) *post*), such forms being, as pointed out in Collette v. The King, *supra*, adaptable by making necessary changes therein, under the authority of section 1152 of the Code.

Costs.—The costs are in the discretion of the judge and he may make an order with or without costs to either party, including the costs of the court below (the justice's court): ss. 751, 754.

If the court merely affirms the conviction, or only reduces the term of imprisonment, if any, the personal attendance of the accused as for a re-sentence is not required; but if a different punishment is awarded, a warrant should be issued and the accused should be brought up to receive such punishment: Johnston v. Robertson, 13 Can. Cr. Cas. 452.

An appellate court will not set aside or quash a conviction on appeal merely by consent of parties unless it appears on the face of the proceedings or on the hearing that the conviction was wrong: The King v. McCabe, 18 Can. Cr. Cas. 217.

The time intervening between the appellant's liberation on the recognizance and his return to custody after conviction affirmed, does not count on his term of imprisonment to which he was sentenced; otherwise, however, as to the time he may have been in gaol: Collette v. The King, 16 Can. Cr. Cas. 282.

Mandamus.—Should the judge refuse to hear the appeal on the merits mandamus will lie: Re McLeod v. Almiro, 27 O. L. R. 282, in which case the principles upon which mandamus will be granted in such a case are fully considered.

Abandonment of Appeal before Hearing.—Section 760 Cr. Code, *ante*. Form of notice, No. 136 (9), in appendix.

Costs.—Cr. Code, ss. 751, 754, 755 (2), 760. The provisions of s. 754 are wide enough to cover the case of an appeal by the prosecutor; and his costs if the conviction is sustained, may be added to the amount awarded on the conviction and payment may be enforced by distress and imprisonment on default: R. v. Hawbolt, 4 Can. Cr. Cas. 229. The question of costs must be dealt with at the sittings of the court for which notice of appeal was given or one to which the hearing was adjourned, and there is no jurisdiction to take it up at a subsequent sitting: McShadden v. Lachance, 5 Can. Cr. Cas. 43; Rothwell v. Burnside, 4 Can. Cr. Cas. 450; but see Re Rex v. Hamlink, 26 O. L. R. 382. The formal order on appeal may, however, be drawn up after the close of the sittings: Re Rush v. Bobcaygeon, 44 U. C. R. 199. The judge must himself fix the amount of the costs, which cannot be referred to the clerk for taxation: R. v. McIntosh, 28 O. R. 603; Re Rex v. Hamlink, 26 O. L. R. 382. There is no provision as to the scale of costs, which are entirely in the disposal of the judge who may make any reasonable allowance: R. v. McIntosh, *supra*.

Application of the Foregoing Provisions.—The right of appeal to the division court above described, applies to summary prosecutions under all statutes of the Parliament of Canada unless some other mode of appeal is expressly provided by the particular statute, excluding the mode of appeal to the division court; as for instance,

if the particular statute does not provide for or mention that there is to be an appeal, or if it is stated that there shall be an appeal but not to what court: section 749 of the Criminal Code governs, and an appeal lies under it to the division court, if the punishment is other than imprisonment only. Sec. 122.

Appeals from Orders for Restoration of Seized Minerals; Sections 750 (d), 637 of the Code.—The procedure is the same in all respects as that above described, except as to the recognizance on appeal which must include security to the value of the property.

Appeals in Prosecutions under the Inspection and Sales Act; R.S.C., c. 85.—The appeal from a conviction or dismissal under any of the clauses of this statute providing for a summary conviction, is to the division court, and will be governed by sections 749, *et seq.*, of the Code, except in the cases of prosecutions under Parts VIII. and IX. of the Inspection Act, in which it is expressly provided that the appeal is to other tribunals than the Division Court: see sections 317 and 333 of that statute. It is to be noticed, however, that the appeal provided by the last-mentioned sections is only against a "conviction;" and that they do not provide for an appeal against an order of *dismissal*, as to which it is submitted section 749 of the Code would therefore apply, providing, as it does, for an appeal to the division court in all cases of *dismissal* or conviction not otherwise provided for.

Appeals from Justices and Others to the Division Court from Convictions for Offences Against Ontario Statutes.—The Dominion parliament has no jurisdiction in regard to appeals from convictions under Ontario statutes; and the provisions in the Criminal Code for such appeals can have no application unless they are expressly made applicable by provincial enactment: R. v. Simpson Co., 28 O. R. 321. But by the R.S.O. 1914, c. 90, s. 10 (The Ontario Summary Convictions Act), a general provision is made for such appeals by the prosecutor or by the defendant in all cases of convictions or orders for the payment of money, or dismissals of charges for the infringement of provincial laws, unless it is otherwise expressly provided in the Act under which the conviction or order is made.

The appeal so provided is to be to the Court of General Sessions of the Peace, when the conviction adjudges imprisonment only as a punishment for the offence; and in all other cases to the division court for the division of the county in which the cause of the complaint arose.

There is also a further provision in the same statute (section 10 (2)) that where by *any* Ontario statute an appeal is given to the "*judge of the county or district court without a jury*," from a summary *conviction* made by a justice, and *no special provision is made therefor*, the appeal shall be to the division court for the division in which the cause of complaint arose.

So an appeal from the justice will be taken to the division court in any case in which a fine or payment of money is ordered, or the case is dismissed, on a charge of an offence against an Ontario law, including a case where the appeal is stated by the particular statute to be to the county or district court judge without a jury, unless the *proceedings* in the latter appeal are expressly provided.

Section 4 of the same statute makes all the provisions of the Criminal Code, Part XV., applicable to all appeals in cases under On-

Sec. 129. tario laws, including the amendment by Dom. Stat. 1909, c. 9, s. 750 (c), as to procedure on appeals.

So the practice and procedure explained, *ante*, will apply to these appeals, including the provisions of the Criminal Code as to amendment on appeal, and also all the saving clauses in section 1124-1129 of the same.

It is to be noticed that while the Ontario statute thus declares the provisions of the Criminal Code, with amendments thereto, to be applicable as above mentioned, any future amendments to those provisions by the Dominion parliament will not be so applicable until after the termination of the session of the Ontario legislature next after the passing of the amending statute: R.S.O. 1914, c. 90, s. 12.

The Crown Attorney.—The Ontario statute, 4 Geo. V. c. 21, s. 23 (2), provides that the Crown Attorney is entitled to a fee of $5, and actual travelling expenses to be paid by the county, for attendance on appeals from the decision of magistrates, under Dominion or Provincial statutes.

INSTANCES OF APPLICATION OF THE PROVISIONS OF THE ONTARIO SUMMARY CONVICTIONS ACT.

Appeals from Convictions under Municipal By-laws.—See R.S.O. 1914, c. 192, ss. 497, 498. The provisions of sections 10-11 of The Ontario Summary Convictions Act apply: section 497 (1).

The Ontario Public Health Act.—R.S.O. 1914, c. 218. Appeal from a conviction for an alleged breach of any of the provisions of the statute was prohibited by section 121 of the former statute, R.S.O. 1897, c. 248, but that prohibition is omitted from the corresponding section 126 of the present Act. An appeal under that statute now lies to the division court.

The Master and Servant Act.—R.S.O. 1914, c. 144, ss. 9-10. Under these sections, the appeal from any conviction or order for payment of money or any order of dismissal from service or employment or against any decision under this Act, is to be to the division court held in the division in which the cause of action arose, or in which the party or parties complained against, or one of them resided at the time of the making of the complaint: section 9; see notes to section 72 of the Division Courts Act, *ante*. The practice and proceedings to be taken upon such appeal are to be the same as in the case of an appeal under The Ontario Summary Convictions Act, R.S.O. 1914, c. 90, s. 10; described, *ante*, p. 379, except in regard to the matters prescribed in sections 9 (1), 10 of The Master and Servant Act; and except that a trial by jury may be had if demanded: section 10 (1).

Act Respecting Dogs and Sheep.—R.S.O. 1914, c. 249, ss. 12-16. Section 21 of this statute now provides that The Ontario Summary Convictions Act: R.S.O. 1914, c. 90, *supra*, are to apply to prosecutions under the former; and the appeal will be taken in accordance with ss. 9 and 10 of chapter 90.

The Act Respecting Line Fences.—R.S.O. 1914, c. 259, s. 12. The appeal from the Fence Viewers' Award is to "a judge:" section

12 (1); *i.e.*, a judge of the county or district court: section 2 (1) (a); and not to the division court. Sec. 129.

The practice and procedure are to be "the same as nearly as may be, as in the case of a suit in the division court:" Line Fences Act, section 12 (8). The practice and procedure are specially laid down in section 12 of that Act.

The Act Respecting Ditches and Watercourses.—R.S.O. 1914, c. 200 ss. 21, 22. The appeal from the engineer's award is to "the judge;" section 21 (1); defined to mean "the senior junior or acting judge of the county court" of the county in which the lands affected are situated: section 3 (g); and not to the division court. The proceedings on the appeal are prescribed by c. 200, s. 21.

The Deserted Wives Maintenance Act.—R.S.O. 1914, c. 152 s. 10, provides for an appeal, to the division court, by the husband or wife, and that the practice and procedure are to be in accordance with the Ontario Summary Convictions Act, *supra*.

The Liquor License Act.—R.S.O. 1914, c. 215. Under section 110 (2), there is an appeal from a conviction only in a case where the person convicted is a licensee or for an offence committed with respect to licensed premises. The proceedings on such appeal are those provided by section 110 (2)-(5), and the Ontario Summary Convictions Act, R.S.O. 1914, c. 90, are made applicable only so far as the latter is not inconsistent with the provisions laid down in the Liquor License Act: section 110 (9). This appeal is to the "judge of the county court sitting in chambers without a jury" and not to the division court: section 110 (2): and any other right of appeal is taken away: section 110 (10) and section 110 (1).

There is to be a notice of appeal served on the prosecutor or complainant within five days after the date of the conviction: section 110 (2).

The person convicted, if in custody, is either to remain in custody until the hearing of the appeal, or (if imprisonment is adjudged as the punishment for the offence and not a fine) he must enter into a recognizance with two sufficient sureties in $200 each before the convicting magistrate; or if the punishment is by fine (although the order directs imprisonment for default in payment) must either remain in custody or enter into a similar recognizance or deposit with the magistrate the amount of the penalty and costs and a further sum of $25 to answer the costs of the appeal: section 110 (3). Forms of recognizance under section 110 (3), Nos. 139 (1) and 140.

Thereupon the magistrate is required to transmit to the clerk of the county court the depositions and papers with the recognizance or deposit: section 110 (4).

There is no provision for any further proceedings or for a summons being issued by the judge, and it is submitted that the case now being in the county court, the usual summons calling the parties to appear before him may be issued by the judge on application to him, and the appeal thereupon heard and the matter then comes under the provisions of the Criminal Code, s. 751, *et seq.*, by virtue of the pro-

Sec. 129. visions of The Ontario Summary Convictions Act, R.S.O. 1914, c. 90, s. 4, which makes the provisions of Part XV. of the Cr. Code apply. The only other appeal in a case under the Liquor License Act is that provided by section 110 (6)-(10); viz.: by the direction of the Attorney-General (Form of fiat, No. 137) to the judge of the county court of the county from an order of dismissal of a complaint laid by an inspector or any one on the latter's behalf.

Notice of the appeal is to be served on the defendant or his solicitor within fifteen days after the date of the order of dismissal: section 110 (6).

Form of notice of appeal under section 110 (6), No. 138.

No recognizance or deposit is, of course, required.

Within ten days after the service of the notice of appeal, a summons is to be granted by the judge calling on the magistrate to show cause why the order of dismissal should not be reversed and the case reheard: section 110 (7).

Form of summons, No. 141. The summons must be served on the magistrate, as well as on the defendant: *ib.*

On the return of the summons, the case is retried and the powers of the judge are provided for by section 110 (8).

The word "magistrate" in the above sections means and include a justice of the peace, two or more justices sitting and acting together, and a police magistrate: The Liquor License Act, s. 2 (k); also The Interpretation Act, R.S.O. 1914, c. 1, s. 29 (r).

Although section 10 (2) of The Summary Convictions Act, R.S.O. 1914, c. 90, provides that where in any statute of Ontario an appeal is given to the judge of the county or district judge and no special provision is made therefor, such appeal shall be to the division court, there is "special provision" made for appeals under the Liquor License Act, by section 110 (10), which expressly excludes the right of appeal given by the former statute, so that the appeal under the Liquor License Act must be to the judge of the county court and not to the division court.

The special provisions and limitations provided by section 111 of The Liquor License Act, as to costs, and also in other sections making special provisions applicable to these appeals, are to be observed.

Only the costs mentioned in the above-mentioned section and in section 111 are allowable between party and party.

Division Court Clerks' Duties on Appeals.—When the clerk receives a notice of appeal from a decision of a justice of the peace, he is to make an entry of it in the procedure book as in ordinary cases: and is to give both parties notice in writing (by registered letter) of the dates of the next two sittings of the court: Rules 77, 78. The clerk is to enter appeal cases at the foot of the list for trial: *ib.*; at the sittings which will take place not less than fourteen days after the time the notice of appeal was served: Cr. Code Amendment, 1909, s. 750 (a).

JURIES.

Secs. 130, 131.

130. Either party may require a jury in an action of tort or replevin where the sum or the value of the goods sought to be recovered exceeds $20, and in other actions where the amount sought to be recovered exceeds $30, aud in interpleader. 10 Edw. VII. c. 32, s. 130.

When a jury may be required.

131.—(1) Where the plaintiff requires a jury, he shall give notice thereof to the clerk one week before the sittings of the court at which the action is to be tried, and deposit with him the proper fees for the expenses attending the summoning of the jury; and where a claimant or a defendant requires a jury, he shall, within five days after the day of service of the summons on him, give to the clerk the like notice, and deposit with him the proper fees; and thereupon, in either case, a jury shall be summoned.

Parties to give notice to clerk if they require a jury.

(2) In an action transferred from one court to another, either party may require a jury to be summoned by giving to the clerk of the court to which the action has been transferred, three clear days before the sittings of the court at which the case is to be tried, a notice requiring a jury to be summoned, and depositing with him the proper fees for the expenses attending the summoning of the jury. 10 Edw. VII. c. 32, s. 131.

When action has been transferred.

Either Party May Require a Jury.—The right to have a jury under this section depends—except in interpleader cases, in which a jury may be demanded without reference to the amount in dispute: see the last clause of section 130—upon whether the action is one for damages exceeding $20 in tort or for replevin, and upwards of $30 in all other actions; and also upon the giving of notice and payment of fees, as required by section 131. If these requirements are met, the judge cannot legally try the case without a jury: Hamlyn v. Betteley, 6 Q. B. D. 63; Bank of B. N. A. v. Eddy, 9 P. R. 468; Metcalf v. Birtle, 34 Sol. Jour. 284.

Action of Tort.—Money obtained by the defendant from the plaintiff by fraudulent misrepresentation is not the money of the defendant, he has no right to retain it and the law implies a promise by him to return it to the rightful owner. The plaintiff may waive the wrong and sue on the implied promise for money had and received; and a claim so framed is a money demand and not a claim in tort: *Re* Mager v. The Canadian Tin Plate Decorating Co., 7 O. L. R. 25. It would seem that in an action framed in accordance with the particulars given in the above case, a jury cannot be demanded unless the claim exceeds $30. But in *Re* London Mutual Fire Ins. Co. v. McFarlane, 26 O. R. 15, a similar action to that above quoted, it was held that the claim being framed upon the fraud, the action was in

Sec. 131. tort and that a jury could be demanded, though the claim did not exceed $30. Under these authorities, it would seem that the nature of the action is to be determined by the form of particulars of claim and where from such particulars it appears that the action is framed in tort and the amount exceeds $20, either party is entitled to a jury.

If the plaintiff's claim is less than the amount required to entitle the parties to a jury, but a counterclaim by the defendant exceeds that amount, a jury may be demanded to try the counterclaim, but not the claim of the plaintiff: *Re* Fraser v. Ham, 7 O. L. R. 449.

Jury in Garnishee Cases.—Section 130 covers garnishee cases as well as ordinary actions. In contestations between rival claimants to money garnished, section 152 (2) makes section 130 applicable to such contestations.

Summary Judgment Applications.—Section 100 (formerly 116) allowing a plaintiff to move for summary judgment, prevails over the right under section 130, and a summary judgment may be ordered, notwithstanding the defendant has demanded a jury: *Re* Tatham v. Atkinson, 1 O. W. N. 183.

Notice Requiring Jury.—Form 142. This and all notices required by the Act, must be in writing: section 82. A verbal notice would not be sufficient: see Fletcher v. Baker, L. R. 9 Q. B. 370: *Re* McGregor v. Norton, 13 P. R. 223. The proper notice is a condition of the right to have a jury summoned; and if a jury be not properly summoned, a judge cannot try the case with a jury against the protest of the opposing party: see Hamlyn v. Betteley, 6 Q. B. D. 63; unless the jurors were called under section 142 (2).

But if both parties appeared at the trial and neither objected to the summoning or empanneling of the jury, that would amount to a waiver of any irregularity or omission in respect of the notice: *Ex parte* Morgan, *Re* Simpson, 2 Ch. D. 72.

When Notice to be Given.—In all cases, including interpleader, the plaintiff must give the notice one week before the sittings of the court, and the defendant, or claimant in interpleader, within five days after service of the summons: section 331 (1); and in cases transferred from one court to another, either party may give the notice three clear days before the sittings: section 331 (2).

As to computation of time, see notes to sections 98 and 122.

The judge cannot extend the time: Brown v. Shaw, 1 Ex. D. 425; Tennant v. Rawlings, 4 C. P. D. 133; Whistler v. Hancock, 3 Q. B. D. 83; *Re* Prescott Election Case, 9 P. R. 481; Barker v. Palmer, 8 Q. B. D. 9; *Re* McLean v. Osgoode, 30 O. R. 430: see also cases cited in notes to section 123.

Clerk's notice that jury demanded: see Form 74.

Deposit the Proper Fees.—As to the fees to be paid to the jurors, see section 145 (6). The clerk is not bound to accept the notice for jury, nor to act on it without prepayment of the expenses of the jury. He should not exact more than should be reasonably required for the purpose of having a jury summoned, but he is entitled to prepayment, not only of his own fees in connection with the work, but to those of the bailiff as well. The expenses attending the summoning of a jury are now costs in the cause: see also section 131.

A Jury Shall be Summoned.—This is imperative. Either party by complying with the terms of the statute has a *right* to have a jury summoned and his case tried by a jury, and the judge cannot deprive him of the right: see Sugg v. Silber, 1 Q. B. D. 362; Clarke v. Cookson, 2 Ch. D. 746; Ford v. Taylor, 3 C. P. D. 21; Clarke v. Skipper, 21 Ch. D. 134; *Re* Lewis v. Old, 17 O. R. at p. 613; *Re* Cowan v. Affie, 24 O. R. 358; unless after hearing the whole evidence, or the evidence adduced by or on behalf of the plaintiff alone, the judge should determine that there is in law no evidence to be submitted to the jury for them to pass upon, in which case he may direct a nonsuit or dismiss the action: see notes to section 105, *ante*, and s. 144; where t subject is more fully noted. The jurors must be summoned at least two days before the sittings: section 136. This is merely directory, and does not affect the right to have the case tried by a jury, where the necessary conditions have been complied with. Secs. 132, 133.

132. Unless exempted by *The Jurors' Act*, every person whose name appears on the last revised voters' list of a municipality partly or wholly within the division who resides therein, and whose name is marked "J," shall be liable to serve as a juror for the court of such division. 10 Edw. VII. c. 56, s. 132. Who liable to be jurors.

Unless Exempted by the Jurors' Act.—The persons exempted by *The Jurors' Act* are enumerated in section 4 of that Act.

Resident in the Division.—See notes to section 72 as to meaning of "resident." The jurors must be resident within the division in which the action is to be tried: section 133 (1). Only those persons whose names are marked "J." in the last revised voters' list, can be taken as jurors.

Revised Voters' List.—The section (163) in the former Act authorized the use of the last "published" voters' list, *i.e.*, whether revised or not; but under the present section the "last revised" list must be used by the clerk in taking the names of the jurors who are to serve.

133.—(1) The jurors shall be residents of the division and shall be selected from the last revised voters' lists of the municipalities partly or wholly within the division. From whom selected.

(2) Where there has been no previous selection of jurors the manner of selecting them shall be as follows:— Manner of selection.

(*a*) The clerk shall begin with the name of the first qualified person on the list of the municipality and proceed with the selection by taking the names in rotation until the requisite number has been selected.

Sec. 133.

(*b*) Where there are several municipalities the clerk shall begin with the name of the first qualified person on the list of the municipality in which the court is held, taking one name from the list, and then shall take one name from each of the lists of the other municipalities in rotation, beginning with that list which contains the greatest number of names of qualified persons, and shall repeat the same process until the requisite number has been selected.

Where there has been previous selection of jurors.

(3) Where there has been a previous selection of jurors the clerk shall proceed as provided by the last preceding subsection, except that he shall begin where he left off at the next preceding selection, or in the case of a new list as nearly as may be at the place which corresponds with the place where he left off at the previous selection.

Where cost of summoning jury is excessive.

(4) If it appears to the Judge that the cost of summoning a jury is excessive, by reason of the residences of the persons liable to be selected being in a distant portion of the division, he may direct the clerk to begin with the name of the first qualified person on the list of any municipality partly or wholly within the division, and proceed as in sub-section 2.

When municipality is a party.

(5) Where a municipality, partly or wholly within the division, is a party, and the jury would, if selected in ordinary course, be composed of ratepayers of such municipality, the judge, upon the application of any party, may direct the clerk not to select any juror from the list of such municipality, or may before or at the trial direct that the issues shall be tried and damages be assessed without a jury. 10 Edw. VII. c. 32, s. 133.

Selecting Jurors.—The former method of selecting the jurors by the clerk is entirely changed by section 133 (2.h.) (3). Where there are more municipailties than one in the division, the clerk is to begin by taking one name from each municipaiity in rotation, beginning with the municipality in which the court is held, and then proceeding with the municipality which contains the greatest number of names of qualified persons, and continuing till the requisite number has been selected.

The judge is empowered, however, when a distant municipality is reached, in order to save expense, to order that the clerk shall take the list for a nearer municipality: section 133 (4).

The improper selection of a jury can be taken advantage of by either party at the trial. In such cases it would be the duty of the judge, if he found any irreguiarity in that respect to exist, to postpone the trial of the cause so that a jury might be properly summoned.

unless both parties waived the objection to the jury or consent to his trying it without a jury. The irregularity being that of an officer of the court, neither party would be allowed to be prejudiced by it. Secs. 134-136.

Qualified Person.—That is, a person whose name is on the last revised voters' list, and whose name is marked "J" therein; section 132 and not exempt: notes to section 132.

Composed of Ratepayers: s. 133 (5).—The word "composed" means "made up of:" Funk & Wagnall's Standard Dict. p. 543. One or more of the jurors, ratepayers of the municipality, being on the jury panel, would not bring the case within the provisions of this sub-section.

Clerk of municipality to furnish copy of voters' list.

134. The clerk of every municipality shall furnish each Division Court clerk within whose division the municipality is partly or wholly situate, with a copy of the voters' list of the municipality immediately after the revision of the same in each year. 10 Edw. VII. c. 32, s. 134.

Case of Judicial District.

135. Sections 132 to 134 shall not apply to a Provisional Judicial District. 10 Edw. VII. c. 32, s. 135.

The Clerk of Every Municipality.—Provision is made by section 139 for the punishment of the clerk of the municipality for breach of his duty under this section. It is submitted that he would be subject to no other liability: Finlay v. Mlscampbell, 20 O. R. 29; Cowley v. Local Board, 1892 A. C. 345; Tomkins v. Brockville Rink Co., 31 O. R. 124. As to power of local legislatures to punish, see R. v. Wason, 17 A. R. 232; R. v. Bittle, 22 O. R. 605.

If no punishment had been provided the clerk might have been indictable: see Roscoe's Crim. Ev. 9th ed. 783; Criminal Code, R.S.C. c. 146, s. 164.

Summoning Jurors

136. Where a jury is required to be summoned, the clerk shall cause not less than twelve of the persons liable to serve as jurors to be summoned, and the summons shall be served at least two days before the court, either personally or by leaving the same with a grown-up person at the residence of the juror, and the summons shall be returned to the clerk, with an affidavit of service of the bailiff serving the same. 10 Edw. VII. c. 32, s. 136.

Required to be Summoned.—See notes to sections 130. If there is more than one case in which a jury notice has been given, the clerk should summon such number of jurors as in wise discretion may be reasonably necessary. He would, if there are several jury cases, do well to consult the Judge as to the number to be summoned.

At Least Two Days.—See notes to sections 98 and 128.

Sec. 137.

Affidavit of Service of the Bailiff.—The bailiff is required to make an affidavit of service and of the mileage necessarily incurred. See notes to section 92 as to computation of mileage and affidavit of service.

Summons to be Issued and Served.—The clerk is required to issue a summons and also not less than twelve copies for service on the jurors, and to deliver them to the bailiff for service. Upon the return of the original summons the clerk prepares an affidavit of service and of the mileage necessarily incurred to effect such service, which affidavit is to be sworn by the bailiff.

The service need not necessarily be personal; section 136 provides that the summons may either be served personally on the juror: see notes to section 87; or left with a grown-up person at the residence of the juror: see notes to sections 72 and 87.

For form of summons see Form No. 35.

Parties entitled to challenge.

137. Each party shall be entitled to challenge two jurors peremptorily and any juror for cause. 10 Edw. VII. c. 32, s. 137.

The Right of Challenge.—The Jurors Act declares the right of peremptory challenge to "any four" of the jurors drawn to serve on the trial of the cause: R.S.O. 1914 c. 64, s. 75; but in the division court it is limited to two jurors.

The right of challenge is a common law right, and cannot be taken away except by express enactment: Barrett v. Long, 3 H. L. Cases 395. If alienage is relied on as a ground of challenge, the party who has an opportunity of making it, and neglects it, cannot afterwards make the objection: R. v. Sutton, 8 B. & C. 417. A juryman should not have an interest in the result of the suit: Bailey v. Macaulay, 13 Q. B. 815. But where a public company was a party to an action, the mere fact that one of the jurymen was a shareholder in the company was held no ground for granting a new trial: Williams v. The G. W. R. Co., 3 H. & N. 869; see also Richardson v. Canada West Farmers' Ins. Co., 17 C. P. 341. A juror cannot be challenged because in a previous case he had shown some dissatisfaction with the law as laid down by the judge in favor of the party challenging: Pearse v. Rogers, 2 F. & F. 137. Want of qualification (except in respect of property) is a good ground of challenge: Jurors Act, s. 74. Because a juror affirms, affords no ground of challenge. "If a juror be challenged for *cause* before any juror *sworn*, two triers are appointed by the court: and if he be found indifferent and sworn, he and the two triers shall try the next challenges: and if he be tried and found indifferent, then the first two triers shall be discharged, and the two first jurors tried and found indifferent shall try the rest:" Roscoe's Crim. Ev., 8th ed., 210: R. v. Smith, 38 U. C. R. 218. The challenge of a juror must be before the oath is commenced. The moment the oath is begun it is too late. *The oath is begun by the juror taking the book*, having been directed by the officer of the court to do so: but if the juror takes the book without authority, neither party willing to challenge is to be prejudiced thereby: R. v. Frost, 9 C. & P. 129. Upon a challenge for cause, the person making the challenge must be prepared to prove the cause: R. v. Savage, 1 Moo. C. C. 51.

In an action to which a municipality, other than the county, is a party every ratepayer, officer or servant of the municipality is for that reason liable to challenge as a juror: Jurors Act, section 77.

138. A juror who, after being duly summoned, wilfully neglects or refuses to attend, shall be liable to a fine, in the discretion of the Judge, not exceeding $4, which shall be levied and collected, with costs, by the same process as a judgment recovered in the court. 10 Edw. VII. c. 32, s. 138.

Penalty on jurors disobeying summons

Not to Exceed $4.—No other punishment, than that prescribed by the section, could be imposed: R. v. Lefroy, L. R. 8 Q. B. 134; R. v. Jordan, 36 W. R. 589, 707; R. v. Judge Brompton, C.C. 1893 2 Q. B. 195.

It is submitted that the word "wilfully" here means of his own free will, viz., that he knew he had been summoned and, being a free agent, did not attend: *Re* Young v. Harston, 31 Ch. D. 174; Smith v. Barnham, 1 Ex. D. 419; Miles v. Roe, 10 P. R. 218; Wilson v. Manes, 26 A. R. 398; but see Johnson v. Allen, 26 O. R. 550. Neglect or refusal to attend is a contempt of court for which the statute provides a remedy: see *Ex parte* Lees and The C.C. Judge of Carleton, 24 C. P. 214. If not summoned two days "at least," (s. 130) the juror would not be in default: Wagner v. Mason, 6 P. R. 187.

139.—(1) If a clerk of a municipality, for six days after demand in writing, neglects or refuses to furnish the clerk of a Division Court, within the limits of which the municipality for which he is clerk, is partly or wholly situate, with a copy of the voters' list, as provided in section 134, the clerk of the Division Court may issue a summons, to be personally served on the clerk of the municipality, three days at least before the sittings of the court, requiring him to appear at the then next sittings of the court, to shew cause why he refused or neglected to comply with the provisions of the said section.

Proceedings against Clerk of municipality for refusing to furnish copy of voters' list.

For Six Days.—This is exclusive of the day on which the demand is made: Young v. Higgon, 6 M. & W. 49; Barrowman v. Fader, 31 N. S. R. 29; and notes to section 112.

Neglects or Refuses.—It will be observed that the word "wilfully" is here omitted.

To "neglect" doing is the omission to do some duty which the party is able to do: *per* Putteson, J., King v. Burrell, 12 A. & E. 468. When "negligently" is part of an offence it implies that the act constituting the offence shall have been done or caused by the alleged offender himself; proof that it was done by his servant, without more, will not bring the charge home: Chisholm v. Doulton, 58 L. J. M. C. 133. "Negligence is the omitting to do something which a reasonable man would do, or the doing of something which a reasonable man would not do:" *per* Alderson, B., tBlyth v. Birmingham W. W. Co., 11 Ex. 781.

Secs. 140, 141.

As to words "neglect or refusal" and "negligence or omission" in a statute, see Vogel v. The G. T. Ry. Co., 10 A. R. 162.

Three Days at Least.—See notes to sections 98 and 128.

Personally Served.—See notes to section 87.
For form of summons, see Form 143.

Judge may fine municipal clerk for breach of duty.

(2) Upon proof of the service of the summons, the Judge may, in a summary manner, inquire into the neglect or refusal or may give further time, and may impose such fine upon the clerk of the municipality, not exceeding $20, as he may deem just, and may order him to pay the costs of the proceedings; and the order of the Judge may be enforced by the same process as a judgment recovered in the court. 10 Edw. VII. c. 32, s. 139.

Upon Proof.—See notes to section 87.

By the Same Process.—See notes to section 174.

Judge's List and Jury List

140.—(1) Actions to be heard by the Judge alone shall be set down in a list separate from the list of those to be tried by a jury, to be severally called "The Judge's List" and "The Jury List," and actions shall be set down in the order in which they were entered with the clerk.

Jury List to be first.

(2) "The Jury List" shall be first disposed of, unless the Judge otherwise directs. 10 Edw. VII. c. 32, s. 140.

Heard by the Judge Alone.—The policy of the law in regard to division court causes is that the judge himself should dispose of the case unless a jury has been summoned: see notes to sections 105 and 142. The convenience of jurors was evidently considered in framing this section; the object clearly was to free them from duty as soon as the business would permit.

The Trial Lists.—The clerk is required to prepare three lists. A "Jury List," in which he shall enter all cases to be tried by a jury; a "Judge's List," s. 140 (1) in which he shall enter all cases to be tried by a judge alone, section 140 (1); and a "Judgment Debtors' List," in which he shall enter all cases in which the judgment debtor has been summoned for examination under section 191. As to arrangement of lists and the order in which actions are to be tried see section 106, which provides that actions in which the sum sought to be recovered exceeds $100, shall be placed at the foot of the trial list.

Five jurors to be empanelled, etc.

141. Five jurors shall be empanelled and sworn to do justice between the parties whose cause they are required to try, according to the best of their skill and ability, and to give a

true verdict according to the evidence, and the verdict of every jury shall be unanimous. 10 Edw. VII. c. 32, s. 141. Sec. 142. Verdict to be unanimous.

Five Jurors.—Five jurors only are to be empanneled and sworn in a division court case.

For forms of oath to jurors see Form 30 (g).

Form of oath to jurors, called by the judge under section 142, Form 30 (h).

142.—(1) If the panel is exhausted, the Judge may direct the clerk to summon from the body of the court a sufficient number of disinterested persons to make up a full jury, and any person so summoned may, saving all lawful exceptions and rights of challenge, act as a juror. Judges may call *tales*.

Summons from the Body of the Court.—Provision is here made for a *tales*. The same rights to the parties would exist in regard to the jurors summoned under the section as to those regularly summoned.

The "summons" in this event would be by orally calling the persons named to come forward and take their places in the jury box.

The fee payable to each of such jurors summoned under this section is ten cents: section 142 (3).

(2) Where the Judge thinks it proper to have the action or any controverted fact tried by a jury, the clerk shall instantly return a jury of five disinterested persons present, to try the same, and the Judge may give judgment on the verdict of the jury. Judge may order jury to be empanelled to try any disputed fact.

(3) Each juror so called and sworn shall be paid the sum of ten cents, and the money so paid shall be taxed as costs in the cause. 10 Edw. VII. c. 32, s. 142. Fee of juror.

Form of oath to such jurors. Form 30 (h).

Any Fact -The parties are entitled to the decision of the judge but the judge may submit any contested fact to a jury, and would be bound to give judgment in accordance with the fact so found. The whole case may now, under the above subsection (2), be left to the jury; or the judge may leave any controverted fact to it.

Tried by a Jury.—It is frequently the case that judges find, to use the words of the late Lord Bramwell, that some facts can be better settled by, "that true Court of Equity, a jury, which, disregarding men's bargain and the law, will decide *what is right* in spite of all you can say to them," than by themselves: 5 L. J. 293.

May Give Judgment.—No doubt the word "may" when used in an Act of the Legislature of Ontario, by the Interpretation Act, R.S.O. 1914, c. 1, s. 29 (s), and on general principles of statutory con-

Sec. 143.

struction, is permissive, but, it is submitted, that construction cannot apply in such a case as this. "When a statute confers an authority to do a judicial or indeed any other act which the public interest, or even individual right may demand, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having a right to make the application. In giving one person the authority to do the act, the statute impliedly gives to others the right of requiring that it shall be done: the power being given for the benefit, not of him who is invested with it, but of those for whom it is to be exercised. The Legislature, in such cases, imposes a positive and absolute duty, and not merely gives a discretionary power, and it must be exercised upon proof of the particular facts out of which the power arises. When therefore, the language in which the authority is conferred is only directory, permissive or enabling, for instance, when it is enacted that the person authorized "may" or "is empowered" or "shall, if he deems it advisable," or that "it shall be lawful" for him to do the act, it has been so often decided as to have become an axiom, that such expressions have a compulsory force, unless there be special grounds for a different construction:" Maxwell on Stats. 218, 219; Macdougall v. Paterson, 11 C. B. 755; R. v. Bishop of Oxford, 4 Q. B. D. 525; Cameron v. Wait, 3 A. R., p. 194; The Supervisors v. The United States, 4 Wallace 446, at pp. 446, 447; Stroud 463.

Paid the Sum of Ten Cents.—Where a jury is required by the parties under section 130, and properly summoned, the fees are paid by the clerk to whom they are repaid by the county treasurer under section 145 (6). Where a jury is empanneled by the judge under this section, the fees are to be paid by the clerk, and are taxable against the party who is ordered to pay the costs.

A difficulty may arise in some cases as to the repayment of the fees paid by the clerk. It seems clear, that as the jury is not called at the instance of either party, there is no obligation on the part of either to pay the fees in advance under section 49. If not recoverable from either party under execution, no provision is made for their collection, and the clerk might have trouble in recovering them.

Judge may discharge jury not agreeing, etc.

143. If the Judge is satisfied that a jury, after having been out a reasonable time, cannot agree upon their verdict, he may discharge them, and adjourn the trial, and order the clerk to summon a new jury for the next sittings, unless the parties consent that the judge may give judgment on the evidence already taken, in which case he may give judgment accordingly. 10 Edw. VII. c. 32, s. 143.

A Reasonable Time.—It is generally a matter of great difficulty for a judge to determine what is "a reasonable time." Every case must depend upon its own circumstances, and whether obstinacy, prejudice or other improper influence has found a place in the jury-room, as it frequently does, it is for the judge, as best he can, to determine that question before discharging a jury; see Stroud, 653.

A party upon whom it is incumbent to do a thing within a reasonable time duly, fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and

he has neither acted negligently nor unreasonably: Hick v. Raymond. Sec. 144.
1893 A. C. 22, 32.

144.—(1) In all cases of trial by jury the judge shall have power to determine, after hearing the whole evidence or the evidence adduced on behalf of the plaintiff alone, whether there is any evidence in support of the plaintiff's case which ought to be submitted to the jury, and if in his opinion there is no such evidence, he may then, or after verdict, if he has reserved his decision, direct a nonsuit or dismiss the action. Power to direct nonsuit or dismiss action.

(2) The judge may direct the jury to answer any questions of fact stated to them by him, and the jury shall answer them, and, subject to the provisions of subsection 1, upon their answers the judge shall enter such judgment as in his opinion may be proper. Submitting questions to jury.

(3) The judge shall determine the law and direct the jury thereon. 10 Edw. VII. c. 32, s. 144. Duty of Judge.

Ought to be Submitted.—After hearing the evidence for all parties or for the plaintiff alone, if the judge thinks there is not sufficient evidence in support of the plaintiff's claim, upon which five reasonable men might find a verdict for him, he may direct a nonsuit or dismiss the action. But he is bound to hear the evidence for the plaintiff before he can do either: notes to section 105. Having heard the plaintiff's case, "If in the opinion of the judge there is no evidence to go to a jury, the judge should have the courage of his opinion and nonsuit the plaintiff:" see remarks of Lord Esher, M. R., referred to in 31 L. J. Newspaper, p. 311.

The ruling of the judge that there is no evidence to support a particular issue may be reviewed on appeal under s. 125 when the amount in dispute exceeds $100. See notes there: McCord v. Cusmell, 1896 A. C. 57.

Under this section the judge may either direct a non-suit or dismiss the action. As to the effect of a non-suit in jury cases, see notes to section 105.

If, at the close of the plaintiff's case, the defendant moves for a non-suit and intimates that he will reserve the motion at the close of the case, and then proceeds to call evidence, until stopped by the court, and a non-suit is entered, the defendant is liable to pay the costs of the trial and appeal, in the event of a successful appeal, although the omission to complete the evidence was in deference to the court: Mills v. Hamilton St. Ry. Co., 17 P. R. 74.

Questions of Fact.—Formerly the judge could not submit questions to the jury in this way: *Re* Jones v. Julian, 28 O. R. 601. The equivalent section of the Supreme Court is section 61 of the Judicature Act, R.S.O. 1914, c. 56. See Canada Cent. Ry. Co. v. McLaren, 8 A. R. 564; St. Denis v. Baxter, 13 O. R. 41; Gower v. Lusse, 16 O. R. 88; Marks v. Windsor, 7 O. R. 719; Denmark v. McConaghy, 26 C. P. 562; Adair v. Wade, 9 O. R. 15.

Sec. 145.

The principles of practice of the Supreme Court of Ontario and Con. Rules as to entering judgment on the jury's answers to questions submitted, will doubtless be applicable: see s. 228 and notes there and to s. 65, and Rule 2 (7). Con. R. 501 says: Where a jury is directed to answer questions and answers some but not all, or when the answers are conflicting so that judgment cannot be entered upon such findings, the action shall be retried as in the case of a disagreement.

Jury to Decide Facts.—See notes to sections 105 and 144, as to the duties and authority of the judge in jury cases.

The judge can only take the case out of the hands of the jury if a nonsuit is applied for at the conclusion of the plaintiff's evidence, when he may either enter a nonsuit or dismiss the action at once or reserve his decision until the evidence is all in, and then do so; or he may, in a case where a municipality is a party and the jury, if selected in the ordinary way, be ratepayers of such municipality, dispense with a jury: section 135 (5).

The judge has no right, when there is a conflict of evidence on a question of fact, to give judgment *pro forma* for the defendant, leaving the plaintiff to apply for a new trial with a jury: Marshall v. Blumen, 10 T. L. R. 85.

It is imperative on the jury to answer the questions submitted to them, and they may not give a general verdict instead, unless the judge, in his discretion, receives it: Furlong v. Carroll, 7 A. R. 143: and the judge's charge, in the latter case, must give them such instructions as to the law as will enable them to give a general verdict, instead of answering the questions: Reid v. Barnes, 25 O. R. 223.

It is discretionary with the judge to submit questions to the jury: Lett v. St. Lawrence, 1 O. R. 545; and his refusal to do so is not a ground for new trial: Turner v. Burns, 24 O. R. 28.

The withdrawal of a juror is not a determination of the case, except in this sense of the word, that unless something very special happens, the court will hold the parties to their understanding and will stay any further proceedings in the action: Thomas v. Exeter Flying Post Co., 18 Q. B. D. 822; and it is doubtful if the withdrawal of a juror has any effect in a division court case: Norburn v. Hilliam, L. R. 5 C. P. 129.

Nonsuit.—As to power to nonsuit, see notes to sections 105, 144.

Inspection of Property by Jury.—The judge by whom any action or matter may be tried, may inspect, or order the jury to inspect, any property or thing concerning which any question may arise in the action.

If a judge in his charge to the jury in effect himself determines facts which should have been left to the jury, it is a good ground for a new trial: see Richards v. Joynt, 1 O. W. N. p. 1066; *Re* Cowan v. Affie, 24 O. R. 35; also notes to sections 104 and 131.

Fees for jury fund.

145.—(1) There shall be paid to the clerk, on every action originally entered in his court, in addition to all costs or jury fees payable

(*a*) Where the claim exceeds $20, but does not exceed $60, three cents; Sec. 145.

(*b*) Where the claim exceeds $60, but does not exceed $100, six cents;

(*c*) Where the claim exceeds $100, twenty-five cents; and the same shall be taxed and allowed as costs in the cause.

(2) On or before the 15th day of January in every year the clerk shall return to the treasurer of the county a statement, under oath, shewing the number of actions originally entered in his court during the year previous, in which the claim exceeded $20, but did not exceed $60, the number in which the claim exceeded $60, but did not exceed $100, and the number in which the claim exceeded $100. Return.

(3) He shall, with the statement, pay over to the treasurer the fees payable under this section; and the treasurer shall keep an account of all moneys so received by him under the head of "Division Court Jury Fund." Fees to be paid to County Treasurer.

(4) The clerk of every court the limits of which are wholly within a city, shall make the return and payment provided for by subsections 2 and 3, to the treasurer of the city, who shall keep an account in the same manner as is provided in the case of a treasurer of a county. Return in cities forming separate divisions.

(5) In the case of cities, other than those provided for by subsection 4, and towns separated from the county, the amounts paid in by the clerks and the amount paid by the county treasurer to the clerks for jury fees, shall be taken into account in settling the proportion of the charges to be paid by the city or town towards the cost of administration of justice. Other cities and separate towns.

In Addition to all Costs, etc.—The fees here provided for are in addition to those fees which the party who requires a jury is obliged to pay under the provisions of section 131.

The Legislature appears to have considered that a small tax should be imposed on all parties to suits entered in the division court with a view of providing a jury fund, and such tax or fee should be allowed as costs in the cause. It is the duty of the clerk to make the return to the county treasurer, otherwise he will be liable to indictment for neglect of duty, and to summary treatment by the Government: see Roscoe, 9th ed. p. 783; Criminal Code, R.S.C. c. 146, s. 164.

The same returns are exacted of the clerk of a city court as are required from the clerk of a rural court under section 145 (4). Too

Sec. 146. much stress cannot be laid on the necessity of this, as of all other returns, being duly made.

Fees of jurors.

(6) The clerk shall pay to every person who has been summoned as a juror, and who attends during the sittings of the court for which he has been summoned, and who does not attend as a witness or as a litigant, the sum of $1 and the sum of ten cents per mile for every mile in excess of two miles necessarily travelled by him from his place of residence to the place at which the court is held; and, having so paid the same, the judge shall so certify to the treasurer, and shall deliver the certificate to the clerk, and the treasurer shall, upon the presentation of the certificate, pay to the clerk the amount which the clerk appears by the certificate to have paid the jurors.

Case of Judicial District.

(7) This section shall not apply to a Provisional Judicial District. 10 Edw. VII. c. 32, s. 145; 1 Geo. V. c. 17, s. 23.

Every Person who has been Summoned.—A juror *who has been summoned* is entitled to a fee of $1, but one called by the judge is only entitled to 10c. under sub-section (3) of section 142.

The small fee formerly payable to jurors is not payable in addition to this. The fee here mentioned is substituted for the other. "If an Act says a juror shall have £20 a year, and a new statute enacts that he shall have twenty marks, the latter necessarily implies that the qualification required by the former Act, shall not be necessary, and repeals that Act:" Maxwell on Stats. 143; Zimmer v. The G. T. Ry. Co., 21 Q. R. 633; s. c. 19 A. R. 693. The same principle would apply here.

The juror who has been summoned under this section and attends is entitled to his fee, no matter whether he is sworn or challenged, or whether the case is settled or the like.

If a case is settled after a jury is summoned, and before the sitting of the court, the clerk should, if possible, countermand the jury summonses, so as to save the jury fees.

A person sworn under section 142 (1) as a *tales* is only entitled to 10c.: section 142 (3), if he is sworn as a juror.

Form of pay list of jurors, No. 81.

PROCEEDINGS TO GARNISH DEBTS.

Garnishment of debts.

Rev. Stat., c. 143.

146. Subject to the provisions of section 7 of *The Wages Act*, where a debt or money demand of the proper competence of the Division Court, and not being a claim for damages, is due and owing to one party from another, or a judgment of a Division Court remains unsatisfied, in whole or in part, and a debt is owing or accruing to the debtor from any other person, the person to whom such first mentioned debt, money demand, or

judgment is due and owing (hereinafter called the primary creditor), may attach and recover the debt owing or accruing to his debtor (hereinafter called the primary debtor), from any other person (hereinafter called the garnishee), or sufficient thereof to satisfy the claim of the primary creditor, subject always to the rights of other persons in respect of such debt. 10 Edw. VII. c. 32, s. 146. Sec. 148.

Rules.—See Rules 26-28 as to garnishee proceedings, *post*.

The Con. Rules of the Supreme Court of Ontario, as to garnishment, do not apply to garnishee proceedings in the division courts: *Re* Clark v. McDonald, 4 O. R. 310; see Simpson v. Chase, 14 P. R. 280; *Re* McCoy v. Arnot, 8 O. L. R. 110.

The Wages Act.—R.S.O. 1914, c. 143: see this statute, *post*. Section 7 exempts from seizure or attachment wages to the amount of $25. The exemption does not apply if the debt has been contracted for board or lodging, and, in the opinion of the judge, the exemption of $25 is not necessary for the support and maintenance of the debtor's family or where the debtor is an unmarried person having no family dependent on him for support: section 7 (2).

The Primary Debtors Claim.—A cause of action to be the subject of garnishment proceedings before judgment, must conform to the following requirements: (1) It must be a debt or money demand of the proper competence of the division court: (2) not for damages; and (3) it must be due and owing to one party from another party.

In order to determine what cases the statute applies to, it is necessary to consider what construction the courts have given to these several requirements.

A Debt or Money Demand Within the Competence of the Division Court.—The words "debt or money demand" are those used in section 62 (*c*) and in section 98. In the notes to those sections, the meaning of the phrase has already been fully discussed; it will not be necessary, therefore, to enter into any discussion of it here. The case of Johnson v. Dinmond, 11 Ex. 73, well illustrates the principle of what is a "debt" within the phrase "debt or money demand," namely a liquidated money obligation for which, generally speaking, an action will lie: see Webster v. Webster, 31 Beav. 393; but which obligation may be either legal or equitable: *per* Lindley, L.J., Webb v. Stenton, 11 Q. B. D. 518; Legarie v. Canada Loan & Banking Co., 11 P. R. 512; *Re* McGibbon v. Eager, 18 C. L. T. 311.

Claims for Damages.—The following causes of action would come within the meaning of the language here used, and would not be the subject of garnishee proceedings before judgment: Actions for trespass or trover: see Shaw v. Shaw, 18 L. T. 420; for breach of warranty of chattels: Northwood v. Rennie, 28 C. P. 202; 3 A. R. 37; against an attorney for negligence: Robinson v. Emanuel, L. R. 9 C. P. 415; or for compromising an action against the express direction of his client: Butler v. Knight, L. R. 2 Ex. 109; for wrongful dismissal of a servant: Hartland v. General Exch. Bank, 14 L. T. 863; for not

Sec. 146. accepting goods sold: Boorman v. Nash, 9 B. & C. 145; for not delivering goods: Brown v. Muller, L. R. 7 Ex. 319; for not accepting stock sold: Pott v. Flather, 16 L. J. Q. B. 366; against a public carrier for negligence: Simpson v. London & N. W. Ry. Co., 1 Q. B. D. 274; for breach of the covenant to repair: Henderson v. Squire, L. R. 4 Q. B. 170; on a bond to do something besides the mere payment of a sum certain in money: Branscombe v. Scarborough, 6 Q. B. 13; or on a replevin bond: *Ib.;* for negligent driving of carriages or trains causing damage: Redhead v. Mid. Ry. Co., L. R. 4 Q. B. 379; for injuries to workmen: Smith v. Baker, 1891 A. C. 225; for deceit: Swift v. Jewsbury, L. R. 9 Q. B. 301: Derry v. Peek, 14 App. Cas. 337: for excessive distress: Fell v. Whittaker, L. R. 7 Q. B. 120-124; for irregular distress: Knight v. Egerton, 7 Ex. 407; for an illegal distress: Attack v. Bramwell, 3 B. & S. 520; or when no rent due: *Ib.;* in detinue: Wiley v. Crawford, 1 B. & S. 253; or replevin: Gibbs v. Cruickshank, L. R. 8 C. P. 454; against a sheriff or bailiff for wrongfully seizing goods: Mayhew v. Herrick, 7 C. B. 229; or for not arresting: Williams v. Mostyn, 4 M. & W. 145; or for allowing a person to escape: Macrae v. Clarke, L. R. 1 C. P. 403; or for not levying, or a false return: Hobson v. Thelluson, L. R. 2 Q. B. 642; on any contract of indemnity: Theobald v. Ry. Passengers Ass. Co., 10 Ex. 45; for injuries resulting from the negligent keeping of animals: Ellis v. Loftus Iron Co., L. R. 10 C. P. 10; Shaw v. McCreary, 19 O. R. 39; for assault and battery and false imprisonment: Warwick v. Foulkes, 12 M. & W. 507; by principal against his agent for negligence: Parker v. McKenna, L.R. 10 Ch. 90; for non-delivery of telegraphic messages: Saunders v. Stuart, 1 C. P. D. 326; or for negligence in transmitting same: Dickson v. Reuter's Tel. Co., 2 C. P. D. 62; or in an action against a witness for non-attendance on subpœna: Yeatman v. Dempsey, 7 C. B. N. S. 628; or for breach of warranty: *Re* McCreary v. Brennan, 3 O. W. N. 1052; or the claim of a residuary legatee: Gilroy v. Conn, 3 O. W. N. 732, and cases there cited; nor when it does not clearly appear that there is a debt owing by the garnishee: Bartlett v. Bartlett Mines Limited, 3 O. W. N. 958.

The Debt.—The debt of the primary debtor must be due *and* owing while that of the garnishee need only be due *or* accruing. "Due" may mean either owing or payable, and what it means is determined by the context: *Ex parte* Kemp, L. R. 9 Ch. 383: *Re* Stockton Malleable Iron Co., 2 Ch. D. 101. The word "due" in the Act is used in the same sense as payable. Money may then be said to be due at the expiration of the credit given, or at the period promised: Webster. To be "due *and* owing," therefore, the primary debtor must not only be indebted, but the debt must be payable: *i.e.*, past due, while to be "due *or* accruing" it is only necessary that there should be a debt contracted though not payable until a future time. There need not be a present right to sustain an action against the garnishee: Parker v. Howe, 12 P. R. 353. Section 154 authorizes execution to issue against the garnishee if the debt has become due; or when and as it becomes due. So judgment may be given against the garnishee at the hearing, suspending the issue of execution until the money becomes due: Tapp v. Jones, L. R. 10 Q. B. 592, 593. The mere possibility that when the day for payment arrives there may be a defence against the recovery of the debt is no ground for resisting judgment: Sparks v. Young, 8 Ir. C. L. R. 251.

Salary or wages must, however, have been fully earned before being attachable, as until then there is no debt accrued: Wilson v. Fleming, 1 O. L. R. p. 601, and cases there cited.

Where the garnishees are co-partners the names of the individual members of the firm must be set out in the process. A garnishee summons against the firm of "A. B. & Co.," is not authorized by section 93, sub-section 3: Walker v. Rooke, 9 Q. B. D. 631; Reid v. McLeod, 20 Ala. 576; and where a garnishee is not indebted in his individual capacity but is a partner in a firm, it was held, he could not be charged without his partners being made parties to the proceeding: Rix v. Elliott, 1 N. H. 184; see also Parker v. Danforth, 16 Mass. 299; but in Clarke v. Macdonald, 4 O. R. 319, it was said, that judgment could not in any event be given except against the partners served. As each partner is jointly liable for the debt, it is an open question whether a partner served with process in which his firm was described as garnishees, would not be sufficiently charged, in the absence of objection by him to the summons as irregular: King v. Hoare, 13 M. & W. 494; Kendall v. Hamilton, 4 App. Cas. 504. Where a judgment creditor has induced his debtor to assign his book debts to him he cannot proceed against the debtors summarily by garnishment proceedings: Armstrong v. Douglas, 8 C. L. T. 49. Sec. 146.

Debts Attachable.—A fair test of a debt being garnishable is whether or not it could be the subject of set-off: Johnson v. Diamond, 11 Ex. 263; Webster v. Webster, 31 Beav. 393; McNaughton v. Webster, 9 U. C. L. J. 17; McPherson v. Tisdale, 11 P. R. 261; Parkes v. Howe, 12 P. R. 351. Generally speaking, "money in the hands of a man who cannot refuse to pay it somehow or another is a 'debt,' and if so, it can be attached:" *per* Coleridge, C.J., Booth v. Trail, 12 Q. B. D. 8. See as to the test whether money garnishable: McLeod v. Clark, 8 O. W. R. 403. If a debt is attachable the recovery of judgment does not make it less so: McKay v. Tait, 11 C. P. 72. A debt due for which a cheque has been given may be attached, but if the garnishees do not stop payment of the cheque, no order for payment will be made: Cohen v. Hale, 3 Q. B. D. 371; Elwell v. Jackson, 1 C. & E. 362. So a cheque issued and placed in the hands of a messenger of the party by whom it is issued, to be delivered to the primary debtor, but not delivered before the garnishee order is served, has not come into the hands of the payee of the cheque or his agent so as to prevent garnishment: Fallis v. Wilson, 13 O. L. R. 595. Money deposited in a bank by an unenfranchised Indian is garnishable: Avery v. Cayuga, 28 O. L. R. 517. Money deposited with the garnishee for a special purpose, which has failed, remains in his hands in trust and is garnishable: Stumore v. Campbell, 1892 1 Q. B. 314.

All "debts," whether legal or equitable, owing to the judgment debtor, whether presently payable or not, are garnishable: but only "*debts*" can be attached, and moneys which may or may not become payable from a trustee to his *cestui que trust*, are not debts: Webb v. Stenton, 11 Q. B. D. 518, 528; Stuart v. Grough, 15 A. R. 299. A trustee is not an equitable debtor until there is money in hand which he ought to pay to the *cestui que trust*, or until he has made himself personally liable to pay money to the *cestui que trust*, by reason of some breach of trust or default in the performance of his duties: *per* Fry, L.J., 11 Q. B. D. 530.

The mere fact of a garnishee being an executor is no ground for not ordering him to pay the debt due by him as executor to the judgment creditor: Tiffany v. Bullen, 18 C. P. 91; Burton v. Roberts, 6 H. & N. 93; Fowler v. Roberts, 2 Giff. 226; but the order in such case should show on its face that it is directed to the executor as

Sec. 146. such: Stevens v. Philips, L. R. 10 Ch. 417. A debt due to an administrator as such, cannot be attached to answer his private debt: Bowman v. Bowman, 1 Ch. Cham. 172; Macaulay v. Rumball, 19 C. P. 284; but a debt due to a deceased judgment debtor may be attached as against his personal representative: *ib.*; McDonald v. Sullivan, 5 O. L. R. 901.

Though the primary debtor may have taken the garnishee in execution for the debt, it is, nevertheless, attachable: Marples v. Hartley, 1 B. & S. 1.

Rent which is accrued though not payable may be attached and may be ordered to be paid when due to satisfy the primary debt: R.S.O. c. 156, ss. 5 and 6; but only an amount apportioned to the time of the attachment can be ordered to be paid: Massie v. Toronto Printing Co., 12 P. R. 12; and when attached the collateral remedy of the landlord by way of distress is suspended: Patterson v. King, 27 O. R. 56. But it is doubtful if rent could be garnished as against a mortgagee of the landlord: Massie v. Toronto Printing Co., *supra*; but see Jones v. Thompson, 27 L. J. Q. B. 234; Davidson v. Taylor, 14 P. R. 78. If the tenants have attorned to the mortgagees, there is no debt due to the mortgagor: Parker v. McIlwain, 17 P. R. 84; nor is there any such debt if the mortgagee has, with the assent of the mortgagor, notified the tenants to pay the rent to him: Campion v. Palmer, 1896 2 Ir. R. 445. In Christie v. Sasey, 31 C. L. J. 35, it was held *per* Ketchum, JJ., that rent not yet payable cannot be attached under this section, as a debt to be attachable in the division court must be "due or owing." But *per* Denn, Co. J., Birmingham v. Malone, 32 C. L. J. 717, such rent is attachable in the division court; see also Webb v. Stenton, 11 Q. B. D. 578; Patterson v. Richmond, 17 L. J. 324; *Re* Wilson, 5 R. 455; and see United Club v. Hotel Co., W. N. (1889), 67, in which it was held that the apportioned part of rent is not "a debt," and Burnett v. Eastman, 67 L. J. Q. B. 517, *per* Day, J., in which it was held that rent cannot be attached as a debt until it is due, notwithstanding the Apportionment Act.

Money payable in seven days under a judgment in favor of B. against J. was held to be attachable in the hands of J. by a judgment creditor of B. before the expiration of the time for payment: Turney v. Burman, 88 L. T. 65.

A judgment or order for costs only is sufficient to sustain garnishee process: Elliott v. Capell, 9 P. R. 35; *Re* Irvine, 12 P. R. 297. See also Nott v. Sands, W. N. (1883), 74; Sunderland Local Marine Bd. v. Frankland, L. R. 8 Q. B. 18; Cremetti v. Crem., 4 Q. B. D. 225. McDonald v. Sullivan, 5 O. L. R. 87.

It has been held that the following are debts and are attachable:

The overdue superannuation of a retired police constable: Booth v. Trail, 12 Q. B. D. 8; Murphy v. Green, 20 L. R. Ir. 610. See also Shanley v. Moore, 9 U. C. L. J. 264; Hall v. Pritchett, 3 Q. B. D. 215; overdue rent: Mitchell v. Lee, L. R. 2 Q. B. 259, or money in the hands of a receiver appointed in an administration action: Rapier v. Wright 14 Ch. D. 638; money due for calls in respect of shares in a company: De Pass v. Capital and Industries Cor., 1891 1 Q. B. 216, a balance due for purchase money of leaseholds, after assignment to the purchaser, and entry into possession by him: Owens v. Shield, 1 C. & E. 356; an ascertained amount due on a guarantee; Bouch v. Sevenoaks etc., Ry. Co., 4 Ex. D. 138; the surplus proceeds of a sale under the powers contained in a mortgage: *Re* Mead v. Creary, 32 C. P.

1; dlvldends, though not declared, on an insolvent estnte: Parker v. Howe, 12 P. R. 351; future instnlments of a deht payabla hy Instalments: Tapp v. Jones, L. R. 10 Q. B. 591; an amount certaln payahle under a bond: Johnson v. Dinmoad, 11 Ex. 73, *per* Parke, B., at p. 80; money in the hands of hnnkers: *Re* United Eng. and Scot. Ins. Co., L. R. 5 Eq. 300; Miller v. Huddlestone, 22 Ch. D. 233; Rogers v. Whitely, 23 Q. B. D. 236; 1892, A. C. 118; the proceeds of an execution in the sheriff's hands for a deht due hy the execution creditor: Murray v. Simpson, 8 Ir. C. L. R. App. xlv.; *Re* Smart v. Miller, 3 P. R. 385; O'Neill v. Cunningham, 6 Ir. L. R. 503; Williams v. Reeves, 12 Ir. Ch. R. 173; *Re* Greer (1895), 2 Ch. 217; a deht due to one or more of the judgment dehtors upon n judgment recovered against several, may be attached in the hnads of the garnishee: Miller v. Mynn, 1 E. & E. 1075; money in the hands of a corporntion or company; Salaman v. Donovan, 10 Ir. C. L. R. Ap. xiii.; or of a division court clerk: Bland v. Andrews, 45 U. C. R. 431; but the contrary has been held in England: see Dolphin v. Layton, 4 C. P. D. 130; Howell v. Metrop. Dist. Ry. Co., 19 Ch. D. 508; or of a division court hailiff: Lockart v. Gray, 2 C. L. J. 163; a deht due to a testator's estate on a judgment against his executors as such: Fowler v. Roberts, 2 Giff. 226; Burton v. Roberts, 6 H. & N. 93; money payahle for work done for a municipal corporation: Alden v. Boomer, 2 P. R. 339; money due under an award and decree of the Court of Chancery, although the full amount was not ascertained by reason of the costs not having been taxed: *Re* Sato v. Hubbard, 8 P. R. 445; costs coming to plaintiff though not yet taxed: McPherson v. Tisdale, 11 P. R. 261; or a sum to be ascertained as due to the holder of n Mechnnics' Lien: *Re* Withrow, 19 C. L. J. 114: an annuity in the hands of trustees in whom it was vested was held attachahle in Nash v. Pease, 47 L. J. Q. B. 766; and money in the hands of a trustee though not as yet due to the *cestui que trust*, in Lloyd v. Wallace, 9 P. R. 335; hut these cases cannot now be considered as authorities: Webb v. Stenton, 11 Q. B. D. 518; Stuart v. Grough, 15 A. R. 299; money lodged in court in the name of the Master of the court was held to be the subject of a charging order: Adams v. Gillem, 9 Ir. C. L. R. 148; unnegotiahle promissory notes, being in the same position as ordinnry choses in action, are the subject of garnishment: Oldham v. Ledbetter, 1 Howard (Miss), 43; Wilhelmi v. Hafner, 52 Ill. 222; Colvin v. Rich, 3 Porter, 175; money in the hands of a receiver may be attached with the leave of the court which appointed him: De Winton v. Brecon, 28 Beav. 200; a deht due by a company in liquidation under the Winding-up Act, to a primary debtor, might he reached hy garnishment, and the primary creditor would then be entitled to the dividend of the debtor: Prichard's Claim, 2 D. F. & J. 354; see, however, Hunter v. Greensill, L. R. 8 C. P. 24; Mack v. Ward, W. N. (1884), 16. The process should apparently be issued against the company after obtaining the leave of the court in which the winding up was being carried on: R.S.C. c. 144, s. 22. Rent payahle to an administrator of an estate for the benefit of others, is garnishable hy the creditors of the beneficiaries: McDonald v. Sullivan, 5 O. L. R. 87. Sec. 146.

An overdue negotiahle note may he attached: Rohlin v. Rankin, 11 S. C. R. 137; and a promissory note not yet due: Girard v. Cyrs., 5 B. C. R. 45.

An incomplete gift of a deht will not prevent its attachment: Davidson v. Cochrane, 34 C. L. J. 318; but as to what will constitute an equitable assignment, see Frankfield v. Proctor, 2 O. L. R. 326.

Sec. 146.

Money payable under a contract to supply a lunch was held to be due when the purveyor had performed his part of the agreement and supplied the food and tables, etc., and when the lunch was over at 2 p.m. the amount was held to be attached by service at 5 p.m.: Kelly v. Rider, 11 T. L. R. 206.

Claims Not Attachable.—The following have been held not to be debts within the meaning of the statute, and therefore not attachable. Damages, though after verdict, until judgment obtained: Jones v. Thompson, 27 L. J. Q. B. 234; a verdict on a marine policy: Dresser v. Johns, 6 C. B. N. S. 429; a verdict obtained in default of delivery of a chattel: *Re* Searth, L. R. 10 Ch. 234; but a verdict is now attachable before judgment: Holtby v. Hodgson, 24 Q. B. D. 103; Davidson v. Taylor, 14 P. R. 78; an unascertained claim on a fire policy: Boyd v. Haynes, 5 P. R. 15; Tate v. Corp. of Toronto, 3 P. R. 181; Randall v. Lithgow, 12 Q. B. D. 525; Bank of Toronto v. Burton, 4 P. R. 56; Gwynne v. Rees, 2 P. R. 282; Simpson v. Chase, 14 P. R. 280; and even though the amount may have been adjusted, it is not attachable; as the adjustment has not the effect of determining absolutely the amount due: Simpson v. Chase, 14 P. R. 280; it would be sufficient if the amount had been fixed by an award: Victoria Mutual v. Bethune, 1 A. R. 398; money due to Poor Law Guardians, primarily applicable to the relief of the poor, though they had become indebted in their official capacity for goods supplied: Murphy v. Guardians Belmullet Union, 22 L. R. Ir. 25; a debt to answer a sum of money which has been ordered to be paid into court: *Re* Greer, 1895 2 Ch. 217; money in the hands of a deputy clerk of the Crown, clerk of the county court, or division court: Dolphin v. Layton, *supra;* or to a clerk of the peace: Darcy v. Garragher, 18 L. R. Ir. 317; or of the police: Jervis v. Peel, 1 T. L. R. 306; Rice v. Jarvis, 49 J. P. 264; *Re* Baird v. Nolan, 20 O. R. 311; but in Field v. Rice, 20 O. R. 309, it was held by the Q. B. Divisional Court, that the question whether money held by the police from a prisoner was a "debt," was a pure question of fact to be determined by the division court judge and not reviewable in prohibition: money lent to a candidate at a parliamentary election to deposit with the returning officer: *Ex parte* Peck, 33 N. B. R. 623.

Money deposited by a judgment debtor with a stock broker cannot be attached so long as the transactions are open: Hatt v. Shaw, 3 T. L. R. 354: nor is money deposited by a stock broker in his own name but belonging to clients: Hancock v. Smith, 41 Ch. D. 456.

Money in a solicitor's hands for distribution amongst creditors under a deed of composition was held not to be attachable by a judgment creditor of the debtor, as a trust had been created: Runtz v. Longbourne, 8 T. L. R. 568; and even if no trust has been created, and there is but a revocable mandate, the debt is not attachable before the mandate has been revoked: Roberts v. Jones, 61 L. J. Q. B. 523.

Money allowed to a contractor as a mere bounty is not garnishable, not being a legal or equitable and enforceable claim: Stewart v. Jones, 1 O. L. R. 34.

Where it is alleged that the right to moneys attached in the hands of a garnishee and owing to a foreign company had passed to a receiver of the company by virtue of a winding up order made in the foreign country by the court having jurisdiction there before the date of an attaching order: see Brand v. Green, 12 Man. L. R. 337.

A contract to loan money creates no debt, and even though the judgment debtor may have mortgaged his property to the garnishee for the amount of a proposed loan, no attachable debt would thereby exist: Western Wagon & Property Co. v. West, 1892 1 Ch. 271. Sec. 146.

Moneys in the hands of a trustee in bankruptcy have been held to be not attachable: Boys v. Simpson, 8 Ir. C. L. R. 523; Hunter v. Greensill, L. R. 8 C. P. 24; Trout v. Gregory, 24 Q. B. D. 281; or of a liquidator; Mack v. Ward, W.N. (1884), 16, or of a receiver: Gray v. Purdy, 5 B. C. R. 241; or of the mortgagee as the surplus of a sale of mortgaged property when sold by a prior mortgagee under his power of sale, the sale having taken place after the service of the garnishee order. Chatterton v. Watney, 16 Ch. D. 378, in appeal, 17 Ch. D. 259; (but the holder of a garnishee order, served after the sale, is entitled to attach the surplus proceeds of sale in the hands of the first mortgagee, *Ib.*; *Re* Mead & Creary, 32 C. P. 1); claims for misrepresentation: Roberts v. Corp. of Toronto, 16 Gr. 236; an unascertained amount claimable under a bond: Johnson v. Diamond, 11 Ex. 73; a legacy in the hands of an executor, even though he promised to pay it if ordered to do so: McDowall v. Hollister, 3 W. R. 522; unless there has been such an account stated by the executor as would entitle the legatee to sue at law: *Ib.*; Hunsberry v. Kratz, 5 O. L. R. 635; the cases of Fleming v. Stephenson, 28 C. L. J. 570; and McLean v. Bruce, 14 P. R. 190, *contra*, were decided under the old Con. R. 935, which was wider than section 146 (formerly 179): Hunsberry v. Kratz, *supra*; dividends payable to the wife of the execution debtor are not garnishable: Dingley v. Robinson, 2 Jur. N. S. 1145; moneys payable to the wife of a debtor by a purchaser of land conveyed to him but unpaid on the delivery of the conveyance: Donohue v. Hall, 24 S. C. R. 683; moneys payable on a contingency, as for purchase money before execution of conveyance: Howell v. Metrop. Dist. Ry. Co., 19 Ch. D. 508; or for purchase money prior to the completion of expropriation proceedings: Richardson v. Elmit, 2 C. P. D. 9; Fellows v. Thornton, 14 Q. B. D. 335; Nash v. Pease, 47 L. J. Q. B. 766; Lloyd v. Wallace, 9 P. R. 335; moneys payable under a building contract which has not yet been fulfilled: Gray v. Hoffer, 5 B. C. R. 56; rent or instalments of rent not yet due: Jones v. Thompson, 27 L. J. Q. B. 234; Commercial Bank v. Jarvis, 5 U. C. L. J. 66; McLean v. Sudworth, 4 U. C. L. J. 233; Christie v. Casey, 15 C. L. J. 13; (but see Patterson v. Richmond, 17 C. L. J. 324; Massie v. Toronto Ptg. Co., 12 P. R. 12); trust income not yet come to the hands of trustees, although when received it would be payable to the debtor: Webb v. Stenton, 11 Q. B. D. 518; McFadden v. Kerr, 12 Man. L. R. 487; Holmes v. Millage, 1893 1 Q. B. 551; Central Bank v. Ellis, 26 A. R. 364; salary, wages or pension not yet payable: Hall v. Pritchett, 3 Q. B. D. 215; Booth v. Trail, 12 Q. B. D. 8; Shanley v. Moore, 9 U. C. L. J. 264; Trust & Loan Co. v. Gorsline, 12 P. R. 654; Wilson v. Fleming, 1 O. L. R. 599; Fallis v. Wilson, 13 O. L. R. 595; Mapleson v. Sears, 105 L. T. 639; the half pay of an army officer: Birch v. Birch, 8 P. D. 163; Lucas v. Harris, 18 Q. B. D. 127; payment to be made by the Crown out of bounty: Stewart v. Jones, 1 O. L. R. 34; the pay of a surgeon in His Majesty's Navy on active service: Apthorp v. Apthorpe, 12 P. D. 192. Half-pay is given to a man in order to keep him in a state to perform his duties, if called upon to discharge them, and pay is given him to enable him to discharge his duties *in presenti*. Neither can be assigned, and not being assignable are not attachable: Flarty v. Odlum, 3 T. R. 681; Apthorpe v. Apthorpe, 12 P. D. 193; Brenan v.

Sec. 146. Morrisey, 26 L. R. Ir. 618. An annual gratuity from the East India Co. is not attachable: Innes v. East India Co., 17 C. B. 351; nor moneys held for and not yet payable to a married woman who is restrained from anticipation: Chapman v. Biggs, 11 Q. B. D. 27; even when it has accrued due subsequently to the judgment against her: Gulmoye v. Cowan, 58 L. J. Ch. 769; see Stanley v. Stanley, 7 Ch. D. 580; Macdonald v. Anderson, 9 C. L. T. 158. A sum of money awarded as damages to a married woman in an action by husband and wife for personal injuries to the latter, was held to be her separate property and not attachable in the hands of the solicitor to answer a debt of the husband: Beasley v. Roney, 1891 1 Q. B. 509. Where trustees have a discretion to apply the whole or any part of income for the benefit of a judgment debtor, there is no attachable debt: R. v. Lincolnshire (Judge), 20 Q. B. D. 167; *Re* McInnes v. McGaw, 30 O. R. 38; annuities or instalments of annuities not yet due: Nash v. Pease, 47 L. J. Q. B. 766; or interim or permanent alimony: *Re* Robinson, 27 Ch. D. 160.

It was held that money in the sheriff's hands, levied under an attachment for costs awarded by a decree in equity, remained in *custodia legis*, and was not, without further order, the property of the party who issued the attachment: Williams v. Reeves, 12 Ir. Ch. R. 173; money paid into court: Jones v. Brown, 29 L. T. Rep. 79; French v. Lewis, 16 U. C. R. 547; unsettled balance by one partner to another: Campbell v. Peden, 3 U. C. L. J. 68; but if ascertained it can: *Ib.*; money sent by a father to his son as a gift, through a bank, was held not to be a debt due by the bank to the son while the father retained power to withdraw the gift: Calsse v. Thorp, 5 P. R. 265; money alleged to be due on an indemnity bond, the same not being capable of being set-off: Griswold v. Buffalo B. & G. Ry. Co., 2 P. R. 178; nor the salary of a municipal officer who holds his office at the will of the corporation at a yearly salary, payable quarterly, until some part of it is overdue: Shanley v. Moore, 9 U. C. L. J. 264: nor a juror's allowance in the hands of the county treasurer: Phillips v. Austin, 3 C. L. T. 316; where a fund is applicable to the payment of several persons, *pari passu*, one of them cannot take garnishment proceedings and thus obtain priority over the others: Kennett v. Westminster Improvement Comm'rs, 11 Ex. 349; nor money in the hands of the sheriff arising from a sale of land for taxes, at the instance of creditors of the county corporation: Wilson v. Corp. of Huron and Bruce, 8 U. C. L. J. 136; nor the redemption moneys paid to the county treasurer by owners of land sold for taxes and banked in the name of the treasurer: s.c. 8 U. C. L. J. 135; nor surplus moneys, if any, after payment of the debts of A., which by the terms of a trust deed might be paid to the debtor or invested in land to be conveyed to him: McKindsey v. Armstrong, 10 A. R. 17; proportion of surplus assets of a company in liquidation belonging to a shareholder who could not be found and was paid to the "Companies Liquidation Account": Spence v. Coleman, 1901, 2 K. B. 199; nor a debt due by the garnishee to a person who would be a trustee of it for the judgment debtor: Boyd v. Haynes, 5 P. R. 15; (but such a debt would be held now to be garnishable: Wilson v. Dundas, W. N. (1875), 232: Summers v. Morphew, 61 L. T. Jour. 140; Webb v. Stenton, 11 Q. B. D. 518; Leaming v. Woon, 7 A. R. 42); nor can money which may become due if the terms of a contract are performed be attacked even though some work may have been done: McCraney v. McLeod, 10 P. R. 539; and though, if the contractor abandons the contract, and the contractee enter upon the work and complete it, a debt may arise

by implication for the value of the work done, a garnishee summons served *before* the contractee entered upon the work will not attach such amount: McCraney v. McLeod, 3 P. R. 539, explained in Parker v. Howe, 12 P. R. 351; nor a negotiable promissory note not yet due: Jackson v. Cassidy, 2 O. R. 521; Exley v. Day, 15 P. R. 353; Pyne v. Klana, 11 Ir. R. C. L. 40; McIlish v. Buffalo H. & G. Ry. Co., 2 U. C. L. J. 230; 14 C. L. J. 256. Sec. 146.

A Government pension is a garnishable debt: Wilcock v. Terrell, 3 Ex. D. 323; Samson v. Samson, 4 P. D. 69; Chowe v. Price, 22 Q. B. D. 420; Re Webber, 18 Q. B. D. 111; but neither our Dominion nor Provincial Governments can be made garnishees, unless so declared by proper statutory authority; R. v. McFarlane, 7 S. C. R. 216; Apthorpe v. Apthorpe, 12 P. D. 192; Gilley v. Palmerston (Lord) 3 B. & B. 275; Macbeath v. Haldimand, 1 T. R. 172. No suit can be brought against the Province of Ontario or its treasurer without the fiat of the Attorney General: R.S.O. 1914 c. 14, s. 15 (9). But section 15 of that statute enables creditors to attach the wages due civil servants of the province by serving a notice of claim on the Treasurer or Assistant Treasurer of the province. The necessary proceedings are provided by that statute. Forms of these proceedings are given, Nos. 192 and 193, *post*. There is no similar provision in regard to civil servants of the Dominion and their wages are not garnishable. Money upon which the garnishee has a lien cannot be taken from him without such lien being first discharged: Nolan v. Crook, 5 Humphreys, 312; Smith v. Clarke, 9 Iowa, 241; Grant v. Shaw, 16 Mass. 341; Curtis v. Norris, 8 Pick. 280; Goddard v. Hapgood, 25 Vt. 181; Nathans v. Giles, 5 Taunt. 558; Stumore v. Campbell, 1892 1 Q. B. 314. A liability cannot be enforced against the garnishee for a debt based on an illegal consideration: McGilnchy v. Wincheli, 63 Maine, 31.

The County Treasurer cannot be garnished on a judgment against the Clerk of the Peace for that county for moneys which may come into the hands of such County Treasurer for said Clerk of the Peace, after the Board of Audit has passed upon his accounts, the same not being a garnishable debt: *Re* Hanvey v. Stanton, 13 C. L. J. 108; Palmer v. Bate, 2 Brod. & Bing. 673.

There being a specific remedy for the collection of taxes it should be held on the principle of public policy that they are not attachable: Canada Permanent v. East Selkirk, 13 C. L. J. 351; 14 C. L. J. 11; London & Canadian L. & A. Co. v. Morris (Tp.), 14 C. L. J. 58.

Voluntary payments, as for instance, the dues and assessments of members in Ontario of a benefit society, incorporated in a foreign country, cannot be reached by a receiver or by attachment: Wintermute v. Brotherhood of Ry. Trainmen, 19 P. R. 6.

The court refused to attach, at the instance of a judgment creditor, on a judgment *de bonis testatoris* against an executrix, funds which were lodged by her in that capacity in the bank of the judgment creditor: Hewat v. Davenport, 21 W. R. 78.

Where a claim is for unliquidated damages, and is referred to arbitrators, there can be no garnishment until after award: Tate v. Corp. of Toronto, 10 U. C. L. J. 66. Where a cheque was given and duly paid, it was held there was no debt between the time of giving it and the time of payment, and no duty upon the drawer of the cheque to stop payment on being served with a garnishee order: Elwell v. Jackson, 1 C. & E. 362; but if the cheque had been stopped,

Sec. 146. the debt would have been attachable: Cohen v. Hale, 3 Q. B. D. 371; Fallis v. Wilson, 13 O. L. R. 595. Officers of the law, whose duty it is to hold moneys for suitors, have, in the United States, been generally held exempt from garnishee process: Staples v. Staples, 4 Maine, 532; Thayer v. Sherman, 12 Mass. 441; Riley v. Hirst, 2 Penn. 346. A debt owing to two cannot be attached to satisfy a claim against only one of these two: *Re* Smart v. Miller, 3 P. R. 385; McCormack v. Park, 9 C. P. 330; Macdonald v. Tacquah Gold Mine Co., 13 Q. B. D. 537; Parker v. Odette, 16 P. R. 69. A life interest of a tenant by the curtesy, in purchase money, is not attachable: Palmer v. Lovett, 14 P. R. 415.

Money deposited with a stock broker to secure loss on speculation in stocks and shares, so long as those transactions are open: Hutt v. Shaw, 33 O. L. R. 354.

Rights of Other Parties.—Only such property can be attached as the debtor could deal with properly and without violating the rights of other persons at the time the garnishee order is served: Westby v. Day, 2 E. & E. 605; Badeley v. Consolidated Bank, 34 Ch. D. 536; s. c. 38 Ch. D. 238; *Re* General Horticultural Co., 32 Ch. D. 512; Vyse v. Brown, 13 Q. B. D. 160; O'Donohue v. Hall, 24 S. C. R. 612; Armstrong v. Douglas, 8 C. L. T. 49; Davis v. Freethy, 24 Q. B. D. 519; Beaty v. Hackett, 14 P. R. 395; Parker v. McIlwain, 17 P. R 84; O'Connor v Ireland (1897), 2 Ir. Rep. 150.

Assignment.—See Wilson v. Fleming, 1 O. L. R. 599; Morphy v. Colwell, 3 O. L. R. 314. An assignment in insolvency prevented garnishment: *Re* Fair v. Bell, 2 A. R. 632. An order upon a garnishee has no operation upon debts of which a judgment debtor has already divested himself by *bona fide* assignment: Hirsch v. Contes, 18 C. B. 757: Ferguson v. Carman, 26 U. C. R. 26; Macaulay v. Rumhall, 19 C. P. 284. As to what amounts to an assignment see Trunkfield v. Procter, 2 O. L. R. 326. When a verdict was assigned with a covenant for further assurance, and the verdict was set aside, but on a new trial a similar verdict was rendered, it was held, that the assignment covered the second verdict, and had priority over a garnishee order on the amount of the second verdict: Davis v. Freethy, 24 Q. B. D. 519. An assignment to a bank of moneys due or to become due under a contract, was held to cover an additional amount, over and above the amount of the contract for damages payable by the employer to the contractor arising in connection with the work under the contract: Graham v. Bourque, 6 O. L. R. 700. To make an assignment of a debt prevail over an attaching order it is not necessary that notice of the assignment should be given to the garnishee: Brown v. McGuffin, 5 P. R. 231, and cases there cited: Robinson v. Nesbitt, L. R. 3 C. P. 264; Grant v. McDonnell, 39 U. C. R. 412; see Foulds v. Chambers, 11 Man. L. R. 300; Meriden Britannia Co. v. Bowell, 4 B. C. R. 520. A person must be made a party to garnishee proceedings before his right can be affected thereby: *Re* Fair v. Bell, 2 A. R. 632; see Turnbull v. Robertson, 38 L. T. 389; Foulds v. Chambers, 11 Man. L. R. 300.

Where a tenant by the curtesy joined in a conveyance of land to a purchaser, but had never obtained any interest in the land or purchase money, it was held that no debt legal or equitable was due to him by the solicitor for the heir, who had received the purchase money: Palmer v. Lovett, 14 P. R. 415. Bond holders of a railway company, whose bonds are a first charge upon the undertaking, have

no right to earnings of the road while operated by the company, as against an attaching creditor; their remedy is the appointment of a receiver: Phelps v. St. Catharines & Niagara Central Ry. Co., 19 Q. R. 501. Sec. 146.

Where a receiver is appointed of a debt, an attachment, after the appointment, without leave, would be a contempt: Searle v. Chant, 25 Ch. D. 723; and if the receiver should be appointed after the attachment, the garnishee would not be justified in paying the money to the attaching creditor without the leave of the court which appointed the receiver: Hawkins v. Gathercole, 1 Drew. 12; Ames v. Birkenhead Dock Co., 20 Beav. 332; Stuart v. Grough, 15 A. R. 209.

A parol assignment of a chose in action is valid: Trusts Cor. of Ontario v. Rider, 24 A. R. 157; and will take priority over a subsequent attaching order: Todd v. Phoenix and United F. Ins. Co., 3 B. C. R. 301.

Where several garnishee summonses were issued on the same day and it afterwards appeared that all but one had been issued in a wrong division, it was held on the transfer of the latter to the court in which they should have been entered in the first instance, that the summons properly issued was entitled to take priority over the others: Sewery v. Burk, 16 C. L. T. 322.

In an interpleader proceeding to decide the question of title to the money garnished it was held that evidence of admissions of the judgment debtor was not admissible as against the attaching creditor either on account of any privity between them or as evidence of declaration made by a party against his own interest: Bertrand v. Henman, 11 Man. L. R. 245; Marshall v. May, 12 Man. L. R. 381.

As to adjudication on adverse claims, see sections 157, 160, 162, and notes thereto.

Where the assignee of a debt not only neglected to give notice of assignment, but his solicitor stood by while an attaching order was being made, and the garnishee paid the debt to the judgment creditor, the court relieved the garnishee from an order made against him prior to the garnishment under which he was liable to attachment: *Re* Jones, *Ex parte* Kelly, 7 C. P. 149; and see Berneski v. Tourangeau, 18 P. R. 263.

Where it is clear, upon the facts appearing in support of the claim of the primary creditor against the garnishee, that the moneys sought to be garnished do not belong to the judgment debtor, but to a third person, such third person should not be summoned to prove his claim but the garnishee summons should be dismissed: Johnson v. Moody, 12 P. R. 203; but it would be otherwise if the primary creditor could suggest a plausible ground for supposing the money to be that of the judgment debtor, or cast any doubt upon the *bona fides* of the third party's claim: *Ib.*

A solicitor, by whose efforts a judgment is recovered, has a lien thereon for the costs of the action in which it was recovered, which will have priority over a garnishee summons issued at the instance of a creditor of the client: Berneski v. Tourangeau, 18 P. R. 263; Palgrave v. McMillan, 31 N. S. R. 488; Canadian Bank of Commerce v. Crouch, 8 P. R. 437; The Jeff. Davis, L. R. 2 A. & E. 1; Cormick v. Ronayne, 22 L. R. Ir. 140; Shippey v. Grey, 42 L. T. 673; but *per* Lord Watson in North v. Stewart, 15 App. Cas. 463, "in the courts of common law, a solicitor's lien upon costs decreed does not prevent their attachment by other persons having claims against the judg-

Sec. 146. ment creditor: see *Re* Knight, Knight v. Gardner, 1892 2 Ch. 370; see, also, Walker v. Gurney-Tilden Co., 18 P. R. 274, 471.

Distinct notice of the lien must be given to the garnishee, who will then be bound to bring it to the notice of the court, and the solicitor will then be summoned under section 102. If the garnishee should not have notice, and the money should, therefore, be paid to the judgment creditor, he would be compelled to repay it if he had notice of the lien at the time of receiving the money: Eladell v. Cunningham, 28 L. J. Ex. 213; s. c. 4 H. & N. 871; Hough v. Edwards, 1 H. & N. 171; Mercer v. Graves, L. R. 7 Q. B. 499; Davidson v. Douglas, 15 Gr. 347; R. v. Henson, 2 P. R. 350; Bank of Upper Canada v. Wallace, 2 P. R. 352; Cotton v. Vansittart, 6 P. R. 91; Hamer v. Giles, 11 Ch. D. 942; Dallow v. Garrold, 14 Q. B. D. 543. If judgment has been given against the garnishee, and it subsequently appears that the debt was assigned prior to the garnishment, the judgment will be set aside: Heatty v. Hackett, 14 P. R. 395; Moore v. Penchy, 60 L. T. 198; notwithstanding more than 14 days may have elapsed: McLean v. McLeod, 5 P. R. 467; Hobson v. Shannon, 26 O. R. 554; 27 O. R. 115; and payment to the primary creditor was held to be no defence to an action by the assignee against the garnishee to recover the money: Foulds v. Chambers, 11 Man. L. R. 300.

Where, in garnishee proceedings it appears that the money is trust money, or there is reasonable suspicion that it is trust money, the *cestui que trust* has a right under equitable procedure to come forward, provided he does so in time, and object to an order absolute being made; and he is not to be damaged by such an order merely because the garnishee will not act: Roberts v. Death, 18 C. L. J. 101; 8 Q. B. D. 316.

The proceedings in garnishment can have no effect to overthrow trusts in order to reach moneys supposed to belong to a debtor. Such moneys must be the property of the debtor absolutely: White v. White, 30 Vermont, 338; Keyser v. Mitchell, 67 Penn. 473.

The Wages Act, R.S.O. 1914, c. 143, s. 7, to which the provisions of section 146 are subject, is as follows:

7.—(1) No debt due or accruing due to a mechanic, workman, laborer, servant, clerk or employee, for or in respect of his wages, shall be liable to seizure or attachment, unless such debt exceeds the sum of $25, and then only to the extent of such excess.

(2) Nothing in this section shall apply to any case where the debt has been contracted for board or lodging, and in the opinion of the judge before whom the matter is brought, the exemption of $25 is not necessary for the support and maintenance of the debtor's family, or where the debtor is an unmarried person, having no family depending on him for support, and the debt was contracted on or after the 23rd day of March, 1889.

Mechanic, Workman, Laborer, etc.—A medical health officer of a city is not an employee: *Re* Macfie v. Hutchinson, 12 P. R. 167;

see also Forsyth v. Cunniff, 20 O. R. 478; and a secretary of a company on a salary of £200 a year, was held not to be a servant within the meaning of the English Act: Gordon v. Jennings, 9 Q. B. D. 45; see Lea v. Parker, 13 Q. B. D. 835; but he would probably be an employee: Fayne v. Langley, 31 O. R. 254. Sec. 146.

Wages.—Under this provision, the "wages" of any "mechanic, workman, laborer, servant, clerk or employee" to the extent of $25 is protected and exempt from garnishee proceedings, subject to the provisions of section 7 (2). A case can hardly be conceived where the relation of employee and employer exists to which this section would not apply. The word "employee" alone, independently of the other classes of persons mentioned, shows how extensive its provisions are. It was held that a person who at a post-master's request gratuitously assisted him in sorting letters was within the phrase "person employed under the Post-Office;" *per* Parke, B., R. v. Reason, 21 L. J. M. C. 13. And the word "employee" means "a person employed:" Worcester; see Gurney v. Atlantic, etc., Ry. Co., 2 N. Y. Supr. Ct. 453. It will include the president and vice-president of a company: Fayne v. Langley, 31 O. R. 254. It has been contended that where a mechanic works by the piece and not by the day, this clause does not apply. It is submitted that the section has application as much in one case as in the other; that work performed either one way or the other should be considered "wages" within the meaning of the section. The word "wages" would seem to apply to the personal earnings of laborers and artizans: see Gordon v. Jennings, 9 Q. B. D. 45; Riley v. Warden, 2 Ex. 59; Sleeman v. Barrett, 2 H. & C. 934; Ingram v. Barnes, 7 E. & B. 132; *Re* Jones, *Ex parte* Lloyd, 1891 2 Q. B. 231. It has been said that "according to the most approved lexicographers, 'salary' and wages are synonymous; both mean 'a sum of money periodically paid for services rendered.' If there is any difference in the popular sense, it is in the application to more or less honorable services:" *per* Sharswood, C.J., Commonwealth, *ex rel.* Wolfe v. Butler, 99 Pa. 542; see Strond, 696, 870. The earnings of a commercial traveller, whose employment is at so much a year, terminable by a week's notice, are "salary:" *Ex parte* Brindley, 35 W. R. 596. The Wages Act, section 7, refers to "wages," but section 14 refers to "wages or salary."

In the New Brunswick Act, 45 Vic. c. 17, s. 33, the word "wages" was used, and it was held that the salary of a deputy sheriff or gaoler could not be termed "wages" so as to entitle him to the exemption: *Ex parte* Howes, 34 N. B. R. 76.

Memorandum on Summons, and Affidavit Required.—See section 147 and notes thereto.

Board or Lodging.—The word "board" means "food, diet, provision;" "the customary meals obtained for a stipulated sum at the table of another; *as*, he pays a high price for his *board*:" Worcester; and the verb "to board" is defined by the same author as "to live in a house at a certain rate for eating; to be furnished with food or meals for a stipulated sum." It would not be necessary under this section that there should be any *stipulated* sum in order to constitute a debt for board. A person boarding with another would impliedly be responsible to the latter for what such board might reasonably be worth. The law would imply a contract to pay for it, unless it appeared that it

Sec. 146. was given gratuitously, and not with the intention of being charged for.

A "lodger," generally speaking, "is a person whose occupation is part of a house, and subordinate to, and in some degree under the control of a landlord or his representative, who either resides in or retains the possession of or dominion over the house generally, or over the outer door, and under such circumstances that the possession of any particular part of the house held by the lodger does not prevent the house being in the possession of the landlord." It is always important in determining whether a man is a lodger to see whether the owner of the house retains his character of master of the house, and whether he occupies a part of it by himself or his servant, and at the same time retains the general control and dominion over the whole house, and this he may do, though he do not personally reside on the premises:" *per* Bovill, C.J., Thompson v. Ward, L. R. 6 C. P. 360, 361; see also Phillips v. Henson, 3 C. P. D. 26; Ness v. Stephenson, 9 Q. B. D. 245; Morton v. Palmer, 51 L. J. Q. B. 7; Heawood v. Bone, 13 Q. B. D. 179.

The section applies to any one who boards or lodges another for reward, as well as to the assignee of the debt contracted therefor.

In the Opinion of the Judge.—This means "according to the judgment of the judge:" Omerod v. Todmorden Co., 8 Q. B. D. 664; see also R. v. London (Bishop), 24 Q. B. D. 213; Julius v. Oxford (Bishop), 5 App. Cas. 214. "Where, as in a multitude of Acts, something is left to be done according to the discretion of justices or other authorities on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the Act, otherwise the act done would not fall within the statute. 'According to his discretion' means, it is said, according to the rules of reason and justice, not private opinion; according to law, and not humor; it is not to be arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limits to which an honest man, competent to the discharge of his office, ought to confine himself, that is, within the limits, and for the objects intended by the legislature." "When the discretion has been exercised upon an erroneous principle or upon a misapprehension of the facts, there has been no real exercise of judicial discretion:" Gates v. Seagram, 19 O. L. R. p. 226. See also Macbeth v. Ashley, L. R. 2 Scotch App. 352, *per* Cairns, L.C.; Julius v. Oxford (Bishop), 5 App. Cas. 214; R. v. Marylebone, C. C. 34 Sol. J. 459; and other cases cited in note on the word "may" and other enabling words, *ante*.

Necessary for the Support, etc., of the Debtor's Family.—The judge by such evidence as may be brought before him or as he may require, will have to determine whether under the circumstances the $25 is "necessary" or not. The language used is of that class which it is unnecessary to define; its construction depending upon the particular circumstances of each particular case. See Johnson v. Crook, 12 Ch. D. 639; Webster v. Overseers of Ashton-under-Lyne, L. R. 8 C. P. 281, 306; Gladstone v. Padwick, L. R. 6 Ex. 203; *Re* Duke of Newcastle, L. R. 8 Eq. 700; Hatton v. Haywood, L. R. 9 Ch. 229; Whimsell v. Giffard, 3 O. R. 1.

It is submitted that a broad and liberal interpretation should be given to the language used. The word "support" is defined as, "to furnish with the means of living, as a family; to provide for, to main-

tain, to supply"; and "maintennnce" means, "supply of the neces- Sec. 146.
saries of life, sustenance, suhsistence, livelihood, support:" Worcester.

Education is included in the phrase "maintenance and support," as applied to children: *Re* Breed, 1 Ch. D. 226. It may, therefore, he stated, in a general way, that in determining whether the exemption is "necessary" or not, the health of the dehtor, his age and ahility to work, the number of his family, their aga and sex and stato of health, and aiso their ahiity to work, whether they or tho dehtor have employment, and other circumstances may he fit suhject of enquiry; and if the $25 shouid he considered by the judge, iu view of ail the circumstances of the case, to ho necessary for the purpose of ohtaining the necessaries of life and sustaining in an ordinnry way the dehtor's family, the exemption shouid he allowed.

Tho word "family" might here mean the wife nnd children only of the dehtor; hut it is submitted that the construction to he given to it shouid not he of so restricted a character. The word haa a variety of meanings and is controlled hy the context. The primary legal meaning is "children:" *per* Jessel, M.R., Pigg v. Clarke, 3 Ch. D. 674. In popular acceptance, it includes parents, chiidren, servants and all those whose domicile or home is in the same house, and under the same management or hend: Cheshire v. Burlington, 31 Conn. 329. In its more ordinary acceptance, it signifies nll the relatives who descend from a common root; in its most extensive scope, all the persons who live under the authority of another: Galligar v. Payne, 34 La. An. 1058: a. l another and more comprehensive definition is, "a number of persons who live in one house and under one management or head": Poor v. Hudson Ins. Co., 2 Fed. R. 438. And a mother and sister were heid to constitute a "familiy" within the exemption of earaings ciause in a statute of the State of Kansas: Seymour v. Cooper, 26 Kansas, 539.

Unmarried Person.—The effect of the section in its present form is, that in the case of an ordinary deht, the exemption does not appiy to an unmarried person having no family dependent on him for support, the amount coming to him, no matter how small, heing garnishahie. In the case of n deht contrneted for board or iodging, there wiii he no exemption in any case if, "in the opinion of the judge, the exemption of $25 is not necessary for the support and maintenance of the dehtor's family." In the case of a married person, having a family depending on him for support, if the deht is contracted for anything except for "board or iodging," the exemption applies.

Onus of Proof.—Where an exemption from garnishment is claimed under the provisions of the Wages Act, *ante*, it is necessary for the primary dehtor to estahlish the fact of such exemption: hut if the affidavit is not fiied or memorandum endorsed upon or annexed to the summons as required hy section 147, the deht is deemed not to have been incurred for hoard or lodging or the dehtor may he deemed hy the garnishee to have a family depending on him for support.

Ordinarliy the rule would be that the dehtor would have made out a *prima facie* case on hringing himself within these provisions, hy showing that the deht garnished was for wages or salary, and that he was married or, if unmarried, that he had a family depending on him for support, and the onus of proof would then have been shifted to the primary creditor to prove the facts under this section.

Sec. 147.

Evidence of repute extending over a considerable time that the debtor was known as a married man and had been keeping house apparently as a married man with wife and children, whom he supported as such, is sufficient proof to establish the exemption of the wages from attachment: *Re* Rochon v. Wellington, 5 O. L. R. 102.

Memorandum on garnishee summons where debt attached is for wages.

147.—(1) In all cases under the provisions of sections 151 and 155, where the debt sought to be garnished is for wages or salary, there shall be filed with the clerk an affidavit showing the residence of the primary debtor and the nature of his occupation in the service of the garnishee at the time of the issuing of the summons (if then in such service), and stating whether the debt alleged or adjudged to be due by the primary debtor to the primary creditor was or was not incurred for board or lodging, and there shall also be endorsed upon or annexed to the summons served on the garnishee a memorandum to the like effect, and in the absence of such affidavit or memorandum the debt may be deemed by the garnishee not to have been incurred for board or lodging.

Material where debts due by unmarried persons.

(2) If the primary debtor is alleged to be an unmarried person, having no family depending on him for support, a statement to that effect, verified by affidavit, shall be filed with the clerk and the statement shall also be endorsed upon or annexed to the summons served on the garnishee; and in the absence of such affidavit or statement, such person may be deemed by the garnishee to have a family depending on him for support. 10 Edw. VII. c. 32, s. 147.

Memorandum on Summons.—For form of memorandum required under this section, see Form at the end of Form 46.

The section was originally intended, no doubt, for the protection and relief of railway and other corporations and large employers of labor who, prior to these provisions, were obliged to await the result of the trial before paying the amount due by them. As now framed, these provisions will be found to be a great convenience to all classes of persons who are unfortunate enough to be made parties to garnishee proceedings, as the absence of the memorandum or the statement required by this section will permit payment of the exemption of $25 without waiting for the decision of the court.

The memorandum required, showing the residence of the primary debtor and the nature of his occupation in the service of the garnishee, if he is then in such service, and whether the debt alleged to be due was or was not incurred for board or lodging, must be set forth by affidavit and filed with the clerk, and a memorandum to the like effect endorsed upon or annexed to the summons, as required by this section.

Sec. 148.

Where the Creditor's Claim is a Judgment.

Attaching order to be granted on judgment.

148. After judgment has been recovered, application may be made to the judge, on behalf of the primary creditor, on affidavit stating when the judgment was recovered, and how much thereof remains unsatisfied, and that the deponent has reason to believe, and does believe, that some one or more persons (naming them, or stating that he is unable to name them) is or are within Ontario and is or are indebted to the primary debtor, for an order that all debts owing or accruing to the primary debtor be attached to satisfy the judgment; and the order may be made in the prescribed form. 10 Edw. VII. c. 32, s. 148.

Judgment Recovered.—That is duly entered by the clerk in the procedure book, or by the judge: see notes to section 98. A judgment more than six years old could be enforced in this way: Fellows v. Thornton, 14 Q. B. D. 335.

It will be observed that this, and the following sections, make provision for an attaching order being obtained, which, *when served*, shall have a certain effect: see section 149, and notes. A proceeding by attaching order only exists in cases where judgment has been recovered. Where judgment has not been recovered, a summons should be issued under section 155. An assignee of a judgment, though the action should not have been revived in his name, might proceed under this and the following sections: Goodman v. Robinson, 18 Q. B. D. 332; McLean v. Bruce, 14 P. R. 192; Smart v. Miller, 3 P. R. 385.

On Affidavit.—The affidavit on which to obtain an attaching order, under section 148, may be made by any person, if he has a knowledge of the facts as required by Con. R. 203; see Rule 45: *Re* Sato v. Hubbard, 8 P. R. 445. It will be observed that the deponent's belief that a debt is due is sufficient: see Vinali v. DePass, 1892 A. C. 90; Coren v. Barne, 22 Q. B. D. 249. But Rule 45 requires the grounds of belief to be given in affidavits as to statements made on belief. The affidavit should state the nature of the debt sought to be attached, and the amount thereof, if known to the deponent, or that he has been unable to ascertain the amount thereof.

Proceedings on such order could not be prohibited on the ground that they were founded on a defective affidavit: *Re* Sato v. Hubbard, *supra*.

Naming Them or Stating That He is Unable to Name Them.—This authorizes what may be called "a roving garnishee order." Delay sometimes occurs in getting an ordinary garnishee summons issued and served. An attaching order enables a judgment creditor, so soon as he finds anybody who is indebted to his judgment debtor, to attach the debt, without first resorting to the issue of a summons to the extent to which the judgment is unsatisfied and the garnishee may pay the amount of the debt into court: s. 149. To enforce payment, he must, however, issue the summons provided for in section 151.

Sec. 149.

In the division court, only debts owing by persons (or corporations: section 153; R.S.O. 1914, c. 1, s. 29 (x) who either reside, or carry on business, in Ontario, are subject to garnishee proceedings: see ss. 93 (8), 148, 151, 153, 155; Wilson v. Postle, 2 O. L. R. 203. There is no provision in the Division Court Act or Rules similar to Con. R. 590 (b)—formerly Con. R. 911 (2)—under which a garnishee order may be made in the Supreme Court of Ontario, if the debt owing by the garnishee to the primary debtor is one which the primary debtor might himself sue for, even when the garnishee neither resides nor carries on business in Ontario: see McMullkin v. Traders' Bank of Canada, 26 O. L. R. 1.

A bank authorized by Parliament to do business in Ontario, although its head office be out of Ontario, is deemed potentially and actually to be within the jurisdiction of Ontario for the purposes of the law, as well as for the transaction of business: The Bank Act, R.S.C. c. 29, s. 76; County of Wentworth v. Smith, 15 P. R. 372.

Non-residents may be garnished provided they carry on business in Ontario through an agent who has an office as *such* therein: see notes to sections 89, 93 (8), 146, 153. So a foreign insurance company, having a local agent in Ontario who merely receives and forwards insurance applications, carries on business in Ontario and may be garnished, and service on such agent is sufficient: Simpson v. Chase, 14 P. R. 289. Section 93 (8) allows garnishee proceedings against a partnership firm carrying on business in Ontario, although some members of the firm reside out of Ontario, provided some person who has the control or management of the firm's business, or a member of the firm, within Ontario, is served with the attaching order.

Under the English Con. Rules, it was held that the granting of a garnishee order was discretionary, and that a debt owing from a foreign corporation, though doing business in England, should not be garnished where the order might not legally discharge the garnishee from the debt: Martin v. Nadel, 1906, 2 K. B. 26; but see McMullkin v. Traders' Bank of Canada, 26 O. L. R. 1.

Form of affidavit for attaching order, No. 47; form of order, No. 48 (a).

Service thereof to bind all debts, etc.

Garnishee may pay in his own discharge.

149. The service of the order on a garnishee shall have the effect (subject to the rights of other persons), of attaching and binding in his hands all debts then owing or accruing from him to the primary debtor, or sufficient thereof to satisfy the claim of the primary creditor, and payment by the garnishee into court of the debt so attached to the extent to which the judgment is unsatisfied, shall be to that extent a discharge of such debt. 10 Edw. VII. c. 32, s. 149.

The Service.—The service of a garnishee order is regulated by sections 152 and 153. The service should, if possible, be personal; or at least it should be shown that the order came to the knowledge of the garnishee: Ward v. Vance, 3 P. R. 130; Mason v. Moggeridge, 18 C. B. 642; Newman v. Rook, 4 C. B. N. S. 434; or that reasonable attempts have been made and proved fruitless, and the judge has dispensed with personal service: Tomlinson v. Goatly, L. R. 1 C. P. 230.

As to substitutional service, see notes to sections 88, 89, and also to sections 146, 148 and 153. **Sec. 149.**

Service on the local agent of a foreign insurance company who had power merely to receive and transmit applications was held a good service: Simpson v. Chase, 14 P. R. 280; see section 153.

Warning to be Endorsed on Order.—The garnishee must be warned upon every attaching order and garnishee summons not to pay the debt to the primary debtor; and a warning (Form at foot of Form 46) must be subjoined to the attaching order.

Effect of Service of Order.—It is the service on the garnishee which is effectual. Until the order is served it has no efficacy: *Re* General Horticultural Co., *Ex parte* Whitehouse, 32 Ch. D. 512; Tate v. City of Toronto, 3 P. R. 181; and where a garnishee was advised by telegram that the money had been garnished, but paid the money nevertheless to the debtor before service, it was held that the debt was not attached: O'Donovan v. Dillon, 24 L. R. Ir. 442.

An attaching order binds only such debts as the debtor can honestly deal with without affecting the rights of the other parties: Parker v. McIlwain, 17 P. R. 84; and a prior equitable assignment will have priority over the attaching order: *Ex parte* Whitehouse, 32 Ch. D. 512. It binds "all debts then owing or accruing" from the garnishee to the primary debtor. It is to be observed that nothing is bound but a "debt." Should there be merely a contingent liability or a claim sounding in damages it would not be bound or affected by the order. Care should, therefore, be taken by the garnishee, that he pays nothing but a debt. Where a garnishee was subject to a liability for unliquidated damages, and allowed a garnishee order absolute to be made by default against him, and afterwards the claim became liquidated by an award, and the money was then claimed under a prior assignment by third parties, it was held that the garnishee had no right to interplead, and that he merely had himself to blame in not appearing and showing to the court that there was no attachable debt due: Randall Lithgow, 12 Q. B. D. 525. And where a garnishee had notice of an assignment of a debt due by him for rent and allowed the attaching order to be made, and afterwards paid the rent as required by the order, he was held liable to pay the same again to the assignee: Foulds v. Chambers, 11 Man. L. R. 300.

See *ante* as to what are garnishable debts.

Until an order to pay is obtained, the primary debtor has the right to enforce all his remedies against the garnishee. If, therefore, the debtor has a judgment and execution, the garnishee should pay the amount to the sheriff advising him at the same time of the existence of the attaching order: Genge v. Freeman, 14 P. R. 330. This is equivalent to payment into court, inasmuch as the payment is to an officer of the court, in trust for the proper person: Turnbull v. Robertson, 38 L. T. 389. After a garnishee order absolute, an execution against the garnishee issued by the primary debtor would be stayed: *Re* Conaan, *Ex parte* Hyde, 20 Q. B. D. 690.

It is next to be observed that *all* debts are attached. Where a debtor had £6,800 on deposit with the garnishees, and an attaching order was made to satisfy a judgment of £6,000, it was held that under the terms of the order, the garnishees was justified in refusing to pay checks for the balance over £6,000: Rogers v. Whiteley, 23 Q. B. D. 236; 1892 A. C. 118. An order might be made, however,

Sec. 149. restricting the attachment to such amount as will satisfy the judgment debt, but care must be taken that no part is released, unless it is clear that the whole amount due by the garnishee is the beneficial property of the judgment debtor: *Ib.*; but the order does not prevent a valid assignment by the debtor of any surplus of the debt beyond what is sufficient to satisfy the claim of the attaching creditor: Yates v. Terry, 1902, 1 K. B. 527.

Under The Creditors Relief Act, R.S.O. 1914, c. 81, s. 5 (1) "a creditor who attaches a debt shall be deemed to do so for the benefit of all creditors of his debtor as well as for himself": subsection (3). This section shall not apply to debts attached by proceedings in a division court unless before the amount recovered by the garnishee proceedings is actually received by the creditor an execution against the property of the debtor is placed in the hands of the sheriff of such county.

Sub-section (5), "Where money which a sheriff is entitled to receive under the provisions of this section is paid into a division court, the sheriff shall be entitled to demand and receive the same from the clerk of such court for the purpose of distributing it under the provisions of this Act."

The garnishee should not pay any amount to the judgment debtor until after the summons to be issued under section 150 has been disposed of, and judgment given ordering payment by the garnishee: Turner v. Jones, 1 H. & N. 878; Sykes v. Brockville & Ottawa Ry. Co., 22 U. C. R. 450; Tate v. Corp. of Toronto, 10 U. C. L. J. at p. 67.

Section 149 provides that the garnishee may discharge himself from all liability by paying the money into court to the extent of the unsatisfied judgment.

Payment into court will be an effectual discharge of the garnishee if the amount due by him was an attachable debt, and the court had jurisdiction: Culverhouse v. Wickens, L. R. 3 C. P. 295; Mayor of London v. Cox, L. R. 2 H. L., at pp. 261, 262, and even if the court has no jurisdiction, if the garnishee without collusion and in ignorance of the want of jurisdiction, pays under compulsion of the attachment, he will be protected: Banks v. Self, 5 Taunt. 234; Harrington v. McMorris, 5 Taunt. 228, Westoby v. Day, 2 E. & B. 605; Wood v. Dunn, L. R. 1 Q. B. 77; L. R. 2 Q. B. 73. But where money belonging to a person was paid into court on proceedings against another person of the same name as the person entitled thereto, and afterwards paid out to him on an order of the court, it was held that the proceedings did not protect the garnishee against the claim of the person rightfully entitled to the moneys: Andrews v. Canadian M. L. & Inv. Co., 29 O. R. 365. The effect of binding all debts in the hands of the garnishee, is to give the primary creditor the security of the garnishee to the extent of its indebtedness. Indeed, it was once said that: "The moment the order of attachment is served upon the garnishee, the property in the debt due from him is absolutely transferred from the judgment debtor to the judgment creditor:" *per* James, L.J., *Ex parte* Joselyne, *Re* Watt, 8 Ch. D. 327, at p. 330; Emanuel v. Bridger, L. R. 9 Q. B. 290; Low v. Blackmore, L. R. 10 Q. B. 485; but this was but a colloquial expression, and meant nothing more than that the debt was bound: *per* Brett, L.J., Chatterton v. Watney, 17 Ch. D. 261; and see *per* Cotton, L.J., and Jessel, M.R., "the order does not transfer the debt;" *Ib.* 262; and it is now clear that a garnishee order does not transfer the debt: *Re* Combined Weighing & Ad. M. Co., 43 Ch. D. 99; Wood v. Joselin, 18 A. R. 60; *Re* Thompson, 17 P. R. 109.

A garnishee may protect himself by application to the judge for direction under Rule 26. Sec. 150.

Until "judgment," under s. 154, is obtained against the garnishee, the primary creditor holds no judgment against him. After such "judgment" is obtained, the primary creditor is entitled to have a judgment summons issued against the garnishee: section 100, sub-section 2 (b) (i): Cowan v. Carlill, 52 L. T. 431; the contrary decisions in *Re* Hanna v. Coulson, 23 O. R. 493; 21 A. R. 692; and *Re* Dowler v. Duffy, 29 O. R. 40, do not apply in view of the altered wording of section 190: see notes to that section.

The proceedings in garnishment are purely collateral to the action between the primary debtor and the primary creditor, and when the right of the primary creditor to enforce his claim in the main proceeding is at an end, the charge upon the debt in the hands of the garnishee drops with it. The primary creditor never becomes a creditor of the garnishee. The garnishee continues to be a debtor to his own creditor, until he has paid into court, or to the attaching creditor, after order so to pay, or a levy of the amount has been made of his property, when he ceases to be a debtor to the amount paid or levied: Wardrope v. Canadian Pacific Ry. Co., 7 O. R. 321; *Re* Combined Weighing & Ad. M. Co., 43 Ch. D. 99; Barnard v. Moison, 15 S. C. R. 716; but the judgment creditor's right against the garnishee would be defeated by a discharge in insolvency, in the same manner as that of an ordinary creditor: Kent v. Tompkinson, L. R. 2 C. P. 502. Inasmuch as the primary creditor never becomes a creditor of the garnishee, the amount payable by the garnishee to him cannot be garnished for a debt due by the primary creditor: Cooper v. Lawson, 6 T. L. R. 34. Although the order of attachment creates no debt as between the primary creditor and garnishee: *Re* Combined Weighing & Ad. In. Co., *supra*, it seems that it gives the primary creditor a right of action for the debt attached: Pritchett v. English and Colonial Syndicate, 1899 2 Q. B. 428. The rights of the primary creditor as against an assignee for the benefit of creditors, a sheriff claiming under an order for attachment or under The Creditors Relief Act, and the holders of mechanics' liens will be found considered in the notes to section 162.

If there are several attaching orders, they rank in the order of their service: Tate v. Corp. of Toronto, 3 P. R. 181; Sweetnam v. Lemon, 13 C. P. 534; but only to the extent of the debt due at time of service: Parker v. Howe, 12 P. R. 353. If a claim is entered in the wrong court, and is not transferred until a valid garnishment summons has been issued from that court, the latter will retain priority: Sewrey v. Burk, 16 C. L. T. 322.

The order does not give any right to the securities for the debt, and where a mortgagee of leasehold property was a judgment debtor and a garnishee order was served on the mortgagor, it was held that the judgment creditor had no interest in the land and was not entitled to a surplus in the hands of a prior mortgagee, after a sale of the mortgaged premises: Chatterton v. Watney, 16 Ch. D. 378; 17 Ch. D. 259.

150. Payment by the garnishee after service on him of the order, otherwise than into Court, except by leave of the Judge, shall, to the extent of the primary creditor's claim and costs, be Payment to any but primary creditor void.

Sec. 150. void; and the garnishee shall be liable to pay the same again, to the extent of the primary creditor's claim, unless the Judge otherwise orders. 10 Edw. VII. c. 32, s. 150.

Payment.—The garnishee should not make any payment, except into court, until after the summons mentioned in section 151 has been heard and an order for payment made: see cases cited in notes to section 149. If the service of the order is not good, the garnishee could, probably, pay over the money to the primary debtor with impunity: Cooper v. Brayne, 3 H. & N. 972, Am. ed. So also if there was no attachable debt: Randall v. Lithgow, 12 Q. B. D. 525; Stuart v. Grough, 15 A. R. 299.

Attaching and Binding.—No payment made to the primary creditor before judgment given against the primary debtor will discharge the garnishee from his liability unless an order for such payment has been first obtained from the judge. When the judge fully decides, the matter is at an end, unless judgment is given against the garnishee: see Belhouse v. Mellor, 4 H. & N. 116. Should the judge adjourn the case, the garnishment would still hold. Judgment against the primary debtor and garnishee may be given at different times, but there must be a *judgment* against the primary debtor before anything can be awarded against the garnishee: see notes to sections 146, 149.

Payment into Court.—See notes to section 149. The safer course is to pay the money into court: Sykes v. Brockville & O. Ry. Co., 22 U. C. R. 459; Culverhouse v. Wickens, L. R. 3 C. P. 295, but this is not an absolute protection. If the amount was not a debt at the time of service, or if the court is without jurisdiction, or if the debt was assigned before the service: see notes to section 157.

Payment Void.—"It has been said that when a statute declares a contract void, but imposes a penalty for making it, it is not voidable merely. In general, however, it would seem that where an enactment has relation only to the benefit of particular persons, the word 'void' would be understood as 'voidable' only at the election of the person for whose protection the enactment was made, and who are capable of protecting themselves, but that where it relates to persons not capable of protecting themselves, or where it has some object of public policy in view which requires strict construction, the word receives its natural full force and effect:" Maxwell on Statutes, 190; Johnson v. Martin, 19 A. R. 592.

Unless the Judge Otherwise Orders.—This the judge would probably do if the primary creditor had by his words or acts, assented to the payments by the garnishee to any other than himself of the moneys garnished: *Re* Jones, *Ex parte* Kelly, 7 C. P. 149; Freeman v. Cooke, 2 Ex. 654; Johnson v. Credit Lyonais Co., 3 C. P. D. p. 40; De Busche v. Alt, 8 Ch. D. 286; *Re* Bohin & San Francisco Ry. Co., L. R. 3 Q. B. 584, and that class of cases.

Payment into court would protect the garnishee if an attachable debt existed at the time of the service of the order: Culverhouse v. Wickens, L. R. 3 C. P. 295; see remarks of Willes, J., at p. 297. To discharge the garnishee there must be an attachable debt and either payment made under compulsion of law or execution levied: Sykes v.

Brockville & O. Ry. Co., 22 U. C. R. 459; Carr v. Baycroft, 4 U. C. L. J. 209; McNaughton v. Webster, 6 U. C. L. J. 17. Sec. 151.

The payment to the creditor must be made by compulsion of law; *i.e.*, some process of law which amounts to compulsion. And this is indispensable for the indemnity of the garnishee and, therefore, indispensable in order that the garnishee should be bound: Mayor of London v. London Joint Stock Bank, 6 App. Cas. 400; Stuart v. Grough, 15 A. R. 305. But if the garnishee pay the money into court and allow it to be paid out to the wrong person, he will not be protected: Andrews v. Canadian M. L. & Inv. Co., 29 O. R. 365.

Money paid by the garnishee to the primary debtor could not be recovered back if it was paid voluntarily, unconditionally and with full knowledge and recollection of the attaching order: Bilbie v. Lumley, 2 East. 469; Towsend v. Croudy, 8 C. B. N. S. 477; Perry v. Newcastle, 8 U. C. R. 363; Montreal Ass. Co. v. McCormick, 25 U. C. R. 440; Baldwin v. Kingstone, 18 A. R. 63, 83, 98, 109, 672; Stewart v. Ferguson, 31 O. R. 112.

Liable to Pay the Same Again.—The liability of the garnishee to pay the claim of the judgment creditor, notwithstanding the intermediate payment to the judgment debtor, is but the logical consequence of the attachment which effectually binds the debt: see notes to section 149.

151. Whether an attaching order is or is not made, the primary creditor may cause to be issued out of the court of the division in which the garnishee, or one of them, if there be joint garnishees, resides or carries on business, a summons in the prescribed form, upon or annexed to which shall be a memorandum shewing the names of the parties as designated in the judgment, the date when, and the court in which, it was recovered, and the amount unsatisfied, and the summons shall be returnable either at any ordinary sittings of the court, or at such other time and place, to be named therein, as the Judge may appoint. 10 Edw. VII. c. 32, s. 151. Primary creditor may summon garnishee.

Joint Garnishees.—This phrase has not been judicially interpreted in any reported case. It is probable that it would be held to extend only to a case where the garnishees were jointly liable. Otherwise garnishees from all corners of the province might be summoned to a distant court merely because they, and a person with whom they had no joint interest, happened to have a common creditor.

Resides or Carries on Business.—See notes to sections 72 and 89, and see also notes to sections 87, 152 and 153, as to the service of the summons. If the garnishee be a body corporate, not having its chief place of business within Ontario, having, however, an agent in the province who has an office *as such agent*, it is provided by section 153 that such agent may be served as is nearest to the place where the court is held.

A Summons.—For form of summons when creditor's claim is a judgment, see Forms 4, 46.

Sec. 152.

Court in which it was Recovered.—If the judgment was recovered in a division other than that in which the garnishee or one of the garnishees, if there be joint garnishees, "resides or carries on business," the judgment must be transferred under section 188: Rule 28.

At Such Other Time and Place.—This would allow the judge to appoint any "time and place" within the county for the disposal of such matters.

Mode of service.

152. A copy of the summons and memorandum shall be served on the garnishee, within the time and in the manner provided for the service of a summons in other actions, and also on the primary debtor, unless the judge otherwise orders. 10 Edw. VII. c. 32, s. 152.

Service of Summons.—The service on the garnishee must in all cases be made at least ten days before the return thereof, and the service on the primary debtor ten or fifteen days (according to the places of residence of the parties) before the return thereof: see sections 85, 87, 89 and 140, and notes thereto. As the proceedings against a garnishee are effectual only on service, it is submitted, that if the garnishee should die before service, the debt could not be reached without proceedings against his representative: *Re* Easy, *Ex parte* Hill v. Hymans, 19 Q. B. D. 538.

If the amount of the primary debtor's claim exceeds $15, the service must be personal, unless the judge otherwise orders, but if the claim does not exceed $15, the service may be personal, or on his wife, or servant, or grown-up inmate of the dwelling-house or usual place of abode, or business of the person to be served: section 87, and the notes to that section.

The primary debtor must be served with the summons, unless the judge otherwise orders: section 152.

The judge may order substitutional service, or by advertisement or otherwise: section 88.

Unless the Judge Otherwise Orders.—Apart from the requirements of section 152, the summons should, in all cases be served on the primary debtor: Ferguson v. Carman, 26 U. C. R. 26: Beaty v. Hackett, 14 P. R. 395. The result of the proceeding must be to incur costs, and no judgment debtor should have his credits reduced or his debts increased without an opportunity of being heard: McLean v. Allen, 14 P. R. 84. At common law, every person whose rights are to be affected by any legal proceeding has a right to be heard: Maxwell on Stats. 325; Thorburn v. Barnes, L. R. 2 C. P. 384; *Re* Pollard, L. R. 2 P. C. 106. The debtor should know of the proceedings, for the judgment upon which they were founded might possibly have become *effete;* or if the debt had been assigned, and no notice given by the assignee (as he is bound to do: Robinson v. Nesbitt, L. R. 3 C. P. 264), the proceeding would lead to a great deal of trouble or injustice. The judge should not, for any reason of mere convenience, dispense with the service, but insist on its being made in every case if practicable: 10 C. L. J. 65, 66. Attempts should at least be made to serve the party, and evidence of these presented to the judge. Whether or

not the efforts made are reasonably sufficient is a matter for the discretion of the judge: Tomlinson v. Gourly, L. R. 1 C. P. p. 231, *per* Erle, C.J. See notes to section 149 and also notes to section 88, *ante*, as to substitutional service. Sec. 153.

Defences in Garnishee Proceedings.—The garnishee is entitled to set up any defence as between the primary creditor and the primary debtor which he would be entitled to set up in an ordinary action, and also such defence as between the garnishee and the primary debtor and show any other just cause why the debt should not be paid over or applied on the claim. As to procedure in such defences see section 157 and notes: Rule 26.

Joint Garnishees.—See notes to sections 85 and 151.

153. In proceedings under section 151 where the garnishee is a body corporate, not having its chief place of business within Ontario, the summons shall be issued from the court in which the judgment was recovered, or in case the judgment has been transferred, from the court to which it was transferred, and shall be served upon the agent of the body corporate whose office as such agent is nearest to the place where the court is held. 10 Edw. VII. c. 32, s. 153. Service on corporation, whose head office is not in the Province.

A Body Corporate.—The late Chief Justice Marshall, of the Supreme Court of the United States, defined a corporation as: "An artificial being, invisible, intangible, and existing only in contemplation of law:" Dartmouth College v. Woodward, 4 Wheaton, 518, 636.

See also notes to sections 146, *et seq.*

Not Within Ontario.—What has been said in the notes to sections 89, 148, 149, has also application here.

In Which the Judgment Was Recovered.—This section has only application to cases "in which judgment was recovered." Where there is no judgment, provision is made for service of a garnishee summons under sections 155 and 156.

Judgment may be said to be "recovered" in cases not tried when the decision of the case has been duly entered by the clerk in the procedure book: see Smith v. Logan, 17 P. R. 219; or when given by the judge, in cases which are tried: Stratton v. Johnston, 7 L. C. G. 141; R. v. Rowland, 1 F. & F. 72; Dews v. Riley, 11 C. B. p. 443; Tuhby v. Stanhope, 5 C. B. 790. It is submitted that "judgment was recovered" within the meaning of this section, only in that court in which judgment was originally entered, and that this provision does not apply to cases of judgment on transcript.

Service on Agent.—See section 89 and notes thereto.

Nearest to the Place Where the Court is Held.—Distance is measured as the crow flies, in a straight line. The point in the division nearest to the agent's office should be taken as the starting point. The *place* of sitting has nothing to do with the question in this case: see Moufflet v. Cole, L. R. 8 Ex. 32.

Sec. 154.

Judgment at hearing.

154. At the hearing of the summons, on proof of the amount owing or accruing from the garnishee to the primary debtor, and if no sufficient cause appears why it should not be paid and applied in satisfaction of the judgment, the Judge may give judgment against the garnishee in the prescribed form for the amount owing or accruing from him, or sufficient thereof to satisfy the judgment; and execution against the garnishee may issue thereon, if due, or when and as it becomes due, or at such later period as the Judge may order. 10 Edw. VII. c. 32, s. 154.

At the Hearing of the Summons.—To "hear a cause or matter means to hear and determine it." And "unless there be something which by natural intendment, or otherwise, would cut down the meaning, I apprehend there can be no doubt that the Legislature, when they direct a particular cause to be heard in a particular court, mean that it is to be heard and finally disposed of there. And further, when they say that it is to be heard—(meaning heard and finally disposed of)—in a particular court, they mean, unless there is something in the context which either by natural interpretation or by necessary implication would cut it down, that in all matters which are not provided for, that court is to follow its ordinary procedure:" *per* Lord Blackburn, *Re* Green, 51 L. J. Q. B. 44; or, as Lord Selborne, L.C., put it in the same case, "Hearing" includes not only its necessary antecedents, but also the necessary or proper consequences: Green v. Penzance, 6 App. Cas. 657; Stroud, 342.

Proof.—See notes to section 156.

A judge of a division court has no jurisdiction to give judgment against a garnishee without proof of the amount owing by the garnishee to the judgment debtor; and for such a course prohibition will lie: *Re* Johnson v. Therrien, 12 P. R. 442.

No Sufficient Cause Appears.—That is, no question arising which the judge has to try. As to defences, see section 157.

May Give Judgment.—Judgment should not be given against a garnishee if there is any suggestion that the debt has been assigned, or is not the beneficial property of the debtor. Such suggestion may come either from the debtor or the garnishee: Lovely v. White, 12 L. R. Ir. 381.

If the garnishee has a lien upon the money, judgment can only be given for the balance due after satisfying the lien: Nathans v. Giles, 5 Taunt. 558; Nolan v. Crook, 5 Humphrey, 312; Smith v. Clarke, 9 Iowa, 241; Grant v. Shaw, 16 Mass. 341; Curtis v. Norris, 8 Pick. 280; Goddard v. Hapgood, 25 Vermont, 181; or if he is entitled to any set-off: Hessa v. Buffalo, B. & G. Ry. Co., Chambers 30th March, 1857, *per* Robinson, C.J.; Nedley v. same defendants, 3 U. C. L. J. 111; or if the debtor is bound to indemnify him against a claim for which he is liable: Rymill v. Wandsworth Dist. Bd., 1 C. & E. 82; but a mere cross-claim, which cannot be set-off, or which would amount only to a counterclaim, would not entitle the garnishee to resist judgment for the full amount of the debt: Stumore v. Campbell, 1892 1 Q. B. 314.

No set-off will be allowed the garnishee of a debt due by the judgment creditor to him: Sampson v. Seaton & Beer Ry. Co., L. R. 10 Q. B. 28; but if the garnishee had obtained judgment against the primary creditor, the judgment might be set-off under section 174. Sec. 155.

Form Prescribed.—Form of Judgment, No. 144.

Amount Owing or Accruing.—The Legislature here clearly intended to use no uncertain expression, but employed words meaning a debt *whether past due or maturing.*

To Satisfy the Judgment.—This would include the costs of recovering judgment, and which form part of it; but would not, in itself, cover the costs of garnishment proceedings, to meet which section 150 was introduced in 1880.

When It Becomes Due.—The order went in this form in Tapp v. Jones, L. R. 10 Q. B. 591; see notes to section 146. No different mode of payment can be substituted than that which exists between the primary debtor and garnishee: Turner v. Jones, 1 H. & N. 878; and the garnishee will not be compelled to pay until the term of credit expires: Harding v. Barrett, 3 U. C. L. J. 31.

Execution Against Garnishee.—Under section 154 execution may issue against the garnishee if the money is due by him, or when and as it becomes due, or such later period as the judge may order: see Tapp v. Jones, L. R. 19 Q. B. 591. If the primary creditor is obliged to issue execution against the garnishee the cost of the execution and the bailiff's fees are to be levied on the garnishee: Rule 27.

Form of Execution against Garnishee, No. 145.

Where the Primary Creditor's Claim not a Judgment.

155.—(1) Where a judgment has not been recovered for the claim of the primary creditor he may cause to be issued out of the court of the division in which the garnishees, or one of them if they are joint garnishees, reside or carry on business, a summons, Form 4, with the particulars of the claim of the primary creditor against the primary debtor with reasonable certainty and detail attached thereto or endorsed thereon, and the summons shall be returnable, as provided by section 151. Garnishee summons before judgment.

(2) As between the primary creditor and the primary debtor the summons shall be deemed a special summons, and all provisions of this Act applicable to a special summons and proceedings thereon shall apply. Summons to be deemed special summons.

(3) Where several garnishees reside or carry on business in the same division they may, by leave of the Judge, be included in the same summons. Several garnishees included in summons.

(4) A copy of the summons and particulars shall be served on the primary debtor and on the garnishee in the manner Service of summons.

Sec. 156. provided for the service of a summons in other actions. 10 Edw. VII. c. 32, s. 155.

The Claim.—That is "a debt or money demand," as mentioned in section 146.

With Reasonable Certainty and Detail.—As to requisites of particulars generally, see section 98 and notes.

Garnisheeing Wages.—Section 147, and notes; also The Wages Act. R.S.O. 1914, c. 143, *ante*. Where the debt sought to be garnished is for wages or salary the affidavit required by section 147 must be filed, and the memorandum required by that section must be endorsed on or annexed to the summons: see notes to s. 147 and Form of Affidavit referred to there. Form of Summons, No. 146.

A chartered bank doing business in Ontario, under the authority of Parliament, although its head office is out of Ontario, is deemed potentially and actually resident in Ontario, for the purposes of the law as well as for the transaction of business: R.S.C. c. 29, ss. 76 *et seq.*; County of Wentworth v. Smith, 15 P. R. 372. Where the debtor resides out of Ontario, an action must be brought in a division in which the cause of action arose, or partly arose: section 75 (formerly section 87). That section was not intended to apply to a garnishee plaint at all: *Re* Franklin v. Owen, 15 C. L. T. 158, 185.

If a garnishee should be resident in the division where an action may properly be brought against a person not resident in Ontario, it would seem probable that that court would then have jurisdiction.

Cause of Action Arose.—See notes to section 72 and notes *supra*.

A garnishee proceeding under this section is an "action" or "cause" within the meaning of section 79, and may be transferred from a wrong to a proper forum under that section: *Re* McCabe v. Middleton, 27 O. R. 179; and a garnishee summons under this section may be issued out of the division in which the garnishee resides or carries on business notwithstanding that the cause of action did not arise, and that the primary debtor does not reside or carry on business there: *Ib.*

Service of Summons.—See section 89 and notes to section 152. Section 155 (4) requires the primary debtor, as well as the garnishee, to be served in the same manner as in "other actions," *e.g.* in the same way as a special summons: sub-section (2). This differs from the provision in the former Act, s. 191, which empowered the judge to dispense with service on the primary debtor. Service on the primary debtors cannot now be dispensed with. Any number of garnishees who reside or carry on business in the same division may by leave of the judge, be included in the same summons: s. 155 (3).

Judgment against garnishee.

156. Where judgment is obtained against the primary debtor under the provisions of sections 98, 99, or 100, or is obtained at the trial, or where judgment is not then given, on proof of the service on the primary debtor of a copy of the summons and particulars, and of the debt due and owing by the primary debtor, the Judge, on proof of the amount owing or accruing due to the

primary debtor from the garnishee, may give judgment against the garnishee in the prescribed form for the amount so owing or accruing from him or sufficient thereof to satisfy the claim of the primary creditor and costs, which sum the garnishee shall pay into court towards the satisfaction of the claim and costs; and, in default, execution may issue therefor, if due, or as it becomes due, or at such later period as the Judge may order. 10 Edw. VII. c. 32, s. 156. Sec. 156.

Form of Judgment.—No. 147.

Judgment Against the Primary Debtor, Etc.—That is, either judgment by default: s. 98; or judgment where defendant files notice of defence but does not appear at the trial: s. 99; or judgment on motion for same: s. 100; or judgment at the trial of the garnishee proceeding: s. 156; or where the claim against the primary debtor is proved but "judgment is not then given" but is reserved and afterwards given against the primary debtor.

Or is Not Then Given.—The adjudication against the primary debtor and garnishee need not be made at the same time, nor embraced in one order, but it frequently is so: see Victoria Mut. Ins. Co. v. Bethune, 1 A. R. 434. If judgment against the primary debtor be reversed, that against the garnishee should also be reversed: Rowlett v. Lane, 43 Texas, 274; and restitution will then be ordered: McKindsey v. Armstrong, 11 P. R. 200.

Even if judgment is not obtained against the garnishee, there is jurisdiction to give judgment against the primary debtor notwithstanding the proceeding is brought in a division other than that in which the primary debtor resides or carries on business or in which the cause of action arose. This was formerly not so, as was held in *Re* Holland v. Walisee, 8 P. R. 186, and in *Re* McCabe v. Middleton, 27 O. R. 170; but subsequent to the decisions in the above cases, subsection (2) of section 192 of the Division Courts Act in the R.S.O. of 1897 (now section 156) was introduced, which provided that if no defence was entered by the primary debtor and the primary creditor abandoned the claim against the garnishee, final judgment might be entered by the clerk against the primary debtor as if there had been no garnishee proceedings. Subsequently Mr. Justice Street held in Lented v. Congdon, 1 O. L. R. 1, that where an action was entered under the then section 190 in the division where the garnishee resided, the primary debtor residing in another division, there was jurisdiction to give judgment against the primary debtor even if the action was dismissed against the garnishee, and even if the primary debtor disputed the jurisdiction of the court, but did not give notice disputing the claim: Hopper v. Wollison, 16 O. L. R. 452; *Re* Boyd v. Sarjeant, 10 O. W. R. 377, 521; but this does not apply to the case where the garnishee resides without the province: Wilson v. Postie, 2 O. L. R. 203. Sub-section (2) of sec. 192 of the old act has been omitted from the present statute. It is submitted, however, that inasmuch as sub-section (2) of section 156 of the present act (formerly sec. 192) provides that as between the primary creditor and primary debtor the garnishee summons is to be deemed a special summons, and that all the provisions of the act applicable to a special summons *and*

Sec. 156. *proceedings thereon* shall apply, the decision in *Re* Lented v. Congdon, *supra*, still prevails; and that unless the primary debtor disputes the primary creditor's claim, judgment is to be entered against the primary debtor by the clerk as if in default of defence on a special summons, notwithstanding the primary creditor may not obtain judgment against the garnishee or even if he withdraws the claim against him. This may be said, as was pointed out in Lented v. Congdon, to open a way for an abuse of the garnishee clauses, and enable a primary creditor by naming a friend as garnishee, to bring his action against the primary debtor in the court of the primary creditor's own choosing; but in such a case the judge has power on application to him under Rule 35 (also under sec. 97) where a party has been improperly added for the mere purpose of giving the court jurisdiction or colorable jurisdiction, to the prejudice of another party, to strike out the garnishee and leave the remaining parties to their rights whatever they may be, as to jurisdiction or otherwise.

When, however, the garnishee was made a party *bona fide* it would seem, upon the principle laid down in *Re* Lented v. Congdon, *supra*, that the court has jurisdiction over the primary debtor in such a case even if the primary creditor failed to recover against the garnishee.

Transferring the Case to Another Division.—The provisions as to transferring cases to the proper court apply to garnishee cases: s. 79; McCabe v. Middleton, 27 O. R. 170, referred to in Wilson v. Postie, 2 O. L. R. p. 203.

The judgment in garnishee cases, whatever the amount in dispute, was formerly final and conclusive: *per* Moss, J., at pp. 431, 433 and 434 of 1 A. R.; but provision is now made for appeal in cases in which the sum in dispute upon the appeal exceeds $100: see section 125 (a). In other cases it is still final, subject to the right of the judge to set it aside or grant a new trial.

A married woman would be subject to judgment as a garnishee. Her separate property, however, would only be bound: Bank of Montreal v. Richardson, 34 C. L. J. 329; Palliser v. Gurney, 19 Q. B. D. 519; Scott v. Morley, 20 Q. B. D. 120; notes to sections 98, 191, *ante*.

For form of a judgment against a married woman in action of contract see Form 114.

The provisions of section 100 as to speedy judgments now apply to garnishee proceedings: s. 2 (j). If some of the parties required to be served are not served, the judge may give the same judgment against those served as in ordinary cases: see notes to sections 98, 99, 100.

The debt garnished continues to be bound after judgment, unless the judge otherwise orders, and any payment made by the garnishee, except as directed by this section, or by the leave of the judge, would be void, and the garnishee would be liable to pay the same again for the purpose of satisfying the primary creditor the amount of his claim: see also notes to sections 146, 150.

The payment by the garnishee under the order of the court satisfies the liability of the garnishee to the primary debtor to the extent of the amount paid, and the primary debtor to such extent ceases to be a creditor of the garnishee: Wardrope v. C. P. Ry. Co., 7 O. R. 321. But the section only protects a garnishee against being called upon by a primary debtor to pay over again and does not protect him

against any third person: Andrews v. Canadian Mutual Loan & Inv. Co., 29 O. R. 365; see notes, *ante*. Sec. 157.

General Provisions.

157.—(1) Whether the claim of the primary creditor is or is not a judgment the garnishee and all other persons in any way interested in or to be affected by the proceeding may show any just cause why the debt sought to be garnished should not be paid to or applied in or towards satisfaction of the claim of the primary creditor. All parties interested may show cause.

(2) A garnishee who desires to set up a statutory or other defence or set-off or to dispute or admit liability, in whole or in part, shall file with the clerk notice thereof, with the particulars of such defence or set-off, or an admission of the amount owing or accruing by him, within eight days after service on him of the summons, and the clerk shall forthwith send by registered post to each of the other parties a copy of such defence, set-off or admission, and the primary creditor may file with the clerk a notice that he admits or disputes the defence or set-off or accepts or disputes the admission of liability. Setting up defences in garnishee proceedings.

(3) The clerk shall forthwith send to the garnishee by registered post a copy of the notice, and in the absence of a defence or set-off the Judge may, in his discretion, give judgment against the garnishee; and unless the primary creditor files a notice disputing such defence, set-off or admission of liability, the garnishee shall not be bound to attend at the trial, and the sum admitted to be owing or accruing by him shall be taken to be the correct amount of his liability, unless the Judge shall otherwise order, in which latter case the garnishee shall be notified by the clerk by registered post, and shall have an opportunity of attending at a subsequent date and being heard before judgment is given against him. Judgment in default of defence.

(4) The costs of all notices required to be given under this section shall be costs in the cause, and in no case shall be payable by the garnishee, unless so ordered by the Judge. 10 Edw. VII. c. 32, s. 157. Costs.

Persons In Any Way Interested.—This section gives an extensive power to all parties concerned to defeat the claim of the plaintiff. The garnishee, or any other party interested, may dispute the claim of the primary creditor against the primary debtor, and likewise the primary debtor or any third party may defeat, so far as the

Sec. 157. primary creditor is concerned, the claim against the garnishee. Ordinarily the defences of the Statutes of Frauds and Limitations are personal, but under this section third parties would be allowed to set them up and defeat a claim which the party liable did not care himself to defeat. But an assignee of the claim against the garnishee cannot set up the defence of want of jurisdiction not raised by the garnishee: Nelson v. Lenz, 9 O. L. R. 50.

Parties Intervening.—See Rule 26.

An intervener would not be able to set up a counterclaim which the primary debtor might have against the primary creditor, but he might plead a primary debtor's set-off. If there should be a contest between primary creditors as to the right to the debt garnished, it would appear to be proper to add the third party as a primary creditor.

See also section 162 and notes there.

Just Causes Why Debt Should Not Be Paid Over.—The following are suggested as arguable reasons for not ordering the money to be paid over:—

(a) Not a garnishable debt: see *ante*, pp. 402, *et seq.*

(b) Not the property of the debtor.

(1) Assignee: see *ante*, pp. 406, 415.

(2) Prior attachment: *ante*, p. 416.

(3) Absconding debtor: *ante*, p. 526.

(4) Creditors Relief Act: *ante*, pp. 416, 434.

(5) Mechanics Lien: *ante*, pp. 408-412.

(c) Subject to a lien.

(1) By garnishee: *ante*, p. 422.

(2) By solicitor or debtor: *ante*, pp. 407, 408.

The judge may adjudicate upon any of these claims at the hearing, if all parties are present, or may make the adverse claimant a party and summon him: see section 162. Ordinarily, it will be found more convenient to issue a summons. If all parties should be present, and the rights clear, a summons will be unnecessary: Wintle v. Williams, 3 H. & N. 288; Victoria M. F. Ins. Co. v. Bethune, 1 A. R. 420.

It is incumbent on the garnishee, if he knows of any just cause why the money should not be paid over, to bring the cause to the notice of the court. If the money should not be a debt within the meaning of the attachment clauses, he might have to pay twice: Randall v. Lithgow, 12 Q. B. D. 525; Victoria Mut. Ins. Co. v. Bethune, 1 A. R. 423; or if the court has no jurisdiction, and the garnishee is aware of the fact; or if the money is paid into court by mistake in a proceeding against a person of the same name as the person entitled to it: Andrews v. Canadian M. Loan and Inv. Co., 29 O. R. 365; see notes to section 149. If he has notice before the hearing of an assignment, or of bankruptcy, he would be bound to show cause, and if he were to pay to the primary creditor, instead of showing cause, the assignees could recover the debt from him: Wood v. Dunn, L. R. 2 Q. B. 73; Foulds v. Chambers, 11 Man. L. R. 300; Meriden Britannia Co. v. Bowell, 4 B. C. R. 520. If he had notice of any facts which might bring the money within any of the suggested cases above mentioned, he should for the same reason show cause. If he should not

have notice of any of these causes, before judgment, but should re- Sec. 157.
ceive same afterwards, and before paying the money three courses are open to him: (1) He may pay without taking any further step, which is unsafe unless there is no time to get the judgment set aside before execution; (2) he may move to set aside the judgment, and ask the court to bring in the third party; (3) he may give notice to the third party that unless he moves to set aside the judgment, the money will be paid thereon: Wood v. Dunn, L. R. 2 Q. B. 73, reversing L. R. 1 Q. B. 77. If the third party has knowledge of the judgment and does not move he may be estopped from claiming the money from the garnishee: Berneski v. Tourangeau, 18 P. R. 263.

Should the money be paid to the judgment creditor, the third party will not be without remedy, as he may recover the money, if he is entitled to it, from the judgment creditor, as money received to his use: Wood v. Dunn, L. R. 2 Q. B. 77. *Quære*: Whether notice to the judgment creditor at the time of receiving the money that it is the property of a third party, is necessary: Sisdell v. Cunningham, 4 H. & N. 871. It would seem to be proper for the claimant, before suing the primary creditor for the money, to move under section 160, for an order discharging the debt from the claim of the primary debtor.

Sub-section 2—Defences in Garnishee Proceedings.

Statutory or Other Defence or Set-off.—It will be observed that sub-section (2) has application not only to any statutory defence which the primary debtor or garnishee may have, but also to *any other defence* or set-off. Formerly it applied only to statutory defences and to set-off as in the case of an ordinary action. But these provisions were introduced by the Act of 1886 (49 Vic. c. 15, section 12). As to the defence of set-off, Statute of Limitations and other statutory defences: see notes to section 113.

Within Eight Days.—This means exclusive of the day of service: see notes to section 78: Stroud, 889.

In Simpson v. Chase, 14 P. R. 284, Mr. Justice Osler said: "The section 188, sub-section 2, [now s. 157 (2), (3)], is most awkwardly and loosely drawn, but I am disposed to think that even if the defence of the garnishee was put in after the expiration of the eight days after service, so long as it was put in in sufficient time to enable the creditor to give notice rejecting it, and for the clerk to transmit such notice to the garnishee, the latter would not be bound to attend the trial if such last mentioned notice was not given and the creditor would not be able to proceed to the trial of the action, until that was done. The object of the section is to relieve the garnishee from the expense of attending the court and defending the case if the creditor will accept his admission of liability, or will tell him that he will not dispute his defence. The onus of doing this is on the creditor, and the garnishee having filed his defence or admission, need not concern himself further unless the former warns him that he must be prepared to support it." See also section 163 which provides for adjournments for the purpose of giving omitted notices, *etc.*

Judgment cannot be given against the garnishee without proof of the amount owing by him to the judgment debtor, even though no notice be given, there being nothing in this sub-section which repeals the condition precedent in sections 154 and 156 to the judge's giving judgment against the garnishee: *Re* Johnson v. Therien, 12 P. R. 442.

Costs.—See sections 157 (4) and 159.

Secs. 158-160.

Effect of service on garnishee.

158. Service of a summons on the garnishee shall have the same effect and consequence as service of an attaching order. 10 Edw. VII. c. 32, s. 158.

Attaching Order.—That is, the order provided by section 148. "The effect and consequence" of service of that order are stated in sections 149 and 150 and notes thereto.

Costs of garnishee proceedings.

159. In giving judgment for the primary creditor, the Judge may award to him the costs of the proceedings out of the amount found due from the garnishee to the primary debtor. 10 Edw. VII. c. 32, s. 159.

Care should be taken to have the costs of the garnishee proceedings awarded to the primary creditor out of the fund garnished, otherwise should the sheriff intervene under the Creditors Relief Act: R.S.O. 1914, c. 81, s. 5 (see *post*, p. 434), he may require the whole fund to be paid over to him for all the creditors, and the primary creditor would have to bear the whole of the costs, while the general creditors would profit by his efforts: see the remarks in Wood v. Joselin, 18 A. R. 59.

Application to discharge debt from attachment.

160.—(1) Upon the application of a person entitled to or interested in any debt attached or bound in the hands of a garnishee made at any time before actual payment out of court to the primary creditor, the Judge may order that such debt be discharged from the claim of the primary creditor.

Order after money paid out of court.

(2) A like order may be made, after the debt has been paid out of court to the primary creditor, in which case all parties shall be remitted to their original rights in respect thereto, except as against the garnishee, whose payment shall not be affected thereby, but shall be and remain an effectual discharge to him. 10 Edw. VII. c. 32, s. 160.

Party Entitled to or Interested In.—The language of this section is very wide. Should there be several garnishments against the same fund, a second garnishee would have the right to apply under this section to discharge the fund from a previous garnishment proceeding.

An assignee of the debt would also have that right. In fact, any person who made any claim to the money or debt garnished, could take the benefit of this section.

An order could be made even after the money or debt had been paid over by the garnishee, and even after its payment out of court to the primary creditor: sub-section (2), and the parties could be remitted to their original rights in respect of it, except as against the garnishee who had *bona fide* paid the money in pursuance of the garnishment proceeding.

It is submitted that the party applying could take advantage only of substantial objections to the attachability of the debt as against

him under the garnishment proceedings which it is sought to set aside. He could not rely upon mere irregularities: Macdonald v. Crombie, 2 O. R. 243; 10 A. R. 92; 11 S. C. R. 107; Archbold's Prac., 13th ed., 1193; but "defences" even though of a kind which would, in other cases, be personal to the primary debtor or garnishee, may be set up under section 157. An order for payment may be rescinded if it appears that the debt was assigned prior to the garnishment: see Beaty v. Hackett, 14 P. R. 395; Moore v. Peachy, 66 L. T. 198; see notes to section 146. Sec. 161.

At Any Time Before Actual Payment.—"I see no reason why a payment in goods may not be as good as a payment in money:" *per* Holland, J., in Cannan v. Wood, 2 M. & W. 470. 'It may be in money or money's worth:" *per* Parke, B., at p. 469. See also Wilkins v. Casey, 7 T. R. 713; Truax v. Dixon, 17 O. R. 366. Or a bank draft: Calue v. Coulton, 1 H. & C. 764. Or cheque: Hopkins v. Ware, L. R. 4 Ex. 268; Norman v. Ricketts, 21 Sol. J. 124. Or by the mere transfer of figures in an account, without any money passing: Eyles v. Ellis, 4 Bing. 112; Bodenham v. Purchas, 2 B. & Ald. 39; Beatty v. Maxwell, 1 P. R. 85; Nightingale v. Bank of Montreal, 26 C. P. 74; Hills v. Mesnard, 10 Q. B. 266. Or by payment to a third person: Waller v. Andrews, 3 M. & W. 312; Brunston v. Robins, 4 Bing. 11; or by accepting an order: Jennings v. Willis, 22 O. R. 439. But a tender is not payment: Bank of New South Wales v. O'Connor, 14 App. Cas. 273. Nor is the mere deduction of an amount from moneys in hand: *Re* West, *Ex parte* Clough. 1892 2 Q. B. 102.

The Application.—See Rule 26.

Order of Payment.—The judge is only authorized to make an order discharging the debt from the claim of the primary creditor. If the money has been paid to the creditor, there is no power to enforce restitution except by a new action by the owner against the primary creditor: see Wood v. Dunn, L. R. 2 Q. B. 73: Andrews v. Canadian Mutual L. & Inv. Co., 29 O. R. 363: or if a bond is given under s. 161, by an action on the bond.

An Effectual Discharge to Him.—See notes to section 149.

A refusal by the judge to grant an order to discharge the debt under this section is a matter within his jurisdiction and prohibition will not lie in such a case: *Re* Dyer v. Evans, 30 O. R. 637, and cases cited *ante*.

161.—(1) The judge may, before giving judgment against the garnishee, or at any time before actual payment out of court to the primary creditor, order such security as may be approved by him or by the clerk, to be given by or on behalf of the primary creditor, to abide by any order which may be made for repayment. Security from primary creditor.

(2) The bond shall be to the clerk by his name of office, and shall enure for the benefit of all persons interested in or entitled to the debt, and by leave of the Judge and on such terms as he may impose, may be sued on in the name of the Effect of bond.

Sec. 162. clerk for the time being, for the benefit of such persons. 10 Edw. VII. c. 32, s. 161.

Security May be Ordered.—This provision is made for the protection of the garnishee or other person in doubtful cases. It sometimes happens that the rights of the parties may have to be settled by appeal: Victoria M. F. Ins. Co. v. Bethune, 1 A. R. 423; or upon interpleader proceedings: *Re* Anderson v. Barber, 13 P. R. 21; and a judge could, by exercising his powers under this section, while obtaining the money from the garnishee, and thus protecting the creditors and the debtor, require security for the protection of the garnishee or other parties. The security must be ordered either before judgment against the garnishee or before actual payment by him.

The bond may, by leave of the judge, be sued on by the clerk for the benefit of persons entitled to the debt; s. 161 (2).

The action upon the bond if brought in the clerk's name could be sued in the clerk's own division without violating section 80, as he would not be the party suing. The bond being merely for the repayment of money is not within 8 & 9 Wm. III., c. 11, section 8, (now R.S.O., c. 324, s. 4), but is within 4 & 5 Anne, c. 16, and a special summons could, therefore, be issued thereon, and payment of the amount before action, though after the time limited by the order, would be an effectual bar to the action: Murray v. Earl of Stair, 2 B. & C. 82; Gerrard v. Clowes, 1892 2 Q. B. 11. For form of bond under this section see Form 148.

Case of adverse claims.

162.—(1) Where a person other than the primary creditor or primary debtor claims to be entitled to the debt owing or accruing from the garnishee or any part thereof by assignment or otherwise, the Judge, after notice to all persons interested, may enquire into and decide upon the claim as the justice of the case may require.

Right to jury in certain cases.

(2) Where the amount claimed by any such person exceeds $30 the provisions of section 130 and the following sections relating to juries shall apply so as to give any party to the proceeding a right to require a jury. 10 Edw. VII. c. 32, s. 162.

Adverse Claims.—This is a far reaching provision, and under it a great variety of questions may come within the jurisdiction of the judge in a division court.

His jurisdiction is, however, limited by the amount garnished, and while in adjudicating, he may possibly render a decision which, if correct, will affect property of large value, his decision is effective only, apart from the doctrine of *res adjudicata*, to the extent of settling whether the primary creditor is or is not entitled to receive the debt which has been garnished: *Re* Perras v. Keefer, 22 O. R. 672. For instance, such judge has power under this section to decide conflicting questions between parties claiming under garnishee proceedings in his court, and parties claiming under an attachment, under the Absconding Debtors Act, from a county court of another county: *Re* Moore v. Wallace, 13 P. R. 201.

Questions between conflicting assignees, between creditors and assignees, between the debtor and his assignee, between conflicting creditors, between parties claiming as *cestuis que trustent*, lien-holders and otherwise might have to be disposed of under this section. Even questions in which the title to land arose might have to be decided: Muasle v. McKinley, 15 C. P. 50; *Re* Sato v. Hubbard, 6 A. R. 546; Cameron v. Allen, 10 P. R. 192. Sec. 162.

The power is doubtless included to decide that an assignment of the debt is void as being a fraud upon creditors or otherwise. It is submitted, however, that in applying this power, the judge must first find that the debt sought to be attached was once due to the primary debtor, and that the assignment, or other title upon which the adverse claim is founded, is void. No power is given to set aside transactions prior to the creation of the debt, although the debtor would, but for such transactions, have been entitled to the money. For instance, if land be transferred by A., the debtor, to B., and B. sells to C., no purchase money ever becomes due by C. to A. There never was any privity between them, and there is, therefore, no debt: Vyse v. Brown, 13 Q. B. D. 190; Palmer v. Lovett, 14 P. R. 415; see O'Donohue v. Hall, 24 S. C. R. 912.

It is submitted that under the words "or otherwise," a judge would have power to decide that a transfer of a debt was void, as a preference, as against the attaching creditor.

Assignment for Benefit of Creditors.—By R.S.O. 1914, c. 134, s. 14, an assignment for the benefit of creditors takes precedence of garnishee orders "not completely executed by payment."

The payment of the money into court by the garnishee would not "completely execute the attachment by payment" Butler v. Wearing, 17 Q. B. D. 182; nor would an arrangement that the debt be paid on a certain day, but that in the meantime judgment should be entered but not enforced: *Re* Trehearne, *Ex parte* Ealing Local Board, 63 L. T. 323, affirmed 39 W. R. 116; but if the bailiff secures the money on an execution against the garnishee the attachment is completely executed by payment: Clarkson v. Severs, 17 O. R. 502.

Absconding Debtor.—An attachment issued to the sheriff against the primary debtor, as an absconding debtor, entitles the sheriff to all money paid into a division court under a garnishee summons: R.S.O. 1914, c. 82, s. 10; *Re* Moore v. Wallace, 13 P. R. 201. Notice by the sheriff to the person owing a debt to an absconding debtor binds the debt, which may be recovered by the sheriff for the benefit of creditors: same statute, ss. 15-17.

Mechanics' Liens.—R.S.O. 1914, c. 140. Whether a mechanic's lien of a sub-contractor takes priority over a garnishee summons against the fund in the hands of the owner, for a debt due by the contractor, is a question of some doubt. There is no reported Canadian decision on the question. It is submitted that the lien exists from the commencement of the work under sections 6 and 12, and that the registration of the statement of claim, under section 17, is merely to preserve the lien. That being the case, the lien, when duly registered, dates from the commencement of the work by the sub-contractor, and nothing short of a payment to the contractor without

Sec. 162. notice of the lien of the sub-contractor, will prevent the lien from being effective: see section 10. The attaching creditor is not a purchaser for value: Dallow v. Garrold, 14 Q. B. D. 543, but merely takes what the debtor (the contractor) could himself honestly deal with: Davis v. Freethy, 24 Q. B. D. 519; Beaty v. Hackett, 14 P. R. 395. As all lien holders of the same class are entitled to rank *pari passu*, one of them would not be able to acquire priority by garnishee proceedings: s. 14; Kennett v. Westminster Improvement Commrs., 11 Ex. 349. Section 12 (3) of the above Act gives the sub-contractor a lien on the amount directed by that section to be retained. It is submitted that sub-contractors' claims would prevail over a garnishee process.

Absconding Debtors Act.—R.S.O. 1914, c. 82, s. 10. See notes to section 200, *post*.

Creditors Relief Act.—By R.S.O. 1914, c. 81, s. 5, of this Act, it is provided:

5.—(1) A creditor who attaches a debt shall be deemed to do so for the benefit of all creditors of his debtor as well as for himself.

(2) Payment of such debt shall be made to the sheriff of the county in which the garnishee resides or, if there are more garnishees than one in respect of the same debt, then to the sheriff of the county in which any one of them resides.

(3) This section shall not apply to debts attached by proceedings in a Division Court unless before the amount recovered by the garnishee proceedings is actually received by the creditor an execution against the property of the debtor is placed in the hands of the sheriff of such county.

(4) Where money is paid to a sheriff in whose hands there is no execution against the property of the debtor, and there is in the hands of the sheriff of another county an execution against the property of the debtor, the Court or a Judge on the application of such last mentioned sheriff or of a creditor or of the debtor may direct, on such terms as to costs and otherwise as may seem just, that such money be paid over to such last mentioned sheriff to be distributed by him as if such money had been paid to him by the garnishee; and the Court or Judge shall fix the compensation to be paid to the sheriff by whom the money was received from the garnishee for his services.

(5) Where money which a sheriff is entitled to receive under the provisions of this section is paid into a division court the sheriff shall be entitled to demand and receive the same from

the clerk of such court for the purpose of distributing it under the provisions of this Act. Sec. 163.

(6) An attaching creditor shall be entitled to share in respect of his claim against the debtor in any distribution made under the provisions of this Act, but his share shall not exceed the amount recovered by his garnishee proceedings unless he has in due time placed an execution or a certificate given under this Act in the sheriff's hands.

(7) The sheriff shall be entitled to poundage upon money received and distributed by him under the provisions of this section at the rate of one and a quarter per cent. and no more.

(8) If an attached debt which the sheriff is entitled to receive, or any part of it, is received by the attaching creditor the sheriff may recover the same from him; but a clerk of a division court shall not be liable for making payment to the creditor unless at the time of payment he has notice that there is an execution against the property of the debtor in the sheriff's hands.

Where a debtor is being harassed by garnishment proceedings, and also by other conflicting claims, he may move for an interpleader order: Rending v. School Board of London, 16 Q. B. D. 181; McElheran v. London Masonic Ben. Assn., 11 P. R. 181.

The proper practice in such a case is for the applicant to move in the court in which he has been sued: *Re* Anderson and Barber, 13 P. R. 21; see *Re* Gould v. Hope, 21 O. R. 624; 20 A. R. 347.

Right to Jury.—Section 162 (2). The provisions of section 130, and subsequent sections respecting trial by jury in division courts, are made applicable to the trial of claims to be adjudicated upon under this section. See sections 130-144, and notes thereto.

163. The Judge may adjourn, from time to time, the hearing and other proceedings in garnishee cases, to allow time for giving omitted notices, or to produce further evidence, or for any other purpose, may require service on and notice to other or additional persons, and may prescribe a form for any proceeding. 10 Edw. VII. c. 32, s. 163. Judge may postpone or adjourn proceedings.

From Time to Time.—As often as he pleases: Neilson v. Jarvis, 13 C. P. 176; *Re* Sutton Coldfield Gram. School, 7 App. Cas. 91; Whitehouse v. Wolverhampton Ry. Co., L. R. 5 Ex. 6.

The judge has, in division court proceedings, generally full powers in regard to adjournment and amendment: see ss. 104 (as to amendment), and 109 (as to adjournment); but in garnishee cases more than ordinary discretion is conferred, even to the granting of new trials after the expiration of 14 days if justice requires it: McLean

Sec. 164. v. McLeod, 5 P. R. 467; followed in Hobson v. Shannon, 26 O. R. 554, 27 O. R. 115.

Under Rule 26 the judge may give directions how to proceed on the application of any person who wishes to avail himself of the benefit of the garnishee proceedings.

Debt Attachment Book.—Former section 164 in the Division Courts Act of 1897, which provided for the clerk keeping a Debt Attachment Book was repealed by Ont. Stat. 1913, c. 18, s. 14 (3), and is omitted from the present statute.

Garnishment of Small Debts in Supreme Court.

Con. Rules 598, 599 are as follows:

598.—(1) Where the debt claimed to be due or accruing from a garnishee is of the amount recoverable in a Division Court, the order to show cause shall require the garnishee to appear before the Judge of the Division Court within whose Division the garnishee resides, at a day to be appointed in writing by such Judge, and the garnishee shall be served with notice of the day appointed.

(2) The proceedings shall thereafter be carried on before the Judge as though the garnishee summons has issued out of the said Division Court and execution may be issued in the Division Court to enforce any order or judgment made.

599.—(3) Payment into court or under an order by the garnishee shall be a valid discharge to him, as against the judgment debtor, or any assignee or claimant of whose claim he has given notice and who has been called upon to show cause under the preceding Rules.

Forms of order to shew cause: Form 149.

Form of order for judgment: Form 150.

ARBITRATION.

Reference to arbitration by order of Judge or by consent.

164.—(1) The Judge, with the consent of the parties, or their agents, may order the action, with or without other matters in dispute between the parties, being within the jurisdiction of the court, to be referred to the arbitration of such person or persons, and in such manner and on such terms as he may deem just.

Reference by agreement.

(2) The parties to an action may by writing, signed by themselves or their agents, agree to refer the matters in dispute to the arbitration of a person or persons named in the agreement.

Agreement to be filed.

(3) The agreement shall be filed with the clerk, and entered in the Procedure Book, as notices are entered. 10 Edw. VII. c. 32, s. 165.

Form of Order.—No. 65; Form of Consent, 65 (1).

Arbitration.—By The Arbitration Act, R.S.O. 1914, c. 65, s. 4, that statute is made applicable to any arbitration under any Act of the Legislature of Ontario, except in so far as the former is inconsistent with the latter or with any rules or procedure authorized by the same. All the provisions of the Arbitration Act therefore apply to arbitrations ordered by the judge under section 104, except where they are inconsistent with the provisions of the Division Courts Act and Rules or the Con. Rules of the Supreme Court relating to the same. Sec. 104.

Parties cannot be compelled to arbitrate.

If the parties' consent in writing under sub-section (2), no order is necessary, and upon the consent being filed and entered as required by sub-section (3), the award is entered by the clerk in the procedure book and becomes a judgment in the action: s. 101; see note to that section.

If one of the parties should be a corporation, and no order be applied for, the consent might be either under the corporate seal or the hand of its agent. If a solicitor consented on behalf of the corporation, his retainer need not be under seal: Faviell v. Eastern Counties Ry. Co., 2 Ex. 344. Counsel has power to consent: Wilson v. Corp. of Huron and Bruce, 11 C. P. 548, even against the wish of his client, unless his dissent is communicated to the opposite party: Strauss v. Francis, L. R. 1 Q. B. 379.

Trustees and executors may submit to arbitration: R.S.O. 1914, c. 121, s. 52 (2).

If an action of replevin be referred without the consent of the sureties, they will be discharged: Burke v. Glover, 21 U. C. R. 294.

The parties on the record, though they are merely nominal parties, must consent: Owen v. Hurd, 2 T. R. 643. Where a third party, who had agreed to join in a submission of a suit, refused to proceed in the reference, the submission was set aside on the application of one of the parties on the record: Bacon v. Creswell, 1 Hodges, 189.

Costs.—The costs of the reference and award are in the discretion of the arbitrators: The Arbitration Act, R.S.O. 1914, c. 65, Schedule A, clause (1); subject, however, to section 30 of that Act, under which the order of reference may be made on such terms as to costs or otherwise as the authority making the order thinks just. And under section 170 (1) of The Division Courts Act, costs are in all cases in the discretion of the judge unless otherwise provided; and in the absence of any order of the judge and of their being provided for in the award, they will abide the event: s. 170 (2).

As to arbitrators' fees, see notes, *post*.

Form of appointment for meeting on reference, No. 67.

Form of enlargement of time for making award, No. 68.

Form of appointment of third arbitrator or umpire (authorized by Schedule A (b) to the Arbitration Act), No. 66.

Form of Award, No. 69.

General Provisions.—An arbitration is a judicial inquiry to be conducted upon the ordinary principles upon which judicial inquiries are conducted, by hearing the parties and the evidence of their witnesses: *Re* Hopper, L. R. 2 Q. B. 373.

Sec. 165.

The arbitrator should decline to receive private communications from either litigant respecting the subject matter of the reference. It is a prudent course to make a rule of handing over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion be made to him without giving information of it to the other side: Russell, 654; see Conmee v. The C. P. Ry. Co., 16 O. R. 639, 654; *Re* Trythall, 5 B. C. R. 50; Wood v. Gold, 3 B. C. R. 281.

No witness should be examined, except in the presence of both parties: Russell, 191-195; Cruickshank v. Corbey, 5 A. R. 415; Whiteley v. MacMahen, 2 C. P. 453; Rice v. Anderson, 14 A. R. 213; *Re* Ferria & Eyre, 18 O. R. 395.

Parties may, however, waive the irregularity by not objecting, or by attending, without objection, meetings held after knowledge of the irregularity: Russell, 196.

The arbitrator may proceed *ex parte* if he have given notice of his intention so to do, in the event of either party not attending. Making an appointment "peremptory," is sufficient: Russell, 198.

Clauses (b), (c) of Schedule A. to The Arbitration Act, provide for the choice of an umpire or other arbitrator.

The arbitrator or arbitrators must be named in the order or consent.

Where more than one arbitrator is appointed, all must concur in the award, or have an opportunity of concurring. Those who are to be affected by it have a right to the united judgment of all up to the very last moment.

The fact of a joint execution by two, although good if the third finally refused to join (Freeman v. Ontario & Quebec Ry. Co., 20 C. L. J. 320), cannot make good an award designed for the three and executed separately by the third, both of the others not being present and joining with him: Nott v. Nott, 5 O. R. 283; Russell, 249. Where the submission provides that the award thereunder shall be made by three arbitrators, the award to be valid must be made by the three arbitrators unanimously: *Re* O'Connor and Fielder, 25 O. R. 568.

Revocation of reference.

165. The reference shall not be revocable by either party except by leave of the Judge. 10 Edw. VII. c. 32, s. 166.

The judge's authority to grant or to revoke a reference, not being an arbitrary one, but to be exercised on sufficient grounds, he should be guided by the principles laid down in the statutes and authorities regulating references to arbitration in the Supreme Court of Ontario, so far as the same can be applied to arbitrations under The Division Courts Act. Thus, the Supreme Court has power to remove an arbitrator who has misconducted himself: The Arbitration Act, *supra*, s. 13 (1); and to prevent an incompetent arbitrator from acting, without waiting until the award is made; and a solicitor who had acted as counsel for one of the parties was restrained from acting: Township of Burford v. Chambers, 25 O. R. 663; see also Sherwood v. Balch, 30 O. R. 1.

Leave was given to revoke a submission, where an arbitrator was going wrong in a point of law, even in a matter within his jurisdiction: East and West India Dock Co. v. Kirk, 12 App. Cas. 738. That case was, however, one of a very exceptional character, and lays down

no general rule. The power to grant leave to revoke is a matter of discretion: James v. James, 22 Q. B. D. 669; 23 Q. B. D. 12. A submission to arbitration will not be revoked on a question of the admission or rejection of evidence unless a miscarriage of justice is involved. If the arbitrators have acted *bona fide* and reasonably in the matter the court will not interfere: *Re* Small and St. Lawrence Foundry Co., 23 O. R. 543. Sec. 165.

If an arbitrator has received evidence behind the back of a party, leave to revoke would be granted, as that would constitute misconduct on the part of the arbitrator: Russell, 159, 160. As to the distinction on this point, between the action of arbitrators and mere "valuers," see *Re* Laidlaw and Campbellford, L. O. and W. R. W. Co., 31 O. L. R. 209.

Upon the wrong reception or rejection of evidence by the arbitrator, the former method was for the party objecting to apply for leave to revoke the authority of the arbitrator; upon which the court might have either revoked the submission or given an opinion upon the question for the arbitrator's guidance, but this was spoken of by Lord Hinsbury in Tabernacle Per. Bld. Soc. v. Knight, 1892 A. C. p. 301, as obviously a clumsy and incomplete remedy; Rogers v. London & Can. L. & Agency Co,. Ltd., 18 O. L. R. p. 11; see now R.S.O. 1914, c. 65, s. 29.

Where an arbitrator has wrongly rejected admissible evidence, the court will not give leave to revoke, if satisfied that the arbitrator will, on hearing the opinion of the court, receive the evidence: Robinson v. Davies, 5 Q. B. D. 26.

It has been held that an arbitrator is not bound by the rules of evidence, and his failure to observe them is no ground for setting aside the award: Russell, 199-201; Webster v. Haggart, 0 O. R. 27; Lemay v. McRae, 16 O. R. 307; 16 A. R. 348; 18 S. C. R. 280; *Re* Keighley, Maxstead & Co., and Brynn, Durant & Co., 9 T. L. R. 107.

But that is when the application is to set aside the arbitrator's award. The question of setting aside an award because the arbitrator has mistakenedly rejected evidence which he ought to have received, is a very different one from the question of revoking a submission upon that ground before the award is made; and if the parties wait until the arbitrator has made his award, the court will not, in the absence of misconduct, set it aside: the reason being that the arbitrator is the judge of both the law and the fact, chosen by the parties, and his award ought not to be set aside for mistake either as to the law or the fact, but only for misconduct, if it is in accordance with the terms of the submission; In re Marsh, 16 L. J. Q. B. 330; Rogers v. London, *supra*, and cases cited therein. An award will not be set aside for mistake in the arbitrator either as to law or fact, unless the mistake appears on the face of the award or in some paper which is by reference incorporated in it, or where the arbitrator states that he made a mistake and desires the assistance of the court in its rectification: McRae v. Lemay, 18 S. C. R. p. 284; *Re* Laidlaw and Campbellford, L. O. and W. R. W. Co., 31 O. L. R. p. 216.

Where new circumstances have arisen since the submission of such a kind as to make it probable that the arbitrator would have a bias, the discretion of the court will be exercised: *Re* Baring & Douiton, 8 T. L. R. 701; Conmee v. C. P. Ry. Co., 16 O. R. 639. The arbitrator must have an open mind: Jackson v. Barry Ry. Co., 9 T. L. R. 90; Sherwood v. Balch, 30 O. R. 1; Good v. Toronto, Hamilton & Buffalo Ry. Co., 26 A. R. 133; affirmed by Supreme Court, 36 C. L. J. 123.

Sec. 166. Death of the parties, or either of them, before award, does not revoke the submission: Clause (d) to Schedule A, The Arbitration Act.

A probability that the arbitrators will give more than one party considers right, is no ground for revocation: G. W. Ry. Co. v. Miller, 12 U. C. R. 654. But if they are about to allow improper charges, application may be made for leave to revoke: Carveth v. Fortune, 12 C. P. 504.

A submission cannot be revoked, except by consent, after award made: Phipps v. Ingram, 3 Dowl. 669; Lemay v. McRae, 16 O. R. 307; 16 A. R. 348; 18 S. C. R. 280; but the award may be set aside upon proper grounds on application to the judge within fourteen days after the entry of the award under section 167, or if reasonable excuse for the delay within 28 days; sub-section 2.

Time for Making Award.—The judge may, when making the order of reference, impose terms: section 164; and may, therefore, fix the time within which the award is to be made. If not so fixed, it is provided by clause (f) in the Schedule A to The Arbitration Act; and by the same clause, the arbitrator has the authority to enlarge the time.

If the award is not made within the time limited, or any extended time, the authority of the arbitrator would be gone: Deaton v. Strong, L. R. 9 Q. B. 117. The lapse of the time might, however, be waived by the parties appearing on the reference afterwards without objection: Thurlow v. Sidney, 29 Grant 497. If the party appears and proceeds after the time fixed for making the award has elapsed, it is a waiver of the objection that it is not made in time: *Re* The Horse Shoe Quarry Co. and St. Marys, 22 O. L. R. 429: *per* Middleton, J., p. 433.

If the time expires without the award being made, the action would still remain untried, and the court could either try it, or on consent, direct a new arbitration. Under the power given to enlarge the time, the enlargement should be made during the original period, as the arbitrator's authority would be at an end, unless special power had been given to enlarge the time afterwards: Russell 143.

An arbitrator cannot be compelled to make an award: Russell 203. The arbitrator may consult men of science in every department where it becomes necessary: Caledonian Ry. Co. v. Lockhart, 3 Marq. 808. A valuer may be consulted: Emery v. Wase, 5 Ves. 846; Gray v. Wilson, L. R. 1 C. P. 50; or a solicitor: Proctor v. Williams, 8 C. B. N. S. 386; or an accountant: *Re* Tidswell, 33 Beav. 213.

Any writing containing words expressing a decision is an award. There need be no recitals: Russell 246. It must finally decide all matters in difference in the suit. Any sum found to be due may be ordered to be paid by instalments, and in default of payment of one the whole may be ordered to become due. The arbitrator cannot delegate his authority to another: see Harrington v. Edison, 11 U. C. R. 114; Haskins v. St. Louis, 109 U. S. Sup. Ct. 923; nor can he reserve any future power to himself. Nor can he order an act to be done to the satisfaction of another. But a mere ministerial act may be reserved to be done by himself or a stranger, *e.g.*, to make measurements or to settle the form of a bond or release: Russell, 281.

The award must be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature

and extent of the duties imposed by it on the parties: Russell, 206 Mitchell v. G. W. Ry. Co., 38 U. C. R. 471. Sec. 166.

It is said that a direction to pay the costs of an inferior court, without ascertaining the amount, is void for uncertainty: Addison v. Gray, 2 Wils. 293; Winter v. Garlick, 1 Salk. 75. But if the direction should be to pay the costs taxed by the clerk of the division court, it would probably be good: Higgins v. Willes, 3 M. & R. 382; Hopcraft v. Hickman, 2 S. & S. 130; see *Re* Preble and Robinson, 1892 2 Q. B. 602.

The award must be mutual, i.e., if payment is directed to be made by the one party, it must destroy his obligation to the other: Russell, 206.

It must be possible, intelligible and consistent.

An affidavit of execution should, it is submitted, accompany it: former Rule 126 required it, but the new rules are silent.

Arbitrator's Fees.—The arbitrator may retain the award until his fees are paid: Russell, 251. The amount of fees is regulated by The Arbitration Act, sections 19 to 27, schedules B and C.

Travelling expenses of arbitrators cannot be allowed in addition: *Re* Hillyard and Royal Ins. Co., 12 P. R. 285.

Until taxation of his fees, the arbitrator cannot maintain an action therefor: McKellop v. Logan, 7 C. L. T. 171; but see Crampton v. Ridley, 20 Q. B. D. 48, where a right to sue for fees was held to exist at common law: see The Arbitration Act, s. 27.

The arbitrator may bring an action for his fees after they have been taxed; and unless there is an express agreement to the contrary, he may sue all the parties to the reference, jointly or severally: The Arbitration Act, s. 27.

No action will lie to recover back the fees paid for an invalid award: Nott v. Gordon, 20 C. L. J. 379.

An award is valid and binding until set aside, although the arbitrators may have misconducted themselves: Bache v. Billingham 1894 1 Q. B. 107.

Where the costs of the arbitration were not provided for by the submission, each party was ordered to pay one-half of the arbitrator's fees: Smith v. Fleming, 12 P. R. 520; *Re* Harding v. Wren, 4 O. R. 605.

"Publication" of an award, signifying its completion so far as the arbitrator is concerned, is made when he executes it in the presence of a witness or does any other act showing his final mind, upon which he becomes *functus officio*: Hnyck v. Wilson, 18 P. R. 44.

Costs of an arbitration, if untaxed, do not form a liquidated amount and judgment by default could not be given in a claim for such costs: *Ib.*

As to the penalty for attempting to exact excessive fees, see The Arbitration Act, s. 26: Jones v. Godson, 23 A. R. 34.

166. The award shall be entered by the clerk as the judgment in the action, and he shall forthwith give notice thereof to the parties. 10 Edw. VII. c. 32, s. 167. Award to be entered as the judgment.

Sec. 167.

Judgment and Execution.—The award on being entered becomes the judgment of the court (section 166) and execution may issue under section 173 (2). Execution could not be issued until 15 days after the entry of judgment: sections 122, 167.

Judge may set aside award.

167.—(1) The Judge, on application to him within fourteen days after the entry of the award, may set it aside and remit the matters referred to the same arbitrator or arbitrators, or may order another reference to be made in the manner aforesaid.

Application after time limited.

(2) If reasonable excuse for the delay is shown to the satisfaction of the Judge, the application may be made at any time within fourteen days after the expiration of the first mentioned fourteen days. 10 Edw. VII. c. 32, s. 168.

Setting Aside Award.—See notes to section 165, *ante*.

Section 167 gives an extended discretionary power to the judge, and the numerous authorities governing motions to set aside an award are only applicable as guides to the judge in exercising his discretion.

The grounds usually urged in moving to set aside an award are: misconduct or corruption on the part of the arbitrator or umpire, or that the arbitration or award has been improperly procured: The Arbitration Act, s. 13; or the improper taking of evidence behind the back of the parties; or mistake admitted by the arbitrator, or apparent on the face of the award. Where arbitrators heard evidence in the absence of each other and of the witnesses and took matters into consideration outside of the question in dispute, the award was held invalidated, but referred back to the arbitrators for re-consideration: *Re* Trythall, 5 B. C. R. 50. But see Kennedy v. Beal, 29 O. R. 549, where it was held that if an arbitrator had misconducted himself as by hearing evidence behind the back of one of the parties, the award must be set aside: see also Wood v. Gold, 3 B. C. R. 281.

Hearing the statements of a witness, although unsworn, behind the back of either or both of the parties, invalidates the award: Wright v. Toronto Ry. Co., 6 O. W. N. 119, *q.v.*, as to other grounds of objections to awards; see also notes to sections 164, 165. If, however, the party objecting to the award proceeded with the arbitration after becoming aware of what had been done amiss and takes his chance of a favorable award, he waives his rights to object: *Re* Zuber and Hollinger, 25 O. L. R. 252, in which the authorities are reviewed. Refer also to *Re* Graham, 25 O. L. R. 5; *Re* Windatt and Georgian Bay and Seaboard Ry. Co., 4 O. W. N. 295.

As to what conduct will disqualify an arbitrator, see Plaunt v. Gillies Brothers, Limited, 3 O. W. N. 921. Viewing the *locus in quo* is a proper method of taking evidence: Rex v. Petrie, 20 O. R. 317: *In re* Gregson and Armstrong, 70 L. T. R. 106: but it is not permissible to take even such evidence *ex parte*, *ibid*: *Re* Hardy and Lake Erie & N. Ry. Co., 7 O. W. N. 308.

The award may also be set aside on account of its lacking the requisites enumerated in note to section 165, or for excess of authority by the arbitrator: Russell, 652-697.

The fact that an award is contrary to law or evidence, is ordinarily no ground for setting it aside unless a miscarriage of justice is involved. The arbitrator has full power to decide contrary to law or evidence if he pleases, but if he intends to decide according to law, and makes a mistake, and such mistake is apparent on the face of the award, or is admitted by the arbitrator, the award may be set aside: Russell, 303-310; McRae v. Lemay, 18 S. C. R. 280. Sec. 168.

Under this section, the judge may, however, set aside the award, if contrary to law or evidence; or if, in his opinion, it does not do substantial justice, or for any other reason.

The judge may set aside the award on the ground that facts, even if not admissible in a court of law, had since been discovered, which might alter the decision: *Re* Keighley, Maxstead & Co., and Bryne, Durant & Co., 9 T. L. R. 107.

An award made by arbitrators, one of whom was, at the time of the arbitration, a sub-agent or an agent of the defendants in obtaining insurance risks, though he had acted as such to only a very small extent, was held void: Vineberg v. Guardian Fire and Life Assce. Co., 19 A. R. 293; but the fact that one arbitrator had acted as chamber counsel for the solicitor for one of the parties does not disqualify him: *Re* Christie and the Town of Toronto Junction, 24 O. R. 443; 25 S. C. R. 551. But see Township of Burford v. Chambers, 25 O. R. 663.

When an arbitrator awards one sum in respect of matters, some of which are within and some without his jurisdiction, the award must be set aside: Cockburn v. Imperial Lumber Co., 26 A. R. 19. See *In re* Baker v. Kelly, 14 O. L. R. 623, for other grounds for setting aside an award, and see notes, *ante*. Section 12 of The Arbitration Act authorizes the judge to remit the matters in reference or any of them to the reconsideration of the arbitrators or umpire. And where the arbitrators have decided upon an erroneous principle, that will be done: *Re* Berlin & Waterloo Street Ry. Co. and Town of Berlin, 19 O. L. R. 57.

Fourteen Days.—The time for moving does not expire until 14 days from the entry of the award as a judgment in the cause by the clerk, as provided by section 166. It will be noticed that "if reasonable excuse" for the delay is shown to the satisfaction of the judge, 14 days further time may be allowed for applying to set aside the award.

See notes to section 166.

168. An arbitrator may administer an oath to the parties and to the witnesses examined before him. 10 Edw. VII. c. 32, s. 169. Arbitrators may administer oaths.

See also The Arbitration Act, s. 10 (n).

It is left to the option of the arbitrator whether he will examine the witnesses on oath or not. He cannot be compelled to so examine them, though one of the parties may require them sworn: Smith v. Goff, 3 D. & L. 47; but the evidence ought to be taken on oath or affirmation in all cases.

Form of oath, 30 (m).

The sending of adulterated samples to be used on an arbitration, though not in fact so used, is a misdemeanor: R. v. Vreones, 1891 1 Q. B. 360.

Sec. 169.

CONFESSIONS OF DEBT.

Clerks and bailiffs may take confessions.

169.—(1) A clerk or bailiff may take a confession or acknowledgment of debt from a defendant, in the prescribed form, which shall be witnessed by the clerk or bailiff at the time of the taking thereof; and upon the production of the confession or acknowledgment to the Judge, and proof thereof by the oath of the clerk or bailiff, the Judge may order that judgment be entered thereon.

(2) The oath shall state that the party making it has not received, and that he will not receive, anything from the plaintiff or defendant, or any other person, except his lawful fees, for taking the confession or acknowledgment, and that he has no interest in the demand sought to be recovered. 10 Edw. VII. c. 32, s. 170.

May Take a Confession.—The former section 211, R.S.O. 1897, c. 60, provided for taking a confession "before or after action commenced;" these words are now omitted, and a confession can only be taken after action commenced.

Form of a confession, No. 83.

Form of affidavit of execution of confession, No. 23.

Form of judgment on confession, No. 49.

One partner cannot give a confession for the firm without special authority: Huff v. Cameron, 1 P. R. 255; Hambridge v. De La Crouee, 3 C. B. 742; but if the non-executing partner comes to know of it, and allows proceedings to be taken upon it, and delays for eighteen months before applying to set it aside, a judgment upon it will not be disturbed: Brown v. Clugmars, 2 P. R. 202. A confession could be given by the attorney of the defendant: Richmond v. Proctor, 3 U. C. L. J. 202; but his authority must be produced and should be attached to the confession. The jurisdiction conferred to order judgment on a confession would seem to be dependent upon the production to the judge of the confession and the special oath of the clerk or bailiff who took it, required by the section. The case of Potter v. Pickle, 2 P. R. 391, in which the affidavit of execution of a cognovit under the Common Law Procedure Act to be filed afterwards, being, it is submitted, distinguishable.

One of several executors has no power to bind the others by giving a confession: Commercial Bank of Canada v. Woodruff, 21 U. C. R. 602.

A confession given by the maker of a note payable immediately is no defence to an action against the endorser: Bank of Montreal v. Douglas, 17 U. C. R. 208. If one of two defendants dies after confession and before judgment, leave would be given to enter judgment against the survivor: Nichall v. Cartwright, Tny. 464; see letter at p. 313 of 7 U. C. L. J. on Confession.

At the Time of Taking Thereof.—The confession or acknowledgment executed in any other form than here prescribed would

operate as an admission of the party of the contents of the instrument, but could not properly be acted upon as a confession. The general opinion is that a confession in the division court has not the effect that the same instrument would have under R.S.O. 1897, c. 147 (now R.S.O. 1914, c. 134), though, in Park v. Willcock, Feb. 16th, 1893 (not reported), it was held that a confession of judgment in a division court came within the express terms of that Act, and was void as against creditors when in contravention thereof; and see Edison General Electric Co. v. Westminster Tramway Co., 1897 A. C. 193. But see Bailey v. Bank of Hamilton, 21 A. R. 156, where a defence was withdrawn pursuant to the provisions of section 118 (now 102) of the Division Courts Act. Sec. 170.

Judgment Upon Confession.—No time is limited within which the application for judgment is to be made: see notes to section 98.

No Interest in the Demand.—It is intended here to make the officer who takes the confession perfectly independent so far as the oath can make him; and as neither clerks nor bailiffs can sue in their own court, neither can they have any "interest" in the suits of others; see section 52 and notes.

COSTS.

Judge's authority as to costs.

170.—(1) Unless otherwise provided, the costs of and incidental to all actions shall be in the discretion of the Judge, who shall have full power to determine by whom and to what extent costs shall be paid.

Costs to abide event except by order.

(2) If the Judge does not make an order as to costs they shall abide the event of the action.

Allowance to defendant for attendance.

(3) Where the plaintiff does not appear, or does not prove his claim, the Judge may award to the defendant a sum for his trouble and attendance not exceeding what he would be entitled to if a witness on his own behalf, to be recovered by execution.

Costs when action fails for want of jurisdiction.

(4) Where the plaintiff fails to recover judgment by reason of the court not having jurisdiction, the Judge shall nevertheless have the power conferred by subsection (1), and the recovery of the costs awarded may be enforced by the same remedies by which costs of proceedings within the proper competence of the court are recoverable. 10 Edw. VII. c. 34, s. 171.

All Actions.—See notes to section 49.

In the Discretion of the Judge. — A very wide discretion ("full power") is here given to the judge on the subject of costs, but it only applies to cases where it is not "otherwise provided." It would not apply to such cases as are provided for under section 111 (5), and others of a similar nature.

Sec. 170. if the discretion and "full power" here given as to costs is exercised upon an erroneous principle, or a misapprehension of the facts, there has been no real exercise of judicial discretion; and in such circumstances, if the case is an appealable one under section 125, an appeal will lie thereunder from such a decision as to costs: Gates v. Seegram, 19 O. L. R. 210; and see Julius v. Oxford (Bishop), 5 App. Cas. 214. Enabling words are always compulsory where they are words to effectuate a legal right: *ib.*

Abide the Event.—Subsection (2). The event is to be taken distributively. If the plaintiff recover as to some items of the claim, and the defendant as to others, the plaintiff is entitled to the general costs of the suit, and the other costs—*e.g.*, witness fees—will be payable to the party who has succeeded upon the issue in respect of which they were incurred: Myers v. Defries, 4 Ex. D. 180; Cooke v. Taylor, 5 Q. B. D. 569; Hawke v. Brear, 14 Q. B. D. 84.

Costs.—Where a party to an action is a necessary and material witness on his own behalf, he is entitled to tax against the opposite party against whom he succeeds in the action the same fees as any other witness: Boyle v. Rothschild, 10 O. L. R. 424; Tattersall v. People's Life Ass. Co., 10 O. L. R. 537. The fact that witnesses may necessarily have to be brought a long distance to attend the court is no reason for disallowing the necessary expenses thereof; but if the case is one in which the evidence could have been properly obtained under a commission under section 118, the judge's discretion would doubtless be rightly exercised in moderating the expenses of witnesses brought at a great expense entirely disproportioned to the amount involved in the action. It is submitted that the tariff is not conclusive as to matters not provided for in it, and that other charges may be allowed which the judge may think just: see Toronto v. Grand Trunk Ry. Co., 13 O. L. R. 12. The judge has the same power over the costs in cases tried by jury as in those not so tried; and the recommendation of the jury on the question of costs need not be, and it is submitted ought not to be, considered: see Farquhar v. Robertson, 13 P. R. 156; Weaver v. Sawyer, 16 A. R. 422.

Witness Resident in the County.—For schedule of witness fees, see Division Court Tariff, 3.

Witness Resident out of County.—Such witness is entitled to be paid witness fees and mileage, according to the County Court Tariff: section 117, *i.e.*:

Witnesses within 3 miles of the courthouse, *per diem*	$1 00
Witnesses over 3 miles of the courthouse, *per diem*	1 50
Barristers and solicitors, physicians and surgeons, other than parties to the cause, when called upon to give evidence of professional service rendered by them, or to give professional evidence, *per diem*, unless otherwise provided by statute	5 00
Engineers, surveyors, architects, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, *per diem*	5 00

If witnesses attend in one case only, they will be entitled to the full allowance; if they attend in more than one case, they will be entitled to a proportionate part in each case only.

The travelling expenses of witnesses, over three miles, are allowed according to the sums reasonably and actually paid, but in no case to exceed 20 cents per mile, one way. Sec. 170.

The above is the tariff in county court cases, provided by Con. Rules of the Supreme Court of Ontario, 1st September, 1913, as amended by Con. Rules of 24th December, 1913. The wording of section 117 is wide enough to include the special fees to barristers and others above stated; but only if "resident in Ontario, but out of the county in which the court is situated." If resident within the county, they will only be entitled to fees on the tariff provided by the Division Court Rules, *post*.

Veterinary surgeons are mentioned in the Division Court Tariff, but not in the County Court Tariff: see, however, The Veterinary Surgeons Act, R.S.O. 1914, c. 171, s. 2.

Under the Division Court Tariff:

Barristers and solicitors, physicians and surgeons, engineers and veterinary surgeons, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give professional opinions, *per diem*.. $4 00

(NOTE.—Disbursements to surveyors, architects and professional witnesses, such as are entitled to specific fees by statute, are to be taxed, as authorized by such statute.)

Veterinary surgeons (R.S.O. 1914, c. 171, s. 2) shall be entitled to professional fees in attending any court as a witness in such cases as relate to the profession.

Architects (The Ontario Architects Act, R.S.O. c. 167, s. 28), $5.00 per day.

Surveyors (The Ontario Land Surveyors Act, R.S.O. 1914, c. 165, s. 40), $5.00 per day.

Under sub-section (3), the judge may allow the defendant, in the circumstances there mentioned, a sum for his trouble and expense of attendance, not exceeding what he would be entitled to if a witness on his own behalf. This is independent of the general law for the allowance of witness fees to a party to the action attending as a witness. So the allowance may be made, even if the defendant did not attend for the purpose of giving evidence.

Costs When Action Fails for Want of Jurisdiction.—Formerly, it was decided that where a judge had no jurisdiction, he had no power to award costs: Lawford v. Partridge, 1 H. & N. 621; Pencock v. The Queen, 4 C. B. N. S. 264; Powley v. Whitehead, 16 U. C. R. 589; Campbell v. Davidson, 19 U. C. R. 222; Nicholls v. Lundy, 16 C. P. 160; *Re* Kingston Election, Stewart v. Macdonald, 41 U. C. R. p. 313; Brown v. Shaw, 1 Ex. D. 425; though the authorities to that effect were disregarded in Great Northern Committee v. Inett, 2 Q. B. D. 284: see cases cited in notes, *ante*.

The provision in sub-section (4) is intended to remove any doubts which existed as to the right of a judge to award costs against the plaintiff in such cases.

The judge cannot lay down a general practice that only the costs of such witnesses as are called at the trial shall be allowed and if it be desired to have the fees of witnesses who have not been called allowed, application is to be made to him: The Cashmere, 62 L. T. 814.

Sec. 171.

Taxation of Costs.—The clerk is to determine (subject to appeal to the judge) what fees are to be allowed for witnesses, and before allowing the same, must be satisfied that they attended, and must be furnished with the affidavit prescribed by Rule 75. The costs must be made out in detail and should be endorsed on or attached to the summons. The parties to the action are entitled to a detailed bill of the costs, if demanded, on payment to the clerk of a fee of 10 cents and necessary postage: Rule 73.

Postage, Etc.—The costs of prepaying and registering letters containing papers sent from one division court officer to another, or to parties to suits or to the judge, and of all necessary notices sent by the clerk, including postage stamps which are required to be sent to the judge for the return of papers sent to him, are in all cases costs in the cause: Rule 57.

Form of affidavit of witness fees, No. 20.

Security for Costs.—See notes to section 110.

Form of bond for security for costs, No. 71.

Counsel fees.

171. Where in a contested action for more than $100, and in the cases mentioned in clauses (*b*) and (*c*) of section 125 where a counsel, solicitor or agent has been employed by the successful party in the conduct of the cause or defence, the Judge may direct a sum of $5, to be increased according to the difficulty and importance of the case to not more than $10, to be allowed to the successful party, and the same shall be added to the costs. 10 Edw. VII. c. 32, s. 172.

In a Contested Action.—This section is extended to apply to appealable interpleader cases by section 125 (b) and to cases in which the parties consent to an appeal, section 125 (c). The fee here given can only be ordered to be taxed when "such agent is a barrister or solicitor:" Rule 53; and it submitted that no fee could be taxed if a clerk or student conducted the case.

"A contested case" is defined by Rule 54 as follows:

(a) Where a defence is put in disputing a claim for more than $100, and a counsel or solicitor has been retained to prosecute or defend the claim in court at the sitting, and the case comes for trial, whether any actual contest is made at the court or not.

(b) Where a defence is put in, disputing a claim for more than $100, and a counsel or solicitor has been retained to make an application under the Act, and an order is made therein by the Judge empowering the clerk to enter final judgment.

(c) Where a defence is put in, disputing a claim for more than $100, and a counsel or solicitor has been retained to prosecute the claim in court, and the defendant afterwards and before the opening of the court, confesses judgment, or pays or settles the claim.

(d) Where a defence is put in, disputing a claim for more than $100, and the defendant has retained a solicitor or counsel to defend the action for him in court, and the plaintiff does not prosecute his action.

Sec. 172.

Judgment Under the Act.—Section 100; Rule 54 (h). Where judgment is moved for under section 100, the power to grant a counsel fee is confined to cases where a defence is put in and afterwards an order is made by the judge empowering the clerk to enter final judgment. Under sub-section (3) of that section, the plaintiff may, in certain cases, obtain final judgment for part only of the claim. It would seem that a counsel fee might be allowed for obtaining such an order where the total claim exceeds $100; but it is submitted only where the amount for which final judgment was ordered exceeded $100. On the trial of the case for the remainder of the amount claimed a further fee might be allowed, but the total fees allowed in the case must not exceed $10.

Cases mentioned in clause (h) section 125. "In interpleader where the money or the value of the goods or chattels claimed, or proceeds thereof exceeds $100, or where the damages claimed by or awarded to either party against the other, or against a bailiff, exceeds the sum of $60:" clause (h) of section 125. Clause (e) section 125: "Where the parties consent to an appeal," no matter how small is the amount involved.

The present law of Ontario permits counsel to sue for the value of professional services: Armour v. Kilmer, 28 O. R. 618; McDougall v. Campbell, 41 U. C. R. 332; and it would seem that a fee taxed under the provisions of this section could be recovered by a barrister or solicitor in an action against his client. See notes to section 110.

Shall be Taxed by the Clerk.—The clerk's duty is simply a ministerial one, which he is bound to execute, the responsibility of the order being improperly granted, resting with the judge: Andrews v. Marris, 1 Q. B. 3; Graham v. Smart, 18 U. C. R. 482; Hill v. Manager of Met. Asylum Dist., 4 Q. B. D. pp. 440, 441.

The discretion conferred upon the judge under this section should be exercised according to the principles laid down in Julius v. Oxford, (Bishop), 5 App. Cas. 214, and other cases cited in note to section 10.

Costs of witnesses in certain cases.

172. Where the defendant having disputed the plaintiff's claim, afterwards and before the opening of the court, confesses judgment or pays the claim so short a time before the sittings of the court that the plaintiff cannot in the ordinary way be notified thereof, and without such notice the plaintiff *bona fide* and reasonably incurs expenses in procuring witnesses or in attending at court, the Judge may order the defendant to pay such costs or such portion thereof as to him may seem just. 10 Edw. VII. c. 32, s. 173.

Confession Judgment.—As to when the defendant may confess judgment, see section 169 and notes thereto. See section 102 as to withdrawal of defence by notice to the clerk, which may be done at least six days before the sitting at which the action may be tried.

Notified Thereof.—It is the duty of the clerk forthwith to notify any party for whom he may receive money by virtue of his office: section 42. The notice is to be registered: Rule 78.

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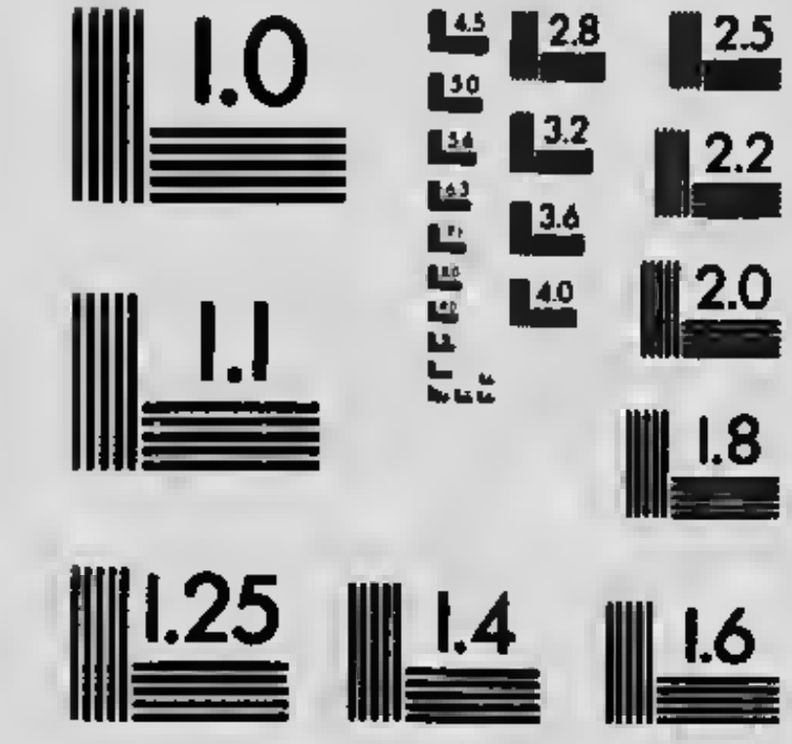
(ANSI and ISO TEST CHART No. 2)



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Sec. 173.

Reasonably Incurs.—What is reasonable must always be a fact to be determined by the judge, and must be decided with reference to the circumstances of each particular case.

See also notes to section 171.

JUDGMENT AND EXECUTION.

When money not paid, pursuant to order, execution to issue.

173.—(1) Where the Judge gives judgment or makes an order for the payment of money, and default is made in payment of the whole or of any part thereof, the party in whose favour the order has been made shall be entitled to execution against the goods and chattels of the party in default.

Form of execution.

(2) The clerk, at the request of the party prosecuting the judgment or order, shall issue an execution, Form 5, to a bailiff of the court, or to a bailiff of any other court within the county, who by virtue thereof shall levy by distress and sale of the goods and chattels of the party in default such sum and costs, with interest thereon from the date of the order or of the entry of the judgment as have been ordered to be paid and remain due, and shall pay the same over to the clerk. 10 Edw. VII. c. 32, s. 174.

Rule 74 provides that every judgment and order shall be entered in the Procedure Book and the moneys shall be payable at the office of the clerk.

Form of execution against goods, No. 52, also No. 4 to Act.

Appointment of Receiver.—There is probably no authority in the division court to aid a judgment creditor by the appointment of a receiver, but the point has not been expressly decided: see notes to section 65.

Judgment.—By a judgment is here meant that final determination of a cause which concludes the parties and their privies to it, and prevents the subject being again litigated, either in the division court or any other except by way of appeal: Gibbs v. Cruickshank, L. R. 8 C. P. 454; Flitters v. Allfrey, L. R. 10 C. P. 29; Austin v. Mills, 9 Ex. 288; Dover v. Child, 1 Ex. D. 172; Bullock v. Dunlop, 2 Ex. D. 43; see note to section 8.

So long as a judgment stands, if regularly entered, on proceedings duly taken, it estops either party from denying its correctness or the execution founded upon it: Huffer v. Allen, L. R. 2 Ex. 15; Ventriss v. Brown, 22 C. P. 345; but if obtained by covin—i.e., secret conspiracy or agreement between two or more persons to injure or defraud another—and collusion, it is no bar, and does not affect third parties: Girdlestone v. Brighton Aquarium Co., 3 Ex. D. 137; 4 Ex. D. 107; see Edison General Electric Co. v. Westminster Tramway Co., 1897, A. C. 193. A defendant in the division court who obtains a judgment on a counterclaim for an amount beyond the jurisdiction of the court, but who has not obtained any relief in respect of the balance in excess of the plaintiff's claim, is not estopped from afterwards bringing an

action in the Supreme Court of Ontario or county court upon the same cause of action; but the defendant in the Supreme Court or county court is estopped from denying the cause of action of the plaintiff in such court, and the only question to be decided therein is the amount of damage: Webster v. Armstrong, 34 L. J. Q. B. 236; *Re* South American and Mexican Co., 1895, 1 Ch. 37. Sec. 173.

Upon the subject of estoppel see the illuminating discussion in Carr v. London & N. W. Ry. Co., L. R. 10 C. P. 307; referred to in Ehy Blain Co. v. Montreal Packing Co., 17 O. L. R. 292.

A judgment of a division court is not removable into a superior court for the purpose of issuing execution thereon: Moreton v. Holt, 10 Ex. 707.

A verbal order of the judge sitting in court is a "judgment" of the court, and can be acted upon: Ely v. Moule, 5 Ex. 918.

See, also, notes to sections 98, 100, 122, 123, 124.

To What Bailiff Execution to Issue.—The above section provides that the execution may be issued to "a bailiff of the court or to a bailiff of any other court within the county." This latter provision was not in the original section, but was contained in the former Rule 124.

THE EXECUTION ACT.

The R. S. O. 1914, c. 80, applies to executions in the division court, and is as follows:

1. This Act may be cited as "*The Execution Act.*" Short title.

2. In this Act Interpretation.

(*a*) "Execution" shall include a writ of *fieri facias* and every subsequent writ for giving effect thereto. "Execution."

(*b*) "Sheriff" shall include any officer to whom an execution is directed. "Sheriff."

[A division court bailiff is within this definition].

EXEMPTION.

[See notes on exemptions, *post*, "Statutory Exemptions."]

3. The following chattels shall be exempt from seizure under any writ issued out of any court, namely: Chattels exempt from seizure.

(*a*) The beds, bedding, and bedsteads (including cradles) in ordinary use by the debtor and his family; Bedding.

(*b*) The necessary and ordinary wearing apparel of the debtor and his family; Apparel.

Sec. 173.

Furniture.

(*c*) One cooking stove with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and a shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve tea cups, twelve saucers, one sugar basin, one milk jug, one tea pot, twelve spoons, two pails, one wash tub, one scrubbing brush, one blacking brush, one wash board, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this subdivision enumerated not exceeding in value $150.

Fuel and provisions.

(*d*) All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value $40;

Animals.

(*e*) One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of $100, and food therefor for thirty days, and one dog.

Tools.

(*f*) Tools and implements of, or chattels ordinarily used in the debtor's occupation, to the value of $100; but if a specific article claimed as exempt be of a value greater than $100 and there are not other goods sufficient to satisfy the writ such article may be sold by the sheriff who shall pay $100 to the debtor out of the net proceeds, but no sale of such article shall take place unless the amount bid therefor shall exceed $100 and the cost of sale in addition thereto.

Exempted article valued at over $100.

Bees.

(*g*) Fifteen hives of bees.

Sec. 173.

Right of debtor to part proceeds of sale of implements.

4. The debtor may in lieu of tools and implements of or chattels ordinarily used in his occupation referred to in clause (*f*) of section 3, elect to receive the proceeds of the sale thereof up to $100, in which case the officer executing the writ shall pay the net proceeds of the sale if the same do not exceed $100, or, if the same exceed $100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under clause (*f*).

Money derived from sale of exempted goods.

5. The sum to which a debtor is entitled, under clause (*f*) of section 3 or under section 4, shall be exempt from attachment or seizure at the instance of a creditor.

Disposal of exempted goods after death of the debtor.

6. Chattels exempt from seizure shall, after the death of the debtor, be exempt from the claims of his creditors, and his widow shall be entitled to retain them for the benefit of herself and his family, or, if there is no widow, the family of the debtor shall he entitled to them.

Right of selection.

7. The debtor, his widow or family, or, in the case of infants, their guardian, may select out of any larger number the chattels exempt from seizure.

Articles for which debt incurred.

8. Nothing herein shall exempt any article enumerated in clauses (*c*) to (*g*) of section 3 from seizure to satisfy a debt contracted for such article.

[Note: Exemptions of Indians' property are provided by The Indian Act, R.S.C. c. 81, s. 102, 105; Avery v. Cayuga, 28 O. L. R. 517, and see notes *post* "Statutory Exemptions."]

Sheriff may sell any lands of execution debtor, including those held in trust for him.

9. The Sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, including any lands whereof any other person is seized in trust for the execution debtor.

WRITS AGAINST LANDS AND GOODS.

From what date binding.

Rev. Stat., c. 126.

Rev. Stat., c. 125.

10.—(1) Subject to the provisions of the Land Titles Act, a writ of execution shall bind the goods and lands against which it is issued from the time of the delivery thereof to the Sheriff for execution; but subject to the provisions of *The Bills of Sale and Chattel Mortgage Act* no writ of execution against goods shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such

Sec. 173.

person had, at the time when he acquired his title, notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to the Sheriff and remains in his hands unexecuted.

Endorsement.

(2) The Sheriff shall upon the receipt of the writ and without fee, endorse thereon the day of the year, the month, the hour and the minute when the same was received.

Exception.

(3) Subsection 1 shall not apply to an execution against goods issued out of a division court, which shall bind only from the time of the seizure.

11. (Provides for the liability of land to execution.)

SEIZURE OF CERTAIN INTERESTS UNDER EXECUTION AGAINST GOODS.

Shares and dividends and equitable interests therein

12. Shares and dividends, and any equitable or other right property, interest or equity of redemption in or in respect of shares or dividends in an incorporated bank or an incorporated company having transferable shares shall be deemed to be personal property found in the place where notice of the seizure thereof is served, and may be seized under execution and may be sold thereunder in like manner as other personal property.

Notice of seizure.

13.—(1) The Sheriff on being informed on behalf of the execution creditor that the execution debtor has such shares, and on being required to seize the same, shall forthwith serve a copy of the execution on the bank or company with a notice that all the shares of the execution debtor are seized thereunder; and from the time of service the seizure shall be deemed to be made and no transfer of the shares by the execution debtor shall be valid unless and until the seizure has been discharged; and every seizure and sale made under the execution shall include all dividends, premiums, bonuses, or other pecuniary profits upon the shares seized, and the same shall not, after notice as aforesaid, be paid by the bank or company to any one except the person to whom the shares have been sold.

Duty of bank or company.

How seizure made.

(2) Such seizure may be made and notice given by the Sheriff where the bank or company has within his bailiwick a place at which service of process may be made.

Sec. 173.

Provisions for the case of more than one place of service.

14. If the bank or company has more than one place where service of process may be made, and there is some place where transfers of shares may be notified to and entered by the bank or company, so as to be valid as regards the bank or company, or where dividends or profits as aforesaid on stock may be paid other than the place where service of such notice has been made, the notice shall not affect any transfer or payment of dividends or profits duly made and entered at any such other place, so as to subject the bank or company to pay twice, or so as to affect the rights of any *bona fide* purchaser, until after the expiration of a period from the time of service sufficient for the transmission of notice of service by post from the place where it has been made to such other place, which notice it shall be the duty of the bank or company to so transmit.

Mode of proceeding after sale.

15. Where any such share is sold the Sheriff shall within ten days after the sale serve upon the bank or company at some place where service of process may be made, a copy of the execution, with his certificate endorsed thereon, certifying the sale and the name of the purchaser who shall have the same rights and be under the same obligations as if he had purchased the share from the execution debtor at the time of the service of notice under section 13.

Saving of all other remedies.

16. Nothing in this Act shall effect any remedy which the execution creditor might, without this Act, have had against any such share or the dividends, premiums, bonuses or other pecuniary profits in respect thereof; and the provisions of the next preceding four sections shall apply to such remedy in so far as they can be applied thereto.

Procedure for sale of equitable interests.

17. The procedure for seizure and sale in the case of an equitable or other right, property, interest or equity of redemption in or in respect of any share shall be the same as hereinbefore provided in the case of shares and dividends, and the same shall be held to be personal property found in the place where notice of the seizure is served.

Rights under patent of invention.

18.—(1) All rights under letters patent of invention and any equitable or other right, property, interest or equity of redemption therein shall be deemed to be personal property and may be seized and sold under execution in like manner as other personal property.

Sec. 173.

How seizable.

(2) Such seizure and sale may be made by the Sheriff of any county or district having in his hands to be executed an execution against the property of the debtor who is the owner of or interested in the letters patent.

Notice of seizure.

(3) Notice of the seizure shall forthwith be given to the Patent Office and the interest of the debtor shall be bound from the time when the notice is received there.

Equitable rights in chattels.

19. The Sheriff may seize and sell any equitable or other right, property, interest or equity of redemption in or in respect of any goods, chattels or personal property, including leasehold interests in any land of the execution debtor, and, except where the sale is under an execution against goods issued out of a division court, the sale shall convey whatever equitable or other right, property, interest or equity of redemption he had or was entitled to in or in respect of the goods, chattels or personal property at the time of the delivery of the execution to the Sheriff for execution, and where the sale is under an execution against goods issued out of a division court the sale shall convey whatever equitable or other right, property, interest or equity of redemption the debtor had or was entitled to in or in respect of the goods, chattels or personal property at the time of the seizure.

Money and securities for money.

20. The Sheriff shall seize any money or bank-notes, including any surplus of a former execution against the debtor, and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties, or other securities for money belonging to the person against whom the execution has been issued; and, subject to the provisions of *The Creditors Relief Act*, shall pay or deliver to the party who sued out the execution, the money or bank notes so seized, or a sufficient part thereof, and hold such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, as security for the amount directed to be levied, or so much thereof as has not been otherwise levied or raised; and the Sheriff may sue in his own name for the recovery of the sums secured thereby.

Rev. Stat., c. 81.

Sheriff's right to sue.

Effect of payment to sheriff.

21. The payment to the Sheriff by the person liable on such cheque, bill of exchange, promissory note, bond, mortgage, specialty or other security, with or without suit, or recovery from him, shall discharge him to the extent of such payment or recovery from his liability thereon.

Sec. 173.

Payment of proceeds.

Rev. Stat., c. 81.

Surplus.

22. Subject to the provisions of *The Creditors Relief Act*, the Sheriff shall pay over to the party who sued out the execution the money so paid or recovered, or a sufficient sum to discharge the amount directed to be levied, and if, after satisfaction thereof and of the fees, poundage and expenses of the Sheriff, a surplus remains the same shall be paid to the party against whom the execution issued.

Indemnity of sheriff.

23. A Sheriff shall not be bound to sue any person liable upon such cheque, bill of exchange, promissory note, bond, mortgage, specialty or other security, unless the party who sued out the execution enters into a bond with two sufficient sureties to indemnify the Sheriff from all costs and expenses to be incurred in the prosecution of the action, or to which he may become liable in consequence thereof; and the expenses of the bond, not exceeding $5, may be deducted from any money recovered in the action.

When sheriff obliged to seize goods claimed by third parties.

24.—(1) A Sheriff shall not, without written instructions and a bond as hereinafter mentioned, be obliged to seize property which is in the possession of a third person claiming the same, and not in the possession of the debtor against whose property the execution was issued.

Instructions.

(2) The instructions shall specify the property in such a way as to enable the Sheriff to identify it.

Bond.

(3) The bond shall be a bond of indemnity to the Sheriff and his assigns, with two sufficient sureties who shall justify in double the value of the property, and the value shall be stated in an affidavit by the creditor or his solicitor or agent attached to the bond.

Conditions of bond.

(4) The bond shall be assignable to the claimant, and shall be conditioned that the persons executing the same shall be liable for the damages, costs and expenses which the Sheriff or the claimant may be put to by the seizure and subsequent proceedings, including interpleader proceedings, (if any), and which he does not recover from other persons who ought to pay the same.

Settlement by Judge.

(5) If the Sheriff is not satisfied with the bond offered the matter in difference shall be determined by a Judge of the county or district court of the county or district.

Sec. 173.

(6) Nothing in this section shall limit the right of the Sheriff to apply for relief by interpleader.

Right of sheriff to interpleader.

Taking money secured by mortgage under execution.

25.—(1) If a Sheriff is informed on behalf of the execution creditor that the execution debtor is a mortgagee of land and that the mortgage is registered, or that he is entitled to receive a sum of money charged upon land by virtue of a registered instrument, and if the Sheriff is required on behalf of the execution creditor to seize the mortgage or charge, and is furnished in writing with the information necessary to enable him to give the notice hereinafter mentioned, he shall, upon payment of the proper fees, forthwith deliver or transmit to the registrar or master of titles in whose office the mortgage or other instrument is registered, who shall forthwith register the same, a notice in the form or to the effect following:

Form of sheriff's notice to registrar.

To the Registrar of (*or as the case may be*)

By virtue of an execution issued out of the Supreme Court of Ontario (*or as the case may be*) whereby I am commanded to levy of the goods and chattels of *A. B.* for costs $, for debt, and $ lately adjudged to be paid by the said *A. B.* to *C. D.*, besides the costs of execution, I have this day seized and taken in execution all the estate, right, title and interest of *A. B.* in a mortgage made by X. Y. to A. B., bearing date the day of 19 . and registered in the registry office for the county of (*or as the case may be*) on the day of , 19 , as number (*or the said mortgage or other instrument may be described in any other manner by reference to dates, parties and the land covered as will enable the notice to be registered against the land therein described*) and in the money secured thereby, and this notice is given for the purpose of binding the interest of *A. B.* under sections 25 to 29 of *The Execution Act*.

Dated this day of , 19 .

(Signed) M. N.,

Sheriff of the County (or District) of

Effect of registration of sheriff's notice to registrar.

(2) Upon registration of the notice, the interest of the execution debtor in the mortgage or other instrument, and in the land therein described, and in the money thereby secured and in all covenants and stipulations for securing payment thereof, shall be bound by the execution, and such registration shall be notice of the execution and seizure to all persons who may thereafter in any way acquire any interest in the mortgage, land, money, or covenants; and the rights of the Sheriff and of the execution creditor shall have priority over the rights of all such persons subject, as regards the mortgagor or person liable

to pay the money secured by the mortgage or charge, to the next following section. Sec. 178.

26.—(1) A notice similar to that mentioned in the next preceding section shall also be served upon the mortgagor or the person who is liable to pay the money secured by the registered instrument; and after such service the person served shall pay to the Sheriff all money then payable and, as it becomes due, all money which may become payable to the execution debtor so far as may be necessary to satisfy the execution. Notice to mortgagor.

(2) Service of the notice may be made personally, or by leaving it at the dwelling-house of the person to be served with a grown up person residing there, or by registered post to the proper address of the person to be served. Mode of effecting service.

(3) Any payment made after service of the notice or after actual knowledge of the seizure shall be void as against the Sheriff and the execution creditor. Payments made after notice.

27. In addition to the remedies herein provided, the Sheriff may bring an action on such mortgage or other instrument seized under the provisions of this Act for the sale or foreclosure of the land covered by it, and shall be entitled to a bond of indemnity as in the cases provided for in section 23. Sheriff enforcing mortgage. Indemnity.

28.—(1) Upon an execution, notice whereof is registered under section 25, expiring or being satisfied, set aside or withdrawn, a certificate of such fact shall be given by the Sheriff or by the execution creditor, and the same or the order to set aside, as the case may be, may be registered; and thereupon such seizure shall be vacated and be at an end. When seizure may be vacated.

(2) The order or the certificate of the Sheriff shall not require verification. Verification of order and certificates.

(3) The certificate of the execution creditor shall be verified by the oath of a subscribing witness as in the case of other instruments affecting land. Idem.

29. For the registration of a notice under section 25 or of a certificate under section 28 the register or master shall be entitled to a fee of 50 cents; and for every notice of seizure under section 25, the Sheriff shall be entitled to a fee of $1, and for every certificate under section 28, to a fee of 75 cents. Fees of registrar and sheriff.

Sec. 173.

Taking chattel mortgage in execution.

29.—(*a*) Where an execution debtor is a mortgagee of chattels, and the mortgage is registered as required by law, sections 25, 26, 27, 28 and 29 of this Act shall be applicable, except that the notice to be given by the sheriff shall be delivered or transmitted to the clerk of the county or district court or other officer in whose office the chattel mortgage is registered.

NOTE: This section was added by 4 Geo. V. c. 21, s. 20.

EQUITY OF REDEMPTION IN LAND.

Interpretation.

30. Where the word "mortgagor" occurs in the next succeeding three sections, it shall be read and construed as if the words "his heirs, executors, administrators or assigns, or person having the equity of redemption," were inserted immediately after the word "mortgagor."

The interest of a mortgagor.

31.—(1) The Sheriff to whom an execution against the lands and tenements of a mortgagor is directed, may seize, sell and convey all the interest of the mortgagor in any mortgaged lands and tenements.

Equity of redemption.

(2) The equity of redemption in freehold land shall be saleable under an execution against the lands and tenements of the owner of the equity of redemption in his lifetime, or in the hands of his executors or administrators after his death, subject to the mortgage, in the same manner as lands and tenements may now be sold under an execution.

Effect of sale.

32. The effect of the seizure or taking in execution, sale and conveyance of mortgaged lands and tenements shall be to vest in the purchaser, his heirs and assigns, all the interest of the mortgagor therein at the time the execution was placed in the hands of the Sheriff, as well as at the time of the sale, and to vest in the purchaser, his heirs and assigns, the same rights as the mortgagor would have had if the sale had not taken place; and the purchaser, his heirs or assigns, may pay, remove or satisfy any mortgage, charge or lien which at the time of the sale existed upon the lands or tenements so sold in like manner as the mortgagor might have done; and thereupon the purchaser, his heirs and assigns, shall acquire the same estate, right and title as the mortgagor would have acquired in case the payment, removal or satisfaction had been effected by the mortgagor.

Sec. 173.

Effect of purchase by mortgagee or execution creditor.

33. A mortgagee of land, or the executors, administrators or assigns of a mortgagee, being or not being the execution creditor, may be the purchaser at the sale, and shall acquire the same estate, interest and rights thereby as any other purchaser, but in that event he or they shall give to the mortgagor a release of the mortgage debt; and if another person becomes the purchaser, and if the mortgagee, his executors, administrators or assigns shall enforce payment of the mortgage debt by the mortgagor, the purchaser shall repay the debt and interest to the mortgagor, and in default of payment thereof within one month after demand the mortgagor may recover the debt and interest from the purchaser, and shall have a charge therefor upon the mortgaged land.

CONTINGENT INTERESTS.

Liability to execution.

Rev. Stat., c. 109.

34.—(1) Any estate, right, title or interest in land which, under section 10 of *The Conveyancing and Law of Property Act*, may be conveyed or assigned by any person, or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution against such person, in like manner and on like conditions as land is by law liable to seizure and sale under execution, and the sheriff selling the same may convey and assign it to the purchaser in the same manner and with the same effect as the person might himself have done.

Except inchoate right of dower.

(2) An inchoate right to dower shall not be liable to seizure or sale under execution.

Property subject to power of appointment.

(3) Property over which a deceased person had a general power of appointment exercisable for his own benefit, without the assent of any other person, where the same is appointed by his will, may be seized and sold under an execution against the personal representative of such deceased person after the property of the deceased has been exhausted.

CHURCH PEWS AND SITTINGS.

Interest in pew or sitting.

35.—(1) The interest of any person derived by deed, lease or license in writing from the churchwardens or other authorities of any church in a pew or sitting, if such interest is assignable by the holder thereof, may be sold under execution at the suit of such churchwardens or other authorities for arrears of rent

Sec. 173. or other charge to which such pew or sittings is subject, or which the holder thereof may have agreed to pay or for which he may be liable, or at the suit of any creditor of such holder, and such churchwardens or other authorities may become purchasers at such sale on behalf of the church, and may relet or sell the right so acquired.

Deed. (2) The Sheriff may execute a deed to the purchaser of the interest so sold; and the churchwardens or other authorities shall, on production of such deed, give effect to the same upon payment of any arrears of rent or charge then due.

Saving. (3) Such sale shall be subject to any continuing rent or charge of such pew or sitting previously stipulated for or imposed, and shall not prejudice the right to impose increased rent or charges on such pew or sitting pursuant to *The Church Temporalities Act*, or any other law or custom.

3 V., c. 74.

EXECUTIONS AGAINST EXECUTORS.

How execution enforceable against executor, etc. **36.** The title and interest of a testator or intestate in land may be seized and sold under an execution upon a judgment recovered by a creditor of the testator or intestate against his executor or administrator in the same manner and under the same process as upon a judgment against the deceased, if he were living.

EXECUTIONS AGAINST MUNICIPAL CORPORATIONS.

Direction to levy rate. **37.**—(1) An execution against a municipal corporation may be indorsed with a direction to the Sheriff to levy the amount thereof by rate, and the proceedings thereon shall then be the following:—

Statement of claim to Treasurer. (*a*) The Sheriff shall deliver a copy of the writ and indorsement to the treasurer of the municipal corporation, or leave such copy at the office or dwelling-place of that officer, with a statement in writing of the Sheriff's fees and of the amount required to satisfy the execution, including the interest calculated to some day, as near as is convenient to the day of the service;

When sheriff to strike rate. (*b*) If the amount with interest thereon from the day mentioned in the statement is not paid to the Sheriff within one month after the service, the

Sheriff shall examine the assessment roll of the municipality and shall, in like manner as rates are struck for general municipal purposes, strike a rate sufficient in the dollar to cover the amount due on the execution, with such addition to the same as the Sheriff deems sufficient to cover the interest up to the time when the rate will probably be available, and his own fees and poundage; Sec. 173.

(*c*) The Sheriff shall thereupon issue a precept under his hand and seal of office, directed to the collector of the corporation, and shall annex to the precept the roll of such rate; and shall by the precept after reciting the writ and that the corporation has neglected to satisfy the same, and referring to the roll annexed to the precept, command the collector to levy such rate at the time and in the manner by law required in respect to the general annual rates; Sheriff's precept to collector, etc., to levy rate.

(*d*) If, at the time for levying the annual rates next after the receipt of such precept, the collector has a general rate roll delivered to him for the year; he shall add a column thereto, headed "Execution rate in A. B. vs. The Township" (or as the case may be, adding a similar column for each execution if more than one), and shall insert therein the amount by such precept required to be levied upon each person respectively, and shall levy the amount of such execution rate as aforesaid; and shall, within the time within which he is required to make the return of the general annual rate, return to the Sheriff the precept, with the amount levied thereon; Rate rolls.

(*e*) The Sheriff shall, after satisfying the execution and all the fees and poundage thereon, pay any surplus, within ten days after receiving the same, to the treasurer of the municipal corporation. Surplus.

(2) The clerk, assessor, and collector of the corporation shall, for all purposes connected with carrying into effect, or permitting or assisting the Sheriff to carry into effect, the provisions of this Act with respect to such execution, be deemed to be Functions of clerk, assessors and collectors.

Sec. 173. officers of the Court out of which the writ issued, and as such shall be amenable to the Court and may be proceeded against by attachment, mandamus or otherwise, in order to compel them to perform the duties imposed upon them.

When Execution May Issue.—On a judgment by default on a special summons under sections 98 and 102 or a summary judgment entered by order of the judge under section 100, execution may issue forthwith. In other cases, unless the judge otherwise orders, the execution shall not issue until fifteen days after the entry of judgment: section 122 (2). But the judge may, by special order, allow execution to issue at once. If it is shown that there is danger in delay: section 181.

The judge may also order a judgment to be paid by instalments: section 122 (1); Robinson v. Gill, 12 C. B. 191; but not so as to postpone execution longer than fifty days from the service of the summons, unless under special circumstances, such as sickness or other cause: section 124.

Execution should not be issued by the clerk without an express order from the party entitled to it: 4 U. C. L. J. 203, 251; Tuckett v. Eaton, 6 O. R. 486; or where from a course of business an authorization could be reasonably inferred. Section 173 (2) authorizes execution to be issued only "at the request of the party prosecuting the judgment."

When judgment is given for the defendant on a set-off or counterclaim execution may issue as in ordinary cases, for the recovery of the balance of such set-off or counterclaim if it does not exceed a sum within the jurisdiction of the court: section 113 (3).

An execution cannot issue in the name of plaintiff's executor without revival: Proctor v. Jarvis, 15 U. C. R. 187; but if issued before, it may be executed after the death of the plaintiff or defendant: Rolt v. Gravesend (Mayor, etc.), 7 C. B. 777; Turner v. Patterson, 13 C. P. 412; Johnson v. McKenna, 3 P. R. 229; even upon goods in the hands of the executor: Smith v. Bernie, 10 C. P. 243; see note *infra* "Reviving Judgments."

The endorsement of execution for a larger amount than is actually due is not *per se* an injury to the defendant; it must be shown that more goods were seized than were necessary or reasonable to satisfy what was really due, and that the acts complained of were done maliciously and without reasonable or probable cause: Barber v. Daniell, 12 C. P. 68; Saxon v. Castle, 6 A. & E. 652; Tancred v. Leyland, 16 Q. B. 669; Churchill v. Siggers, 3 E. & B. 937.

But an allegation and proof in a similar case that execution was issued wrongfully and maliciously, and without reasonable or probable cause, will support an action for the injury: Dewar v. Carrique, 14 C. P. 737; Gilding v. Eyre, 10 C. B. N. S. 592.

If the defendant pay the debt to the plaintiff, the defendant should notify the clerk thereof: Tuckett v. Eaton, 6 O. R. 486.

Executions should be executed in the order in which the bailiff receives them: 4 U. C. L. J. 251. See Rule 109 as to bailiff's duty on receiving an execution.

An execution from a division court only binds goods from the time of seizure: The Execution Act, ss. 10 (3), 19, *ante;* and see notes

post, "Abandonment and Priority of Execution." Cullodeu v. McDowell, 17 U. C. R. 359; *per* Burns, J.; Watts v. Howell, 21 U. C. R. at p. 259. Sec. 173.

One who fraudulently removes goods of an execution debtor to prevent their seizure is liable to an action therefor: Young v. Buchanan, 6 C. P. 218; Turner v. Patterson, 13 C. P. 412.

A person purchasing a crop of wheat at a bailiff's sale might bring trespass against a person injuring or converting it: Haydon v. Crawford, 3 O. S. 583.

A sale may be made after the expiry of an execution if a seizure took place while it was in force: but if no seizure was made during that time, the sale is void: *Doe d.* Greenshields v. Garrow, 5 U. C. R. 273; Reynolds v. Streeter, 3 P. R. 315; Lee v. Howes, 30 U. C. R. 292; Hall v. Gosler, 15 C. P. 101.

See section 180 as to the death, resignation or suspension of a bailiff after action taken by him on an execution or attachment.

There is no warranty of title at a bailiff's sale, unless the bailiff expressly makes one: Chapman v. Speller, 14 Q. B. 621; but there is a warranty that he does not know he is destitute of title to the goods: Peto v. Blades, 5 Taunt. 65; see note to this case, 15 R. R. 611.

The purchaser gets no better title than the execution debtor had: and if he had none, neither does the purchaser acquire any.

A writ of execution issued too soon would not be a nullity but an irregularity only: Macdonald v. Crombie, 2 O. R. 243.

Where a writ of execution is not renewed, but not through any default of any officer of the court, it will not be renewed *nunc pro tunc*: Lowson v. Canada Farmers' Mut. Ins. Co., 9 P. R. 309.

An expired execution cannot be renewed: Macdonald v. Crombie, 11 S. C. R. 109; Barker v. Palmer, 8 Q. B. D. 9; Doyle v. Kaufman, 3 Q. B. D. 7; Neilson v. Jarvis, 13 C. P. 182, 183; Price v. Thomas, 11 C. B. 543; Cole v. Sherard, 11 Ex. 482; Smalpage v. Tongue, 17 Q. B. D. 644; Lowson v. Farmers' Mut. Ins. Co., 9 P. R. 309.

Where an order had been made which gave an execution priority over one in the sheriff's hands, it was held that the execution creditor, though a stranger to the action in which the order was made, had a *locus standi* to move to set aside the order: Glass v. Cameron, 9 O. R. 712.

The terms "*fieri facias*" and "execution," used in the Execution Act, are convertible terms: section 2 (a) of The Execution Act, *ante*; Macfie v. Hunter, 9 P. R. 149.

Where a discharge in insolvency is a complete answer to the issue of an execution, see Forrester v. Thrasher, 2 O. R. 38; s. c. 9 P. R. 383.

A writ of execution is not a judicial act, and the court may inquire at what period of the day it was issued: Clark v. Bradlaugh, 8 Q. B. D. 63.

A bailiff who has taken possession of goods under a writ of execution has a sufficient special property in them to enable him to maintain trespass and trover: Krehl v. Great Central Gas Co., L. R. 5 Ex. 289-293, or to insure them against fire: Drake on Attachment, 5th ed., 291.

Sec. 173.

It is submitted that goods sold by a bailiff under execution may be lent by the purchaser to the debtor, and that such act is not a contravention of the Bills of Sale Act, provided it is not done for the purpose of protecting the goods against the creditors of such debtor: Graham v. Furber, 14 C. B. 410; Woodgate v. Godfrey, 5 Ex. D. 24; see *Ex parte* Cooper, *Re* Baum, 10 Ch. D. 313; *Ex parte* Odell, *Re* Walden, 10 Ch. D. 76; Williams v. McDonald, 7 P. C. R. 381.

When a person assists a bailiff on an execution, his acts may be considered as those of the bailiff: McDougall v. Waddell, 28 C. P. 191.

What Constitutes a Seizure.—Execution sometimes means the writ itself and sometimes what is done under it: McDonald v. Cleland, 6 P. R. 293; Prentice v. Harrison, 4 Q. B. 852-857.

Levying on execution sometimes means *seizure and sale*: Ross v. Grange, 25 U. C. R. 396; Buchanan v. Frank, 15 C. P. 198; or the receipt of money: Traders Bank v. McConnell, 24 C. L. J. 87.

Seizure is forcible taking of possession: Johnston v. Hogg, 10 Q. B. D. 432. See also Gladstone v. Padwick, L. R. 6 Ex. 203; Gibbons v. Farewell, 34 Alb. L. J. 497, and cases there cited; May v. Standard Fire Ins. Co., 5 A. R. 605; Craig v. Craig, 7 P. R. 209; Cropper v. Cropper, 1 Cab. & E. 152.

Seizure of part of the goods in the name of the whole is good seizure of all: Cole v. Davis, 1 Ld. Raym. 724.

Where a sheriff went to defendant's house with an execution and merely produced the warrant, at the same time demanding the debt, costs and poundage, which were paid under protest, it was held not to amount to a seizure so as to entitle the sheriff to poundage: Nash v. Dickenson, L. R. 2 C. P. 252. But where a sheriff's officer went with another man to defendant's house, showed him the warrant, and demanded payment and told him that on default of payment the man must remain in possession, and further proceedings would be taken, the defendant then paid the sum demanded in the warrant, which included poundage and officer's fees, it was held there had been a seizure which entitled the sheriff to poundage: Bissicks v. Bath Colliery Co., 3 Ex. D. 174.

See Lee v. Danger, 1892 1 Q. B. 231, 241, 242; Craig v. Craig, 7 P. R. 209; Cropper v. Cropper, 1 Cab. & E. 152.

Bailiff's Duties.—On receiving an execution, the bailiff must endorse on the same a correct statement of the day of the year, the month, the hour and minute of its receipt by him: The Execution Act, s. 10 (2), *ante*; Rule 100. Whether several executions against the same person are delivered into the bailiff's hands, or he receives them by post, that execution should be first executed which the bailiff first sees. Seizure should be made, and the money paid over according to their priority: Hazlett v. Hall, 24 U. C. R., at p. 486; Lowe v. Jarvis, 13 C. P. 495; Bank of Montreal v. Munroe, 23 U. C. R. 414; Dennis v. Wethern, L. R. 9 Q. B. 345.

A bailiff cannot make a valid contract for the sale of the goods of a judgment debtor, against whom he holds a writ of execution, until he has actually seized the goods: *Ex parte* Hall, *Re* Townsend, 14 Ch. D. 132; Samis v. Ireland, 4 A. R. 141.

As to bailiff's liability to an action for anything done under execution, etc., see Public Authorities Probation Act, R.S.O., 1914, c. 89, s. 12.

If the bailiff cannot effect a sale for a reasonable amount he should return the execution "property on hand for want of buyers;" Rule 96, Form 151; and on the request of the execution creditor the clerk must then issue another execution directing the bailiff to sell the property for what it will bring: Rule 97; Form 152. Sec. 173.

Interest.—Division courts are now courts of record; s. 8 and notes; and interest is now recoverable on judgments therein from the date of judgment: section 174 (2); Con. R. 116; at 5 per cent: R.S.C. c. 120.

Return.—A return of *nulla bona* where there were goods is no more than an irregularity to be complained of by the defendant, and a third party cannot object that such a return was made at the instance of the solicitor of the plaintiffs: Molsons Bank v. McMeekin, 15 A. R. 385.

A return of *nulla bona* may be properly made after the expiration of the writ: *Ib.*

Where the goods of a third party were seized and sold under an execution against the judgment debtor, and damages were recovered by such third party against the sheriff, and paid by the plaintiff in accordance with an undertaking to indemnify the sheriff, an *alias fi. fa.* issued by the plaintiff in spite of the sheriff's return to the previous writ, "money made and paid to plaintiff's attorney" was set aside and satisfaction entered upon the judgment roll; and a summons to amend the sheriff's return discharged: Hanna v. McKenzie, 9 C. L. T. 358.

Requisites of Executions.—All summonses, executions and warrants shall be printed on half sheet foolscap paper: Rule 38.

If in an execution and the endorsements, the names of the plaintiffs and defendants are transposed throughout, it is clearly irregular: Davidson v. Grange, 5 P. R. 258.

An execution not entitled in the cause, but giving the names of the parties to the cause in which the judgment was recovered, and the date and amount, is valid and sufficient to protect the sheriff levying thereunder: McAskill v. Power, 30 N. S. R. 189.

After seizure under a division court execution, the property in the goods remains in the debtor until sale: Giles v. Grover, 1 Cl. & F. 72, 219; and the execution creditor is in the position of a secured creditor; *Ex parte* Williams, L. R. 7 Ch. 314; Slater v. Pender, L. R. 7 Eq. 95. A receiver in lunacy appointed after seizure does not obtain priority: *Re* Clarke, 1898 1 Ch. 336.

Setting Aside An Execution.—An execution would not be set aside at the instance of a subsequent creditor, a stranger to the execution: Perrin v. Bowes, 5 U. C. L. J. 138; but if judgment and execution are fraudulent, they can both be set aside in an action by a subsequent execution creditor: Balfour v. Ellison, 8 U. C. L. J. 330; Commercial Bank v. Wilson, 3 E. & A. 257; Bowerman v. Phillips, 15 A. R. 679; see also Glass v. Cameron, 9 O. R. 712.

Costs.—A plaintiff who has recovered a judgment for debt and costs, and has received the debt out of court, is entitled to have execution for costs, and a mandamus would be granted to the clerk to compel

Sec. 173. its issue: R. v. Fletcher, 2 E. & B. 279; *Re* Linden v. Buchanan, 29 U. C. R. 1.

Where Execution May Issue for Part of Claim Without Prejudicing Right to Remainder.—See section 98, *ante*.

Abandonment and Priority of Execution.—The question whether a bailiff or other officer abandons a seizure by withdrawing for a time is a question of fact depending on the circumstances of the case and the necessity for such withdrawal. If, for instance, he should go out temporarily for the purpose of obtaining food, or to see a doctor, he would not abandon the possession, but if he went out to assist the debtor, and to enable a sale to be made of the debtor's business, it would probably be held to be an abandonment of possession: Bagshaw's (Ltd.) v. Deacon, 1898 2 Q. B. 173. On chattels being seized by the sheriff, and afterwards, by direction of the plaintiff's attorney, abandoned, it was held that the execution debtor could sell and give a good title to the goods: Gould v. White, 4 O. S. 124. A chattel seized by the sheriff, and lent by him before return of the writ, was held no abandonment: Hamilton v. Bonek, 5 O. S. 664. A sheriff, having seized goods under an execution, took a bond for the delivery thereof when he required them, and allowed the debtor to remain in possession and carry on his business as before the seizure; and while the debtor so continued in possession, and after the return day of the writ had expired, a second execution at the suit of another creditor was received by the sheriff; it was held that the second writ took precedence of the first: Castle v. Ruttan, 4 C. P. 252; see R. v. Curley, 18 C. L. T. 26; and where there was an understanding between the execution creditor and the debtor that the execution was not to be proceeded with until other creditors pressed, and the debtor continued to carry on the business, it was held that the writ was not in the sheriff's hands to be executed when seizure was afterwards made under a subsequent execution: Hazlett v. McArthur, 11 Man. L. R. 602, following Pringle v. McIsaac, 11 Price 445; Kempland v. Macaulay, 1 Peake, 95. As remarked by Macaulay, C.J., Castle v. Ruttan, 4 C. P. at p. 260, in delivering the judgment of the court, "The sheriff, in the absence of directions, acts upon his own responsibility;" and if he adopts a course which conflicts with the rights of others, he may incur responsibility to the first execution creditor or to the second: but he has no discretion to bond the goods to the debtor or suffer him to continue the possession or use of the goods and to prosecute his business with them as before suspending and deferring the execution indefinitely, and until long after its return, without further acting upon it, and at the same time to interpose the expired writ between the writ of another creditor and the goods." After two ineffectual attempts by the sheriff to sell certain articles, which he considered chattels, he left them where they were; the execution debtor removed and sold them. It was held that the seizure had not been abandoned, and that the sheriff might retake them: Walton v. Jarvis, 14 U. C. R. 640. Where the plaintiff's attorney had ordered execution to be stayed, and afterwards telegraphed the sheriff that he must act as he thought fit, it was held that this answer was an abandonment of the stay: Roulton v. Smith, 17 U. C. R. 400. The bailiff, having merely made an inventory of the goods seized under a *fi. fa.*, leaving no one in possession, it was held that they were not in *custodia legis*, and, therefore, could not be held against the landlord's claim for rent: Hart v. Reynolds, 13 C. P. 501. A sheriff having seized goods under an execution, left them in the

possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested so to do, the landlord of the execution debtor having in the meantime seized and sold the goods for rent due him by the debtor, it was held, in an action by the sheriff, that he had not at the time of the distress such a possession of the goods as prevented the landlord from distraining for rent: McIntyre v. Stota, 4 C. P. 248. But the taking of a bond from the tenant to the bailiff to produce and keep and deliver the chattels, and not to remove them nor allow them to be removed from the premises, and to hold them for the bailiff, is not evidence of an abandonment, but the contrary: Anderson v. Henry, 29 O. R. 719; see also Robertson v. Fortune, 9 C. P. 427; R. v. Carley, 18 C. L. T. 26. Long delay of a writ in a sheriff's hands does not of itself amount to an abandonment of it, but it is evidence of it: Mein v. Hall, 13 C. P. 518. Taking an execution by the plaintiff to the clerk for renewal would not be an abandonment of it: Rowe v. Jarvis, 13 C. P. 495; McNeilly v. McKenzie, 3 E. & A. 209. In an action against a sheriff for a false return, it appeared that on the day before the plaintiff's writ came in, he received a *fi. fa.*, at the suit of one K. for more than the value of the debtor's goods, and gave a warrant to his bailiff, who only went to the debtor's shop and told him of it, because he thought more could be got by allowing him to go on with his business. On the plaintiff's writ, he did nothing. The plaintiff's attorney wrote twice, urging him to act and ruled him, and afterwards he returned the writ *nulla bona*. K.'s writ having been previously renewed, the court being left to draw inferences of fact, it was held, as a matter of fact, that the sheriff never seized; or, as a matter of law, if he did, he had abandoned the seizure: Foster v. Glass, 26 U. C. R. 277. A bailiff who has withdrawn from possession of goods after seizure may again seize them if the writ is in force: Gates v. Smith, 13 C. P. 572. As to the difference between the rights of a subsequent execution creditor, as in Castle v. Ruttan, and one who purchases from an execution debtor, even after abandonment of the seizure, *but while the execution is in force*, see the remarks of Gwynne, J., at pp. 470 and 471 of 19 C. P. in McGivern v. McCousland: see also 5 U. C. L. J. 250. In that connection, it must be borne in mind that division court execution does not bind the goods before seizure: Culloden v. McDowell, 17 U. C. R. 359: The Execution Act, ss. 10 (3), 19, *ante;* whereas a writ in the sheriff's hands does. Under The Creditors' Relief Act, R.S.O., 1914, c. 81, *q.v., post*, all execution creditors are entitled to rank rotably on the moneys in the hands of the sheriff: see Harvey v. McNeil, 12 P. R. 362. But this will not prevent an execution creditor losing his priority as against executions then in the sheriff's hands or subsequently coming into his hands, if a stay is directed, as, for instance, where a writ was delivered to a sheriff, with instructions not to levy until another execution came in, it was held that a subsequent execution took priority: Ross v. Hamilton, E. T. 3 Vic. Such a writ is not in the sheriff's hands *to be executed*: Foster v. Smith, 13 U. C. R. 243; *Re* Ross, 3 P. R. 394. If the bailiff is notified not to proceed and execute a writ, from that moment, it loses its priority: Bank of Montreal v. Munro, 23 U. C. R. 414: Patterson v. McKellar, 4 O. R. 407; see also Kerr v. Kinsey, 15 C. P. 531; Trust and Loan Company v. Cuthbert, 13 Gr. 412. A sheriff cannot seize goods on execution already under the seizure of a division court bailiff: King v. Macdonald, 15 C. P. 397; but he may obtain them from the bailiff under the Creditors' Relief Act, s. 26, s.-s. (5). The foregoing cases are principally on *fi. fas.* Sec. 173.

Sec. 173. In the hands of sheriffs, but it is submitted that the principles of them have a direct application to division court executions in the hands of a bailiff, always keeping in mind that a bailiff's right to the goods is by virtue of a *continuing seizure*. If a bailiff should enforce an execution where he had no authority, he would be liable: Davis v. Moore, 4 U. C. R. 200. In Lossing v. Jennings, 9 U. C. R. 406, a bailiff, having an execution against J. L., went to him and seized a yoke of oxen, which he allowed him to retain on receiving by endorsement on the writ an acknowledgment of the levy, it was held that the debtor had put it out of his power to sell the oxen; see also Duffus v. Creighton, 14 S. C. R. 740. Where after making the seizure, the bailiff placed a man in charge, who afterwards left the premises, and the goods were then seized by the defendant's landlord for arrears of rent, it was held that the goods were not in *custodia legis* at the time of the taking under this distress: Cross v. Davidson, 17 C. L. T. 180. Where a sheriff seized goods in the morning, and went away, intending to return in the evening, and visited the property daily, he was held to continue possession: Beatty v. Rumble, 21 O. R. 184. On an execution against A., money belonging to him in the hands of B. may be seized, but it must be shown that it is the *identical money* of A.: Clarke v. Easton, 14 U. C. R. 251. When the bailiff makes a seizure but at the debtor's request leaves them with the latter, he should take a bond with a surety to protect himself: see Form No. 82.

As to action against third party for illegal seizure, and evidence connecting him with it: see Slaght v. West, 25 U. C. R. 391; McClevertie v. Massie, 21 C. P. 516; Tilt v. Jarvis, 7 C. P. 145; McLeod v. Fortune, 19 U. C. R. 98; Kennedy v. Patterson, 22 U. C. R. 556; Croushaw v. Chapman, 7 H. & N. 911; Woollen v. Wright, 1 H. & C. 554; Stevens v. Peacock, 30 U. C. R. 51; Smith v. Keal, 9 Q. B. D. 340; Wilkinson v. Harvey, 15 O. R. 346.

It is a criminal offence amounting to theft, for any person, including the owner, to secretly or openly take or carry away goods under seizure and detention by a bailiff, or to cause it to be done: Canadian Criminal Code, s. 349. What is "seizure" under this provision is explained and defined in Johnston v. Hogg, 10 Q. B. D. 432.

Statutory Exemptions.—Execution Act, s. 3, *ante*.

Wearing Apparel consists of that which is worn or made to be worn. Cloth actually appropriated thereto was held to be apparel: Richardson v. Buswell, 10 Mete. 507; see also Astor v. Merrett, 111 U. S. 202, where "wearing apparel owned by a passenger in a condition to be worn at once without further manufacture" was held to be wearing apparel within the customs laws.

Tools and Implements.—"Tools" are mechanical instruments of any kind for working with. The term includes all instruments of manual operation, but particularly such as are used by farmers and mechanics: Oliver v. White, 18 S. C. 241.

"Implements" is used for things of necessary use in any trade or mystery which are employed in the practice of the said trade, or without which the work cannot be accomplished: Terms de la Ley, cited Stroud, 462.

"Implements of trade" are those implements used in a man's trade or business. It has been held that the expression "implements of a debtor's trade" refers to the business of a mechanic, as a car-

penter, blacksmith, silversmith, printer or the like: Attwood v. De- Sec. 173.
Forest, 19 Conn. 517. But the words used in our Act have a wider significance: "Tools and implements of, *or chattels* ordinarily used in the debtor's *occupation*" would cover any business and profession as well as a mechanical occupation.

A music teacher's piano has been held in the U.S. to be an instrument of business: Amend v. Murphy, 69 Ill. 338.

A steam engine used for working a threshing machine was held to be an instrument of husbandry: R. v. Malty, 8 E. & B. 712.

An execution debtor can do as he pleases with the statutory exemptions, and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor: Field v. Hart, 22 A. R. 440.

Where, in an interpleader issue, the claimant alleges that the goods seized include statutory exemptions, it is a question for trial in the issue and not to be left for the sheriff to deal with: *Ib.*

Tools and implements ordinarily used in the debtor's occupation are not exempt after he has changed that occupation to one in which such tools are not ordinarily used: Wright v. Hollingshead, 23 A. R. 1.

Only those goods which are liable to seizure under execution are liable to seizure under an attachment: R.S.O. 1914, c. 82, s. 8; and see R.S.O. 1914, c. 80, s. 5.

A boat while in lawful use by the owner, though not a fisherman, is exempt: Dunagh v. Dunn, 7 U. C. L. J. 273.

If goods exempt are seized and sold the execution creditor is not entitled to the money, but the execution debtor would be: Michie v. Reynolds, 24 U. C. R. 303.

Money received by a debtor from an insurance company by reason of a fire destroying exempted goods is exempt from garnishment: Osler v. Muter, 19 A. R. 94.

If a specific article used by the debtor in his occupation is of greater value than $100 it may be sold under execution if there are no other sufficient and unexempted goods available: but $100 of the purchase money will belong to the debtor: The Execution Act, s. 3 (f), *ante*.

It is not a fraudulent preference for a debtor to hand over his exemptions to one of his creditors: Temperance Ins. Co. v. Combes, 28 C. L. J. 88.

A bailiff would be a trespasser who seized goods exempted by law: *Re* Gould v. Hope, 21 O. R. 624; Bagge v. Whitehead, 1892, 2 Q. B. 355; 20 A. R. 347. If a bailiff should sell exemptions the proceeds could be recovered from him by the debtor or other person entitled thereto through him: Michie v. Reynolds, 24 U. C. R. 303. Goods of a deceased husband which were exempt from execution are not assets in the hands of the widow or executors for payment of debts, except as to funeral or testamentary expenses; and the Devolution of Estates Act, R.S.O. 1914, c. 119, s. 3, is to be read as being subject to section 6 of The Execution Act, R.S.O. 1914, c. 80, which gives the widow and family, and in the case of infants their guardian, the right to the same: *Re* Tatham, 2 O. L. R. 343. But an article otherwise exempt is not so as against an execution for a debt contracted for such article: The Execution Act, s. 8, *ante*.

When Property of Indians Exempt.—The Indian Act, R.S.C. 1906, c. 81, s. 102, prohibits the taking of any security, lien or charge

Sec. 173. "by mortgage, judgment or otherwise upon real or personal estate of any Indian or non-treaty Indian, except on real or personal property subject to taxation under the last three sections" of that statute, *i.e.* real estate held in his own individual right under lease or in fee simple, or personal property outside the Indian reserve: section 99 of that Act. Such last mentioned property, being liable to be taxed, is not exempt from execution even if not actually taxed: Avery v. Cayuga, 28 O. L. R. 517.

What May be Sold Under Execution Against Goods.—Section 172 (2) authorizes the levy by distress and sale of the goods and chattels of the party in default; and see The Execution Act, s. 16, *et seq.*, *ante*. Under section 10 (3) of that statute, an execution issued out of a division court binds the property from the time of seizure only. See also section 19 of that Act, *ante*.

The Goods Must Belong to the Debtor.—The goods must be the property of the judgment debtor, and if they belong to another person, although they may be in the possession, and under the apparent control of the judgment debtor, they are not liable to seizure on an execution against him: see Ames-Holden Co. v. Hatfield, 29 S. C. R. 95; Dawson v. Wood, 3 Taunt. 256; Edwards v. Bridges, 2 Stark. 396; Lanyon v. Toogood, 13 M. & W. 27. For instance, goods lent on hire cannot be taken for the debt of the hirer: Dean v. Whittaker, 1 C. & P. 347; nor the goods of a testator in the hands of his executor, on an execution against the latter: Fan v. Newman, 4 T. R. 621.

The property in goods furnished by a manufacturer to a retail dealer under an agreement by which the latter was to devote his whole time to the business, to make monthly returns of sales on hand, and to remit monthly proceeds of sales, with certain deductions, was held to remain in the party supplying them, and that they were not liable to execution against the other party: Ames-Holden Co. v. Hatfield, 29 S. C. R. 95.

Growing crops may be seized: McDougall v. Waddell, 28 C. P. 191; and see Smith v. Union Bank, 15 C. L. T. 15; but see Rodwell v. Philips, 9 M. & W. 505.

Farm stock transferred by A. to B. on the terms that A. should be repaid by a greater number of the same kind at a certain time are, as well as the increase, liable to seizure under an execution against B. placed in the bailiff's hands before the specified time expired: see Peers v. Carroll, 19 U. C. R. 229; South Australian Ins. Co. v. Randall, L. R. 3 C. P. at p. 109; *Ex parte* White, L. R. 6 Ch. 397. Such a case is nothing less than a sale: see South Australian Ins. Co. v. Randall, L. R. 3 C. P. at p. 109; *Ex parte* White, L. R. 6 Ch. 397. But if merely lent, this would not be so: Dillaree v. Doyle, 43 U. C. R. 442.

Tenant's fixtures may be seized and removed: Grymes v. Bowern, 6 Bing. 437; but fixtures in defendant's house and attached to the freehold cannot be seized: Winn v. Ingilby, 5 B. & Ald. 625; Rogers v. Ontario Bank, 21 O. R. 416; nor fixtures which have been wrongfully severed by a tenant: Farrant v. Thompson, 5 B. & Ald. 826.

If a person buy an article from a tradesman, and afterwards see another article of the same kind belonging to the tradesman which he prefers to the one purchased, and which he buys by delivering back the first one and paying an additional sum, but allows the article last purchased to remain an unreasonable time in the tradesman's posses-

sion, without registering a bill of sale, it is liable to seizure on an execution against the latter: Carruthers v. Reynolds, 12 C. P. 500. Sec. 173.

Should a mare in foal be seized under an execution, the right to the foal would follow the dam: Rogers v. Highland, Iowa Sup. Ch., 34 Alb. L. J. 307.

A pawnbroker's interest in redeemable pledges may be taken in execution, and the bailiff will be entitled to receive the money payable in redemption of the pledges and to sell the pledges when the pawnbroker might have done: *Re* Rollinson, 34 Ch. D. 495.

An unpatented mining claim: Clarkson and Forgie v. Wishart, 1913 A. C. 828.

Patents.—All rights under letters patent of invention: R.S.O. 1914, c. 80, s. 18. Mortgage-moneys due under mortgages on land: *ib.* section 25; chattel mortgages: *ib.* section 29a, added by 4 Geo. V. c. 21, s. 20.

Book debts are not seizable under execution: McNaughton v. Webster, 6 U. C. L. J. 17; nor a license to sell liquors: *Re* Gilmer, 17 L. R. Ir. 1; Walsh v. Walper, 3 O. L. R. 158; nor growing fruit, it being part of the realty: Rodwell v. Phillips, 9 M. & W. 505. A registered trade mark is not saleable by itself, apart from the business which it represents: Gegg v. Bassett, 3 O. L. R. 263. The interest of a defendant in an "oil lease" with the right to drill for oil on land is an incorporeal right to be exercised in the land: McIntosh v. Leckie, 13 O. L. R. 54; and so it is an interest in land and cannot be sold under execution against goods: Canadian Ry. Acc. Co. v. Williams, 21 O. L. R. 472.

Goods of Partners.—On an execution against one of two partners the defendant's interest in the goods of the partnership cannot be seized: Con. R. 556; but an order may be made charging the partners' interest in the partnership property and profits with the payment of the amount of the execution and a receiver may be appointed. The other partners may redeem the interests charged, or in the event of a sale may purchase the same. This rule is based on s. 23 of The English Partnership Act, 1890. The creditor obtaining a charging order would in England have no right during the continuance of the partnership to sue for an account: Lindley on Partnership, 8th ed., p. 421, but in Ontario it would seem that such an action would lie: Whetham v. Davey, 30 Ch. D. 574; Glyn v. Hood, 1 Giff. 328; see Cassels v. Stewart, 69 C. 64, 73.

The partner's interest in the goodwill, or book debts, or that "intangible thing the interest of the judgment debtor in the partnership assets," which is incapable of seizure, cannot be sold: Helmore v. Smith, 35 Ch. D. 436; Reanie v. Quebec Bank, 1 O. L. R. 303; 3 O. L. R. 541.

An execution against a partner has no priority against his separate property over one against him as a member of the firm: Bank of Toronto v. Hall, 6 O. R. 653.

Joint Owners.—A half-interest in a chattel may be seized: Guan v. Burgess, 5 O. R. 685.

Execution Against Partnership, Etc.—See section 53.

Sec. 173. **Shares in Banks and Companies, and Dividends.**—See The Execution Act, sections 12-17, *ante*.

Equity of Redemption, Etc.—Under The Execution Act, s. 10, *ante*, the bailiff may seize and sell the judgment debtor's equitable or other interest, property or estate in any goods; also under s. 10 of the Act, leasehold interests in lands to which the debtor is entitled the time of seizure. An "oil lease" with right to bore for oil on land is, however, not seizable under execution against goods, it being an incorporeal right to be exercised in the land: McIntosh v. Leckie, 13 O. L. R. 54; Canadian Ry. Acc. Co. v. Williams, 21 O. L. R. 472. The debtor's equity of redemption or other interest in goods seizable under this section is only bound, by an execution issued out of the division court, from the time of seizure by the bailiff: The Execution Act, s. 10, *ante;* McDowell v. McDowell, 10 C. L. J. 48; Rennie v. Quebec Bank, 1 O. L. R. 301; 3 O. L. R. 541; Allan v. Place, 15 O. L. R. 476.

Upon the sale of the equity of redemption the goods themselves cannot be sold; the purchaser acquires only the right to stand in the position of the mortgagor: Sqnair v. Fortune, 18 U. C. R. 547.

Under an execution against the chattels of a mortgagor, the bailiff may seize the *corpus* of the mortgaged goods, so that he may expose them to view, although he can sell only the equity of redemption in them: see Smith v. Cobourg and Peterborough Ry. Co., 3 P. R. 113: but see *Ex parte* Miller, *Re* Miller v. Smith, 34 N.B.R. 5. In Watson v. Henderson, 25 C. P. 562, Adam Wilson, J., said: "The equity of redemption in goods may be seized while the debtor is in possession by an actual taking of the goods. Where the debtor is not in possession, but the mortgagee is so, by virtue of his title, the sheriff may do what is equivalent to a seizure just as he proceeds when he seizes bank or other stocks of the debtor." In May v. Standard Fire Ins. Co., 30 C. P. 54, the same learned judge, then Wilson, C.J., said: "The mortgagor and execution debtor was in actual possession at the time of the seizure, and I see no objection to the sheriff seizing them in *corpore* and taking them out of the debtor's possession, if need be, so long as he is not forbidden doing so by the mortgagee, if the mortgagee is entitled to immediate possession of the goods."

Money and Securities for Money, Etc., are seizable: The Execution Act, s. 20, *ante*.

Money.—Money made under an execution at the suit of one man cannot be retained to meet another execution in his hands against the same man: Sharp v. Leitch, 2 C. L. J. 132; Wood v. Wood, 12 L. J. Q. B. 141; Collingridge v. Paxton, 11 C. B. 683. Money in court cannot be seized: France v. Campbell, 6 Jur. 105; but any surplus of a former execution against the same debtor may now be seized: The Execution Act, s. 20, *ante*. Nor can money in the hands of an auctioneer be seized: Brown v. Perrot, 4 Beav. 585. Money deposited by a party privileged from arrest to secure his release by the sheriff who has taken him on a *ca. sa.* cannot be retained by the sheriff after a judge's order to refund has been made: Masters v. Stanley, 8 D. P. C. 169.

Money payable by a bank on a cheque becomes the property of the payee as soon as the money is laid on the ledge of the wicket for him to take and even before it is counted by him, and may be seized

there: Hall v. Hatch, 3 U. L. R. 147. Money in the hands of a third person as trustee for the defendant cannot be seized unless it be the exact pieces of coin or paper of the defendant: Robinson v. Piece, 7 Dowl. 93; Wood v. Wood, 4 Q. B. 397; but see, *per* Osler, J.A., Sullivan v. Francis, 18 A. R. 121, 126, where it is said that a surplus after paying a landlord and mortgagee would be subject to the execution. It would seem that money in a defendant's pocket no more than clothes on his back can be seized on execution: see Sunbolf v. Alford, 3 M. & W. 248. Money seized under execution is in exactly the same position as the proceeds of goods sold: Collinridge v. Paxton, 11 C. B. 683. Sec. 173.

Securities for Money.—Under section 20, cheques are liable to be seized, though in the hands of another: Watts v. Jefferyes, 3 Mac. & G. 422. A policy of life insurance is seizable: Stokes v. Cowan, 30 L. J. Ch. 882. A title deed, if pledged with the debtor for a loan, or a letter or a guarantee for some collateral act; or any deed or writing which could not form the foundation of an action by the debtor himself for a specific sum of money, cannot be taken. But it would seem that all instruments containing an unconditional covenant or agreement for payment of a specific sum of money to the execution debtor for his own benefit are within the words "other securities for money," and may be taken: Arch. Prac., 12th ed., 653. The word "money" here used means specific gold and silver coin, bank or government notes, and not debts due to the defendant: Harrison v. Paynter, 6 M. & W. 387. A money bond for the conveyance of land is seizable by a bailiff: R. v. Potter, 10 C. P. 39. So also is a fire policy after a loss has taken place and money has become payable thereon, even though the amount has not been ascertained: The Bank of Montreal v. McTavish, 13 Gr. 395.

Seizure of Mortgage.—On seizure of a mortgage on land the bailiff must register in the registry office the notice in the form provided by section 25 of The Execution Act: *ante*; and serve the mortgagor with a similar notice: section 26; and if the land is registered under The Land Titles Act the notice must be lodged with the Master of Titles instead of in the registry office: s. 25.

Chattel Mortgages.—May also be seized, and sections 27 to 29 of The Execution Act, are made applicable to same by Ont. Stat. 4 Geo. V., c. 21, s. 20, which adds clause 29 (a) to that statute as stated, *ante*.

The bailiff cannot sell any security seized by him: Rumohr v. Marx, 2 C. L. T. 501; but may sue in his own name on it and recover the money: same statute s. 20.

Bailiff to Hold Securities.—After the bailiff has made the seizure, it would be advisable for him carefully to prepare a list of the securities seized, showing their amounts, dates, when and by whom payable, and to give notices to the different persons liable on them of such seizure. He should also advise the execution creditor of what he has done, so that he might better determine whether he would proceed on them or not. As regards such securities as might not be due, their deposit in the clerk's safe, or some other safe depository, would be a prudent course for the bailiff to take. If the execution creditor should not within a reasonable time determine to take proceedings upon those overdue, and the others as they become due, it would be

Sec. 173. the duty of the bailiff to hand them back to the debtor, for should he be negligent in that respect, and the debts due upon such securities be barred by the Statute of Limitations, or lost otherwise, the bailiff and his sureties would undoubtedly be liable. Should the execution creditor's claim and all costs be satisfied out of the proceeds of the securities seized, or discharged in any other manner, it would then also be the duty of the bailiff to restore such of the securities as remained in his hands to the execution debtor. Bank stock could not be considered "money," or "other securities for money," within the meaning of section 20 of The Execution Act: Ogle v. Knipe, L. R. 8 Eq. 434. Neither would shares in a building society or other corporation: Collins v. Collins, L. R. 12 Eq. 455. On this section generally, see 1 U. C. L. J. 181 and 182; Hopkins v. Abbott, L. R. 19 Eq. 222.

Bailiff May Sue in His Own Name.—Execution Act, s. 20, *ante*, p. 456.

The suit would be subject to all the equities between the execution debtor and the defendant: *Re* Natal Inv. Co., L. R. 3 Ch. 355; Rodger v. The Comptoir D'Escompte De Paris, L. R. 2 P. C. 393.

A defendant could not set up matters that occurred subsequently to the seizure and notice: Dennison v. Knox, 24 U. C. R. 119; Jeffs v. Day, L. R. 1 Q. B. 372; Watson v. Mid Wales Railway Co., L. R. 2 C. P. 593; Brighton Arcade Co. v. Dowling, L. R. 3 C. P. 175; Chisholm v. Provincial Ins. Co., 20 C. P. 11; DePothonier v. DeMattos, E. B. & E. 461; Wilson v. Gabriel, 4 B. & S. 243.

As to the duties of the bailiff and other matters relating to the seizure of securities for money and proceedings to realize on same see sections 20 to 29 of The Executions Act, *ante*.

Executions Against Municipal Corporations.—See the provisions of The Execution Act, ss. 37, *et seq.*, *ante*.

Priority of Landlord for Rent.—Section 216, *post*, and notes thereto.

Wages.—R.S.O. 1914, c. 143 (The Wages Act), s. 4, giving a priority to wages, does not apply to executions in the division court bailiff's hands.

But the Mechanics' and Wage Earners' Lien Act: R.S.O. 1914, c. 146, s. 14, gives lien-holders under that Act priority over all judgments, executions, assignments, attachments, garnishments, etc. See also The Woodmen's Lien for Wages Act: R.S.O. 1914, c. 141, s. 6.

When Execution Superseded.

The Creditors Relief Act.—R.S.O. 1914, c. 81, contains important provisions affecting the rights of parties under division court executions:

Section 4 of that Act abolishes priority amongst creditors by execution from the Supreme Court or a county court. This does not apply to executions remaining in the hands of a bailiff of a division court, and they are entitled to be paid in the order in which they have been received by the bailiff.

Section 6, *et seq.*, provide for the proceedings towards the distribution of the property of a debtor amongst all creditors who bring

their claims into the sheriff's office as therein provided, within one month thereafter. Sec. 173.

By section 17 a creditor who has recovered judgment in a division court against the debtor, may deliver to the sheriff a certificate under the hand of the clerk of the division court and the seal of that court, of the amount of the judgment and of the costs (Form of Certificate No. 179), and the certificate so delivered has the same effect for the purposes of the statute, as if the creditor had delivered to the sheriff an execution from a county court.

The division court creditor will be entitled to share in moneys realized by the sheriff from lands as well as goods, after the delivery of the certificate: Harvey v. McNeil, 12 P. R. 632; *Re* Bokstal, 17 P. R. 201; all creditors are entitled to share in proceeds of goods and lands: s. 6 (10). But in case of an interpleader, only those creditors who have joined in the contestation share in the benefits: Reid v. Gowans, 13 A. R. 501; Bank of Hamilton v. Durrell, 15 A. R. 500; *Re* Henderson Roller Bearings, Limited, 2 O. W. N. 162, and cases cited there: but not if the claimant abandons: Wait v. Sager, 14 P. R. 437.

By section 26.—If the sheriff does not find property of a debtor leviable under the executions and certificates in his hands, sufficient to pay the same in full, but finds property, or the proceeds thereof, in the hands of a bailiff of a division court under an execution or attachment against the debtor, the sheriff shall demand and obtain them from the bailiff, who shall forthwith deliver the same to the sheriff with a copy of every execution and attachment in his hands against the debtor, and a memorandum showing the amount to be levied under the execution, including the bailiff's fees, and the date upon which each execution or attachment was received by him.

(2) If a bailiff fails to deliver any such property or the proceeds thereof, he shall pay double the value of that which is retained, which may be recovered by the sheriff from him, with costs of suit, and shall be accounted for by the sheriff as part of the estate of the debtor.

(3) The costs and disbursements of the bailiff shall be a first charge upon such property or the proceeds thereof and shall be paid by the sheriff to the bailiff upon demand after being taxed by the division court clerk.

(4) The sheriff shall distribute the proceeds amongst the creditors entitled to share in the distribution, and the division court execution creditors shall be entitled, without further proof, to stand in the same position as creditors whose executions are in the sheriff's hands.

By section 28, the certificate may be endorsed for interest, and $1.35 disbursements on any renewal of the certificate, with $1.25 solicitor's costs on renewal if made upon application of a solicitor.

As to enforcing in the division court afterwards, claims which are not paid in full by the sheriff, see section 178, *post*, and notes thereto.

The Assignments and Preferences Act.—R.S.O. 1914, c. 134, s. 14, provides that an assignment for the general benefit of creditors under that Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution subject to the lien of the first execution creditor for his costs. An execution is "completely executed by payment" within the meaning of that statute, when the bailiff gets the money: see Clarkson v. Severs, 17 O. R. 592.

Secs. 174-176.

Cross judgments may be set off.

174. If there are cross judgments between the parties, the party who has obtained judgment for the larger sum shall have execution for the excess and satisfaction for the remainder, and also satisfaction on the judgment for the smaller sum shall be entered; and if both sums are equal, satisfaction shall be entered upon both judgments. 10 Edw. VII. c. 32, s. 175.

Cross-Judgments.—In case there are cross-judgments, the proper course authorized by this section is the following: the clerk on the application of either party is to make an entry thereof in the procedure book: Rule 74; and the clerk is then, if required, to issue execution in the ordinary form, for the balance over the smaller judgment: s. 174; and he is to enter satisfaction on the judgment for the smaller sum. If both sums are equal satisfaction to be entered upon both judgments. (See Forms 153-156.)

Satisfaction Shall be Entered.—This is simply applying the principle of setting off judgments: Throckmorton v. Crowley, L. R. 3 Eq. 196; Mercer v. Graves, L. R. 7 Q. B. 499; *Ex parte* Griffin, *Re* Adams, 14 Ch. D. 37; Grant v. McAlpine, 46 U. C. R. 284; Brown v. Nelson, 11 P. R. 121; C. P. Ry. Co. v. Grant, 11 P. R. 208; Flett v. Way, 14 P. R. 312; Moody v. Canadian Bank of Commerce, 14 P. R. 258.

A set-off will not be allowed to the prejudice of a solicitor's lien for costs: C. P. Ry. Co. v. Grant, 11 P. R. 208; Flett v. Way, 14 P. R. 312.

Writs of execution, where to be executed.

175. Except in actions brought under section 73, an execution or attachment shall not be executed out of the limits of the county over which the Judge of the court from which the same issues has jurisdiction. 10 Edw. VII. c. 32, s. 176.

Not to be Executed out of Limits of County.—Every writ of execution or attachment must be executed within the county from which it issues, except in cases provided in sections 72 and 80 (2). If such writ should be executed out of the county the bailiff would be a trespasser: Davis v. Moore, 4 U. C. R. 209; Campbell v. Coulthard, 25 U. C. R. 621; Davy v. Johnston, 32 U. C. R. 153; Hoover v. Craig, 12 A. R. 72.

Where an execution is required to be issued anywhere within the county it may be directed to the bailiff of any of the division courts within the county, but it shall not be issued to the bailiff of another county: s. 173 (2); see notes to section 91.

Effect of payment of execution before sale.

176. Where the party against whom an execution has been issued pays or tenders to the clerk or to the bailiff, before an actual sale of his goods and chattels, the amount to be levied, or so much thereof as the party in whose favour the execution has issued agrees to accept in full of his debt, together with the fees to be levied, the execution shall thereupon be super-

seded, and the bailiff shall withdraw from possession. 10 Edw. VII. c. 32, s. 177. Sec. 176.

Pays or Tenders.—See notes to section 111.

To the Clerk or Bailiff.—The bailiff would have no authority to receive it if he had not an *existing* execution in his hands or warrant of commitment: Rule 103; 5 U. C. L. J. 32; Preston v. Wilmot, 23 U. C. R. 348; Kero v. Powell, 25 C. P. 448. The clerk is not allowed to receive any money unless a suit had been commenced in his court against such person or a transcript of judgment has been received: Rule 81; see also section 52 and notes thereto.

Fees to be Levied.—Should the proper fees be tendered and refused, further proceedings by the bailiff would render him liable as a trespasser: Bennett v. Bayes, 5 H. & N. 391. And remaining in possession would be a trespass each day: Playfair v. Musgrave, 14 M. & W. 239; As v. Dawnay, 8 Ex. 237. As to what are proper fees, see the tariff: Form 1 to Rules.

Formerly a return of *nulla bona* did not entitle the bailiff to mileage: see 5 U. C. L. J. 82, 181. But under Rule 56 if the plaintiff or other person interested in an execution or an attachment insists upon the bailiff making an attempt to find property, whereby mileage and expenses are to be incurred, he must deposit the bailiff's fees and mileage with the clerk, and if the bailiff makes a *bona fide* endeavor to secure property he shall be entitled to his fees and mileage. Two facts are necessary to entitle the bailiff to mileage where no goods are seized, *i.e.*, that the judgment or attaching creditor insists upon the bailiff making an attempt to find goods, and a *bona fide* endeavor on the part of the bailiff to secure such property. There is no provision made for ascertaining the amount of fees to be deposited, but the proper amount would no doubt be the mileage which the clerk would be entitled to tax under the tariff. The allowance by the clerk of mileage in such a case is subject to an appeal to the judge who may review the clerk's finding that a proper endeavor has been made to levy.

Goods to be Released and Restored.—When the party has paid or tendered the amount called for or which the judgment creditor agrees to accept and the fees to be levied, he has a right to have his goods released and restored to him.

If the defendant pay the debt to the plaintiff after service on him of a summons, the defendant should notify the clerk thereof. When after such a payment a transcript was issued to another court than that in which the summons was issued and execution was issued thereon and the defendant's goods were seized, it was held that he could recover no damages against the plaintiff as it was his duty to protect himself by seeing that the clerk of the court was notified of the payment: Tuckett v. Eaton, 6 O. R. 186. In that case it was said to be doubtful, under this section, whether a person whose goods had been seized under division court process could have any further relief than the return of his goods.

Satisfaction of Judgment.—There is now no provision similar to that given by former Rule 256 requiring the clerk to enter up satisfaction on payment or settlement of a judgment; except in the case of cross-judgments, under section 174.

Sec. 177.

Accord and Satisfaction.—Prior to 1885, payment of a smaller sum was no satisfaction of a larger: Foakes v. Beer, 9 App. Cas. 609; but an agreement to accept a sheet of paper, or a stick of sealing-wax, or a bill of exchange, promissory note, or cheque for any amount, would be an accord, and delivery of the article agreed upon, pursuant to the agreement, would be a satisfaction: Sibree v. Tripp, 15 M. & W. 23, 37; Curlewis v. Clark, 3 Ex. 375; Goddard v. O'Brien, 9 Q. B. D. 37; Bidder v. Bridges, 37 Ch. D. 406. "Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing, or one of the two persons acting in such a way as to induce the other to think that the money is payment in satisfaction of the claim, and to cause him to act on that view:" *per* Bowen, L.J., Day v. McLea, 22 Q. B. D. 610, p. 613. If a cheque is sent for a smaller amount than a claim or judgment, and is marked in full, it is a question of fact whether the same was accepted in satisfaction of the payment: Day v. McLea, 22 Q. B. D. 610; Mason v. Johnston, 20 A. R. 412; *Re* Woodall, 8 O. L. R. 284; Allison v. Breen, 19 P. R. 119; Butler v. McMillan, 32 O. R. 422; Rielle v. Reid, 28 O. R. 497. By the Judicature Act, R.S.O. 1897, c. 51, s. 58, s.-s. 8, it was enacted that "part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation." In Canadian Bank of Commerce v. Jenkins, 16 O. R. 215; Peterboro Hydraulic Power Co. v. McAllister, 17 O. L. R. 145, an agreement to accept a smaller sum in satisfaction of a debt was made, and it was held that a subsequent tender of the amount agreed upon, although not accepted, was sufficient to entitle the debtor to the benefit of this section; see also Davey v. Baines, 9 T. L. R. 20. Mr. Justice Osler, in Mason v. Johnson, 20 A. R., p. 415, in commenting upon this decision, said: "It is not now necessary to decide this point, and I may only say that, at present, I am not satisfied that this is the proper construction to be placed on the section."

The present Judicature Act, R.S.O. 1914, c. 56, omits section 58, s.-s. 8 of the Act of 1897, and the latter is nowhere re-enacted. It is submitted therefore that the law now is governed by the above mentioned decisions which were prior to the Act of 1897.

Clerk to give notice to plaintiff of return of *nulla bona* in case of execution on a transcript of judgment.

177.—(1) The clerk, immediately after a return of *nulla bona* has been made to an execution issued on a transcript of judgment, shall forward by registered post to the plaintiff and to the clerk who issued the transcript a notice informing them of the date at which the execution issued, the date at which it was returned by the bailiff, and the return made.

Registration certificate to be filed.

(2) The clerk shall file among the papers in the action the post-office certificate of registration, and the absence from amongst the papers of the certificate shall be *prima facie* evidence against the clerk that the notice was not forwarded. 10 Edw. VII. c. 32, s. 178.

Notice of Return of Nulla Bona.—The clerk to whom a transcript is sent is here required to send *immediately* through the post, prepaid and registered, to the plaintiff, if his address is known, or to the clerk who issued the transcript, a notice informing him: (1) When the execution issued: (2) the date of its return: (3) the return of the bailiff thereto. As to the meaning of "immediately" see note to section 101. The language of this section requires the clerk to send the notice *to the plaintiff* and also to the clerk who issued the transcript. It would seem to be the duty of the clerk giving the notice to ascertain the address of the plaintiff for this purpose. It is the duty of the parties to leave their address with the clerk of the court in which the action is entered: Rule 84; and he is required by s. 188 to furnish such address to the clerk to whom he sends a transcript. The object of this section is to bring home the nature of the return to the person most interested—the plaintiff. The absence of the registration certificate is only *prima facie* evidence of the notice not having been sent. The statute would be virtually complied with if there was any other evidence of the notice having been received by the plaintiff or the clerk who issued the transcript: Campbell v. Barrie, 31 U. C. R. 279. But the safest course is for the clerk to carefully preserve the certificate of registration in all cases. Sec. 178.

178. Where a memorandum of the amount of a judgment or execution or a certificate of a claim within the jurisdiction of a Division Court is filed with a sheriff under *The Creditors Relief Act*, and the amount is not paid in full, and the sheriff is unable to make the money thereon, the creditor may obtain from the sheriff a return according to the fact, and file the same with the clerk of the court in which the judgment was recovered, or, in the case of a certificate of a claim with the clerk of the court of the division where the cause of action arose, or the debtor, or one of the debtors, if more than one, resides, and the clerk shall enter the return in his Procedure Book, and in the latter case the claim shall thereupon become a judgment of the court for the unpaid balance due thereon appearing by the return, and may be enforced in the same manner as a judgment of the division court. 10 Edw. VII. c. 52, s. 179. Enforcing claims under Creditors' Relief Act in Division Courts. Rev. Stat., c. 81.

A Certificate of Any Claim.—See The Creditors Relief Act, *ante*, and notes thereto.

A Return From the Sheriff.—Where the sheriff's return relates to a judgment or execution of the division court, and is filed with the clerk of the court in which such judgment was recovered or from which the execution issued, the clerk enters the same in the procedure book at the place where the judgment was entered, setting forth the sheriff's return according to Form 157; and where the sheriff's return relates to a certificate for a claim within the division court jurisdiction the entry of it will be according to Form No. 158.

Secs. 179, 180.

The effect of this is that if judgment was originally entered in the division court the judgment stands thereafter for such balance as remains unpaid. If the first entry in the procedure book is the sheriff's return the clerk enters judgment for the balance of the claim unpaid and proceedings may be taken thereon as upon any other judgment of the court. An execution against goods, or a transcript of judgment to another court, a judgment summons, or a garnishee summons might be issued thereon; and the provisions of section 65 may also be resorted to: see notes to that section.

Revivor of judgment in case of death of party.

179. In the case of the death of either or both of the parties to a judgment, the party in whose favor the judgment has been entered, or his personal representative in case of his death, may in the prescribed form revive the judgment against the other party, or his personal representative in case of his death, and may issue execution thereon. 10 Edw. VII. c. 32, s. 180.

Reviving the Judgment.—See notes to section 8. If either or both parties should die, this section provides for the revival of the judgment by or against the personal representative. The party who seeks to revive a judgment or against whom it is sought to revive the same, must be duly appointed the personal representative before proceedings can be taken. In Keena v. O'Hara, 16 C. P. 435, it was held that an action might be revived against an executor *de son tort*.

Form of Affidavit on Application of Executor, etc., to revive judgment, No. 27.

Form to Revive Judgment against Executor, *etc.*, No. 28.

During the lives of the parties no revivor is necessary; but after six years from the recovery of judgment, execution cannot issue without the leave of the judge.

Application for Leave.—Rules 31, 32. The application must be made upon affidavit, and at least three days' notice must be given to the party against whom it is sought to issue execution, unless the judge otherwise directs. The judge may, on the application, direct an issue to be tried in which the party applying would affirm and the other party deny the right to have execution issued: Rule 32. If the judgment creditor should be in danger of losing the amount of his claim during the delay caused by the application being made, the judge would probably dispense with the notice.

Form of Affidavit for leave to issue execution, No. 26.

Execution, when dated and returnable.

Renewable.

180.—(1) Every execution against goods shall bear the date of its issue, and shall be returnable immediately after the execution thereof, and, if unexecuted shall remain in force for thirty days, unless renewed, but may be renewed from time to time in the prescribed manner by the clerk, at the instance of the execution creditor, for six months from the date of the renewal.

(2) The execution so renewed shall have effect and be entitled to priority according to the time of the original delivery thereof to the bailiff. 10 Edw VII. c. 32, s. 181. Sec. 181. Priority of execution.

See Rule 85.

For Six Months.—See Clarke v. Garrett, 28 C. P. 75, the effect of which is that the day of issue is excluded: see also notes to section 77 and to section 98. The renewal of an execution must take place at the instance of the execution creditor before the expiration of thirty days, unless a seizure has been made thereunder. The renewal cannot take place if the thirty days have expired.

An execution that has expired cannot be renewed: notes to section 173; and nothing can legally be done under it: Weston v. Thomas, 6 U. C. L. J. 181; Gardiner v. Jusou, 2 E. & A. 188; and a sale by the defendant of his goods would cut out the execution creditor, or any one claiming under a supposed sale on such writ: Carroll v. Lunn, 7 C. P. 510; Buffalo & L. H. Ry. Co. v. Brooksbanks, 16 U. C. R. 337; section 173 and notes thereto.

The too common practice of clerks renewing executions at the instance of bailiffs or of their own motion, is entirely unwarranted and of no legal effect: see 5 L. C. G. 175, 176. It is doubtful if an execution creditor could ratify such an act: Brook v. Hook, L. R. 6 Ex. 95; Westloh v. Brown, 43 U. C. R. 402; Turner v. Wilson, 23 C. P. 87. Certainly not unless done *within* the time for which the renewal was made: Ainsworth v. Creeke, L. R. 4 C. P. 476; nor perhaps at all: Taylor v. Alaslie, 19 C. P. 78; Prince v. Lewis, 21 C. P. 63; Patterson v. Fuller, 32 U. C. R. 240. The authority to the clerk to issue execution does not imply a right to renew it. The unauthorized renewal of an execution, by the clerk, even if it could be ratified, would not affect the rights of other creditors before ratification: Ainsworth v. Creeke, L. R. 4 C. P. 476; Bird v. Brown, 4 Ex. 796; Hutchings v. Nunes, 1 Moo. P. C. 243; but see Vanderlip v. Smyth, 32 C. P. 60; Bolton Partners v. Lambert, 41 Ch. D. 295.

Six calendar months is meant: Interpretation Act, R.S.O. 1914, c. 1, s. 31 (u).

The renewal of execution may be made from time to time before the expiration thereof, by the clerk issuing the same, by marking in the margin thereof "Renewed for six months from the date hereof. Dated day of 19 . X. Y. , Clerk." Rule 85. The Rule requires this form to be printed on the execution.

From Time to Time.—This means that it may be renewed more than once: see Neilson v. Jarvis, 13 C. P. 176.

An execution need not be renewed when it has been acted upon or levy made: Neilson v. Jarvis, 13 C. P. 176; see also Miller v. Beaver M. F. Ins. Assn., 14 C. P. 399.

181. Where the Judge is satisfied by the oath of the execution creditor or by other testimony that he will be in danger of losing the amount of the judgment if compelled to wait till the day appointed for the payment thereof before an execution can issue, the Judge may order an execution to issue at such time as he may deem just. 10 Edw. VII. c. 32, s. 182. Judge may order an execution to issue before regular day.

Sec. 182.

At Such Time as He May Deem Just.—The application must be made to the judge, and it had better be so made upon affidavit in due form to be filed in the court. Such affidavit should if practicable be made by the party in whose favor such judgment has been given. Should such affidavit not be obtainable, the judge could satisfy himself by other testimony (by which is meant either affidavit or oral testimony): as to affidavits see Rules 42-50. The affidavit must show reasons for believing the party would be in danger of losing the amount of the judgment if compelled to wait until the day appointed for payment.

From the context of this section, and the object it has in view, we are of opinion that the application could be made *ex parte*.

DIVISION COURT EXECUTIONS AGAINST LANDS.

Executions against lands.

182.—(1) Where an execution against goods is returned *nulla bona*, and the sum remaining unsatisfied on the judgment amounts to the sum of $40 or upwards, the judgment creditor shall be entitled to an execution, Form 6, against the land of the judgment debtor, and the clerk, at the request of the party prosecuting the judgment, shall issue an execution against the land of the judgment debtor directed to the sheriff of any county.

Effect of execution.

(2) The execution shall have the same force and effect as an execution issued from a County Court.

Sheriff's return to be made to Clerk.

(3) The sheriff shall make a return thereof, and pay any money made thereon to the clerk of the court out of which the execution issued.

Further proceedings by execution creditor.

(4) Until the judgment is fully satisfied, the execution creditor may, subject to section 183, pursue the same remedy for the recovery thereof as if the judgment had been obtained in the County Court.

Duration and renewal of writ.

(5) The writ, if unexecuted, shall remain in force for three years only from its issue unless renewed, but may be renewed from time to time in the prescribed manner by the clerk at the instance of the execution creditor for three years from the date of the renewal.

Formal effect of renewal.

(6) The execution may be renewed by being marked on the margin with a memorandum signed by the clerk stating the day, month and year of the renewal, and a writ so renewed shall have effect and be entitled to priority according to the time of the original delivery thereof to the sheriff.

(7) The production of an execution purporting to be marked with the memorandum shall be *prima facie* evidence of its having been renewed. Sec. 182. Evidence of renewal.

(8) The sheriff shall be entitled to the same fees as upon a writ of execution against land issued from a county court. 10 Edw. VII. c 32, s. 183. Fees on writ against lands.

(9) Where land is on hand for want of buyers a sheriff to whom such execution is directed may endorse thereon a return of "land on hand for want of buyers" and shall return a certificate of such endorsement to the Clerk of the Division Court from whose office such execution issued in lieu of the writ; and such endorsement and the certificate so returned shall be deemed a return of the writ, and thereupon a writ of *venditioni exponas* may be issued by the Clerk for the sale of such land, and the original execution shall remain in force for the residue. 2 Geo. V. c. 17, s. 14 (2). Certificate in lieu of return of execution.

[Form No. 159, *post.*]

Form of execution against lands, No. 53; also Form G in appendix to Act

See the provisions of The Execution Act, *ante*, which include in their application executions against lands issued out of division courts.

Return of Nulla Bona.—Form No. 87. Section 230. in The Division Courts Act of 1897 required a return of *nulla bona* "by the bailiff in the court in which judgment was obtained," even if the defendant did not reside and had no goods in that division, and even if a return of *nulla bona* had been made to an execution to another division. The useless proceeding of issuing an execution and having a return made in the manner apparently required by that section was, however, held not to be necessary: Jones v. Paxton, 19 A. R. 163; Turner v. Tourangeau, 8 O. L. R. 221; and it is omitted from the present section.

The return of *nulla bona* is made when there are no goods to distrain upon: see Wharton, 512.

For the purpose of this section a return of *nulla bona* may be made even after the execution has expired: Molsons Bank v. McMeekin, 15 A. R. 535.

Should a seizure be made before the execution expires, there need be no renewal of the execution: Neilson v. Jarvis, 13 C. P. p. 183, per Draper, C.J.; notes to section 8, *ante*, notes to sections 180, 181, *ante*. But if on such seizure, part of the money were made and *nulla bona* returned as to residue, an execution against the defendant's lands may be issued for such residue, provided it amounts to $40 or upwards.

If the execution is against more than one defendant the goods of all should be exhausted before a return of *nulla bona*: Ontario Bank v. Kerby, 16 C. P. 35; Molsons Bank v. McMeekin, 15 A. R. 535.

In the latter case the plaintiff recovered a judgment in the division court and issued an execution thereon, under which nothing was

Sec. 182. made and which expired by lapse of time. At the request of plaintiff's solicitor the bailiff returned the writ *nulla bona*, although it was alleged that there were goods out of which the debt might have been levied. Upon this return the plaintiffs procured a transcript of their division court judgment in regular form and filed the same in the office of the clerk of the county court and sued out a *fi. fa.* goods in order to obtain the benefit of the provisions of the Creditors Relief Act. The respondent S., the holder of the execution in the division court, then moved to set aside the plaintiff's proceedings and they were accordingly set aside by the county court judge on the ground that the judgment in the county court was void, being founded on a return to an expired execution.

Held, that a return of *nulla bona* where there were goods was not more than an irregularity to be complained of by the defendant. Nor could a third party object that such return was made at the instance of the solicitor of the plaintiffs.

Held, also, reversing the judgment of the county court, that a return of *nulla bona* could be properly made after the expiration of a writ; and that the transcript and judgment in the county court founded thereon were valid and regular.

Sum Remaining Unsatisfied.—By this section transcripts of judgment from the division court to the county court are abolished; and an execution against lands may be issued direct from the division court, without the intervention of the county court, in cases where the "sum remaining unsatisfied on the judgment amounts to the sum of $40 or upwards." This means the whole or any balance remaining unpaid on the judgment whether for debt or debt *and* costs. The costs of recovering the judgment when taxed by the clerk and entered in the procedure book are as much a part of the judgment debt as the principal money or damages recovered. Interest on the judgment can be estimated under this section: notes to s. 174, *ante*. The costs of execution are also "part of the sum remaining unsatisfied on the judgment." The costs of execution are chargeable against the defendant and he could not *satisfy* the judgment without discharging such costs also. So also would costs of a judgment summons. It would be anomalous that a plaintiff should be obliged to issue execution in the division court before he could proceed against the lands of the defendant, and then that the costs of doing so should not form part of the amount of his unsatisfied judgment: see Burgess v. Tully, 24 C. P. 549.

A creditor for less than $40 cannot attack a conveyance of land as fraudulent: Zilliax v. Deans, 20 O. R. 539.

Shall Have the Same Force as if Issued from a County Court.—Under such a writ, the lands of the debtor in the county, to the sheriff of which the writ is issued, will be bound from the time of the delivery of the writ: The Execution Act, s. 9, *ante*. The judgment creditor will at once, upon such delivery, obtain a charge against such lands. He would be entitled to redeem, and would be entitled to notice of the exercise of a power of sale contained in a mortgage of the lands if the mortgagor "or his assigns" were entitled to such: Commercial Bank v. Watson, 5 U. C. L. J. 163; *Re* Abbott and Metcalf, 20 O. R. 299.

The sheriff may sell an equity of redemption in lands, even if there are more than one mortgage thereon: 5 Geo. V. c. 20, s. 19,

and also any contingent interest therein, under The Execution Act, ss. 28-32, *ante*. Formerly the interest of a judgment debtor in the proceeds of lands vested in trustees, or which he had contracted to sell, would not be bound by such an execution: *Re* Lewis and Thorne, 14 O. R. 133; see Perke v. Riley, 3 E. & A. 215; *Re* Trusts Corporation of Ontario and Boehmer, 20 O. R. 191; Davey v. Williamson, 1898 2 Q. B. 194. Such interest could only be reached by the appointment of a receiver. But by The Execution Act, s. 8, *ante*, property held in trust for the debtor may be seized and sold under execution. See 182.

Pursue the Same Remedy.—The judgment creditor is not entitled, after the issue of a writ against lands, to take any further proceedings in the division court without an order of the judge, except after filing the affidavit mentioned in section 183. In pursuing the same remedy in the county court for the recovery of his judgment, as if the judgment had been obtained in that court, it will frequently become necessary for further proceedings to be taken in the division court.

There is no judgment in the county court; and practical difficulties may arise in attempting to deal with it as if it were such, by proceedings for examination, attachment of debts or other proceedings as upon a judgment of the county court, except in so far as the enforcing of the execution and the remedies for the recovery of the money by means of the execution and of proceedings in aid thereof, are concerned.

By section 65 of the Division Courts Act, the division courts are to grant such relief, redress or remedy, or combination of remedies, either absolute or conditional, as might and ought to be done in a like case by the Supreme Court of Ontario: see *ante*, and by section 226 of the Act the judge may, in his discretion, adopt and apply the general principles of practice in the Supreme Court. In Wood v. Leatham, 61 L. J. Q. B. 215, it was said, with reference to section 164 of the English County Courts Act, 1888, which is similar in this respect to section 226, that the practice of the High Court of Justice should be followed in all cases where the same is not inconsistent with the provisions of the English County Courts Act. The rule in this province, however, does not appear to be so wide: see notes to section 226, and cases there cited. It is possible that, by virtue of sub-section 2 of section 182, the judgment creditor is entitled to pursue the same remedy for the recovery of the judgment, or of any balance due thereon, as if the judgment had been obtained in a county court; but in a matter where the title to land may be affected, it is important that doubts should be removed. As the judgment cannot be sued on, the judgment creditor would be unable to reach assets of the debtor, which otherwise would be liable, except by the adoption of the principles and practice of equitable execution. It is submitted, therefore, that a judgment creditor who finds interests in real estate vested in his debtor, which his execution will not enable him to sell, may avail himself of the powers of the county court in regard to equitable execution and other remedies for the recovery of the money under the execution: but that in respect of other proceedings, it will be expedient and proper for him to proceed in the division court under section 183.

Where Execution Against Land Renewable.—By section 182 (5), the writ remains in force for three years from its issue, but

Sec. 182. may be renewed from time to time for periods of three years in the manner prescribed by section 182 (6).

Form of renewal, No. 100.

An execution against lands ceases to be a lien thereon ten years after the time of its delivery to the sheriff, although renewed from time to time: *Re* Woodall, 8 O. L. R. 288. If the office of clerk of the division court is vacant, the clerk of the peace becomes *ex officio* clerk of the division court *pro tem.*: sections 44, 45; and so would have authority to renew the execution.

Proof of Title.—By The Ontario Evidence Act, R.S.O. 1914, c. 76, s. 37, it is enacted that: "In proving a title under a sheriff's conveyance based upon an execution issued from a division court, it shall be sufficient to prove the judgment recovered in the division court, without proof of any prior proceedings."

As a general rule, all circumstances required by the statute to give jurisdiction must appear on the face of the proceedings, or by reasonable intendment. The section is intended to avoid the necessity of alleging jurisdiction and proving the regularity of all proceedings in the division court. The section does not, in terms, make the judgment conclusive of the jurisdiction of the court, and, although the proof of the judgment will be sufficient to prove a *prima facie* title in the purchaser from the sheriff, there seems to be nothing to prevent the want of jurisdiction or the invalidity of the division court judgment from being set up by a person claiming adversely to the purchaser.

What May be Sold Under Execution Against Lands.—See The Execution Act, R.S.O. 1914, c. 80, s. 30 and following sections, *ante*.

Sale of Lands.—Lands cannot be sold under an execution within twelve (calendar: Interpretation Act, R.S.O. 1914, c. 1, s. 29 (a)) months from the day of the delivery of the writ to the sheriff: Con. R. 559; and the sheriff cannot expose them for sale within that period: *ib.* But where an execution against lands has been in the sheriff's hands for twelve months, and returned, nothing having been done under it, the sheriff may sell under an alias *fi. fa.* issued thereon without waiting a year: Campbell v. Delihanty, 24 U. C. R. 236; Nickall v. Crawford, Tay. 277; Ruttan v. Levisconte, 16 U. C. R. 495. And the court or a judge may order a sale of the lands before the expiration of the twelve months, under a *fi. fa.* against an absconding debtor against whom an order for attachment has been issued: Con. R. 560.

Lands in the district of Manitoulin or Rainy River, situate more than 20 miles from a line of railway may only be sold by the sheriff in July, August, September or October: The Sheriffs Act, R.S.O. 1914, c. 16, s. 23.

Advertisement of Sale.—See Con. Rs. 563, 564. Defects in the advertisement will not invalidate the sale if there has been no collusion or improper conduct on the part of the purchaser: Patterson v. Todd, 24 U. C. R. 296; Ross v. Malone, 7 O. R. 215, 397. Nor will the omission to advertise at all, where there is no uncertainty as to what has been sold, though it may give a right of action against the sheriff: Osborne v. Kerr, 17 U. C. R. 134, 141; Lee v. Howes, 30 U. C. R. 292; notes to section 183. And even if the purchaser be one of the execution creditors, errors or defects in the advertisement

will not affect his title: Patterson v. Todd, 24 U. C. R. 291; but if the execution creditor becomes the purchaser at a price greatly below the value of the property, effect will only be given to the transaction as security for the debt and costs, and not as an absolute purchase: Kerr v. Bain, 11 Gr. 423; so also if the creditor interfered to prevent competition at the sale and bought the property at one-half its value: *Re* Davis, 17 Gr. 613. Sec. 162.

A sheriff should make reasonable inquiries as to what property the execution debtor has, and his interest in it; he should not advertise more of the estate than he finds the debtor is interested in, and if he knows what the debtor's interest is, he should give such a statement of it in the advertisement as a prudent owner would; and in regard to these matters, he is not justified in acting irregularly by the instructions of the plaintiff's solicitor, against his own judgment: McDonald v. Cameron, 13 Gr. 84. A third person who purchases and gets a sheriff's deed is not affected by irregularities on the part of the sheriff, unless the circumstances are such that the purchaser's taking the deed may be said to amount to fraud: *Ib.*

An irregularity in the notice of an adjourned sale may be waived by the execution debtor, by his attendance at the sale and by his subsequent ratification of the proceedings: *Doe* d. Bissett v. McLeod, 3 U. C. R. 297. Where, owing to the title being in dispute, the land was sold for a price greatly below its value, the court refused to give effect to the sheriff's deed, except as a security for the debt: Chalmers v. Piggott, 11 Gr. 475; Malloch v. Plunkett, 11 Gr. 439. But inadequacy of price alone is not a ground for the interference of the court unless it is very greatly below the value of the property sold: Laing v. Mathews, 14 Gr. 36.

Where it appeared that the sheriff had been advised not to complete the sale on the ground of irregularities in the advertisement, and after advertising again, sold the lands at a price in excess of the offer received at the first sale, a summary application by the purchaser at the first sale to compel the sheriff to execute a deed to him was refused: *Re* Campbell, 10 U. C. R. 41.

The advertisement of the lands in the *Ontario Gazette* during the currency of the writ is a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the land after the writ has become returnable: Con. R. 564; see Hall v. Gosley, 15 C. P. 101. But a sale under an expired writ, or in pursuance of an advertisement of sale first published in the *Ontario Gazette*, after the writ has expired, is void: Gardiner v. Jason, 2 E. & A. 188; Reynolds v. Streeter, 3 P. R. 315; Lee v. Howes, 30 U. C. R. 292; *Doe d.* Burnham v. Simmonds, 9 U. C. R. 436; and so also is a return of "lands on hand for want of buyers:" Lee v. Howes, 30 U. C. R. 292. The fact that the sheriff had told the debtor that he had an execution against his lands, which would be sold unless he paid the debt, was held not to be an inception of execution under the above rule, although the sheriff had been on the lands more than once before the writ expired: Bradburn v. Hall, 16 Gr. 518. There must be a compliance with the rule and an actual publication of the advertisement during the currency of the execution: Reynolds v. Streeter, 3 P. R. 315.

Where there has been misconduct on the part of the sheriff in the conduct of the sale, an injunction will be granted to restrain him from executing a deed to the purchaser: Jones v. Jones, 15 Gr. 40.

Sec. 182. **Sales of Equity of Redemption in Lands.**—The Execution Act, R.S.O. 1914, c. 80, ss. 30-33, *ante*. Sales of equities of redemption are governed by the same rules as sales of land: same statute, section 31 (2). An equity of redemption to be saleable under execution must be such as arises under the terms of the instrument creating the security. Where a deed is absolute in form, any right of redemption or re-purchase is not bound by or saleable under an execution: McCabe v. Thomson, 6 Gr. 175; McDonald v. McDouell, 2 E. & A. 393; Fitzgibbon v. Duggan, 11 Gr. 188. Formerly, an equity of redemption was saleable only where there was but one mortgage: Canadian Mining and Investment Co. v. Wheeler, 3 O. L. R. 219; or at most, when it was an equity existing between one mortgagor and one mortgagee: Wood v. Wood, 16 Gr. 471; Donovan v. Bacon, 16 Gr. 472*n*; *Re* Keenan, 3 Ch. Chamb. 285; Kerr v. Styles, 26 Gr. 309. See Parr v. Montgomery, 27 Gr. 521, where three mortgages were held by one mortgagee. By 5 Geo. V. c. 20, s. 10, it is now provided that the execution attaches, notwithstanding there are more than one mortgage. An equity of redemption is an entire whole: Faulds v. Harper, 2 O. R. 495; 11 S. C. R. 639, and, therefore, the interest of the debtor in a part of the lands comprised in the mortgage was not saleable: Shaw v. Tims, 10 Gr. 496; Vannorman v. McCarty, 20 C. P. 42, and if two tenants in common mortgage land, the interest of one of them is not bound by and cannot be sold under execution: Crown v. Chamberlin, 27 Gr. 551, and if lands comprised in a mortgage are in different counties, an execution will not affect the equity of redemption: Heward v. Wolfenden, 14 Gr. 188.

If a person entitled to an undivided interest in land has mortgaged the same, his equity of redemption therein is exigible: Rathbun v. Culbertson, 22 Gr. 465. The correctness of the decisions that the equity of redemption under two mortgages upon the same lands was not exigible, was open to doubt. In Samis v. Ireland, 4 A. R. 118, both Moss, C.J.O., and Patterson, J.A., who alone gave judgments, thought the statute wide enough to authorize the sale of such an equity. It had been held that a purchaser of a leasehold interest, which was subject to two mortgages, could not keep the first mortgage alive as against the second mortgagee, being bound by the effect of his purchase to pay off both mortgages: McDonald v. Reynolds, 14 Gr. 691. It would seem that unencumbered property may be put up for sale with an equity of redemption in one parcel: Samis v. Ireland, 4 A. R. 118.

It has been questioned whether a mortgagee, who recovers judgment upon the covenant contained in the mortgage, can sell the equity of redemption under an execution upon such judgment. The purchaser is bound to satisfy the mortgage. The amount, it has been said, therefore, which is realized by the sheriff, should, of right, be paid over to the mortgagor as the value of his estate in excess of the mortgage: Vannorman v. McCarty, 20 C. P. 47. "There has always," said Gwynne, J., "appeared to me to be something so inconsistent, as to be impracticable, in the law permitting money to be levied under an execution issued upon a judgment, which money is not payable to the judgment creditor; while the operation of the sale, by means of which it was levied, is to nullify the judgment without satisfying it, leaving the judgment creditor a mortgagee still, but stripped by his own act of the benefit of the covenant contained in his mortgage, and of the judgment which he had recovered thereon:" *Ib.*; see also Samis v. Ireland, 28 C. P. 478, 484. It was pointed out by Patterson, J.A., in Samis v. Ireland, 4 A. R. at p. 136, that a judgment upon a covenant is a

mortgage is almost necessarily for more than the mortgage debt, and the view of Gwynne, J., has not been adopted in any reported case. A purchaser of the equity of redemption, even though he be the mortgagee, will take precedence of an inter mediate fraudulent conveyance: Parr v. Montgomery, 27 Gr. 521. Sec. 182.

The equity of redemption of a deceased mortgagor may, since 27 Vic. c. 13 (now The Execution Act, s. 31, (2). *ante*), be sold on an execution against his personal representatives: McEvoy v. Clune, 21 Gr. 515. Sales by devisees will not prevent the sheriff selling: Johnston v. Snowden, 19 Gr. 221. A sale cannot be made for a debt not contracted by the deceased: Sumis v. Ireland, 4 A. R. 118; Freed v. Orr, 6 A. R. 690; notwithstanding judgment against his representatives: Ianson v. Clyde, 36 C. L. J. 215.

Effect of Sale.—See The Execution Act, section 32, *ante*.

Contingent Interests in Land.—See The Execution Act, section 32.

Any estate, right, title or interest in land which, under section 10 of the Conveyancing and Law of Property Act, may be conveyed or assigned by any person or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit is liable under execution: The Execution Act, s. 31, *ante*, And any property over which a deceased person had a general power of appointment exercisable for his own benefit, without the assent of any other person where the same is appointed by his will, is liable to execution against his personal representative after his other property has been exhausted: The Execution Act, s. 34 (3), *ante*.

Land held in trust for a debtor may be sold under execution against him: The Execution Act, s. 9, *ante*.

The equitable interest of an assignee from a purchaser under a contract for the sale of lands is exigible, and a purchaser from the sheriff is entitled to specific performance of the contract: Ward v. Archer, 24 O. R. 650.

The interest which a husband formerly had in the real estate of his wife might be sold under execution: Moffatt v. Grover, 4 C. P. 402. It is submitted that a husband has no exigible interest in the separate property of his wife during her lifetime. A right to dower consummate, is saleable under execution as a possibility coupled with an interest, and, but for sub-section 2 of section 34 of The Execution Act, an inchoate right to dower would be exigible: Rose v. Zimmerman, 3 Gr. 598; Miller v. Wiley, 16 C. P. 529; Allen v. Edinburgh Life Assur. Co., 25 Gr. 306.

An interest is contingent where a right of enjoyment is to accrue on an event which is dubious and uncertain: Fearne on Contingent Remainder, 2.

An executory interest is an interest which is limited by a will or conveyance to uses, and which would not be valid at common law as a contingent remainder: Challis on Real Property, 58.

Property over which a person has a disposing power under the Conveyancing and Law of Property Act, includes all property which, under a deed or will, the debtor might appoint to his own use: London Chartered Bank of Australia v. Lempriere, L. R. 4 P. C. 572.

Entireties.—Neither the estate of the husband nor the wife when they hold by entireties can be seized or sold under an execution: Griffin v. Patterson, 45 U. C. R. 536.

Sec. 183.

Church Pews.—Are saleable under execution against lands: The Execution Act, s. 35.

Sales Against Executors.—See The Execution Act, section 30. The judgment creditor must have been a creditor of the deceased: Freed v. Orr, 6 A. R. 690. Lands are assets in the hands of an executor or administrator, and to a defence of *plene administravit* the plaintiff may show that there are lands: Gardiner v. Gardiner, 2 O. S. 520; Seaton v. Taylor, 3 U. C. R. 302; Sickles v. Asseltine, 10 U. C. R. 203; but such a reply would seem to be unnecessary: Mein v. Short, 0 C. P. 244; 11 C. P. 430; Hoiton v. McDonald, 12 C. P. 246. The heirs and devisees of the deceased are *prima facie* bound by a judgment against personal representatives: Lovell v. Gibson, 19 Gr. 280; Willis v. Willis, 19 Gr. 573; but the parties interested in the real estate are at liberty to show that there was no debt due: Ianson v. Clyde, 36 C. L. J. 215; If persons appointed executors by a will, defend an action against them as executors, they will, without probate, be held to have accepted the office; and a good title to the testator's lands may be conveyed by the sheriff under an execution on a judgment recovered in such action: McDonald v. McDonald, 17 A. R. 192.

A judgment against an executor *de son tort* will not authorize the sale of the lands of deceased: O'Connor v. Dafoe, 15 U. C. R. 386; Wrathwell v. Bates, 15 U. C. R. 391; Graham v. Neison, 6 C. P. 280.

If the estate is insolvent, the creditors must be paid ratably, and the personal representatives on being sued should either set up the insolvency or obtain an order for administration: see 10 C. L. T. 277: *Re* Trusts Corporation of Ontario and Boehmer, 26 O. R. 191. This, of course, could not be done in the division court, and where an administration order could not be granted, it would appear that if there were sufficient assets to satisfy the claim, the insufficiency of assets to satisfy all claims would be no defence: Parsons v. Gooding, 33 U. C. R. 499.

Rules Governing Sales.—The rules governing the sales of land under such execution are comprised in Con. Rules 559-564.

Death, etc., of Sheriff.—If a sheriff dies, or his resignation is accepted or he is removed from office, his deputy, or if no deputy, the Crown Attorney, becomes sheriff *pro tem.*, and is charged with the execution of the office: The Sheriff's Act, R.S.O. 1914, c. 10, s. 33; and in case of the death, resignation or removal of the sheriff or sheriff *pro tem.*, after he has made a sale of lands and before conveying the same to the purchaser, the conveyance is to be made by the incoming sheriff: same statute, section 38.

Further proceedings after execution against lands issued.

183. After an execution against lands has been issued under the next preceding section, no further proceedings shall be had in the court out of which the execution issued, without an order of the Judge, unless the judgment creditor or his agent makes and files with the clerk an affidavit stating:—

(*a*) That the judgment remains unsatisfied in whole or in part;

(*b*) The amount, if any, which has been paid upon the judgment; Sec. 184.

(*c*) That execution against lands has been returned unsatisfied, or that he believes the judgment debtor has not sufficient lands in the county to the sheriff of which the execution was directed to satisfy the judgment. 10 Edw. VII. c. 32, s. 184.

An Affidavit.—Form 161. The proceedings, as in the case of a transcript of judgment to another court under section 188, are stayed unless an order of the judge is obtained, or the execution creditor, his attorney, or agents makes and files with the clerk of the court an affidavit in the precise terms of the section. The provision is similar to that contained in section 188, except that this section makes no provision for subsequent proceedings in the court in which the judgment was obtained. But the jurisdiction of that court having been re-established, its machinery could be resorted to for the purpose of enforcing the judgment in the same way as if the execution against lands had not been issued.

An Affidavit.—The affidavit must be made by the judgment creditor or his agent. The affidavit may be entitled in the court in which judgment was originally obtained. This affidavit must strictly comply with the requirements of this section. It has been held that an affidavit under section 190, stating that a sum remained unsatisfied "as I am informed and believe" is insufficient, and prohibition was granted: *Re* Barr v. McMillan, 7 O. L. R. 70, 672.

Bailiff after seizure of goods to indorse date of seizure and give notice of sale.

184. The bailiff, after making a seizure under an execution against goods, shall endorse thereon the date of the seizure, and shall immediately, and at least eight days before the time appointed for the sale, put up at three of the most public places in the division where any property liable to be sold under the execution has been taken, public notice, signed by himself, of the time and place within the division when and where it will be exposed for sale; and the notice shall describe the property taken. 10 Edw. VII. c. 32, s. 188.

After Seizure.—See notes to section 173, and especially Gladstone v. Padwick, L. R. 6 Ex. 203. See also Hineks v. Sowerby, 4 A. R. 113; Whimsell v. Giffard, 3 O. R. 1, and cases there cited. Under Rule 100, the bailiff is required to endorse the day and hour when he receives such execution.

Endorse Date of Seizure.—See also notes to section 173; and The Execution Act, section 10 (2), also requires the year, day, hour and minute to be endorsed.

At Least Eight Days.—This means clear days, *i.e.*, excluding the day of posting the advertisement, as well as the day of the sale: see note to section 85, *ante*.

Sec. 185. The advertisement should be put up immediately after the seizure: see note to section 77 (7), *ante*, and to section 101, *ante*.

Three Most Public Places.—The policy of the law is to realize as much as possible out of the defendant's goods; and for that reason, the statute prescribes the most public form of advertisement.

Notice of Sale.—Form 86. An irregularity in the publication of the notice, or even the absence of notice, would not invalidate the sale, provided it was honestly conducted in other respects; but it would subject the bailiff to an action: Campbell v. Coulthard, 25 U. C. R. 621; Paterson v. Todd, 24 U. C. R. 296; McDonald v. Cameron, 13 Gr. 84; Shultz v. Reddick, 43 U. C. R. 155; Trent v. Hunt, 9 Ex. 14.

The notice must be signed by the bailiff himself to be in strict conformity with the section.

Even a lithographed signature would be insufficient: R. v. Cowper, 24 Q. B. D. 60, 533; and it is submitted that a signature by a clerk or assistant would not be in conformity with the section: Monks v. Jackson, 1 C. P. D. 683; R. v. Jones, 23 Q. B. D. 29; see, however, France v. Dutron, 1891 2 Q. B. 208.

A failure to comply with the provisions would not, however, involve any serious consequences, unless, perhaps, it could be shown that by reason of the absence of the signature, the sale was considered fictitious, and buyers did not, therefore, attend.

The notice should be of such a character as to give intending purchasers and others reasonable information of what is to be sold, and of the time and place of sale.

Goods not to be sold until eight days after seizure.

185. The property so taken shall not be sold until the expiration of eight days at least next after the seizure thereof, unless upon the request in writing under the hand of the party whose property has been seized. 10 Edw. VII. c. 63, s. 186.

Shall Not be Sold Until the Expiration of Eight Days.—If sold before the eight days, the sale would not be void, but only irregular; see notes to section 184. But if the debtor suffered any damage in consequence, the bailiff and his sureties would be responsible: Schultz v. Reddick, 43 U. C. R. 155, 161.

The measure of damages would be the real value of the goods, less the amount of execution: *Ib.*

Pending the sale, the goods are at the risk of the bailiff. "If the sheriff seize goods he is liable for them, no matter what becomes of them, and whether he sells or not the judgment debtor, after the seizure, is discharged as to the plaintiff, and he is not liable to a second execution and he may plead the taking in discharge of himself:" Bac. Abr. Execution (D): Clerk v. Withers, 2 Ld. Raymd. 1074; Ross v. Grange, 25 U. C. R. 396.

Request in Writing.—In view of the positive prohibition contained in the section, it is doubtful if a sale could take place without a written consent. Ordinarily a person may waive a provision intended for his benefit, and such waiver may be in writing or by words or conduct: Girvin v. Burke, 19 O. R. 204 and Johnson v. Martin, 19 A. R. 592. In this case the statute expressly provides that the waiver must be in writing. A mere submission to the injury, or a voluntary promise,

after the sale, not to seek redress, would be insufficient. After the injury had been committed, a release, or accord and satisfaction, would have to be shown: *per* Thesiger, L.J., De Bussche v. Alt, 8 Ch. D. at p. 314. Sec. 185.

The bailiff should stop the sale as soon as sufficient money is raised: Cook v. Palmer, 6 B. & C. 739.

The sale is for ready money and immediate delivery, and the bailiff is not justified, after he has sold as much as will apparently satisfy the execution, in selling more, on the speculation that the actual delivery of the goods sold may be prevented by loss or accident: Aldred v. Constable, 6 Q. B. 370.

The goods must be sold within a reasonable time or an action by the creditor will lie: Bales v. Wingfield, 2 N. & M. 831; Jacobs v. Humphrey, 2 C. & M. 413.

The sale need not be by public auction; but it seems the bailiff must bear any expense in selling in any other way: Phillips v. Caterbury, 11 M. & W. 619.

The bailiff must not sell goods for much below their real value: Keightley v. Birch, 3 Camp. 521.

Should an execution, in the meantime, have issued to the sheriff, he would be entitled, under The Creditors Relief Act, R.S.O. 1914, c. 81, s. 26, to demand the goods, and the bailiff would be bound to deliver them; but would then, under sub-section 3, be entitled to have his fees taxed by the clerk and paid by the sheriff on demand; but these fees would not include poundage: see notes to section 173, *ante*. If no demand was made for the goods, the bailiff might sell them; Woolford's Estate (Trustee of v. Levy), 1892 1 Q. B. 772.

Should the execution debtor be a company no execution can be put in force after the making of a winding up order: R.S.C. c. 144, s. 23; R.S.O. 1914, c. 178, s. 173; or after a resolution or order for winding up by the members under R.S.O. 1914, c. 178, s. 169, unless by leave of the Supreme Court of Ontario: R.S.O. 1914, c. 178, ss. 170, 173: see Westbury v. Twigg, 1892 1 Q. B. 77; *Re* Hille India Rubber Co., W. N., 1897, 20.

Proceedings When Goods Not Sold.—In case the bailiff has offered the property for sale (after duly advertising it) and is unable to either effect a sale or to realize a reasonable amount therefor, he must not sacrifice the property, but must return the execution "property on hand for want of buyers:" Rule 96. If the execution is returned "property on hand for want of buyers": Form 151, the clerk must on the written request of the execution creditor issue another execution directing the bailiff to sell the property for what it will bring: Rule 97. See Form No. 151 (1).

Return to the Clerk of Money Realized.—The whole money realized including debt, damages, costs, interest and bailiff's fees and poundage must be paid over by the bailiff to the clerk, who must forthwith after taxation pay to the bailiff his proper fees and disbursements: Rule 98. The bailiff cannot set off against the money he receives any sum due to him by the clerk for fees or costs: see Rule 98.

Then money must be paid over to the clerk immediately after its receipt: Rule 99.

Form of bailiff's return when money made, No. 88.

Form of return of part of money made and no goods for residue, No. 89.

Secs. 188, 187.

Bailiff and other officers not to purchase goods seized.

186. A clerk, bailiff or other officer of the court shall not, directly or indirectly, purchase any property at any sale made by a bailiff under legal process, and every such purchase shall be absolutely void. 10 Edw. VII. c. 32, s. 187.

Directly or Indirectly Purchase. — This section is only declaratory of the common law. No person who has, as a public officer, the sale of any goods or chattels, could either directly or indirectly be the purchaser thereof. The bailiff is in the position of a trustee, and it would never do to allow selfish interest to conflict with public duty: see King v. England, 4 B. & S. 782; Williams v. Grey, 23 C. P. 561; Gastonguay v. Savoie, 29 S. C. R. 613; see also section 52. The words, "directly or indirectly," used here mean either by himself or some secret agent on his behalf. It has been held that the addition or omission of these words to an offence was immaterial: Todd v. Robinson, 14 Q. B. D. 739, at p. 746; but see Stewart v. Macdonald, 11 C. L. J. 19.

The sale to an officer, or to a person for him, is void, and passes no property; and the debtor would be entitled to maintain replevin or trover against the party in possession of the goods: Cundy v. Lindsay, 3 App. Cas. 459.

The execution debtor might also, perhaps, maintain an action against the officer and his sureties for misconduct, and recover any expenses he had been put to in recovering the goods: see Mayor of Salford v. Lever 25 Q. B. D. 363; 1891, 1 Q. B. 168.

Under The Sheriff's Act, R.S.O. 1914, c. 16, s. 14, the sheriff, deputy sheriff and bailiff, etc., including constables, are prohibited from purchasing any goods or lands by him exposed for sale under execution.

Bailiff's Return.—The bailiff is required to return an execution within thirty days: section 180; unless renewed or unless a seizure has been made, so recent that he has been unable to realize thereon. In which case he shall report to the clerk, who shall notify the execution creditor thereof: Rule 95.

Form of return of no goods, No. 87; of money made, No. 88; of part of money made and no goods for residue, No. 89; of goods on hand for want of buyers, No. 151.

Return when rent paid by bailiff, No. 90.

Right of bailiff to fees on execution, etc., when action settled or assignment made.

187. Where a bailiff has seized property under an execution or attachment, and the action is afterwards settled between the parties, or the defendant makes an assignment for the general benefit of his creditors, the bailiff, until his fees and disbursements are fully satisfied, shall have a lien therefor upon so much of the property as will reasonably satisfy the same; but in the event of a dispute as to the proper amount of the fees and disbursements, the amount claimed therefor may be paid into court until the proper amount shall be certified by the Judge, and on such payment into court the lien shall cease. 10 Edw. VII. c. 32, s. 188.

A Lien Therefor.—This section provides for two cases: (1) settlement; (2) assignment for benefit of creditors. Sec. 188.

The bailiff must first make an effective seizure, which becomes inoperative by the settlement or assignment. The assignment must, it is submitted, be under The Assignments and Preferences Act, R.S.O. 1914, c. 134, which takes precedence over executions: *ib.*, s. 14. See notes to sections 173 and 199.

No power is given to the bailiff to sell for the realization of his lien, and without such a provision the bailiff would have no lien: Sneary v. Abdy, 1 Ex. D. 207; *Re* Ross, 3 P. R. 394; *Re* Ludmore, 13 Q. B. D. 415; *Re* Wells & Croft, 68 L. T. 231; *Re* Harrison, 1893 2 Q. B. 111; *Re* Thomas, 1899, I Q. B. 60, 460; and the creditor could not add the cost of execution or bailiff's fees to his debt: Marquis of Salisbury v. Ray, 8 C. B. N. S. 193; *Re* Long, *Ex parte* Cuddeford, 20 Q. B. D., 316. Three per cent. would be allowable to the bailiff under the tariff in case of settlement, but nothing on an assignment: *Re* Ludmore, 13 Q. B. D. 417.

TRANSCRIPT.

Clerk to prepare transcript of unsatisfied judgment for transmission to any other Division Court.

188.—(1) The clerk, upon the application of a person having an unsatisfied judgment in his favour, shall prepare a transcript of the judgment in the prescribed form, and shall send the same to the clerk of any other Division Court, whether in the same or any other county, with a certificate at the foot thereof signed by him, sealed with the seal of the court, and addressed to the clerk of the court to whom it is to be sent, stating the amount unpaid upon the judgment, the date at which the same was recovered, and the post-office address of the person applying for the transcript, and the clerk to whom the certificate is addressed shall, on the receipt of the transcript and certificate, enter the transcript and the amount due on the judgment according to the certificate in a book to be kept in his office for the purpose; and all proceedings may be taken for enforcing the judgment in such last mentioned court.

Proceedings stayed in office from which transcript of judgment is issued.

(2) After a transcript has been issued under this section, no further proceedings shall be had in the court from which the transcript issued without an order from the Judge, unless the person who obtained the transcript, or his agent, shall make and file with the clerk an affidavit stating:—

(*a*) That the judgment remains unsatisfied in whole or in part;

(*b*) That the execution issued out of the court to which the transcript was sent has been returned *nulla bona*, or that he believes the judgment debtor has

Sec. 188.

not sufficient goods in the Division of that court to satisfy the judgment,

and upon the affidavit being filed, the clerk may issue such other process as the applicant may be entitled to and may direct. 10 Edw. VII. c. 63, s. 189.

Upon the Application of a Plaintiff or Defendant.—Under this section the clerk cannot, upon his own mere motion, prepare and send the transcript which this section requires. It can only be done upon the application of the plaintiff or the defendant, or the agent of either party, as the case may be.

All Proceedings May be Taken.—Where a plaint was brought in the wrong division and the defendant filed a notice disputing the claim and the jurisdiction of the court, but did not appear at the trial, and judgment was given against him; and subsequently a transcript of the judgment was transmitted to the court of the division in which defendant resided, it was held that the judgment did not thereby become a judgment of the latter court, and prohibition was granted to the court in which the judgment was originally obtained notwithstanding such transmission: *Re* Elliott v. Norris, 17 O. R. 78; see Labatt v. Chisholm, 2 West, L. T. 54. Nevertheless, the bailiff of the foreign court cannot be called to account by the judge of the home court: R. v. Shropshire (Judge), 20 Q. B. D. 242.

How Transcript Prepared; Form, Etc.—The transcript should be prepared by the clerk: see Rule 38, according to Form 61, and if judgment has been revived the order of revivnl or its purport must be set forth therein.

This section was held in Jones v. Paxton, 19 A. R. 163, to have changed the law laid down in Burgess v. Tully, 24 C. P. 549, and to have rendered it unnecessary to the validity of a transcript to the county court that execution shall issue out of the home court.

As to the address of parties see Rule 84.

Not to Issue Where Proceedings Have Abated. — Where proceedings have abated or a judgment is more than six years old the judgment must be revived before execution "or other process" issues: Rules 31, 32; as to reviving judgments, see Rules 31 and 32 and notes to section 179.

Enter the Transcript in a Book.—The entries in proceedings required under this section may be made in the procedure book in the form of an ordinary suit, as near as may be: Rules 66, 82.

After a Transcript Has Been Issued.—All proceedings in the original court are stayed after the issue of the transcript therefrom to another division court unless: (1) the judge otherwise orders or (2) unless the person who obtained the transcript, or his agent shall make and file with the clerk an affidavit stating the facts set out in subsections (a.) and (b.): see Form 61 (1); in which case the clerk may issue such other process as the creditor may be entitled to and may direct: section 188 (2).

An execution issued in contravention of sub-section (2), is invalid and will be set aside: Shepphard v. Shepphard, 12 O. W. R. 186.

DEATH, ETC., OF BAILIFF WHILE EXECUTION OR ATTACHMENT UNEXECUTED.

Continuation of proceedings after death of bailiff.

189.—(1) In the event of the death, resignation, suspension or removal of a bailiff after action taken by him under an execution or attachment, the proceedings may be continued by his successor.

Securities given to the bailiff.

(2) The benefit of all securities given to the bailiff shall enure to his successor in office. 10 Edw. VII. c. 32, s. 190.

EXAMINATION OF JUDGMENT DEBTORS.

Judgment debtors may be examined at the instance of their creditors.

190.—(1) A party having an unsatisfied judgment may procure from the court out of which execution might issue, if the judgment debtor resides or carries on business within the limits of that court, a summons in the prescribed form.

Affidavit required before judgment summons.

(2) Before the summons is issued the judgment creditor, or his agent, shall make and file with the clerk an affidavit stating:—

(*a*) That the judgment remains unsatisfied in whole or in part; and

(*b*) That the deponent believes that the judgment debtor sought to be examined is able to pay the amount due in respect of the judgment or some part thereof, or that he has rendered himself liable to be committed to gaol under this Act.

Examination of judgment debtor.

(3) The summons shall be served personally upon the judgment debtor, and if he appears he may be examined upon oath as to any and what debts are owing to him and touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability which formed the subject of the action, and as to the means and expectation he then had, and as to the property and means he still has of discharging the judgment debt, and as to the disposal he has made of any property.

Examination of witnesses.

(4) The party obtaining the summons and all witnesses whom the Judge thinks requisite may be examined upon oath touching the inquiries.

Place of examination.

(5) The examination shall not be held in open court unless the Judge so directs.

Sec. 190.

Costs.

(6) The costs of the summons and of all proceedings thereon shall be costs in the action, unless the Judge otherwise directs.

Party examined and discharged not to be again summoned.

Exception.

(7) If after the examination the Judge makes no order against the party examined, no further summons shall issue out of the same court against him at the suit of the same or any other creditor, except upon an affidavit satisfying the Judge that since the examination the party has acquired the means of paying, or, upon facts not before the court upon the examination, that he did not then make a full disclosure of his estate, effects and debts. 1 Edw. VII. c. 32, s. 191.

Examination of a Judgment Debtor.—This section having been taken originally from the English statute, 9 & 10 Vic. c. 95, s. 98, the cases upon that statute are applicable.

Process in the Nature of Execution.—Whatever doubt may have formerly existed as to the nature of the proceeding, it is now well settled that the order to commit under the judgment summons clauses in the Division Court Act, is a process to enforce payment of the judgment, and in the nature of execution, or of limited or qualified execution: *Ex p.* Dakins, 16 C. B. 17, which interpreted the effect of statutory law in England almost identical in form with the provisions now under consideration. The principle laid down in that case was approved and followed in *Re* Riley, 15 Q. B. D. 320; Stonor v. Fowle, 13 A. C. 20, Bailey v. Plant, 1901, 1 Q. B. 31, 33; and in our own courts in Henderson v. Dickson, 19 U. C. R. 592; *Re* McLeod v. Emigh, 12 P. R. 450; *Re* Reid v. Graham, 25 O. R. 573, 26 O. R. 126; *Re* Kay v. Storry, 8 O. L. R. 45; *Re* Stewart v. Edwards, 11 O. L. R. 378.

So when execution cannot be issued against the defendant personally, the provisions of section 190 would seem to have no application.

Married Woman.—Thus a married woman, not being liable to have an execution issued against her personally, but only against her separate estate: R.S.O. 1914, c. 149, s. 5; Scott v. Morley, 20 Q. B. D. 120, and see note to section 98; such judgment will not authorize her examination or committal in the division court: *Re* McLeod v. Emigh, 12 P. R. 450; Reid v. Graham, 26 O. R. 126; *Re* Stewart v. Edwards, 11 O. L. R. 378. In *Re* Teasdill v. Brady, 18 P. R. 104, it was held that a married woman was subject to examination and committal upon a judgment against her "in respect of a debt incurred before marriage, and in which the judgment was of personal incidence:" see *Re* Stewart v. Edwards, 11 O. L. R., p. 378; but in view of the interpretation given to the clauses of the Division Court Act in regard to the committal of judgment debtors, that it is in the nature of process to enforce payment, and in view of the provisions of The Fraudulent Debtor's Arrest Act, R.S.O. 1914, c. 83, s. 14, that a married woman shall not be arrested on mesne or final process, it may be doubted whether a married woman is liable to be committed in any case.

A creditor's rights against a married woman debtor are determined by the rights at the time the debt is contracted, and cannot be enlarged by the debtor subsequently becoming a widow: *Re* McLeod v. Enright, 12 P. R. 450.

Sec. 180.

Examination of a Garnishee.—The words of the section are wide enough to include any person against whom there may exist an unsatisfied judgment; and will include a garnishee against whom a judgment has been recovered under section 154 or 156: Cowan v. Carilli, 52 L. T. 434. The reasons to the contrary given in Hanna v. Coulson, 23 O. R. 493; 21 A. R. 602, do not now apply in view of the wording of the present section, and of section 2 (b) (i) interpreting the words "judgment creditor" to "include a creditor" who has obtained judgment against a garnishee and "judgment debtor" to "include a garnishee against whom judgment has been recovered."

Section 255 of the former Act has been omitted from the present provisions as being unnecessary. See also *Re* Dowler v. Duffy, 20 O. R. 40.

Partners.—On a judgment against a firm, only persons who are in fact partners, are liable, and no right exists to examine a person who might have been made liable by holding himself out as a partner: *Re* Young v. Parker & Co., 12 P. R. 646; nor can a judgment summons issue against a partner who has not been served with process: Reid v. Graham, 25 O. R. 573, affirmed 26 O. R. 126; *Re* Young, 14 Ch. D. 124; notes to sections 93-96.

This section would appear to authorize the examination of a defendant against whom there is an unsatisfied judgment for costs only. But formerly not an unsuccessful plaintiff: Meyers v. Kendrick, 9 P. R. 363; Troutman v. Flakin, 13 P. R. 153. These cases were decided under the old consolidated rules, but now see Con. Rule 580, under which an examination may be had for costs. The present section differs materially from the former section 243, which provided, "if the defendant appears" . . . he may be examined; the present section uses the word "judgment debtor," which means "the party or person to make payment under any judgment or order or against whom the same may be enforced, Con. Rule 3 (h), which applies to division courts, Rule 2 (7). It is submitted that a plaintiff might now be examined on any unsatisfied judgment against him for costs: see notes *infra*. A consular agent of the United States was held liable to examination under this section: Detroit Soap Co. v. Thratcher, 15 C. L. T. 161.

Corporations.—Before the Con. R. providing for the examination of an officer of a corporation judgment debtor, directors or officers, could not be examined: Dickson v. Neath & Brecon Ry. Co., L. R. 4 Ex. 87. Con. R. 581 provides for such examination, but no similar provision is made in the division court, and in view of the necessity for personal service under section 190 (3), the Con. R. would seem not to be applicable.

Judgment More Than 6 Years Old.—A judgment summons cannot issue on a judgment more than six years old without leave of a judge being procured under Rule 32, after three days notice, this proceeding being, as before stated, in the nature of "execution."

Unsatisfied Judgment.—The fact that the judgment is for more than $100, does not prevent an examination: Bryne v. Knipe, 5 D. & L. 639.

Out of What Court to Issue.—The summons may issue from "the court out of which execution might issue, if the debtor resides or carries on business within the limits of that court:" but if he resides

Sec. 190. or carries on business in another division, the summons must issue from the latter upon a transcript thereto under section 188.

It is not necessary that execution should issue before this proceeding can be resorted to: Peck v. McDougall, 27 U. C. R. 300; but if it should be vexatiously taken, it is probable the judge would order that the judgment creditor pay the costs of it; section 170 (1); and also compensation to the debtor for his trouble and attendance; section 192 (2).

Where proceedings in the suit were served upon the wrong man, who disregarded them, and a judgment summons was issued and an order for committment made, and the party imprisoned, the plaintiff was held liable for false imprisonment: Walley v. McConnell, 13 Q. B. 903.

Time and Place of Examination.—"There is nothing in either the language used or the context to show that the examination is to be made in the judge's chambers at the county town, and it would be a great hardship to bring parties there for the purpose, if a discretion existed. But it does not. The party is summoned to be and appear at the place where the court is held, in the division in which it issues; and there is no authority to require him to appear elsewhere, for the order in respect to the matter must be entered by the clerk in like manner as any other order of the court:" 9 U. C. L. J. 101.

As to Any and What Debts are Owing to Him.—This is now added to the former section, making express provision for investigation into this branch of the debtor's estate and effects.

Touching His Estate and Effects.—A defendant under judgment summons is bound virtually to give a full exposition of his affairs: Republic of Costa Rica v. Strousberg, 16 Ch. D. 8.

The debtor must furnish such information about his affairs as will place his dealing in intelligible shape. It is not enough for him to say he does not know, if he has the means at hand to qualify himself to explain: Foster v. Van Wormer, 12 P. R. 597; Stavert v. Holderoft, 2 O. W. N. 153.

It is submitted that the examination of the judgment debtor is not restricted to the period of contracting the debt, but that it may be shown at some anterior time, no matter how far back the debtor had property, as to which he may be required to give an account: Ontario Bank v. Mitchell, 32 C. P. 73, even though the judgment is for costs only: Hartlett v. Bartlett Mines, 3 O. W. N. 328.

See also, *post*, "Causes of Committal."

Disposal He Has Made of any Property.—See notes to section 191.

Affidavit for Summons.—It is important to consider the condition on which the summons can issue under this section. An affidavit must be made and filed as required by this section. It must be made by "the judgment creditor or his agent." A stranger could not make it: Hersehfeld v. Clarke, 11 Ex. 712; Christopherson v. Lotinga, 15 C. B. N. S. 809; Barwick v. DeBlaquiere, 4 P. R. 267; Tiffany v. Bullen, 18 C. P. 91; Frederiel v. Vanderzee, 2 C. P. D. 70; Bank of Montreal v. Cameron, 2 Q. B. D. 536; and the affidavit is also a condition precedent to the issue of a judgment summons against a garnishee: *Re* Dowler v. Duffey, 29 O. R. 40.

Sec. 190.

As the right to examination of a debtor depends on the making, by one of the persons mentioned in this section, of this affidavit and the due filing of it, care should be taken to see that such is done. This is more important in cases where the defendant does not appear, for should an order of committment be made against him, and enforced without these requirements being first complied with, the judge, clerk and execution creditor would probably be liable as trespassers, and prohibition might be granted: *Re* McGregor v. Norton, 13 P. R. 223.

Should the defendant appear and submit to examination, he would thereby waive the making or filing of this affidavit, and an order could be made against him in the same way as if the affidavit had been properly made and filed: see R. v. Hughes, 4 Q. B. D. 614; Dayfoot v. Byrens, 7 C. L. T. 21; Hawkins v. Batzold, 2 O. L. R. 704.

Form of affidavit, No. 24.

Form of judgment summons, No. 33.

Form of summons after default, No. 34.

Form of warrant of committment in default of appearance, No. 57.

Form of warrant of commitment after examination, No. 58.

It is doubtful if prohibition would be granted by reason of a merely defective affidavit: *e.g.*, an affidavit made by a person, who was really the agent, but which did not so state: *Re* Sato v. Hubbard, 8 P. R. 445.

But the affidavit must be that required by the very positive terms of the section; and prohibition was granted when the affidavit filed, stated that the judgment remained unsatisfied "as the deponent was informed and believed," instead of positively affirming the fact: *In re* Barr v. McMillan, 7 O. L. R. 70; 7 O. L. R. 672.

Upon application for prohibition, the court will assume that the proper affidavit was filed, unless the contrary appear on the face of the proceedings: *Re* Hawkins v. Batzold, 2 O. L. R. 704; *Re* Kay v. Storry, 8 O. L. R. 45.

Circumstances Under Which He Contracted the Debt, Etc.—It was held that these words could not be construed so as to include an unsuccessful plaintiff: Meyers v. Kendrick, 9 P. R. 363; Troutman v. Fiskin, 13 P. R. 153; see Griffiths v. Canonica, 5 B. C. R. 48, in which it was held that the words "as to the means or property he had when the debt or liability was incurred" refer to the liability to recover which the action was brought and do not apply to a judgment for costs only.

Service of Judgment Summons.—The service is expressly required by sub-section (3) to be personal. As to personal service, see notes to section 75, *ante*. For affidavit of service, see Form No. 162.

If the summons cannot be served, a return must be made by the bailiff: Rule 105.

It was held that in serving defendant with an order to examine him as a judgment debtor, it was not necessary in order to obtain a *ca. sa.*, to exhibit the original order unless demanded: Imperial Bank v. Dickey, 8 P. R. 246.

As to time of service, there is now no provision similar to former Rules 17, 18 and 104 as to time of service. Probably ten days would be deemed a reasonable time.

Payment of Expenses and Mileage.—When a judgment debtor resides more than three miles from the place of examination, he must

Sec. 190. be paid or tendered a sum equal to 75c. for his day's attendance and 10c. for each mile from his place of residence to the place of sitting, such payment to be costs in the cause, unless otherwise ordered: Rule 33. No payment is required if the debtor resides three miles or less from the place of examination.

Judgment Debtors' List.—See notes to section 106, *ante*.

Witnesses Whom the Judge Thinks Requisite.—When the defendant cannot or will not give a full account of his circumstances, or where his evidence is intended to be contradicted, the judgment creditor and other witnesses may be called to show the facts. The judge, however, has a discretion whether he will hear the plaintiff or his witnesses. But the ordinary rules for dealing with litigated matters where money or money's worth only are involved, are not to be applied, without more, to cases where the liberty of the person is at stake: Graham v. Devlin, 13 P. R. 245.

Examination Not to be in Open Court.—Without this provision, the examination would have to be held in open court: Nagle-Gillman v. Christopher, 4 Ch. D. 173; Kerwood v. Eastwood, 57 L. J. Q. B. 455. "The simple object of the enactment is to prevent needless exposure in open court, and to give authority to hold the examination in private; and the practice in every court we have knowledge of is to allow the general public to depart after the ordinary business is over, and to make the court room the judge's chamber for the time being:" 9 U. C. L. J. 101. The judge may, however, direct the examination to be in open court: section 190 (5).

Costs in the Action.—i.e., the costs of the ordinary proceedings in a suit: Cameron v. Campbell, 1 P. R. 173.

Unless the Judge Otherwise Directs.—Section 190 (6). Where the proceedings are taken vexatiously or wantonly, or without any reasonable prospect of eliciting anything favorable to the creditor, it is submitted that the judge would exercise a reasonable discretion in refusing costs; and the judge may in such case award compensation to the debtor for his trouble and attendance: section 192 (2).

No Further Summons Shall Issue.—Section 191 (7). That is, a summons of the same character.

Rule 66 (6) provides that every clerk shall keep a book, called the "Judgment Debtor's Book" (Form 3), in which shall be entered the date when each judgment debtor was examined and discharged, together with the number and style of the cause in which he was summoned and examined. This rule is important, as it places a liability upon the clerk. Under this rule and section 190 (7), it is the duty of the clerk, before issuing a judgment summons, to examine the judgment debtors' book to see whether the judgment debtor has been examined and discharged, and if his name is found therein, the clerk should refuse to issue the summons, otherwise he may render himself liable to an action. Under sub-section (7) if, after examination, the judge makes no order against the debtor, no further summons shall issue without the requisite affidavit.

The Same Court.—Sub-section (7), does not apply to a summons from another division court, but to the case of any other creditor in the same court.

Has Acquired the Means of Paying; or has not made a full disclosure of his estate, effects and debts. These are the only grounds upon which the judge would be warranted in granting an order for another summons. Sec. 191.

If the plaintiff should adopt the former alternative of sub-section (7), the affidavit should clearly show what means, if any, the defendant has acquired of paying the debt since the examination. Form of affidavit, No. 25.

What might be considered a full "disclosure" is a matter of some doubt. It could hardly be said that a debtor should voluntarily make such disclosure as this section contemplates, but it would appear that if he made such full disclosure concerning matters upon which the plaintiff thought proper to examine him, it would be a compliance with the section.

When judgment debtor may be committed to gaol.

191. If the party summoned—

(*a*) Does not attend as required by the summons, or give a sufficient reason for not attending; or

(*b*) Attends and refuses to be sworn or to answer such question as in the opinion of the Judge are proper,

or, if it appears to the Judge, by the examination of the party or by other evidence, that he

(*c*) Obtained credit from the judgment creditor or incurred the debt or liability under false pretences, or by means of fraud or breach of trust; or

(*d*) Has made or caused to be made any gift, delivery or transfer of any property, or has removed or concealed the same with intent to defraud his creditors or any of them; or

(*e*) Had, when or since judgment was obtained against him, sufficient means and ability to pay the debt or damages or costs recovered against him, either altogether or by the instalments which the court in which the judgment was obtained, ordered without depriving himself or his family of the means of living, and that he has wilfully refused or neglected to pay the same as ordered,

the Judge may order him to be committed to the common gaol of the county in which he resides or carries on business, for any period not exceeding forty days. 10 Edw. VII. c. 32, s. 192.

Does Not Attend.—The judge should see that the defendant has been properly called upon to appear on the summons before proceeding.

Sec. 191. The affidavit of service should conform to the provisions of Rules 42-48, and show that the judgment summons has been personally served, as required by section 190 (3).

Sufficient Reason.—Non-payment of his fees and travelling expenses, as required by Rule 33, would be a "sufficient reason" if the debtor lives more than three miles from the place of sitting of the court. But otherwise inability to pay expenses would not, it is submitted, be a good reason for not attending: Contrast Con. R. 587.

Illness, it is submitted, would be: *Re* Jacobs, 1 Har. & W. 123; Boast v. Firth, L. R. 4 C. P. 1; Robinson v. Davison, L. R. 6 Ex. 269; R. v. Wellings, 3 Q. B. D. 426.

Attends and Refuses to be Sworn or to Affirm.—Canada Evidence Act, R.S.C. c. 145, s. 14. Forms of oath and affirmation, Form No. 30 (i). See Rule 49.

Proper Questions.—What are proper questions is a matter for the judge, in the exercise of the discretion given him under this sub-section, to decide. A great deal may depend upon the conduct of the party under examination, and the circumstances of each particular case. The examination should not be conducted so as to try to entrap the debtor, but it should be full, fair and searching: Graham v. Devlin, 13 P. R. 245. "In the opinion of the judge" means according to the judgment of the judge: Omerod v. Todmorden Co., 8 Q. B. D. 664: which judgment should be exercised honestly and in the spirit of the Act, not arbitrarily.

It is submitted that, notwithstanding the omission from the Act of former sub-section 3 of the Revised Statutes, 1897, the answers to the questions should be such as would satisfy the mind of a reasonable person that a full and a true disclosure has been made: see Graham v. Devlin, 13 P. R. 245. Otherwise the object of the examination would be defeated. If the questions are pertinent to purposes of the examination, as provided in section 190 (3), and the replies of the party under examination so equivocal as to render his answers abortive, it would be the same as if he had refused to answer: see Republic of Costa Rica v. Strousberg, L. R. 16 Ch. D. 8. An answer in which the person declares his ignorance or obliviousness of a transaction of which it is manifest he cannot be ignorant or oblivious, is not a "satisfactory" answer: *Ex parte* Bradbury, 14 C. B. 15.

Where a debtor did not, in his examination, give a full explanation for want of knowledge, he was ordered to qualify himself by obtaining full knowledge of all his transactions: Foster v. Van Wormer, 12 P. R. 597; Stavert v. Holdcroft, 2 O. W. N. 153; see also Lemon v. Lemon, 6 P. R. 184; Schneider v. Agnew, 6 P. R. 338; Hobbs v. Scott, 23 U. C. R. 619. See notes to section 190.

Fraud or Breach of Trust.—Credit must have been obtained, or the debt incurred by false pretences, or by means of fraud or breach of trust, and strict legal proof of it must be given: see 3 U. C. L. J. 196; Jenkins v. Fereday, L. R. 7 C. P. 358; Cooper v. Pritchard, 11 Q. B. D. 351.

"In ordinary parlance, we speak of obtaining money or property by false pretences as indicating the criminal offence of obtaining the same by false pretences with intent to defraud:" *per* Harrison, C.J., Craw-

ford v. Beattie, 39 U. C. R. at p. 29. For definition, see Criminal Code, s. 404. Sec. 191.

A "breach of trust" would be the non-payment of money which the defendant had received for the plaintiff upon any express or implied trust. An auctioneer would fall within this category: Crowther v. Elgood, 34 Ch. D. 691; Criminal Code, s. 390.

As to fraudulent acts justifying commitment, see 4 U. C. L. J. 12, 61; 9 U. C. L. J. 121; Winka v. Holden, 1 C. L. J. 100.

Gift, Delivery or Transfer of Any Property.—The property may be either real or personal: Kidd v. O'Connor, 43 U. C. R. 193. A conveyance of real estate is a "gift, delivery or transfer of property" within the meaning of this sub-section; and an express wrongful intent need not be shown. It is sufficient to show that the natural consequences of what was done was to defraud creditors: *per* Rohh, Co.J.; Kitchen v. Saville, 17 C. L. T. 88. It was also held in that case that this sub-section is *intra vires* of the Ontario Legislature: *Ib.*

This paragraph of the sub-section also describes a criminal offence: R. v. Henry, 21 O. R. 113; Criminal Code, s. 417.

A transfer which merely amounted to a preference would not be within this provision: May on Fraudulent Conveyances, 100. And a conveyance of property by the debtor to his wife, to whom he was indebted, under pressure for payment or security, is not within this provision, and the judge rescinded an order for committal made by himself on evidence of the indebtedness, and of pressure having been made: Kitchen v. Saville, 17 C. L. T. 88.

An order having been made for committal on the ground that the defendant had made away with his property, the fact that the judge refused to allow him to make explanations as to his dealings with money lent and repaid to him after judgment was not a ground for granting prohibition: *Re* Reid v. Graham Bros., 25 O. R. 573; affirmed on appeal, 26 O. R. 126.

Sufficient Means and Ability to Pay.—This must mean with reference to the necessities of the debtor and his family. Equitable estate can be looked at for the purpose of determining if the debtor has had sufficient means: Bennett v. Powell, 1 Jur. N. S. 719.

The judge may take into account money derived from a gift. It is not necessary that the "means and ability to pay" should have been derived from his earnings or a fixed income: *Ex parte* Koster, *Re* Parke, 14 Q. B. D. 597.

When the debtor has means to pay a part only of the sum due, the court is not precluded from making the order: *Ex parte* Fryer, 17 Q. B. D. 718.

It has been said that there is no law which compels a debtor to work for his creditors if he chooses to live in idleness, or which prevents him from giving away his time and services, or devoting them towards satisfying one creditor's demand: Bahy v. Ross, 14 P. R. at p. 446; but under the provisions of The Division Courts Act, the words "ability to pay" cover the case of a dishonest debtor who can by working earn the means to pay the debtor, but contumaciously refuses to do anything: *Re* Kay v. Storry, 8 O. L. R. 45; and see Stavert v. Holdcroft, 2 O. W. N. 153.

Where the division court judge has been judicially satisfied with the ability of a debtor to pay, his conclusion cannot be interfered with: *Re*

Sec. 191. Hyde v. Cavan, 31 O. R. 189; see Esdaile v. Visser, 13 Ch. D. 421; *Re* Hawkins v. Batzold, 2 O. L. R. 704; *Re* Kay v. Storry, 8 O. L. R. 45; see Smith v. Frame, 41 N. S. R. 28; for there is no authority to review the judge's decision in a matter of law, even if erroneous: *Re* Morgan v. Billings, 7 O. W. N. 138.

Where the debtor lived in good style as a country gentleman, but his horses, carriages, etc., all belonged to his wife, an order for his committal was, nevertheless, affirmed: Harper v. Scrimegeour, 5 C. P. D. 366. But this was a decision upon a mere question of fact, and is not binding on any court; and the onus is upon the creditors to prove sufficient means or ability as above defined: Chard v. Jervis, 9 Q. B. D. 178. See also 18 C. L. J. 390; *Re* Ross, 29 Gr. 385; Dillon v. Cunningham, L. R. 8 Ex. 23; Esdaile v. Visser, 13 Ch. D. 421; Newell v. Van Praagh, L. R. 9 C. P. 96; Debenham v. Wardroper, 48 L. T. 235. A government official who has no other means than his salary may be committed: *Re* Hyde v. Cavan, 31 O. R. 189.

Altogether or by Instalments.—Power is given by sections 122, *ante*, and 196, *infra*, to order the payment of a judgment by instalments.

The Judge May Order.—See note to sections 10 and 142.

Order Such Party to be Committed.—An order for committal may be made, upon examination, under this section, without any previous order for payment based upon a previous examination and default thereunder; the original judgment is a sufficient order for payment for that purpose, and a second examination is not required: *Re* Hawkins v. Batzold, 2 O. L. R. 704; *Re* Kay v. Storry, 8 O. L. R. 45.

If the judge orders a party to pay the money at a future day, or in default to be committed, and the party again makes default, he cannot be committed without an opportunity of being heard as to the cause of such default: Abley v. Dale, 10 C. B. 62; see *Ex parte* Kinning, 4 C. B. 507; Kinning v. Buchanan, 8 C. B. 271; Baird v. Story, 23 U. C. R. 624.

Judgment for debt and costs was given against B., and an order made to pay by instalments. B. made default, and a judgment summons was issued, upon which he was examined and committed for seven days, upon the ground that he had the means of satisfying the judgment and refused to do so. He was subsequently summoned and committed two several times for forty days, each on the same ground. Held, that there was power to commit for default of the same kind as often as default is committed: *Re* Boyce, 2 E. & B. 521. A warrant of commitment, stating that "it appeared to the satisfaction of the judge that the defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery or transfer of his property, with intent to defraud his creditors, and thereupon the judge by a certain order did adjudge, etc.," not being in the nature of a conviction, is not bad for stating in the alternative the mode by which the offence was committed: *Ex parte* Purdy, 9 C. B. 201. Where a defendant does not attend on judgment summons, and a warrant of commitment is issued in consequence, payment made to the plaintiff will prevent the execution of the warrant: *Ex parte* Dukins, 16 C. B. 77; *Re* McLeod v. Emigh, 12 P. R. 450. An order on which a warrant of commitment was founded, that defendant pay the debt at a future given day or be imprisoned for thirty days, was held bad: Dewa v. Riley, 11 C. B. 434; 4

L. C. G. 65. It follows from Abley v. Dale, 10 C. B. 62, and the case just quoted of Dews v. Riley, that if the judge postpones the ordering of commitment of the defendant after examination, he must have an opportunity of being again heard: see also Bullen v. Moodie, 13 C. P. 126; 2 E. & A. 379, section c; *Re* Hicks, 5 P. R. 88. But if in the presence of the defendant, the judge orders his commitment, then there is no necessity for any other summons; Baird v. Story, 23 U. C. R. 624. One who does not reside or carry on business in this province could not be committed: Regan v. McGreevy, 5 P. R. 94; see notes to sections 75 and 89. An order of commitment upon non-payment cannot be embodied in the original order to pay: *Ex parte* Kinning, 4 C. B. 507. See Rule 203; Thorpe v. Browne, L. R. 2 H. L. 220; R. v. Oxford, L. R. 7 Q. B. 471. Sec. 192.

Where an order was made to commit the defendant to prison in default of payment of an amount due on a judgment, but he was never arrested nor imprisoned under the order which, under the English County Court Rules, expired a year from its date: Held, upon motion for prohibition that as no arrest nor imprisonment had ever taken place upon this order before its expiration, and as the defendant was still in default, the County Court judge had power to make a second order of commitment: R. v. Stonor, 59 L. T. 669; 57 L. J. Q. B. 510. As to life of warrant under this Act, see Rule 34; notes to section 195.

Where a plaintiff had compounded with a debtor, it was held that the default in payment of the composition was to remit the plaintiff to the position he occupied before the proceedings in respect of the composition, and that consequently where an order had been made for payment by the defendant, proceedings could be taken on such order for non-compliance with it on such default: Newell v. Van Praagh, L. R. 9 C. P. 96.

An order for committal should state in which particular the person committed was guilty of default: R. v. Lambeth, C. C. Judge, 3C W. R. 475, but this applies only to the formal order, and not to a mere minute made on the pronouncement of his decision: Harris v. Slater, 21 Q. B. D. 359.

192.—(1) A party failing to attend shall not be liable to be committed for the default, unless the Judge is satisfied that his non-attendance is wilful. When party may be committed for non-attendance.

(2) If at the hearing it appears to the Judge by the examination of the party, or otherwise, that he ought not to have been summoned, or if the judgment creditor or his agent does not appear, the Judge shall award the party summoned compensation for his trouble and attendance, to be recovered against the judgment creditor in the same manner as a judgment of the court. 10 Edw. VII. c. 63, s. 192. Costs allowed him in certain cases.

Such Non-Attendance is Wilful.—It is often a difficult matter to determine when a defendant's failure to attend is wilful non-attendance. It is also difficult to say whether a judge should receive evidence affirmatively showing that fact, or whether the non-attendance is *prima facie* evidence of its being "wilful." It has been said that "wilful is a word of familiar use in every branch of the law, and although in some

Sec. 193.

branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent:" *per* Bowen, L.J., *Re* Young and Harston, 31 Ch. D. 174; Wilson v. Manes, 26 A. R. 398; see also Squire v. Wheeler, 16 L. T. 93; Carpenter v. Mason, 12 A. & E. 629. But it has been said, also, that the word "wilfully" is sometimes used as denoting evil intentions; in fact, that such is the common use of the word in the English language, and that a surveyor was not guilty of the offence of "wilfully receiving" a higher fee than he was entitled to when acting under an honest mistake: R. v. Badger, 6 E. & B. 137; Smith v. Barnham, 1 Ex. D. 419; Miles v. Roe, 10 P. R. 218; see notes to section 191.

Compensation for His Trouble and Attendance. — If a creditor, knowing that his debtor has been unfortunate, or if when the summons was issued, he knew that the debtor had no means beyond what afforded himself and family a scanty subsistence, or under other circumstances of a like character, nevertheless has the debtor summoned under section 190, and the judge makes no order, it is submitted that a wise discretion would be exercised in making the creditor pay the debtor for his trouble and attendance under this section, and also bear the costs of the proceedings under section 192 (2); see Miller v. Macdonald, 14 P. R. 499.

The words "shall award" appear to leave the judge no discretion if application is made, but are imperative. The judge could probably award the debtor compensation if there should be a violation of section 190 (7).

Unless the Judge is Satisfied.—This provision would seem to point to a duty on the part of the judge to satisfy himself that the non-attendance was wilful and to permit it to be shewn that such non-attendance was not wilful.

Judgment summons where principal and interest sued for separately.

193. Where a judgment has been recovered in an action which, but for subsection 2 of section 67, could not have been recovered in the Division Court, the judgment debtor shall not be committed where a judgment debtor could not have been committed upon or in respect of a judgment recovered in a higher court, or upon or by reason of an examination upon such a judgment. 10 Edw. VII. c. 32, s. 194.

Sub-section 2 of Section 67.—The provisions of the sub-section referred to permit actions to be brought separately for the principal and for the interest payable to the same person, upon a mortgage, bill, note, bond or other instrument.

Object of the Section.—The evident object of the present section is to prevent the peculiar powers of committal for non-payment of judgment debts, conferred upon the division courts, from being exercised in the case of a judgment which, but for sub-section 2 of section 67, must have been recovered in the Supreme Court or in the county court. To

entitle a judgment debtor to the benefit of the enactment, it will be necessary for him to show that the plaintiff, at the time the suit was commenced, had a cause of action for principal as well as interest, *i.e.*, that both were overdue; that such cause of action was for an amount beyond the jurisdiction of the division court; that the plaintiff did not abandon the excess, but sued for either the principal or the interest alone, thus splitting his demand, and thereby was entitled to obtain a division court judgment, while still retaining a right to sue for the other part of the cause of action. Sec. 193.

Committal in Supreme Court.—This is governed by Con. R. 587, which is as follows:—

587. Where the judgment debtor does not attend, does not allege a sufficient excuse for not attending, or if attending, refuses to disclose his property or his transactions, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defeat or defraud his creditors or any of them, the court may order the debtor to be committed to the common gaol of the county or district in which he resides, for any term not exceeding twelve months; or that a writ of *capias ad satisfaciendum* may be issued against the debtor, or in case the debtor is at large upon bail, may make an order for his committal to close custody; and the Sheriff, on due notice of the order, shall forthwith take the debtor and commit him to close custody until he obtains an order allowing him to go out of close custody, on giving the necessary bond in that behalf, or until he is otherwise discharged in due course of law.

Causes for Committal.—It will be observed that in the Supreme Court or county court, there is no power of committal merely because the party has had sufficient means and ability to pay the debt, either altogether or by instalments, or because the debt was contracted by fraud or breach of trust. Reckless expenditure of money disclosed by an examination has been said to make an answer unsatisfactory within the Consolidated Rule: Crooks v. Stroud, 10 P. R. 131; but the tendency of the other cases is that, so long as the answers are full and truthful, the fact that they do not account for the application of the debtor's assets in a proper manner will not make them unsatisfactory: Hobbs v. Scott, 23 U. C. R. 619; Lemon v. Lemon, 6 P. R. 184; Foster v. Van Wormer, 12 P. R. 597; Graham v. Devlin, 13 P. R. 245.

The defendant must have refused to answer, or his answer must have been so equivocal or indefinite as really not to be an answer: Lemon v. Lemon, 6 P. R. 184; Merrell v. McFarren, 1 C. L. T. 133; Benttie v. Barton, 2 C. L. T. 104; Schneider v. Agnew, 6 P. R. 135; and see Stavert v. Holdcroft, 2 O. W. N. 153.

The fact that the debtor has a small sum of money which is required for the support of his children, and which on that account he refuses to hand over to the judgment creditor will not justify committal: McKay v. Atherton, 12 P. R. 464. If the property of the debtor has been disposed of, and the proceeds sent to a foreign country, and the debtor professes ignorance of where such proceeds are, committal will be ordered: McKinnon v. Crowe, 17 P. R. 201. The court should not be called upon to enquire into the gambling transactions of a debtor to ascertain if he has made or lost money thereby: Harvey v. Aitkens, 17 P. R. 71.

Sec. 194. As to the scope and practice upon the examination under Con. Rule 580, see Graham v. Devlin, 13 P. R. 245; Dyment v. Jerrett, 9 C. L. T. 141; Bank of Hamilton v. Essery, 15 P. R. 202; Jones v. McDonald, 15 P. R. 345; Chatham Harvester Co. v. Campbell, 12 P. R. 666; Stavert v. Holdcroft, 2 O. W. N. 153.

Warrant of Commitment.

194.—(1) Where an order of commitment has been made, the clerk shall issue, under the seal of the court, a warrant of commitment in the prescribed form directed to the bailiff of any court within the county, upon which shall be endorsed a memorandum of the amount upon payment of which the party is entitled to be discharged from custody, and the bailiff may, by virtue of the warrant, take the party and deliver him to the keeper of the gaol in which he has been directed to be imprisoned.

Constables, etc., to execute warrants.

(2) All constables and other peace officers within their respective jurisdictions shall aid in the execution of the warrant, and the keeper of the gaol shall receive and keep the party therein until discharged under the provisions of this Act, or otherwise, in due course of law. 10 Edw. VII. c. 32, s. 195.

Order of Commitment.—The judge's endorsement on the judgment summons was held to be the order upon such summons, and a subsequent order was held to be illegal: *Re* McLeod v. Emigh, 12 P. R. 450; R. v. Judge of Brompton C. C., 18 Q. B. D. 213, but this case was reversed on appeal *sub nom.* Stonor v. Fowle, 13 App. Cas. 20. Upon it appearing that the formal order was correct in form; and in a subsequent case, it was held that a minute taken by the clerk would not be the order, and that the order might be drawn up subsequently to its pronouncement: Harris v. Slater, 21 Q. B. D. 359. The judge has power to rescind or alter the order for payment upon a subsequent application: section 196 and notes. In Kitchen v. Saville, 17 C. L. T. 88, it was held that the judge had power to vacate the order, but the contrary was decided in *Re* Wilson v. Durham, 18 O. L. R. 328. Even after an *ex parte* order had been acted upon, it was formerly held the judge had no power to rescind it: McNabb v. Oppenheimer, 11 P. R. 214, but now see section 196 (2).

Warrant of Commitment.—The warrant of commitment shall bear date on the day on which the order for commitment is made, and shall continue in force for six calendar months from such date and no longer, unless renewed by an order of the judge, upon affidavit, showing the cause of the non-execution and that the moneys payable thereunder have not been satisfied: Rule 34. See note below. "Renewal of Warrant." In issuing the warrant, the clerk should be careful to see that six calendar months from the date of the order of commitment have not expired: Hayes v. Keene, 12 C. B. 233. If they have he would, in the event of the debtor's arrest, be liable as a trespasser: Lawrenson v. Hill, 10 Ir. C. L. R. 177; Pedley v. Davis, 10 C. B. N. S. 492; but see *Ex parte* O'Neill, 10 C. B. 57.

The warrant can not be renewed for longer than six calendar months: *ib.*

The warrant must, in addition to being under seal, be dated, otherwise the arrest would be illegal: *Re* Fletcher, 1 D. & L. 726; and it must have endorsed thereon the amount upon payment of which the debtor is entitled to be discharged, as provided by the above section. Sec. 194.

On motion to discharge a prisoner from gaol, it was held that the Habeas Corpus Act of Ontario, R.S.O. 1914, c. 84, s. 1, enables a person confined under civil process to obtain the writ; and that a warrant of commitment which did not show that it appeared to the satisfaction of the judge that the debtor had sufficient means to pay the debt or damages by instalments, which the court had ordered, was defective, and that the debtor could not be imprisoned for non-payment or disobedience of the order to pay: *Re* Gesner, *per* Osler, J. (not reported); see also R. v. Lambeth C. C. Judge, 30 W. R. 475; but in *Re* Anderson v. Vanstone, 16 P. R. 243, the divisional court held that an order for committal of a judgment debtor for default of attendance was "process" in an action within the exception to section 1 of R.S.O. 1914, c. 84, and a writ of *habeas corpus* was quashed as having been improvidently issued.

The Bailiff of any Court Within the County.—A warrant of commitment must be directed to a bailiff within the county in which the proceedings are taken, and is not effectual beyond the limits of the county within which it is issued, nor does the "backing" of it by a magistrate in another county give it any force or validity there: *Re* Hendry, 27 O. R. 297.

It need not be executed by the bailiff of the court from which it issues. The bailiff of any court within the county has equal power to do so. But the warrant should be directed to the bailiff who is to execute it.

Take the Party.—"On receiving a warrant, the officer should see that it has the seal of the court and the signature of the clerk. The arrest may be made at any time of the day or night, but must not be made on a Sunday:" 4 U. C. L. J. 62; 29 Car. II., c. 7, s. 6, which is still in force in Canada: R.S.C. 1906, c. 153, s. 16; Con. Stat. U. C. c. 104, *q.v.*, R.S.O. 1914, p. 2962; and see Rawlins v. Ellis, 16 M. & W. 172; *Re* Cooper, 5 P. R. 256; R. v. Wilmot, 10 Cox C. C. 276, 305, 322. If the debtor is ordered to be committed for a definite time, and the bailiff is negligent in executing the warrant, he and his sureties would no doubt be liable: see 4 U. C. L. J. 62.

"The bailiff will not be justified in breaking open the outer door of a person's dwelling house to execute a warrant, nor indeed in the use of any *force* to effect an entrance, even to the breaking of a latch:" 5 Coke, 92. An arrest under such circumstances would be void, and render the bailiff liable to an action: see Hodgson v. Towning, 5 Dowl. P. C. 410; but, having once got in, he may break any *inner* door; so he may break open the outer door of a barn, stable or outhouse. But what has been said before as to executions against goods will apply in this particular to the execution of warrants: and the caution is repeated, that even when force is necessary, a demand for admission should be first made, and all fair means resorted to before force is employed. Although an officer having reason to believe that a party is in his house, may peaceably enter to arrest him, yet he cannot justify even a peaceable entry into the house of a stranger, except by proof that the party was actually there: Cook v. Birt, 5 Taunt. 765; Johnson v. Leigh, 6 Taunt. 246. If after being once arrested, the party escape and

Sec. 194. shelter himself in the house of another, the bailiff may enter and take him, provided *it be done on fresh pursuit*: Coke, 92. The bailiff should always keep this in his mind, that if a defendant escape from custody through his negligence or want of precaution, he will be liable to plaintiff; it may be, to the whole extent of the claim: 4 U. C. L. J. 62, 63. "To constitute an arrest, the party should, if possible, be touched by the officer; bare words will not make an arrest without laying hold of the person or otherwise confining him. But if a bailiff come into a room and tell a party he arrests him and locks the door, this is an arrest, for he is in the custody of the bailiff: or if in any other way the party submit himself by word or action to be in custody, it is an arrest. The bailiff, whether known as such or not, ought to produce his warrant if required; but should in no case part with the possession of it. If the party snatch or take the warrant, the bailiff may force it from him, using no unnecessary violence in so doing. As in case of a constable where resistance is made, the utmost caution and forbearance should be used; but the bailiff may lawfully use force to overcome resistance—that force not exceeding the necessity of the case, and ceasing the instant resistance ceases. Whenever difficulty is apprehended in effecting an arrest, the bailiff may call any constable or peace officer to his assistance, as constables and peace officers within their respective jurisdictions will be bound to aid the bailiff to make an arrest: section 194 (2). It would seem that where the bailiff uses proper precaution, and acts with reasonable firmness, he is not liable in case of a rescue being made. When an arrest is made, the party arrested should be at once brought to gaol, unless indeed he pay the amount mentioned in the warrant, with the costs: section 195 (c). See notes to section 195. No more force or restraint should be imposed on the prisoner than is necessary to prevent his escape, and no delay should be made in placing the party in gaol. The warrant is left with the gaoler. The bailiff should obtain a memorandum from the gaoler of his having received the warrant and the party named therein from the hands of the bailiff. As in other cases, the bailiff must make return to the clerk of what he has done under the warrant:" 4 U. C. L. J. 83; see also notes to section 191. *Quære:* Should a judge, if in doubt as to the validity of a commitment on application to discharge the debtor presume in favor of liberty and discharge him? See *Re* Beebe, 3 P. R. 270; R. v. Jordan, 36 W. R. 589.

In Sandon v. Jervis, E. B. & E. 935, it was held that a sheriff's officer, under execution of a *ca. sa.*, by putting his hand into a debtor's dwelling-house by an opening in a window caused by a pane having been broken in the scuffle, but not by the officer, touched the debtor who was inside the house, and then said, "You are my prisoner,"—was an arrest.

But if an officer opens a window (which is shut but not fastened) of a house for the purpose of making an arrest, it would seem that the arrest is unlawful: Ne v. Lucas, L. R. 2 Q. B. 590; Angiebeurt v. Ratbier, 27 C. P. 97.

A bailiff is responsible for not arresting: Burham v. Hall, 15 C. L. J. 204.

Renewal of Warrant.—Upon an application founded upon affidavit showing to the satisfaction of the judge the cause of the non-execution of the warrant and that the moneys payable thereunder have not been satisfied, the judge may order the same to be renewed for not more than six months or for a less period: Rule 34. The renewal shall be made by the clerk by marking in the margin of the warrant—"Renewed by judge's order for calendar months from the

day of A.D., 19 . N.Y., clerk:" Rule 88. The warrant being in the nature of an execution, Rule 85, applies, the warrant must be renewed before its expiration. Sec. 195.

Only one renewal is provided for and under the wording of Rule 34, it would seem that the life of an order of commitment cannot exceed twelve months.

The order for renewal should be filed with the clerk who will then make the necessary endorsement. The clerk should enter the order and renewal in the procedure book.

Form of Affidavit for renewal, No. 163.

Warrant to be Delivered to Gaoler.—At the time of delivering the party arrested to the gaoler, the bailiff must deliver to him the warrant of commitment and endorse thereon the amount of his fees and mileage which will be added to the amount of the debt, and costs, the whole being endorsed in accordance with the above section 194, so that the debtor may ascertain the full amount required to obtain his discharge under section 195. (h).

All Constables, Etc., Shall Aid in the Execution.—Section 194 (2). A refusal to "aid in the execution" of a warrant of commitment would be a misdemeanor: R. v. Sherlock, L. R. 1 C. C. 20; Criminal Code, section 167.

In Due Course of Law.—If the gaoler should keep the debtor in prison longer than the law allows, according to the facts appearing on the face of the warrant, he would be liable: Moore v. Rose, L. R. 4 Q. B. 486; and if the debtor should escape, the gaoler would also be liable: Alnept v. Eyles, 2 H. Bl. 108, even though he escape through a relaxation of the prison rules on account of the debtor's ill health: Haines v. East India Co., 11 Moo. P. C. 39; or the insufficiency of the gaol: Rowan v. McDonell, H. T. 3 Vic.; R. & J. 1624.

As to damages in a case against any officer or gaoler for an escape, see Macrae v. Clarke, L. R. 1 C. P. 403.

Imprisonment usually commences to run from the day on which the prisoner is actually lodged in gaol: *Ex parte* Fouiken, 15 M. & W. 612; but it may be presumed that the rule requiring the bailiff to endorse on the warrant the actual date of arrest contemplates the period of imprisonment commencing from the moment of the arrest by the bailiff, and that the gaoler is to compute the time from the date of such endorsement. A gaoler acting in obedience to a warrant valid on its face, is protected if he does not detain the prisoner longer than the period mentioned therein, although he may have been in custody prior to the day of his delivery to the gaoler: Henderson v. Preston, 21 Q. B. D. 362.

195. A party may be discharged out of custody— When debtor in custody shall be discharged.

(*a*) By order of the Judge, or

(*b*) When he has paid to the keeper of the gaol the amount endorsed on the warrant, or

(*c*) Upon the certificate of the clerk that such amount has been paid to him. 10 Edw. VII. c. 32, s. 196.

Secs. 196, 197.

Payment on Arrest.—If the debtor on being arrested and before he is delivered to the gaoler, desires to pay the amount endorsed on the warrant, the bailiff should give him the opportunity to pay it to the clerk, on whose certificate the debtor is to be discharged under sub-section (c). If the debtor pays the debt and costs to the execution creditor, but makes no application to the court, and he is subsequently arrested by the bailiff, the arrest is legal: Davis v. Fletcher, 2 E. & B. 271.

Payment While in Custody.—After the debtor is delivered to the gaoler the bailiff cannot receive payment of the debt and costs, but by section 195 (h), the gaoler must receive the money and allow the debtor to go at large; or the amount may be paid to the clerk of the court from which the warrant issued, and upon a certificate from him, the defendant is entitled to his discharge: Section 195 (c).

The gaoler would be bound to liberate the defendant on the certificate of the clerk or on an order of the judge, either of which the gaoler should retain as his security. In the case of a discharge by the order of the judge on the payment of the default, as remarked by Jervis, C.J., in the case of *Ex parte* Dakins, 16 C. B. at p. 91, "When the money is paid, the judge becomes a mere ministerial officer to order the discharge. He has no discretion. The prisoner is entitled to the order as a matter of course."

Judge may rescind order and may alter and modify the same.

196.—(1) The Judge may rescind or alter the order for payment, and make any further or other order for the payment of the debt or damages recovered and costs forthwith, or by instalments, or in any other manner that he thinks reasonable.

May Rescind or Alter the Order.—Power is here given to the judge, on the hearing of a judgment summons, if he thinks fit, to mould the judgment of the court to suit the debtor's means and circumstances. Sub-section (1) refers only to the order for payment, and not to the order for commitment which is dealt with by sub-section (2).

(2) The Judge may rescind or alter any order of commitment made by him, whether or not the same has been acted on. 10 Edw. VII. c. 32, s. 197.

Sub-section 2 is new, and over-rides Nerlick v. Marks, 31 O. R. 677; Hawkins v. Botzold, 2 O. L. R. 704; *Re* Wilson v. Durham, 18 O. L. R. 328, in which it was held that the order to commit was on adjudication, and, therefore, final and could not be rescinded or altered by the judge (especially if it had been acted on: McNab v. Oppenheimer, 11 P. R. 214), but under the present section the judge now has authority to alter or rescind the order of commitment whether it has been acted on or not.

Order Made by Him.—The authority to rescind or alter the order is restricted to the judge who made the order.

Debt not to be extinguished by imprisonment.

197. Imprisonment under this Act shall not extinguish the judgment, or protect the judgment debtor from being summoned anew and imprisoned for any new fraud or other default rendering him liable to be imprisoned, or deprive the judgment

creditor of the right to execution on his judgment. 10 Edw. VII. c. 32, s. 198. Secs. 198, 199.

Any New Fraud or Other Default.—At common law imprisonment on final process was generally considered a satisfaction of the plaintiff's debt. But it is not so under the provisions of this section: see Evans v. Wills, 1 C. P. D. 229.

The judge can commit for as many defaults in payment as the facts warrant. There should be a fresh adjudication every time: *Re* Boyce, 2 E. & B. 521; see notes to section 191.

Annual return of committment of judgment debtors.

198. Every clerk, on or before the 15th day of January in every year, shall make to the inspector a return shewing the number of judgment debtors who, during the twelve months ending the 31st day of December next preceding, were ordered to be committed under each of the heads mentioned in section 192. 10 Edw. VII. c. 32, s. 199.

ABSCONDING DEBTORS.

Absconding debtors.

199. Where a person indebted in a sum not less than $4 either for debt or damages arising upon a contract, and recoverable in or upon a judgment of a Division Court,

(*a*) Absconds from Ontario, leaving personal property liable to seizure under execution for debt in any county; or

(*b*) Attempts to remove such personal property out of Ontario or from one county to another therein with intent to defraud; or

(*c*) Keeps concealed to avoid service of process,

Warrant for attachment.

the clerk of any division court, upon the application of the creditor, and upon his filing an affidavit in the prescribed form made by him, his agent, or servant, shall issue a warrant in the prescribed form, directed to the bailiff of the court from which the same issued, or to a constable of the county, commanding him to attach, seize, take and safely keep all the personal estate and effects of such person within the county, liable to seizure under execution for debt, or a sufficient part thereof to secure the sum mentioned in the warrant, with costs, and to return the warrant forthwith to the court. 10 Edw VII. c. 32, s. 200.

See Rules 61-64.

Forms of affidavit, No. 19; of warrant of attachment, No. 37.

Sec. 199.

Absconding Debtors.—The proceeding under this and the following sections respecting absconding debtors is summary in its nature and exceptional in its character. The party taking it should, therefore, be held to a strict exercise of the rights conferred by the statute, and the due observance of all its requirements: Fletcher v. Caithrop, 6 Q. B. 891; Royal Can. Bank v. Matheson, 6 C. L. J. 11; Kreamer v. Glass, 10 C. P. 475; R. v. Ellis, 6 Q. B. 506.

Debt or Damages Arising Upon Contract.—See notes to section 62 (d), *ante*.

The provisions of this section are not confined to *liquidated* damages but apply as well to claims of an unliquidated character, provided they arise in the manner pointed out by the statute. A claim in trespass or trover or for any other actionable wrong would not be within this section.

Proceedings could be taken on a judgment, no matter for what cause obtained. A claim for damages in any action when reduced to judgment, would become a "debt" under this clause: see Jones v. Thompson, E. B. & E. 63; Dresser v. Johns, 6 C. B. N. S. 429; Wilson v. Campbell, 15 P. R. 254, 258.

Not Less Than $4.—The words "not exceeding $100," in the former Act are now omitted and the amount is governed by the clauses limiting the jurisdiction of the division courts, viz.: by section 62 (c) to $100, on a claim for debt, account or breach of covenant or money demand; by section 62 (d), (i), (ii) to $200, where the amount of the claim is ascertained by the signature of the defendant or of the person whom as executor or administrator he represents, or the claim is for the balance of an amount not exceeding $200, so ascertained; and by section 62 (d), (iii), for the balance of an amount not exceeding $400, so ascertained and the plaintiff abandons the excess over $200.

The last clause of section 62 (d) provides that "the jurisdiction conferred by this clause shall apply to claims and proceedings against an absconding debtor."

Interest, whether payable by contract or as damages, is excluded in determining the jurisdiction of the court under section 62 (d), but not under 62 (c). In the former class of cases the addition of interest is permitted, in the latter it is not.

Who is an Absconding Debtor.—To abscond is to depart to defraud creditors or avoid service of process.

A debtor could "abscond" from this province to Quebec, or any other province of the Dominion, within this section.

One who might be in Ontario on a temporary sojourn could not be said to be absconding "from this province," on returning to his home: McPhadden v. Bacon, 9 C. L. J. 226; Clement v. Kirby, 7 P. R. 103; Rice v. Fletcher, 13 P. R. 46; see also *Ex parte* Gutierrez, *Re* Gutierrez, 11 Ch. D. 298; Butler v. Rosenfeldt, 8 P. R. 175; Seane v. Coffey, 15 P. R. 112; 22 A. R. 269; Phair v. Phair, 19 P. R. 67. Where a foreigner is in England for a merely temporary purpose, and is preparing to return home, there is no presumption (as there might be in the case of a domiciled Englishman going abroad), that he is going away with the intention of avoiding the payment of a debt: *Ex parte* Gutierrez, *Re* Gutierrez, 11 Ch. D. 298. The Master of the Rolls, at page 301, in speaking of an Act in some respects similar in its provisions to ours, says, "The Act is aimed at absconding debtors. A man who goes away does not *necessarily* abscond. . . . I must say it appears to me that the process of the Court of Bankruptcy has been abused, by which I

mean that it has been knowingly used for an improper purpose, contrary to the plain meaning of the Act and the justice of the case."

A defendant who contracts a debt in the United States, his ordinary place of abode, and is in the act of returning there after a visit to his parents in this country, can not be arrested on a charge of leaving Ontario with intent to defraud his creditors: Smith v. Smith, 9 P. R. 511; Elgie v. Butt, 26 A. R. 13. It is of no consequence where the domicile of a person may be or to what country he is bound by allegiance as a subject or citizen, if he comes to this province and reside here and contract debts and is about to quit the country (that is, in effect, about to change his residence to a foreign country, even if that country be his place of domicile) with intention to defraud his creditors, he is subject to arrest as an absconding debtor in this province: Kersterman v. McLellan, 10 P. R. 122; see also Lamond v. Eiffe, 3 Q. B. D. 910.

A defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest to which he was subject in this province at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest: Kerstermaa v. McLellan, 10 P. R. 122.

An intention to be temporarily absent on a trip to Europe does not justify an arrest, nor could it be said in such case that a man "absconds:" Shaw v. McKenzie, 6 S. C. R. 181.

The person must have "personal property liable to seizure under execution" before he is an "absconding debtor," within this section.

To "abscond" merely is not sufficient: Higgins v. Brady, 10 U. C. L. J. 268; Wakefield v. Bruce, 5 P. R. 77.

There cannot be a judgment against an absconding debtor where there has been no property attached, except upon proper service of the summons: *per* Draper, C.J., in Offsy v. Offsy, 36 U. C. R. p. 364; Robertson v. Coulton, 9 P. R. 16.

Proceedings cannot be taken against an absconding debtor under the Absconding Debtors Act, until after the maturity of the debt: Kyle v. Barnes, 10 P. R. 20. It is submitted that the same principle is applicable to proceedings under this Act.

Personal Property Liable to Seizure.—Formerly the general impression seems to have been that there was no exemption of any part of the goods of an absconding debtor: see R. v. Davidson, 21 U. C. R. 41. But now by The Execution Act, R.S.O. 1914, c. 80, s. 3, *ante*, the debtor's goods there mentioned are expressly exempted from seizure under attachment. Under The Absconding Debtor's Act, R.S.O. 1914, c. 82, s. 8, all the property of an absconding debtor liable to seizure under execution may be attached in the same manner as it might be seized under execution, notes to sections 173, 174.

Attempts to Remove.—The mere *intention* of removing personal property would not be sufficient. The *attempt* to remove or removal itself of any part of a debtor's personal property, with intent to defraud, would justify an attachment under this section upon which all the personal estate and effects of the absconding debtor would be subject to seizure or such part as is necessary to secure the sum mentioned in the warrant: Sharp v. Matthews, 5 P. R. 10; Hood v. Cronkite, 29 U. C. R. 98; R. v. Collins, L. & C. 471; R. v. Johnson, 34 L. J. M. C. 24; *Ex parte* Coates, *Re* Skelton, 5 Ch. D. 979; 6 L. C. G. 17.

Keeps Concealed.—This must in every case be a question of fact, and proper inquiries should be made before making the affidavit. The

Sec. 199. inference must be that the concealment is for the purpose of avoiding the service of process. If the facts show any other object or intention, the affidavit could not properly be made. A person might be said to be keeping concealed if he remained in his own house, and at his request his presence there was denied by his servants or others, or if being there, he, knowing the object of a process-server refused him admission.

"Concealment by a debtor to avoid the service of summons" was said to involve "an intention to delay or prevent creditors from enforcing their demands in the ordinary legal modes. It may be by the debtor's secreting himself upon his own premises, or by departing secretly to a more secure place, in or out of the county of his residence:" Dunn v. Salter, 1 Duv. 345; see also Frey v. Aultman, 30 Kansas, 182, 184.

Leaving a place, and requesting that false information of his movements be given, is concealment: North v. McDonald, 1 Biss. 59.

The Creditor.—The word "creditor" must be read in connection with the words "for debt or damages," etc., in the first part of the section, and cannot be confined to persons having liquidated demands merely.

Affidavit by Agent or Servant.—Form 19. The affidavit may be made by one who has express or implied authority to make it. The word "servant" cannot be held to apply to every servant, domestic or otherwise, but to one who, from the nature of his employment, would in this way have an express or implied authority to protect the interests of his master: see R. v. Cummings, 4 U. C. L. J. 182.

"An important branch of the duties of clerks is preparing affidavits for and suing out *warrants of attachment*. It is presumed that clerks will be applied to, except in cases of pressing emergency, where it may be indispensable to resort to justices of the peace; indeed, as a general rule, parties have no guarantee for the regularity of the proceeding unless they employ an officer instructed in and familiar with the requirements of law; and as magistrates seldom trouble themselves with such matters, and are not entitled to make any charge for drawing the affidavit and suing out the attachment, it is not probable their services will be sought, save where the defendant's property would be lost unless instant action was taken, and the clerk's office happens to be at a distance. The right to seize a party's property on the plaintiff's affidavit, or his agent's, unsupported by other testimony of the debt and state of facts giving right to attach, though a salutary provision of the law, is liable to abuse; and being an *ex parte* proceeding, the rules regulating the right must be strictly observed:" 1 U. C. L. J. 21. Before issuing an attachment the clerk must see that immediately following the statement in the affidavit of the amount due to the attaching creditor the cause and subject of such indebtedness is properly set forth according to Form No. 19; Rule 63. The form should be adhered to as closely as possible: Archibald v. Hubley, 18 S. C. R. 116; Morse v. Phinney, 22 S. C. R. 563. The allegation of the intent and design of the debtor being to defraud is necessary in all cases. The statement of the cause of action must be specially set out: *Ib.*, and for such statement in issuing attachment, see 1 U. C. L. J 21 and 41. Unless the affidavit *clearly* makes out a case under the increased jurisdiction provision of section 62 (d), if the sum claimed is in excess of $100, the creditor and probably the clerk, if a seizure were made, could be held responsible as trespassers: Quackenbush v. Snider, 13 C. P. 196. Should the affidavit be "for money lent and goods sold and delivered," without showing either that the money was lent, or that the goods were sold and delivered by the creditor to

the debtor, it would be insufficient: Handley v. Franchi, L. R. 2 Ex. 34; McKenzie v. Bussell, 3 O. S. 343. The defendant could waive an irregularity in the affidavit, such as the omission to allege that the proceedings were not taken from any vexatious or malicious motive: Burrow v. Capreol, 2 U. C. L. J. 210. An affidavit for attachment which contains more than any one of the three alternatives of the statute is bad, and an attachment issued upon it would perhaps render all parties, except the bailiff, liable as trespassers: Quackenbush v. Snider, 13 C. P. 196; so also would they be liable if the warrant were issued without any affidavit: Caudle v. Seymour, 1 Q. B. 889; Gray v. McCarty, 22 U. C. R. 568. It would not render the affidavit bad, where made before suit commenced, to entitle it in the court: Hart v. Ruttan, 23 C. P. 613; Wakefield v. Bruce, 5 P. R. 77; see also Higgins v. Brady, 10 U. C. L. J. 268. If made after suit commenced the Form, (19) prescribes that the court and cause are to be inserted. The affidavit must comply with Rules 42-50. Sec. 199.

If the promissory note or other cause of action is fully set out, the indebtedness of the defendant would be alleged with sufficient certainty: Wakefield v. Bruce, 5 P. R. 77.

The necessity for the affidavit being duly made will more strongly appear by a reference to the cases of Morgan v. Hughes, 2 T. R. 225; Stevens v. Clark, 2 M. & Rob. 435; R. v. Hughes, 4 Q. B. D. 614; McLean v. Bradley, 2 S. C. R. 535; in addition to Caudle v. Seymour, and other cases *supra*. See also notes to section 77.

Warrant of Attachment.—Form 37. The warrant may be issued by the clerk: section 199, a judge or a justice of the peace: section 200. According to the above Form 37, the warrant must be sealed with the seal of the court, if issued by the clerk. The judge or justice of the peace are authorized to take the affidavit and issue the warrant affixing their ordinary seal.

To a Constable of the County.—Any constable of the county would have power to execute the warrant: Delaney v. Moore, 9 U. C. R. 294. If the bailiff cannot be found to execute the attachment and a county constable is resorted to, care must be taken to see that he is a constable duly appointed: R.S.O. 1914, c. 94.

Attach, Seize, Take.—See notes to section 173 (2). If the warrant is executed by a constable he must forthwith deliver the property seized to the bailiff of the court out of which the warrant of attachment issued: Section 208.

Liable to Seizure Under Execution.—See also notes to section 173. In an action for seizing goods under division court attachment, it was proved that a few days before the seizure the goods had been sold by auction under the direction of one of the plaintiffs, who executed a bill of sale to the vendee, witnessed by the auctioneer. Held, that the plaintiff could not afterwards be permitted to set up that the sale was void because fraudulent as against the plaintiff's creditors, and to maintain trespass for seizing the same goods as if they were his own: McPhatter v. Leslie, 23 U. C. R. 573; see Roberts v. Roberts, 2 B. & Ad. 367; Mundell v. Tinkiss, 6 O. R. 625; but if no bill of sale had been executed and there had in fact been no sale, the result would be different: Bowes v. Foster, 2 H. & N. 779; Taylor v. Bowers, 1 Q. B. D. 291; Whitelock v. Cook, 20 C. L. T. 171.

Return the Warrant Forthwith to the Court.—The bailiff or constable should make a written return to the warrant, to be filed

Sec. 200. with the papers. If nothing has been seized under the attachment, the plaintiff can only proceed as in an ordinary case: Offay v. Offay, 26 U. C. R. 364. Sometimes a judgment is attempted to be obtained by attachment in disregard of this rule.

Where a warrant is issued by a judge or justice of the peace, the affidavit must be forthwith transmitted to the clerk of the court within whose division the affidavit was taken: section 200.

If an attachment is maliciously issued and without reasonable and probable cause, an action for damages for such wrong would lie at the suit of the debtor against the attaching creditor: Drake on Attachment, 5th edition, sections 724-745; Pollock on Torts, 234, 235; Cartwright v. Hinds, 3 O. R. 384-395.

If there should be reasonable and probable cause for issuing an attachment, the action would not lie, no matter how maliciously issued. If a person has a right to do an act, and does it *maliciously*, yet it is not actionable: Allen v. Flood, 1898 A. C. 1.

Should an attaching creditor place the warrant of attachment for execution in the hands of someone unauthorized by statute—for instance, one who is not a duly appointed constable—he would be liable as a trespasser.

When County Judge or Justice of the Peace may issue attachments, etc.

200. The affidavit in the next preceding section mentioned may be taken before a Judge or a Justice of the Peace, and upon the same being filed with him, he may issue a warrant under his hand and seal in the form mentioned in the next preceding section, and he shall forthwith transmit the affidavit to the clerk of the court within whose division the same was taken, to be by him filed. 10 Edw. VII. c. 32, s. 201.

Judge or Justice of the Peace.—Judge is defined in section 2 (g), to mean and include the judge and a junior judge of the county court. From the notes to the previous section will be seen the danger that justices of the peace run in issuing warrants of attachment; their safest course is to allow the clerk of the court to perform a duty which properly belongs to him. It is only in cases of necessity that a justice of the peace should grant the warrant. "Under the Division Courts Act, the creditor has a choice in cases of attachment to apply to any magistrate, or to the clerk of the court, to issue the warrant. The divisions are so small throughout the country, and the clerk's office is usually so near a creditor's residence, generally in the same or an adjoining township, that rarely is there any cogent necessity for applying to a magistrate rather than the clerk; and the saving of a few miles against the risk of error is rather heavy odds for a plaintiff to take. Applying to a clerk, he comes to an officer experienced in the work—one who has all the forms before him, and whose friendly word of caution will often save a plaintiff from getting himself into difficulty. It is not so when he applies to a magistrate, who is not and cannot be expected to be familiar with the division court procedure. The propriety, therefore, of employing the clerk seems obvious enough:" 9 U. C. L. J., page 318.

A justice of the peace for the county is, of course, intended. His jurisdiction is limited to matters within the county for which he is a justice.

Affidavit to be Filed.—In Moore v. Gidley, 32 U. C. R. 233, it was held, in an action against a justice of the peace for trespass in issuing a warrant of attachment, that the transmission of the affidavit to the D. C. clerk was not a necessary condition of his having jurisdiction. Sec. 201.

Bailiff or constable to seize and make inventory.

201. Upon receipt of a warrant by the bailiff or constable, and upon being paid his lawful fees, including the fees for appraisement, he shall forthwith execute the warrant, and make a true inventory of all the estate and effects which he seizes and takes by virtue thereof, and shall, within twenty-four hours after seizure, call to his aid two freeholders, who, being first sworn by him to appraise the estate and effects seized, shall then appraise the same, and the bailiff or constable shall forthwith return the inventory attached to the appraisement to the clerk. 10 Edw. VII. c. 32, s. 202.

Including the Fees of Appraisement.—The lawful fees of the bailiff including fees of appraisement, must be paid to the bailiff or constable before execution of the warrant. It is his option to exact them, but if he waives prepayment he would be bound to execute the warrant and be as responsible as if he had exacted prepayment of his fees.

See section 47 and Tariff of Fees, *post*, for fees of appraisers.

Forthwith Execute the Warrant.—Enquiry should be made by the bailiff as to the property intended to be seized, and, if perishable, it will be proper for him to require security under section 212: but generally, on receipt of a warrant directed to him, the bailiff is forthwith to execute the same; that is to say, he is to proceed with all diligence to seize such personal property of the debtor as may be taken under the ordinary writ of execution (as to which, and the property exempt from seizure, see notes to section 173, *ante*), or a sufficient portion thereof to *secure* the sum mentioned in the warrant, with costs. A difficulty may occur with respect to other creditors coming in afterwards, and it is not easy to lay down any rule as to the amount of property the bailiff should attach. If he has knowledge of any other creditors coming in, it would seem proper to seize enough to cover the claims of all: but in any case let the bailiff take ample property to cover, at a forced sale, the debt and costs in the case in which he acts. It may be that an enlarged meaning ought, in construction, to be given the word *secure* as used in section 199; but the point opens several nice questions, which have not yet received judicial elucidation. The constable or the bailiff (with the latter's sureties) would be liable for an excessive seizure: see Piggott v. Birtles, 1 M. & W. 449. Having seized, the bailiff's first duty is to make an inventory of the property. For form of inventory see Form 85 (1).

The inventory made, the bailiff within twenty-four hours thereafter, calls to his aid two freeholders, and swears them to appraise the property seized: 1 U. C. L. J. 22. The Form of oath No. 84. A memorandum thereof should be then endorsed on the inventory, Form 84 (1).

The freeholders then examine the property as pointed out to them by the bailiff, and having valued the same, their appraisement should be endorsed on the inventory: 1 U. C. L. J. 22. The form of this endorse-

Secs. 202-204.

ment will be found at Form 85. The appraisers must be sworn *before* they make the appraisement: Kenney v. May, 1 M. & Rob. 56; Form of Oath of Appraisers, No. 84. If the bailiff should sell without an appraisement, he would be liable to an action, but the sale would not be void: Lyon v. Weldon, 2 Bing. 334: Campbell v. Coulthard, 25 U. C. R. 621. The bailiff can not be an appraiser: Westwood v. Cowne, 1 Stark. 172; nor the attaching creditor: Andrews v. Russell, Bull. N. P. 81.

Return the Inventory to the Clerk.—This, it is submitted, means to the clerk of the court within whose division the affidavit for attachment was taken whether by himself or a justice of the peace: see section 200.

Freeholders.—A freeholder is the owner of land in his own name and right, either of inheritance or for life: see Stroud's Dictionary, 771. A tenant for years of land would not suffice.

Proceedings may be continued in same court.

202. In an action commenced by attachment the proceedings may be conducted to judgment and execution in the court of the division within which the warrant issued. 10 Edw. VII. c. 32, s. 203.

Conducted to Judgment.—The hearing or trial is not to take place within one (calendar) month after the seizure, unless the defendant is personally served, unless the judge otherwise orders: Rule 61.

Defences.—Any attaching creditors may enter a defence, set-off or counterclaim against another attaching creditor's claim, and defend to the same extent as the debtor might do: Rule 62.

The Division Within Which the Warrant Issued.—Reading this section in connection with section 200, it will be seen that the legislature presupposes the affidavit to be "taken" and the warrant of attachment to be issued within the same division.

Proceedings commenced before attachment.

203. Where proceedings have been commenced before the issue of an attachment they may be continued to judgment and execution in the court in which the proceedings were commenced. 10 Edw. VII. c. 32, s. 204.

Execution.—When several judgments are recovered against an absconding debtor, only one execution need be issued: Rule 64.

Property attached may be sold under execution.

204. The property attached upon a warrant of attachment shall be liable to seizure and sale under the execution to be issued upon the judgment, and if the property was perishable, and has been sold, the proceeds thereof shall be applied in satisfaction of the judgment. 10 Edw. VII. c. 32, s. 205.

The Property Attached.—As to seizure and sale of property on execution, see sections 173 *et seq.*

Sec. 205.

Replevin is not maintainable by the debtor against whom the attachment issues: The Replevin Act, R.S.O. 1914, c. 69, s. 4; and see notes *ante*. But it is maintainable by a third party: Arnold v. Higgins, 11 U. C. R. 191: the action would, however, be stayed upon the issue of an interpleader summons under section 215: Caron v. Graham, 18 U. C. R. 315. See also notes to section 62, sub-section (4), *ante*.

Applied in Satisfaction of the Judgment.—This section provides for two classes of cases: (1) If there is judgment in the case, the party in whose favor it is, may have the property seized and sold under execution. (2) If the goods are perishable, and have been sold, the proceeds of them shall be applied in satisfaction of the judgment.

Execution.—This provision is varied by Rule 64, which provides that where several judgments have been recovered against an absconding debtor it shall not be necessary to issue execution upon each such judgment; but one execution against the property seized upon the attachment shall issue for the sale thereof to satisfy the judgments of those creditors, and so much of such property as shall be sufficient to satisfy the said judgments and costs, may be sold thereunder, or if the property has been previously sold as perishable, enough of the proceeds may be applied by the clerk to satisfy such judgments and costs, without execution. But one execution should, therefore, be issued and all judgment creditors will be entitled to share. Notice of the attachment in each case must be given within one month after the issue of the first attachment, to the clerk of the court out of which the first attachment issued or in which it was made returnable: see section 207.

As to sale of perishable property see sections 211 and 212, and notes there.

Plaintiff not to divide cause of action.

205. A plaintiff shall not divide a cause of action into two or more actions for the purpose of bringing the same within the provisions of the next six preceding sections, but a plaintiff having a cause of action for which, but for the amount of the claim, an attachment might be issued, may abandon the excess, and the judgment shall be a full discharge of all demands in respect of the cause of action, and the entry of judgment shall be made accordingly. 10 Edw. VII. c. 32, s. 206.

Plaintiff Shall not Divide a Cause of Action.—As to dividing cause of action into two or more actions for the purpose of bringing the same in the division court, see section 67 and notes.

The fact that there has been a splitting of demands must be taken advantage of by the defence in the first action: Public School Trustees of Nottawasaga v. Township of Nottawasaga, 15 A. R. 310.

May Abandon the Excess.—Where the excess is abandoned, it must be done in the first instance on the claim: *Re* Higginbotham v. Moore, 21 U. C. R. 326: *Re* McKenzie v. Ryan, 6 P. R. 323. But where such has not been done the judge may permit the plaintiff to amend his claim before or at the trial, upon such terms as he thinks fit: see notes *ante* "Amendment," and notes to section 67. But the judge cannot be compelled by *mandamus* to exercise his discretion to permit amendment: *Re* White v. Galbraith, 12 P. R. 513.

Sec. 206.

Entry of Judgment.—It is submitted that if personal service of the summons, and of detailed particulars of the plaintiff's claim were made, the judge might in his discretion give judgment without further proof.

If several attachments issued.

Rev. Stat., c. 82.

206. Subject to the provisions of *The Absconding Debtors Act*, where there are several attachments against a party, the proceeds of the property attached shall not be paid over to the attaching creditors according to priority, but shall be rateably distributed among such of them as obtain judgment against the debtor, in proportion to the amounts actually due upon their judgments; and no distribution shall take place until, in the opinion of the Judge, reasonable time has been allowed to the creditors to proceed to judgment. 10 Edw. VII. c. 32, s. 207.

Several Attachments.—Where several persons sue out warrants of attachment, each one may enter a defence, set-off, or counterclaim, and call and examine and cross-examine witnesses, etc., in the same way and to the same extent as the debtor himself might do, were he personally to appear and defend the suit, on any ground whatever: Rule 62.

Where several judgments have been recovered, it is only necessary to issue one execution upon which the property may be sold to satisfy the judgments, and enough of such property to satisfy the judgments may be sold thereunder; or if the property has been previously sold as perishable, enough of the proceeds may be applied by the clerk to satisfy such judgments and costs, without execution: Rule 64.

Form of Plan of Distribution amongst several attaching creditors: Form 18.

WHEN DIVISION COURT ATTACHMENT SUPERSEDED.

The *Absconding Debtors Act*, R.S.O. 1914, c. 82, contains the following provision:

Proceedings if sheriff finds property in the hands of a bailiff or clerk of a division court.

Rev. Stat., c. 63.

10.—(1) Where the sheriff finds any property, or the proceeds of any property which has been sold as perishable, belonging to the defendant in the custody of a constable or of a bailiff or clerk of a division court under a warrant of attachment issued, or finds money paid into court under a garnishee summons under *The Division Courts Act*, the sheriff shall demand and be entitled to receive the same from the constable, bailiff or clerk, who, on demand and notice of the order of attachment, shall forthwith deliver the same to the sheriff, under the penalty of forfeiting double the value thereof, to be recovered by the sheriff, with costs of suit, and to be by him accounted for after deducting his own costs, as part of the property of the defendant; but the creditor who has sued out the warrant of attachment or

taken the garnishee proceedings in the division court may proceed to judgment, and on obtaining judgment, and serving a certificate of the amount thereof, and of the costs, under the hand of the clerk and the seal of the division court, shall be entitled to share in the distribution, if any, by the sheriff under *The Creditors Relief Act*. Sec. 207. Rights of division court creditor. Rev. Stat., c. 81.

(2) The costs and disbursements of such constable or bailiff shall be a first charge upon such property and proceeds and shall be paid by the sheriff upon demand after being taxed by the clerk of the division court. Costs of bailiff or constable.

See as to the application of this section, *Re* Moore v. Wallace, 13 P. R. 201. The costs for which priority is given are the costs and disbursements of the constable or bailiff and not the general costs of the division court action in the attachment proceedings.

The Assignments and Preferences Act.—R.S.O. 1914, c. 134, s. 14, enacts: 14. An assignment for the general benefit of creditors under this Act shall take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment, and orders appointing receivers by way of equitable execution subject to the lien, if any, of an execution creditor for his costs where there is but one execution in the sheriff's hands or to the lien, if any, for his costs of the creditor who has the first execution in the sheriff's hands.

See the notes to section 1 , *ante*, upon the application of the above section of The Assignments and Preferences Act.

The Creditor's Relief Act.—R.S.O. 1914, c. 81, s. 26. See this provision and notes thereon under section 173, *ante*. By section 5 (8) of the last-mentioned Act, provision is made for the recovery by the sheriff from an execution or attaching creditor *who* receives money which the sheriff is entitled to, but the clerk of the division court is not liable, unless he has previous notice of the execution being in the sheriff's hands.

The Wages Act.—R.S.O. 1914, c. 143, s. 5. Under this statute wages to the extent of three months take precedence of other claims: see notes to section 173, *ante*.

207. Where the proceeds of the property are insufficient to satisfy the claims of all the attaching creditors, a creditor shall not be allowed to share unless he sued out his attachment, and gave notice thereof to the clerk of the court out of which the first attachment issued or into which it was returnable, within one month next after the issue of the first attachment. 10 Edw. VII. c. 32, s. 208. If goods insufficient to satisfy claims of all attaching creditors.

Within One Month Next After.—A calendar month is here meant: see Interpretation Act, R.S.O. 1914, c. 1, s. 29 (u); and the day on which the first attachment issued would not be reckoned as

Secs. 208, 209.

part of the time; Hanna v. Johnston, 3 O. R. 100; notes to section 123, *ante*. See Macfie v. Pearson, 8 O. R. 745.

Notice Thereof to the Clerk.—This notice is required now to be in writing; section 82. It is doubtful if depositing the notice in the post-office would be sufficient if it did not reach the clerk until after the month had expired. We think that if the post-office is used, it is at the risk of the party, and if the clerk does not receive the notice, it is not given.

Goods seized by constable to be delivered to bailiff.

208.—(1) Where property is attached under the provisions of the next nine preceding sections by a constable, it shall forthwith be handed over to the bailiff of the court out of which the warrant of attachment issued, or into which it was made returnable.

Custody of goods seized under attachment.

(2) Property attached by a bailiff under the provisions of the next nine preceding sections, and the property delivered to him under the provisions of subsection (1), shall remain in custody of the bailiff; and he shall keep it until disposed of according to law. 10 Edw. VII, c. 32, s. 209.

Shall Remain in Custody and Possession of the Bailiff.—If property is seized by a county constable, it is to be forthwith handed over to the bailiff, as provided in sub-section (1); and if the bailiff did not seize the goods himself, but they were delivered to him by a county constable, neither trover, trespass nor replevin would lie against him: Caron v. Graham, 18 U. C. R. 318; see The Replevin Act, R.S.O. 1914, c. 69, s. 4.

The bailiff would be bound to use ordinary care, diligence and prudence in keeping possession, and if exposed to danger from fire, should insure the goods.

The Fees and Disbursements of the Bailiff for Keeping the Goods are a First Charge on Them.—Section 187. The clerk should observe great care in this matter by seeing that the bailiff does not overcharge for keeping possession of the goods attached.

What are "proper fees and disbursements" must, of course, depend on the circumstances of the case, and must be determined by the clerk, subject to the revision of the judge: section 38; and see section 47.

The bailiff is required in addition to the formal return to give a correct and full statement *in detail* of his fees and disbursements in the execution of the attachment: Rule 100.

On what terms goods attached may be restored.

209.—(1) Where a person against whom an attachment has issued, or any person on his behalf, executes and files in the court to which the attachment, or first attachment if there are more than one, has been returned, or is returnable, a bond with good and sufficient sureties, to be approved by the judge or clerk, binding the obligors, jointly and severally, to the

clerk, in double the appraised value of the property attached, with a condition that the debtor (naming him) will, wherever thereunto required by order of the Judge, pay into court a sum sufficient to satisfy the claims of all creditors who may be entitled to share in the proceeds of the property or the value of the property attached, or will produce the property to satisfy the judgments, the clerk may supersede the attachment, and the property attached shall be restored. Sec. 208.

(2) Subject to the provisions of section 206, if, within one month after the property has been attached, the person against whom the attachment has issued, or some person on his behalf, does not appear and give such bond, execution may issue as soon as judgment has been recovered and the property attached, or so much thereof as may be necessary to satisfy the judgment and costs, may be sold for the satisfaction thereof, or if the property has been previously sold as perishable so much of the proceeds thereof as may be necessary may be applied to satisfy the judgment and costs. 10 Edw. VII. c. 32, s. 210. Sale of goods if the debtor does not appear and give security. Perishable goods.

A Bond with Good and Sufficient Sureties.—Except the attachment is set aside by order of the judge, the only method by which the debtor can gain possession of his goods is by giving a bond under this section.

One surety would be sufficient: Interpretation Act, R.S.O. 1914, c. 1, s. 29 (b-b); provided the judge or clerk approves.

If, however, the bond should be drawn naming two sureties, and but one executed it, the bond could not be received, for it would be a good defence to the surety who signed to show that he believed, owing to the form of the bond, that it would be executed by the other: Hansard v. Lethbridge, 8 T. L. R. 346; and a plaintiff is entitled to a bond free from possible objections of that kind: Jones v. Macdonald, 14 P. R. 535; see also notes to section 26, *ante*.

To be Approved of by the Judge or Clerk.—Properly this should only be done after notice to the opposite party. The rights given to the creditor by attachment should not be taken away without an opportunity of his showing cause against it, if so advised: notes to section 187, *ante*.

For form of bond: see Form 164. For affidavit of execution thereof, see Form 8 (*a*). For form of approval of bond, see Form 164 (1). For form of affidavits of justification of sureties: see Form 8 (*b*). The form of bond, provided by the old Rules, was drawn to meet the requirements of the previous statute which required the bond to be given to the attaching creditor. Under the present section the bond is to be to the clerk of the court. The bond is to be in double the appraised value of the property attached, and not of the amount of the creditor's claim, as was formerly required.

Sec. 210.

If an action had to be brought on the bond, the plaintiff could not reasonably claim more than the value of the goods as estimated by the appraisers: see notes to section 20, *ante*.

No provision is made for re-delivery of the goods on payment of the amount claimed and costs. Such a course is frequently adopted when the possession of the goods is important to the debtor, or to a third party who may be owner thereof. It is submitted that the money so paid, is not paid voluntarily, but may be recovered back on showing that the goods were improperly seized, either by reason of the attachment being improperly issued, or that the goods were not the property of the debtor: Little v. Dundas and Waterloo Road Co., 2 C. P. 390; DeCadaval v. Collins, 4 A. & E. 858; Pitt v. Coomes, 2 A. & E. 459; Clarke v. Woods, 2 Ex. 395; Parker v. The G. W. Ry. Co., 7 M. & G. 253; Close v. Phipps, 7 M. & G. 586; Valpy v. Manley, 1 C. B. 596; Green v. Duckett, 11 Q. B. D. 275; McKay v. Howard, 6 O. R. 135; Chandler v. Sanger, 114 Mass. 364; Cobb v. Charter, 32 Conn. 358.

When the goods of a third party are lawfully seized for the debt of another, such third party is entitled to indemnity from the debtor, though there may be no agreement to indemnify, and though there may be in that sense no privity between the owner of the goods and the debtor: Edmunds v. Wallingford, 14 Q. B. D. 811: see Herring v. Wilson, 4 O. R. 607, which, however, was founded on England v. Marsden, L. R. 1 C. P. 529, which is questioned in Edmunds v. Wallingford, *supra*.

If the third party should pay the money to the bailiff in order to obtain possession of the goods, the bailiff might interplead as to them: Smith v. Critchfield, 14 Q. B. D. 873.

A seizure by a landlord, of the goods attached, as a distress for rent, would be no answer to an action on the bond: Repelje v. Fineh, 14 U. C. R. 249. Nor would it be a performance of the condition, under such circumstances, to say to the obligee that he might go and take goods out of the possession of the landlord at his peril: s. c. 14 U. C. R. 468.

Within One Month.—This would be exclusive of the day of the seizure: Young v. Higgon, 6 M. & W. p. 53; McCrae v. Waterloo M. F. Ins. Co., 26 C. P. 437; note to sections 123, 128.

As Soon as Judgment has been Recovered.—This provision is probably made in order to save expense. It is submitted that the judge could not postpone the issuing of execution in such a case as this, and that sections 122 and 124 would not apply.

May be Sold.—See notes to sections 184, 185 and 186.

As Perishable.—See notes to section 211.

Proceedings against debtors where process not previously served.

210.—(1) Where a summons has not been served before the issue of a warrant of attachment, it may be served personally or by leaving a copy at the last place of abode or business of the defendant, with any grown person residing there, or by leaving the copy at such place if no grown person be there found.

(2) If it appears to the Judge at the trial that the creditor who sued out an attachment had not reasonable or probable cause for taking the proceedings, the Judge shall order that no costs be allowed to the creditor. 10 Edw. VII. c. 32, s. 211. Sec. 210. Costs.

Served Personally.—See notes to sections 87 and 98. If the defendant has not been personally served the trial cannot take place until one month after seizure, unless the judge otherwise orders: Rule 61. This applies whether the suit was commenced by attachment in the first instance or not: *Ibid.*

The usual Form of Summons will be used: see Form No. 3.

Affidavit of Service: Forms 20, 21, 22.

At the Last Place of Abode.—See notes to section 87, as to service of process.

It is to be noticed that if no grown person is to be found there, the copy of summons may be left at the last place of abode or business; that is, by fastening it to the door or in some conspicuous place or even by leaving it with a grown person there. If it is served on some person there who is not the defendant, such person should be informed of the nature of the paper served and whom it is for.

Reasonable and Probable Cause.—If a man honestly believes in the case which he lays before a judicial tribunal, such belief being based on an honest conviction of the existence of circumstances which would lead any fairly cautious man to such belief, he has reasonable and probable cause for his action: Chatfield v. Comerford, 4 F. & F. 1008; Walker v. S. E. Ry. Co., L. R. 5 C. P. 640; Lister v. Perryman, L. R. 4 H. L. 521; Bank of B. N. A. v. Strong, 1 App. Cas. 307; Ahrath v. N. E. Ry. Co., 11 Q. B. D. 440; 11 App. Cas. 247; Brond v. Ham, 5 N. C. 725, *per* Tindal, C.J.; Shoresberry v. Osmeton, 37 L. T. 792; Hicks v. Faulkner, 8 Q. B. D. 107; Shaw v. Mackenzie, 6 S. C. R. 181; McGill v. Walton, 15 O. R. 389; Webber v. McLeod, 16 O. R. 609; Hope v. Evered, 17 Q. B. D. 338; Lee v. Charmington, 23 Q. B. D. 45, 272; Howard v. Clarke, 20 Q. B. D. 558; Hamilton v. Cousineau, 19 A. R. 293; Archibald v. McLaren, 21 S. C. R. 588; Charlebois v. Surveyor, 27 S. C. R. 556; Leary v. Saxton, 28 N. S. R. 278; St. Denis v. Shoults, 25 A. R. 131; Malcolm v. Perth, M. F. Ins. Co., 29 O. R. 406, 717; Wainwright v. Villeneuf, 6 Terr. L. R. 193; Benton v. Gallagher, 19 Minn. R. 502; Still v. Hastings, 13 C. L. R. 322.

Where the party causing the attachment to be issued, does so upon the advice of counsel to whom he submitted all the material facts fairly, and acted *bona fide* upon such advice, that will be evidence of reasonable and probable cause: see Revenge v. Mackintosh, 2 B. & C. 693; Williuski v. Anderson, 19 O. L. R. 437. The authorities on this question are cited and the subject fully discussed in McMullen v. Wetmufer, 32 O. L. R. 178, and in s. c. in appeal, 7 O. W. N. 797.

The Judge Shall Order.—This is imperative on the judge, upon his finding the absence of reasonable and probable cause.

That no Costs be Allowed.—This is a penalty which the judge may impose for the improper issue of an attachment. It would not

Sec. 211. affect the right of action against the attaching creditor for improperly issuing an attachment: Erickson v. Brand, 14 A. R. 614.

Setting Aside Attachment.—Power over the process of his own court is inherent in the judge of a division court as well as of other courts; and notwithstanding the provisions of this section, a judge may set aside an attachment which has been improperly issued: Howland v. Rowe, 25 U. C. R. 467; *Re* Mitchell v. Scribner, 20 O. R. 17; Damer v. Bushy, 5 P. R. at p. 389; Bank of Montreal v. Partridge, 3 O. W. N. 149.

Perishable goods, how disposed of.

211. Subject to the provisions of *The Absconding Debtors Act*, where perishable property has been attached, the bailiff who has the custody thereof, (the same having been first appraised), may, at the request of the attaching creditor, expose and sell the same at public auction to the highest bidder, giving at least eight days' notice at the office of the clerk and two at two other public places within his division, of the time and place of sale, if the property attached will admit of being so long kept, otherwise he may sell the same at his discretion. 10 Edw. VII. c. 32, s. 212.

The Absconding Debtors Act, R.S.O. 1914, c. 82, s. 9, is here referred to, and is as follows:

PERISHABLE PROPERTY.

Sale of perishable goods on plaintiff giving security.

9.—(1) Where horses, cattle, sheep or pigs, or perishable property, or such as from its nature cannot be safely kept or conveniently taken care of, are taken under an order of attachment, the sheriff who attaches the same shall have them appraised, on oath, by two competent persons; and if the plaintiff desires it and deposits with the sheriff a bond to the defendant executed by two freeholders, approved as sufficient by the sheriff, in double the appraised value of the property, conditioned for the payment of the appraised value to the defendant, his executors or administrators, together with all costs and damages incurred by the seizure and sale thereof, in case judgment is not obtained by the plaintiff against the defendant, then the sheriff shall proceed to sell all or any of such property at public auction to the highest bidder, giving not less than six days' notice of the sale, unless any of the property is of such a nature as not to allow of that delay, in which case the sheriff may sell it forthwith; and the sheriff shall hold the proceeds for the same purposes as he would hold property seized under the order of attachment.

Application of proceeds.

(2) If the plaintiff, after notice to him or to his solicitor of the seizure of any property mentioned in sub-section 1, does not deposit such bond, then, after four days next after the notice, the sheriff shall be relieved from all liability to the plaintiff in respect to the property so seized, and the sheriff shall forthwith restore the same to the person from whose possession it was taken. Sec. 212. Restoration.

Perishable Goods.—These would include lumber exposed to the weather, fruit, fish, vegetables or other chattel property of a perishable nature: Bank of Nova Scotia v. Ward, 20 N. S. R. 230; Cork and Bandon Ry. Co. v. Goode, 13 C. B. 836. Shares in a limited company may be "of a perishable nature or likely to injure from keeping" within a provision similar to this: Evans v. Davies, 1893 2 Ch. 216.

Having Been First Appraised.—See notes to section 201. For forms of inventory, oath and appraisement to be endorsed on inventory, see notes to that section.

At the Request of the Plaintiff.—The request is a necessary condition of the sale. As remarked by Coleridge, J., in R. v. Ellis, 6 Q. B. 506, "the inflexible rule attaches, that under a special power parties must act strictly on the conditions under which it is given."

For his own protection the bailiff had better take the "request" in writing.

Giving Notice at the Office of the Clerk.—This means posting it up conspicuously there.

At Least Eight Days.—This means "clear days:" see note to section 128; Rumohr v. Marx, 3 C. L. T. 31. *Two* clear days' notice at the two public places other than at the clerk's office is now sufficient instead of eight days formerly required.

The goods must be exposed and sold at public auction and to the highest bidder. Any informality in the conduct of the sale would not invalidate it, though it might subject the bailiff to an action, if damages were sustained in consequence: Campbell v. Coulthard, 25 U. C. R. 621; see notes to section 185.

May Sell the Same at His Discretion.—A discretion is here vested in the bailiff in regard to the sale of perishable property which cannot be safely kept for eight days, and if he did not exercise his discretion within the limits to which an honest man, competent to the discharge of his office, ought to confine himself, and damage ensued, he and his sureties would be responsible for it on their covenant: see 6 U. C. L. J. 250; Wilson v. Rastall, 4 T. R. 757.

Care should be taken that the notice of sale is duly given according to law: see notes to section 184.

212.—(1) It shall not be compulsory upon the bailiff or constable to attach, or upon the bailiff to sell perishable property until the attaching creditor has given a bond to the defendant, with good and sufficient sureties to the satisfaction Creditors may be required to indemnify the defendant.

Sec. 213. of the bailiff, in double the amount of the appraised value of the property, conditioned that the attaching creditor will repay the value thereof, together with all costs and damages incurred in consequence of the attachment and sale in case judgment be not obtained by him, and the bond shall be filed with the clerk.

Application of proceeds of sale. (2) The money made shall be paid over by the bailiff to the clerk, to be dealt with in the manner hereinbefore provided. 10 Edw. VII. c. 32, s. 213.

Has Given a Bond.—If the officer neglects to obtain this bond, and proceeds to sell perishable goods it will be at his own risk. He would not be entitled to indemnity from the plaintiff unless the latter directed the sale: Barker v. Furlong, 1891, 2 Ch. 185: see 6 U. C. L. J. 250.

For form of bond, see Form 70.

Sureties.—One person shall be sufficient unless otherwise expressly required: Interpretation Act, s. 29 (b-h). See notes to section 209.

To the Satisfaction of the Bailiff.—The bond is to be to the defendant; and the bailiff is acting judicially in seeing that it is sufficient and satisfactory, which he should carefully see to personally: but he is not responsible in respect of the sale or the sufficiency of the bond.

In Manner Hereinbefore Provided.—The proper method of distributing the proceeds in cases where there are several attachments is provided for by section 206 and is fully discussed in the notes to that section.

Enforcing security given under Act **213.**—(1) A bond given in the course of any proceeding under this Act may be sued on in any Division Court of the county wherein the same was executed, notwithstanding that the penalty in the bond exceeded the sum of $100.

Delivery of bond to party entitled. (2) The bond shall be delivered to any person entitled to it, upon the order of the Judge, to be enforced or cancelled as the case may require. 10 Edw. VII. c. 32, s. 214.

May be Sued in any Division Court.—In order to retain the division court as that in which certain proceedings relative to that court may be sued, it is here provided that a bond given in the course of any proceeding under the Act may be sued in any division court of the county wherein the same was executed. It matters not what the penalty of the bond may be—whether otherwise beyond the jurisdiction of the court or not—it is by this section made suable in that court. This would not deprive a party of the right to sue upon such bond in any higher court, except at the risk of losing and having to pay the costs of such court: Kennin v. Macdonald, 22 O. R. 484.

In an action on any such bond, set-off could be pleaded, the penalty of the bond being considered as the debt: McKelvey v. McLean, 34 U. C. R. 635. Sec. 214.

Since the existence of counterclaim, we see no reason why a defendant should not have the right to set the same up in such action.

Enforced or Cancelled.—When a bond given in any division court proceeding has served its purpose, the judge of the court may order the same to be delivered up, to be enforced, or cancelled, as the case may require.

Any proceeding.—This provision is of the widest scope, and does not apply merely to a bond given under section 212, but includes a bond given under any of the provisions of the statute.

CLAIMS OF LANDLORDS AND OTHERS IN RESPECT TO GOODS SEIZED.

214. In this and the next following six sections, Interpretation.

(*a*) The word "landlord" shall include the person entitled to the immediate reversion of land, or, if it be held in joint tenancy, coparcenary or tenancy in common, any one of the persons entitled to the [reversion]; and "Landlord."

Note.—The word "reversion" was inserted by 4 Geo. V. c. 2, schedule 20.

(*b*) The word "agent" shall mean any person usually employed by the landlord in the letting of land or in the collection of the rents thereof, or specially authorized by writing under the hand of the landlord to act in any particular matter. 10 Edw. VII. c. 32, s. 215. "Agent."

See also Rules 8-12.

Joint-Tenancy, Coparcenary or Tenancy in Common.—The person entitled to the "immediate reversion," would be any person entitled to the property immediately on the determination of the lease, as for instance, a tenant who has sub-let would be the immediate reversioner: see Laird v. Briggs, W. N. (1880), 205.

"Joint-tenancy" is a unity of interest, title, time and possession, that is, joint-tenants have one and the same interest accruing by one and the same conveyance, commencing at the same time and held by one and the same undivided possession. One tenant cannot sue or be sued without joining the other; nor do any set to defeat or injure the other's estate; nor, at common law, have an action of waste or of account against his co-tenant.

Upon the death of one tenant the estate remains to the survivor. The estate is destroyed by severing any one of the unities, and then becomes a tenancy in common.

"Coparcenary" is where two or more persons together form one heir. They have distinct estates, with right to possession in common;

Sec. 215. and each may alien his share. It has practically no existence in this province, as since 1852, co-heirs take as tenants-in-common.

"Tenants in common" are such as hold by several and distinct titles, but by unity of possession; because none knows his own severalty, and therefore, all occupy promiscuously. One tenant may hold in fee-simple, the other in fee-tail or for life; or one may hold by descent, the other by purchase, or each by purchase from a different quarter; or the estate of one may have been vested for fifty years, and that of the other for a single day. The only unity is that of possession, because no man can certainly tell which part is his own. They take by distinct moieties; no one has any entirety of interest; hence, there is no survivorship between them. As they differ from estates in severalty only in having the possession blended, the estate is dissolved by uniting all interests in one tenant, or by partition of the interests: Bl. Com. 191-194.

Claims of landlords, etc., to goods seized in execution, how to be adjusted.

215.—(1) Where a claim is made to or in respect of property or security taken in execution or attached under the process of a Division Court, or the proceeds or value thereof, by a landlord for rent, or by a person other than the party against whom the process issued, then, subject to the provisions of *The Absconding Debtors Act*, upon application of the bailiff or officer charged with the execution of the process, either before or after an action has been brought against him, the clerk shall issue a summons calling before the court out of which the process issued, or the court for the division in which the seizure or attachment under the process was made, the party who issued the process and the person making the claim, and thereupon any action which has been brought in the Supreme Court or in any other court in respect of the claim, shall be stayed.

Costs.

(2) The court in which the action has been brought, or a Judge thereof, on proof of the issue of the summons, and that the property or security was taken in execution or upon attachment, may order the party bringing the action to pay the costs of all proceedings had in the action after the issue of the summons out of the Division Court.

County Judge to adjudicate on claims.

(3) The Judge shall adjudicate upon the claim, and make such order between the parties in respect thereof, and of the costs of the proceedings as to him may seem just, and shall also adjudicate between the parties, or either of them, and the bailiff or officer in respect of any claim for damages arising out of the execution of the process by the bailiff or officer, although the amount of the damages claimed or awarded is beyond the jurisdiction of a Division Court, and may make

sueh order in respect thereof, and of the costs of any proceed- Sec. 215.
ings as to him may seem just.

(4) The order may be enforced in like manuer as an order made in an action. Enforcing order.

(5) The Judge, upon the application of the execution or attaehing ereditor or the claimant, or the bailiff or officer, may grant a new trial as in other cases, and may in the meantime stay proceedings. New trial.

(6) Where the bailiff or officer has executions or attachments for different persons against the same property it shall not be necessary to make a separate application on each execution or attaehment; but he may use the names of the execution or attaching ereditors collectively, in the applieation, and the summons may issue in the name of the ereditors as plaintiffs. Where more than one execution or attachment has issued

(7) The parties and the bailiff or officer shall have the same rights of defence and counter-claim, including in all cases the right and liability to costs, as would exist had an action, within the jurisdiction of the court, been brought to recover the damages. 10 Edw. VII. c. 32, s. 216. Rights of parties as to defence and as to costs.

Form of Bailiff's Application for Interpleader, No. 62.
Form of Iaterpleader Summons, No. 63.

Principles of Interpleader.—At one time the claim had to be of a legal nature: Sturgess v. Claude, 1 Dowl. 505; Hurst v. Sheldon, 13 C. B. N. S. 750; but that is aot so now. The court will look at equitable as well as the legal rights of the claimant: Duncan v. Cashia, L. R. 10 C. P. 554; McIntosh v. McIntosh, 18 Gr. 58; Schroeder v. Hemrott, 28 L. T. 704; Dominion Bank v. Davidson, 12 A. R. 90; Coaaell v. Hickok, 15 A. R. 518; see also Carter v. Long, 26 S. C. R. 430. It is competeat for the claimant to show any facts warranting him to iaterfere with the process of execution even if the property in tha goods be in aaother, provided that this will not work a aurprise upon the executioa creditor and that the claimant appears to he in privity with, or claiming under the real owner: Bryce v. Kianie, 14 P. R. 509.

The claim must be made hy a third party. A claim of lien is withia tha statute: Ford v. Baynton, 1 Dowl. 357; Rogers v. Keanay, 9 Q. B. 592; or other special claim to the gooda: Mnckleston v. Smith, 17 C. P. 401.

So also if the goods nre seized in the possession of a stranger: Allen v. Gibbon, 2 Dowl. 292.

A married woman may sustain a claim on interpleader: Shingler v. Holt, 7 H. & N. 65; R.S.O. 1914, c. 149, ss. 4 (2) nnd 16; see Hogaboom v. Grundy, 16 P. R. 47, *infra*.

Iaterpleader proceedings apply to foreigners residing abroad: Attenborough v. London & St. Katharines Dock Co., 3 C. P. D. 450; Bel-

Sec. 215. mont v. Aynard, 4 C. P. D. 352; The Credits Gerundeuse (Ltd.) v. Van Weeda, 12 Q. B. D. 171; *Re* Confederation Life Assn. and Cordingly, 10 P. R. 16, 89. But the court has no power to direct foreigners to come within its jurisdiction to defend their right to a fund, under an agreement as to property in Ontario, payable in a foreign country, to foreigners residing there, by a person also residing therein, but claimed by a party within the jurisdiction: *Re* Benfield v. Stevens, 17 P. R. 399; see Harris v. Bank of B. N. A., 36 C. L. J. 29.

Growing crops are liable to seizure and sale and therefore can be the subject of an interpleader issue in division courts: Ingram v. Taylor, 7 A. R. 216; Grass v. Austin, 7 A. R. 511; Hamilton v. Harrison, 46 U. C. R. 127; Hayden v. Crawford, 3 O. S. 583; Campbell v. Cushman, 4 U. C. R. 9; Hamilton P. & L. Co. v. Campbell, 5 O. R. 371.

And an interpleader may be allowed, notwithstanding that the specific property, such as grain, could not be delivered owing to its being mixed with other property of the same description: *Re* C. P. Ry. Co. v. Carruthers, 17 P. R. 277.

If the bailiff were placed in circumstances which gave him an interest on either side, he could not interplead: Duddin v. Long, 3 Dowl. 139; 1 Bing. N. C. 299; Ostler v. Bower, 4 Dowl. 605, as where he has taken an indemnity from one party: Adams v. Blackwell, 10 P. R. 168; Thompson v. Wright, 13 Q. B. D. 632. Nor where he has brought about the claim: Cox v. Baine, 2 D. & L. 718. Nor where he has been guilty of neglect, and in consequence incurred a liability: Brackenbury v. Laurie, 3 Dowl. 180; Miller v. Nolan, 1 C. L. J. 327.

Where the goods have passed to an assignee in insolvency, see O'Callaghan v. Cowan, 41 U. C. R. 272.

The bailiff is entitled to interpleader unless he has acted dishonestly, or his conduct has prejudiced either party: Holt v. Frost, 3 H. & N. 821.

In the case of an execution against one personally, he may *as executor* make claim to the goods, and such is the subject of interpleader: Fenwick v. Laycock, 2 Q. B. 108.

The interpleader summons must be taken out before money is paid over to the creditor, though the bailiff had notice before: Anderson v. Calloway, 1 C. & M. 182.

If the claimant has *possession* of the goods at the time of seizure, even though lent to him, that is sufficient, *prima facie*, to sustain his claim, and if the creditor wishes to show a higher right in himself he must displace the *prima facie* title which possession gives: Green v. Stevens, 2 H. & N. 146; Shingle v. Holt, 7 H. & N. 65; Porter v. Flintoft, 6 C. P. 337; Mason v. Morgan, 24 U. C. R. 328; Winfield v. Fowlie, 14 O. R. 102; Dominion S. & I. Co. v. Kilroy, 7 C. L. T. 87; Doran v. Toronto Suspender Co., 14 P. R. 103.

Execution creditors in the division court should be made parties to interpleader proceedings in the Supreme Court: Macfie v. Hunter, 9 P. R. 149.

An action of trespass may be brought pending an interpleader issue: *per* Denman, C.J., Hooke v. Ind. Coope & Co., 36 L. T. 467. But under the provisions of this section it would be immediately stayed on the issue of the interpleader summons: sub-section 1; Smith v. Critchfield, 14 Q. B. D. 873.

Though the debtor may be estopped from claiming the goods as against the claimant, still the execution creditor may show that the

claimant has no valid title: Richards v. Jenkins, 18 Q. B. D. 451. Sec. 315.
The object of the issue is to inform the conscience of the court, and the judge at the trial should receive any evidence calculated to shew what are the real rights of the parties and should not be strictly tied down to the form of the issue, but should make any necessary amendments: Bryce Brothers v. Kinnee, 17 Q. B. D. 544.

Where more goods are seized than claimed, the claimant must, in his particulars, specify the particular goods which he claims: Rule 9; Price v. Plummer, 26 W. R. 45; Plummer v. Price, 39 L. T. 657; and in case of a claim for rent, the amount and particulars thereof: Rule 9. The judge may, however, direct the claim to be tried, although the provisions of the Rule have not been complied with: *ibid.* And if the particulars required have not been delivered, the judge may allow the claimant to deliver them on such terms as he may direct: Rule 10.

Where on a claim being made to goods seized, the execution creditor does not direct the bailiff to give up the goods to the claimant but appears and contests his title in interpleader proceedings, it was held no evidence of a ratification by the creditor of the bailiff's detention: Toppin v. Buckerfield, 1 C. & E. 157.

Under this Act, if the bailiff sells the goods without the claimant's consent, he cannot interplead for the proceeds: Reid v. McDonald, 26 C. P. 147; Darling v. Collatton, 10 P. R. 110.

The claimant might pay the amount of the execution and the bailiff might then interplead as to the moneys: Paris Manufacturing Co. v. Walls, 10 P. R. 138; Smith v. Critchfield, 14 Q. B. D. 873.

Abandonment.—Should the bailiff, with the consent of the execution creditor and the claimant, temporarily withdraw from possession the goods would no longer be under seizure, and a landlord could distrain upon them for rent, although he knew that the interpleader proceedings were pending: Cropper v. Warner, 1 C. & E. 152; see Craig v. Craig, 7 P. R. 209; Flynn v. Cooney, 18 P. R. 321.

If, having seized goods in execution which are claimed by another party, he delivers up part of the goods, the title to them being the same as the others, he "in fact colludes with the party to whom he delivers them up," and disentitles himself to relief: Braine v. Hunt, 2 Dowl. 391.

Nor can the bailiff interplead where the goods are claimed by a third party after the bailiff withdraws from the seizure: Holton v. Guntrip, 3 M. & W. 145. Nor where the goods are under distress for rent, as they are then in the custody of the law, and the bailiff has no right to seize them: Haythorn v. Bush, 2 Dowl. 641.

Except under the provisions of Rules 11 or 12 a bailiff has no alternative but to keep possession of the goods or chattels seized, and should he take a bond from the debtor and allow him to remain in possession or otherwise abandon the possession the rights of other creditors or of a landlord would prevail: Anderson v. Henry, 29 O. R. 719; Roe v. Roper, 23 C. P. 76; Williams v. Gray, 23 C. P. 561; Blates v. Arundel, 1 M. & S. 711; Darby v. Waterlow, L. R. 3 C. P. 453, and cases cited, *supra*. But see Anderson v. Henry, 29 O. R. 719, and other cases cited, *ante*.

Should the execution creditor be prejudiced by the bailiff's abandoning the seizure, the latter would be liable: Maclean v. Anthony, 6 O. R. 320; and the goods would, in case of doubt, be presumed to be sufficient to satisfy the execution: Donnelly v. Hall, 7 O. R. 581. The

Sec. 518. bailiff is not required to retire from the possession of goods he has seized because an interpleader summons has issued: *Ex parte* Summers, 18 Jur. 522.

As to what is an abandonment of the seizure, see notes to section 173, *ante*.

Taken in Execution or Attached.—Goods must be "taken in execution or attached," that is, they must be seized before a bailiff can interplead: Goslin v. Tune, 2 U. C. R. 177; Ogden v. Craig, 10 P. R. 378; Rule 8.

Proceeds or Value Thereof.—This is analogous to money in the sheriff's hands about which interpleader can be had; Scott v. Lewis, 2 C. M. & R. 289; Hall v. Wheelock, 11 U. C. R. 0; Booth v. Preston & Berlin Ry. Co., 6 U. C. L. J. 57; Smith v. Critchfield, 14 Q. B. D. 873.

But under this section there can only be an interpleader "in respect of the proceeds or value" where a claim is made to the same; and should the claim be made *to the goods*, there could be no interpleader as to the proceeds: Reid v. McDonald, 26 C. P. 299; see also McArthur v. Cool, 19 U. C. R. 476; Watson v. Henderson, 6 P. R. 299; unless sold by consent of the claimant: Darling v. Collatton, 10 P. R. 110.

By a Landlord for Rent.—Should the bailiff, for instance, have reason to believe that a landlord's claim for rent was merely fictitious, or that no rent was due, or in any such case, then it would be his duty to interplead. The party claiming must virtually be a third party: Fenwick v. Laycock, 2 Q. B. 108; 3 U. C. L. J. 197-214; 4 U. C. L. J. 12-38.

The execution creditor is not liable for the seizure: Walker v. Olding, 1 H. & C. 621; Tinkler v. Hilder, 4 Ex. 187; unless directed by him or his agent: Wilkinson v. Harvey, 15 O. R. 346.

In Slaght v. West, 25 U. C. R. 391, it was held that a solicitor has implied authority to direct a seizure, but the contrary was held in Smith v. Kent, 9 Q. B. D. 340; and a solicitor retained to collect a debt is not entitled to interplead without a further retainer for that purpose: Hackett v. Bible, 12 P. R. 482.

Application for Interpleader Summons.—Form 62. The summons shall be issued by the clerk on the application of the bailiff: s. 215 (1). The bailiff should apply as soon as possible: Cook v. Allen, 2 Dowl. 11.

"The clerk ought not, without the application of the bailiff, to have issued the summons:" R. v. Doty, 13 U. C. R. p. 400; see Greatorix v. Shackle, 1895 2 Q. B. 249; but if both parties appear the objection would be waived: *Ib.*

Every bailiff deeming it necessary to seek the protection of an interpleader should act promptly in the issuing of a summons. He may proceed either in the court from which execution issued, or the court for the division in which he makes the seizure, when it happens that the seizure is made in another division. The application to the clerk should be in writing, and care should be taken to obtain the correct name and address of the claimant. The goods claimed should also be specified, and the reasonable value set down to guide the clerk in rat-

ing the fees, and for the information of the court. The date of the seizure should also be named. Sec. 218.

The issue of the interpleader summons does not remove the case from the control of the court: Wicks v. Wood, 26 W. R. 680.

Issue of Summons.—Form No. 63. Section 215 (6) provides that the summons may issue in the name of the execution creditor as plaintiff; but Rule 8 directs that if the goods were seized or attached while in possession of the claimant the case shall proceed as if the creditor were the plaintiff and the claimant were the defendant, and in all other cases it shall proceed as if the claimant were the plaintiff and the creditor were the defendant. This rule adopts in stringent form the rule of decision in Duncan v. Tees, 11 P. R. 66, 206: Dominion L. & S. Co. v. Kilroy, 7 C. L. T. 87. It rejects the distinction suggested in Doran v. Toronto Suspender Co., 14 P. R. 103, that when the claimant claims by transfer from the execution debtor he should be required to prove his title.

The question to be tried when the execution creditor is plaintiff is, whether the goods were, at the time of the seizure, exigible under his execution: Duncan v. Tees, 11 P. R. 206; in other words, "were they the property of the debtor?" Wingfield v. Fowlie, 14 O. R. 102; see also Doyle v. Lasher, 16 C. P. 263; Van Every v. Ross, 11 C. P. 133; Culloden v. McDowell, 17 U. C. R. 359; McDowell v. McDowell, 10 U. C. L. J. 48; Watts v. Howell, 21 U. C. R. p. 259; Merchants' Bank v. Herson, 19 C. L. J. 353; 10 P. R. 117. But it is immaterial who is plaintiff, the object of the proceeding being to inform the conscience of the court whether the creditor has a right to seize the goods: Mucklestone v. Smith, 17 C. P. 405; Edwards v. English, 7 E. & B. 564; Bryce Brothers v. Kinnee, 14 P. R. 509. But the form of the issue is of little consequence; the substance is to be looked at: *per* Boyd, C., in Bryce Brothers v. Kinnee, 14 P. R. 509.

Where husband and wife live together in the same house, the husband being the owner or tenant, he is in apparent possession, and the wife claiming household furniture, not being for her personal use, must be made plaintiff: Hogaboom v. Grundy, 16 P. R. 47. But the stock *of goods of a business* conducted in the name of the wife, though by the husband under a power of attorney, are in her possession: Dominion L. & S. Co. v. Kilroy, 7 C. L. T. 87; and see Ramsay v. Margett 1894 2 Q. B. 18.

Court from which Summons to Issue.—Under the provisions of clause (1) of section 215, a summons is to be issued calling before the court out of which the process issued, or the court for the division in which the seizure or attachment under the process was made, the party who issued the process and the person making the claim; but the judge may change the place of trial: Rule 11 (a). The bailiff has the option of saying before which court the summons shall be returnable, subject to the power of the judge, in his discretion, to change the place of trial. But it seems doubtful whether any clerk, other than the one who issues the process, can issue the interpleader summons.

Change of Place of Trial.—The judge "in his discretion" has power to change the place of trial: Rule 11 (a). The place of trial should not be changed unless the preponderance of convenience would be in favor of the other division to that chosen by the bailiff: Peer v. Northwest Transportation Company, 14 P. R. 381; Berlin Piano Co.

Sec. 215. v. Trunisch, 15 P. R. 68; Brethour v. Brooke, 15 P. R. 205; Dowie v. Partio, 15 P. R. 313; Standard Drain Pipe Co. v. Fort William, 16 P. R. 404; Madigan v. Forland, 17 P. R. 124; Campbell v. Doherty, 18 P. R. 243; Keyes v. McKeon, 2 O. W. N. 899; Dickenson v. Tor. Ry., 2 O. W. N. 832; McDonald v. Dawson, 8 O. L. R. 72. Instead of changing the place of trial, the judge may, under his discretionary power over costs, apportion the costs of the trial so as to do justice: McArthur v. Michigan Central Railway Co., 15 P. R. 77; Roberts v. Great Northern Railway Co., 1891 2 Q. B. 194.

See notes to section 170, *ante*.

Stay of Proceedings.—When interpleader process is issued, section 215 directs that all proceedings in any action that may have been commenced against the bailiff connected with the claim shall be stayed.

The regularity of the proceedings in the division court will not be enquired into on an application to stay proceedings: Finlayson v. Howard, 1 P. R. 224. An action of replevin for the same goods about which an interpleader issue was tried will be stayed: Caron v. Graham, 18 U. C. R. 315. The application to stay proceedings can only be made *before the adjudication* on the interpleader summons; if made after, it will be refused, and the defendant can only plead the adjudication: Schamehorn v. Traske, 30 U. C. R. 543; see Harmer v. Cowan, 23 U. C. R. 479.

Under the power to stay proceedings the court or judge has power to stay the action against the execution creditor as well as the officer: Carpenter v. Pearce, 27 L. J. Ex. 143, and the words of the statute here are imperative.

Service of Summons.—Neither section 215 nor the Rules now provide how the summons shall be served. The service of an ordinary summons is regulated by sections 85, 87, 88, which probably apply.

Particulars of Claim.—Rule 9, Form No. 64. Particulars of the goods, chattels, property or securities and the grounds and particulars of the claim must be delivered by the claimant to the bailiff, or left at the clerk's office, within five days (see notes to section 78), *after* the service of the summons; such particulars must specify the property claimed, the grounds of the claim, i.e., how and by what right the claimant asserts his title, and in case of a claim for rent must show the amount thereof, the period for which it is claimed and the terms of holding; but the judge may, by consent of all parties, or without consent if he so direct, try the interpleader claim, although the rules may not have been complied with: Rule 10. Particulars delivered *before* the service of the summons would not be a compliance with the rule: Thwaites v. Wilding, 11 Q. B. D. 421; 12 Q. B. D. 4.

A claim to certain goods, stating that they had been assigned to the claimant by deed, giving the date and parties, is sufficient, although it does not appear that the deed was good as against creditors: R. v. Richards, 2 L. M. & P. 263.

Goods having been seized under an execution issued out of a county court were claimed by a third party, who delivered particulars of his claim. The judge refused to adjudicate on the claim, on the ground that the particulars did not distinguish that portion of the goods seized to which the claimant was entitled. *Held*, that he should have determined what part the claimant was entitled to, and given judgment accordingly: R. v. Stapleton, 15 Jur. 1177; 21 L. J. Q. B. 8, e. c. A

notice that goods "are and were my own property, and not the property of It.," is out s compliance with the rule. In Heatop v. McGeorge, 18 L. T. 109, it is held that the claim need not specify the goods, but in Richardson v. Wright, L. R. 10 Ex. 367, the court was equally divided upon the question: Beswick v. Boffey, 9 Ex. 315; R. v. Chilton, 15 Q. B. 220; *Ex parte* Tanner, 19 L. J. Q. B. 318. The question is, do the particulars tend to mislead? *Ex parte* McFee, 9 Ex. 261. Rule 9 requires the goods to be specified. Sec. 218.

If the claimant shall not have delivered particulars of claim, the judge may, upon such terms as he may direct, allow him to deliver the same; Rule 10. This read with section 100 empowers the judge to adjourn the trial and proceedings to enable the claimant to comply with the rule.

If the particulars are insufficient, the judge should order their amendment: R. v. Chilton, 15 Q. B. 220; Fraser v. Fothergill, 14 C. B. 298. If he should erroneously decide that they are insufficient and decide against the claimant, he may be compelled by mandamus to hear the case: R. v. Richards, 2 L. M. & P. 263; Churchward v. Coleman, L. R. 2 Q. B. 18; Whitehead v. Proctor, 2 H. & N. 352; or he may be prohibited from proceeding on the judgment pending the interpleader: *Ex parte* McFee, 9 Ex. 261.

Claimant's Damages.—If the claimant, when successful, claims damages under section 215, sub-section 3, the judge is required to adjudicate upon it, and in order to enable him to do so, the claimant should state in his particulars of claim the amount and the ground upon which he claims such damages.

Deposit for Costs.—In case it is alleged that there is an incumbrance or lien upon the property, or if a claim is made thereto, as provided for in this section, the bailiff must forthwith give notice thereof to the party who issued the process; and if such party insists upon the bailiff maintaining the seizure, he is required, within five days after such notice, to pay to the clerk a sufficient sum of money to secure the clerk and bailiff their costs of an interpleader; otherwise the bailiff may abandon the seizure, and the party who issues the process shall be barred, unless the judge otherwise directs, and he is then required to pay to the bailiff his costs: Rule 11 (h).

The effect of the creditor's failure to deposit the costs is to bar any claim he may have under that execution to the goods seized, unless the judge otherwise directs. This is tantamount to an adjudication that such goods, as against the creditor, are the property of the claimant. There could be no further seizure after abandonment, except by direction of the judge. A motion for such a direction should ordinarily be on notice, as the claimant's position might, in the meantime, have been altered on the faith of the creditor being barred.

Sale of Perishable Property.—This is provided for by Rule 12. Compare this rule with section 11, and see notes to the latter. The order should only be made on notice to the debtor, claimant, and other parties interested. Any reasonable notice would be sufficient. By the sale, a good title would be conferred on the purchaser, although the goods should be shown to be the property of the claimant: Goodlock v. Cousins, 1897 1 Q. B. 348, 558.

Liability of Sale.—The sale being the act of the court, neither the execution creditor, the bailiff, nor other person making the sale

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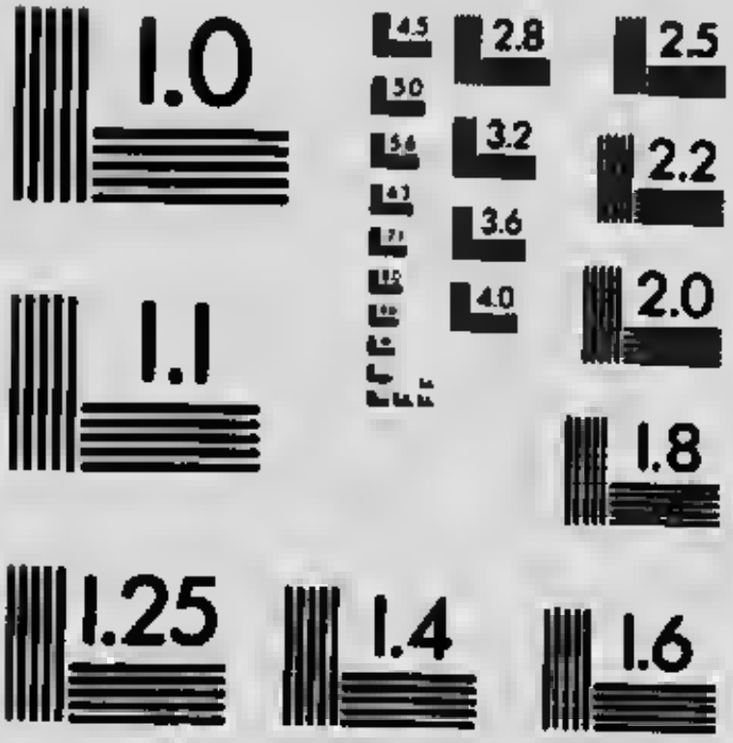

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Sec. 215. would be liable for any special damage caused by it. The liability would be confined to the seizure and the time between it and the order: Walker v. Oldiag, 1 H. & C. 621; Abbott v. Richards, 15 M. & W. 194; Lister v. Northern Ry. Co., 19 C. P. 408; Keanedy v. Patterson, 22 U. C. R. 556; Reid v. Gowans, 13 A. R. 501.

Advertisement of Sale.—The sale should not be advertised as being under the execution, but under the order of the judge.

Proceeds.—The order should provide for payment of the proceeds, after deducting expenses, into court: see Form 64 (1). The liability for the expenses of sale may be disposed of after the determination of any contest as to the title to the goods: Reid v. Murphy, 12 P. R. 338; Goodman v. Blake, 19 Q. B. D. 77.

For Other Good Cause.—Under a similar rule, a horse, which was the subject of an action for breach of warranty, was ordered to be sold pending the trial: Bartholomew v. Freeman, 3 C. P. D. 316; and shares in a limited company: Evans v. Davies, 1893 2 Ch. 216.

Claimant May Regain Possession.—By Rule 11 (c), if the goods were in the possession of the claimant when seized, he may regain possession of the property seized by depositing with the bailiff the value of the property seized, or the amount for which the seizure or attachment has been made, whichever is the lesser sum, to be paid into court to abide the Judge's decision. In case of disagreement as to the value of the property, the matter shall be decided by the clerk, subject to appeal to the judge. Upon the deposit being made, the bailiff is required to re-deliver the property to the claimant: Rule 11 (c). Under the English Act, 51 and 52 Vic. c. 43, s. 156, from which this is taken, the claimant could give a bond for the value of the goods claimed. Under this rule, the bailiff can only restore the goods to the claimant upon the money being deposited with him.

If a claimant pay money into court under this rule and fails, and the creditor takes the money out of court, and the same is insufficient to satisfy his judgment, he cannot, *on that judgment*, seize the goods a second time. "By the payment into court, the claimant does not acquire any property in the goods; but the judgment creditor, by taking out of court the money paid in by the claimant, elects to accept the money in lieu of the goods, and is thereby estopped from afterwards denying that, as against himself, the goods were the goods of the claimant:" Haddow v. Morton, 1894 1 Q. B. 95, 565. "It is not necessary to determine what might be the result if the judgment creditor had seized the goods a second time on another judgment: *per* Lord Esher, M.R., *Ib.*, p. 567. See also Kotchie v. Golden Sovereigns, Ltd. 1898 2 Q. B. 164.

The method by which the clerk or judge may arrive at a decision as to the value of the property is not provided. The bailiff and the claimant should each attend before the clerk or judge when the question of value is decided if the decision is arrived at from evidence. It would, however, be competent to arrive at it from a view of the property: Collins v. Collins, 26 Beav. 306; Bos v. Helsham, L. R. 2 Ex. 72; *Re* Dawdy, 15 Q. B. D. 426.

The bailiff has no option, but is bound to sell the goods, if ordered, under Rule 12; but the claimant, if the goods when seized were in his possession, may prevent the sale by making the deposit required by Rule 11 (c).

It is not necessary for the interpleader summons to issue nor for the bailiff to request the claimant to comply with the conditions before proceeding to sell the goods: Cramer v. Matthews, 7 Q. B. D. 425; and the sale being the act of the law, no liability would be incurred therefor: Reid v. Gowans, 13 A. R. 501. Sec. 215.

No provision is made for the deduction of the bailiff's costs.

The proceeds of the sale must be paid into court to abide the final decision of the matter: Rule 99. Any money paid into court shall be retained by the clerk until the claim shall be adjudicated upon.

The Judge.—See the definition of the word "judge" in section 2 (*z*). Should the summons not be properly issuable from the court from which it was issued, the judge would have no jurisdiction: see notes to sections 61-62; but see Holden v. Beatty, 43 U. C. R. 614.

The Judge Shall Adjudicate on the Claim.—The language is imperative and the judge has no alternative but to adjudicate on the questions which are properly presented to him in the interpleader issue. The adjudication here mentioned is simply the judicial determination of some question or questions in dispute between the parties to the interplender issue.

Either party to an interpleader issue has a right to require a jury where the value of the goods exceeds $20: sections 130 *et seq.*, and notes thereto.

Unless a new trial is applied for, as allowed by sub-section 5, section 215, and Rule 65, within the time prescribed by section 123, the decision of the judge is final and conclusive as to the goods or the proceeds thereof: R. v. Doty, 13 U. C. R. 398; Keane v. Stedman, 10 C. P. 435; Williams v. Richardson, 36 L. T. 505; Turner v. Bridgett, 9 Q. B. D. 55; and the judge cannot reverse, change or alter his decision if such application is made after the time has elapsed: *Re* Foley v. Moran, 11 P. R. 316; Bland v. Rivers, 19 O. R. 407. See notes to sections 130, *et seq.*, as to the powers of the judge in jury cases.

The Costs of the Proceedings.—It will be observed that the subject of costs is mentioned twice in section 215, sub-section (3): 1st, in regard to the costs of the interpleader proceedings to test the right to the goods seized, and 2nd, in respect to the costs of the proceedings incident to the enquiry as to damages. As to the question of costs between the parties to the interpleader issue, it may be said that costs should usually follow the result. It is a rule generally observed and subject to few exceptions, if any: Seaward v. Williams, 1 Dowl. 528; Scales v. Surgeson, 3 Dowl. 707; Wills v. Hopkins, 3 Dowl. 346; Bank of Montreal v. Little, 17 Gr. 685.

When each party succeeds as to part, the costs will be apportioned: Lewis v. Holding, 3 Scott. N. R. 191; Staley v. Bedwell, 10 A. & E. 145; Clifton v. Davis, 7 E. & B. 392; Dempsey v. Caspar, 1 P. R. 134; Carter v. Stewart, 7 P. R. 85; Segsworth v. Meridan S. Plating Co., 3 O. R. 413.

Rule 11 provides the course to be taken when it is alleged that there is a lien or incumbrance upon the property seized, or a claim is made thereto. The bailiff must forthwith notify the party who issued the process, and if the latter requires the seizure to be maintained, he

Sec. 215. must, within five days after such notice, pay the clerk a sum sufficient to secure the clerk's and bailiff's costs, and, if it is not so paid, the bailiff may abandon the seizure and the party who caused the process to issue is to pay the bailiff's costs.

If an execution creditor had not given any instructions as to the seizure of the goods, and on being made aware of it had given notice abandoning all claim to them, it is submitted that he could not be held responsible for costs: Wilkins v. Peatman, 7 P. R. 84; Canadian Bank of Commerce v. Tasker, 8 P. R. 351; Roola v. Gun and Shot and Griffin's Wharves Co., 28 L. T. 635; Vanstaden v. Vanstaden, 10 P. R. 428.

Where the claimant fails, the bailiff's costs are to be allowed to him unless otherwise ordered: Rule 11. This Rule differs from former Rule 35, which provided that in the events mentioned, the bailiff's costs should be ordered to be paid out of the amount levied. It is submitted this would still be so under the present Rule.

If the bailiff does not retain his costs out of the amount levied, he cannot, if the claimant has been ordered to pay the costs, sue the execution creditor for them: Bloor v. Huston, 15 C. B. 266.

The Supreme Court would have no power to interfere with the discretion exercised by the judge of the division court on a question of costs: Churchward v. Coleman, L. R. 2 Q. B. 18.

Where a judgment had been given in an interpleader issue, and the Court of Appeal reversed it, it was held that the part relating to costs was reversed too: Gage v. Collins, L. R. 2 C. P. 381.

Security for Costs.—Even if there manifestly appear to be no *bona fide* claim to the goods by a claimant, he could not, it is submitted, obtain security for costs from the other party: Doer v. Rand, 10 P. R. 165; De St. Martin v. Davis, W.N. (1884), 86; Anglo-American v. Rowlin, 20 C. L. J. 371; Tomlinson v. Land and Finance Corporation, 14 Q. B. D. 539.

As security for costs can now be ordered in the division court: *Re* Fletcher v. Noble, 9 P. R. 255, there appears to be no reason why such security cannot be ordered in an interpleader issue: Lovell v. Wardroper, 4 P. R. 265; Swain v. Stoddart, 12 P. R. 490.

On the question when security for costs will be ordered, see notes to sections 119 and 170, *ante*; Bruce v. The Ancient Order of United Workmen, 11 O. L. R. 633.

Damages Arising out of the Execution of the Process.—Section 215 (3). This provision is taken from the English statute, 30 & 31 V. c. 12, s. 31 (The County Court, 1888, 51 & 52 V. c. 43, s. 157). The material words are similar in both statutes.

The judge has power, and it is his imperative duty, not only to adjudicate between the parties to the issue or either of them, but also as between either of them and the officer or bailiff in respect of any claim to damages arising out of the execution of the process by the officer or bailiff.

The words of section 215 (3) are very comprehensive, and are intended to cover, and it is submitted do cover all and every claim for damages which any of the parties would have had against the other or the bailiff or officer in any way arising, or that by possibility might arise out of the execution of the process. The judge is expressly authorized to adjudicate in respect of "any claim" for damages. This

would include a claim to any amount, even one beyond the ordinary jurisdiction of the court. Sec. 215.

It is submitted that a liberal interpretation should be given to the clause and that it would be applicable to the case of a seizure made under warrant of attachment issued by a county judge or justice of the peace under section 200, if damages ensue. Should any of the parties have any claim for damages, within the meaning of this provision, it should be asserted in the interpleader issue, and if the party having such claim should lie idly by and allow the judge to adjudicate upon the other questions only, he would be precluded from making the claim in another action: Death v. Harrison, L. R. 6 Ex. 15; Fox v. Symington, 13 A. R. 296. The section was enacted following the English statute after the decision of Farrow v. Tobin, 10 A. R. 69, which probably suggested the amendment.

What damages may be given must, of course, depend on the circumstances of each particular case. But it is submitted that the object of allowing the bailiff to interplead is that he may be protected against the adverse claims of the execution creditor and the claimant, and so that they may fight out the question of the ownership of the goods between themselves.

The bailiff stands in this position. If he does not seize, the execution creditor may sue him and his sureties for misconduct. If he seizes, the claimant may sue him for trespass and conversion. It would, in fact, be no protection to the bailiff to mulct him in damages, if acting honestly in the execution of his duty, he seized goods which in fact belonged to the claimant. The principles of interpleader and the principles of practice of the Supreme Court may well be followed in a case of this kind.

In Smith v. Critchfield, 14 Q. B. D. 873, at p. 878, Bret, M.R., said: "It is not, of course, [illegible] every case that the judge will protect the sheriff. He will be pr[illegible]d when he has only made an honest mistake in executing the powe[illegible] of the court, and but for such mistake, everything that has been done would have been justified by the writ."

It is only where the goods are not in the debtor's possession when seized, but in that of a third person, that the bailiff is entitled to require written instructions and a bond of indemnity, as provided by the Execution Act, 1914, c. 80, s. 24. In this statute, the word "sheriff" includes a division court bailiff: see section 2 (b) of that statute.

Application for New Trial.—This is provided for by subsection (5); see also section 123 and Rule 65 as to application for new trial. At one time, there was no power to grant a new trial in cases of interpleader in the division court: R. v. Doty, 13 U. C. R. 398; and unless a new trial is moved for within the proper time now, the judge's decision is irrevocable in such cases: *Re* Foley v. Moran, 11 P. R. 316: Bland v. Rivers, 19 O. R. 407.

Any one of the three parties may apply for a new trial: (1) The attaching or execution creditor; (2) the claimant: (3) the officer or bailiff.

Grant a New Trial, as in Other Cases.—Section 215 (5). The usual power to impose such terms as the judge thinks reasonable, on granting a new trial, is here conferred on the judge: section 123; including stay of proceedings: section 215 (5). This is a discretion

Sec. 215. which should not be exercised arbitrarily, but according to the principles of reason and justice, and with a due regard to the rules of law applicable to such cases.

As to the imposition of terms, see notes to section 98, *ante*.

Sub-Section 6.—Summons May Issue in the Names of the Creditors as Plaintiffs.—The application by the bailiff for an interpleader summons and the summons to be issued by the clerk in pursuance of it, must give the names of all the execution or attaching creditors as in the suits, and all must be duly served in order to bind them. Should a bailiff disregard this section, he, as an officer, would be subject to the summary jurisdiction of the court, and would be made to bear the unnecessary expense, and the cases would be consolidated: Merchants Bank v. Herson, 10 P. R. 117.

The issue of the interpleader summons assumes the right of the execution creditor to seize the goods of the execution debtor by virtue of a judgment recovered or attachment issued against him, and subsequently the execution creditor is not bound to prove a judgment: Holden v. Langley, 11 C. P. 407; Vindin v. Wallis, 24 U. C. R. 9; Doyle v. Lasher, 16 C. P. 263; McWhirter v. Learmouth, 18 C. P. 136.

Quære, whether a subsequent execution creditor could contest the right of a prior execution creditor to the goods or their proceeds on the ground that his judgment was void as against creditors?

Appeal.—As to the right of appeal in interpleader cases, where the money or the value of the goods claimed or the proceeds thereof exceeds $100, or where the damages claimed by or awarded to either party against the other or the bailiff, exceeds $60: section 125 (b), and notes thereto. Where neither the value of the goods claimed, nor the proceeds thereof, exceed $100, or the damages claimed or awarded do not exceed $60, an appeal does not lie, even by leave of the judge: Collis v. Lewis, 20 Q. B. D. 202; see also White v. Milne, W. N. (1897), 256. A claimant who has deposited less than $100 as the appraised value of the goods, cannot claim to appeal on the ground that the goods were really more than $100, and that a less amount was deposited, because it was sufficient to satisfy the execution creditor's judgment: White v. Milne, W. N. (1887), 256; 58 L. T. 225; but see Studbarn v. Stanbridge, 1895 1 Q. B. 870. Where the value of the goods seized exceed $100, there is an appeal, though the claim of the execution creditor is for less than $100: Vallance v. Naish, 2 H. & N. 712.

Defence by Bailiff and Creditor.—Section 215 (7), gives the parties and the bailiff or constable the same right of defence and counterclaim, including the right to and liability for costs, as would exist in an action within the jurisdiction of the court. The right of tender and payment into court, as provided by sections 111, 112, are included, with all the consequences there prescribed.

The right given to the bailiff to countercIaim is practically allowing him to sue in his own court, notwithstanding section 80. As to counterclaim, see notes to section 65.

If any claim for damages be not adjudicated upon in the interpleader proceedings, the claimant is absolutely barred from recovering from the creditor or bailiff: Fox v. Symington, 13 A. R. 296, and cases cited, *ante*.

Payment into Court.—See sections 111 and 112 and notes thereto. The payment into court must be made six clear days before the return day. Sec. 216.

The Creditors Relief Act.—R.S.O. 1914, c. 81, providing that there shall be no priority amongst execution creditors and that the moneys realized under execution shall be distributed rateably amongst all executions and other creditors therein mentioned, does not apply to property or proceeds which were the subject of interpleader; and only the creditors who have joined in the interpleader proceedings and shared in the expenses of them can share in the same: section 6 (3, 4, 6) of the above statute; *Re* Henderson Roller Bearings Limited, 22 O. L. R. 306; 2 O. W. N. 273.

Con. Rule 647 assumes to give power in interpleader matters in the Supreme Court to the court to direct that where the amount of the execution or the value of the goods does not exceed $100, the interpleader issue may be tried in a division court. It would appear that the judges of the Supreme Court of Judicature had no power to make these rules. Their powers are conferred by the Judicature Act, R.S.O. 1914, c. 56, s. 109. There is no statute giving to the division court jurisdiction to try issues sent from the Supreme Court. The rules of the Supreme Court are of no force unless they come within the terms of the statute conferring the power to make them: Institute of Patent Agents v. Lockwood, 1894 A. C. 347.

Provisions in relation to rents due to landlords.

216.—(1) The landlord of a tenement in or upon which property is taken under an execution, may, by notice in writing, signed by himself or his agent, stating the terms of the holding and the rent payable, delivered to the bailiff or officer making the levy, claim any rent due and in arrear at the time of the taking in execution not exceeding the rent of four weeks where the tenement has been let by the week, and not exceeding the rent for two terms of payment where the tenement has been let for any other term less than a year, and not exceeding in any case the rent for one year.

Notice of claim for rent.

(2) Notice of the claim may be given at any time before the return of the process, notwithstanding that the property may in the meantime have been removed from the premises upon which it was seized, and where the property of a tenant is sold within ten days after seizure, the money realized shall remain in court until the expiration of the ten days to answer the claim of the landlord; and where the money has been paid into court the notice may be directed to the clerk with like effect as if given to the bailiff or officer, before the sale of the property seized.

How the bailiff is to proceed.

(3) The bailiff or officer making the levy shall also distrain for the amount of the rent claimed, and the costs of the distress, but shall not sell the property, or any part thereof, until after the expiration of eight days after the distress.

Sec. 218.

Fees of bailiff in such cases. Rev. Stat., c. 78.

(4) For every distress for rent in arrear the bailiff or officer shall be entitled to have as costs of the distress, instead of the fees allowed by this Act, the fees allowed by *The Costs of Distress Act*.

Sale where replevin made.

(5) If any replevin is made of the property distrained, so much of the property taken under the execution shall be sold as will satisfy the money and costs for which the execution issued and the costs of the sale, and the surplus of the sale, if any, and the property so distrained shall be returned as in other cases of distress for rent and replevin.

Priority of landlord's claim.

(6) An execution creditor shall not have his debt satisfied out of the proceeds of the execution and distress, or of the execution only, where the tenant replevies, until the landlord who conforms to the provisions of this Act has been paid the rent in arrear for the periods hereinbefore mentioned. 10 Edw. VII. c. 32, s. 217.

Goods Taken by Virtue of any Execution.—The statute 8 Anne, c. 14, prevented the sheriff from removing "goods seized" under execution, without paying the rent of the premises in arrear, "not exceeding the rent for one year."

The English County Courts Act, 1888 (51 and 52 V. c. 43, s. 160) contains provisions very similar to those made by this section of The Division Courts Act, and the decisions under the former are applicable.

The section would apply to an execution for costs of defence: Henchett v. Kimpson, 2 Wils. 140.

A similar provision is contained in R.S.O. 1914, c. 155, s. 55; but it is expressly made applicable to executions issued out of the Supreme Court or county or district courts, and does not apply to division court executions, as to which the section under consideration applies.

Landlord's Claim for Rent—The Landlord of a Tenement.—"Tenement," though in its vulgar acceptation is only applied to houses and other buildings, yet, in its original, proper and legal term signifies everything that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind:" 2 Bl. Com. 16; Stroud. 974.

The notice of claim by a landlord cannot be given unless there is an *existing tenancy* at a fixed rent; and if the tenancy should be determined or has expired, the notice would not be effective: Cook v. Cook, Andrew, 219; Risley v. Ryle 10 M. & W. 101; and Risley v. Ryle, 11 M. & W. 16. A *mere* agreement for a lease under which no rent has been paid or possession taken would not be sufficient: *Ib.*; see Hand v. Hall, 2 Ex. D. 355. Nor does the statute apply if the lease has been legally determined by a notice to quit or by entry or ejectment for a forfeiture: Hodgson v. Gascoigne, 5 B. & Ald. 88. It applies to forehand rents payable in advance: Harrison v. Barry, 7 Price 690; Duck v. Braddyll, McClel. 217; and even when reserved in a mortgage by way of further security for interest: Yates v. Rutledge, 5 H. & N.

249; Trust & Loan Co. v. Lawrason, 10 S. C. R. 679; Ontario Loan & Debenture Co. v. Hobbs, 16 A. R. 255; 18 S. C. R. 483. The statute would apply to the case of a lessee or under-tenant of apartments: Thurgood v. Richardson, 7 Bing. 428. The landlord can only claim rent which was *due* at the time of the seizure, and not what accrued afterwards: Hoskin v. Knight, 1 M. & S. 245; Reynolds v. Barford, 7 M. & G. 449; Tomlinson v. Jarvis, 11 U. C. R. 60; Vance v. Ruttan, 12 U. C. R. 632. And this is also the law as to growing crops: Congrieve v. Evetts, 10 Ex. 298; Wharton v. Naylor, 12 Q. B. 673. It is to be observed that the words of the section are "any rent *due* and in arrear." The statute of Anne was construed liberally, and in favor of the landlord: Henchett v. Kimpson, 2 Wils. 141. We see no reason for construing this section in any different spirit. This provision would not apply to a case where the landlord was himself the execution creditor: Taylor v. Lanyon, 6 Bing. 536. Where the execution creditor pays the landlord, the rent after seizure, the bailiff holds the proceeds of sale for the repayment to the creditor of the rent paid *and* the amount of the execution: Lockhart v. Gray, 2 C. L. J. 163. Under the statute of Anne, it is not necessary to give notice "in writing" to the sheriff: Brown v. Ruttan, 7 U. C. R. 97; Sharpe v. Fortune, 9 C. P. 523; Tomlinson v. Jarvis, 11 U. C. R. 60; City of Kingston v. Shaw, 6 U. C. L. J. 280; Corp. Kingston v. Shaw, 20 U. C. R. 223; but under this statute, *written* notice is rendered necessary: *Re* McGregor v. Norton, 13 P. R. 223. The landlord could not distrain the goods for rent after seizure by the bailiff: Sharpe v. Fortune, *supra;* Craig v. Craig, 13 C. L. J. 326. The fact of a landlord having joined in a bond that the goods distrained should be forthcoming for sale upon a *fi. fa.* was held not to prejudice his claim for rent: Brown v. Ruttan, 7 U. C. R. 97; nor would the landlord's having distrained and afterwards abandoned the distress, nor even his having bid at the sale of the goods, prejudice such claim for rent: *Ib.* In Vance v. Ruttan, 12 U. C. R. 632, the facts were that premises had been let for a year at a rental of £75, to be paid on the first of May, and it was agreed that if the tenant should leave before the first of May, the rent was to become payable immediately. The tenant left on the Saturday before the first of May, and on Monday the goods were seized under execution; it was held that the landlord was entitled to his rent. Should a bailiff, acting in good faith for all concerned, agree to pay for having grain threshed for the purpose of its better sale, the expenses of such threshing would be allowed him: Galbraith v. Fortune, 16 C. P. 109.

Sec. 216.

Abandonment of Seizure.—Should a bailiff merely make an inventory of goods seized, leaving no one in possession of them, they would not be in the custody of the law so as to prevent the landlord claiming for the rent due at the time the execution was subsequently attempted to be enforced: Hart v. Reynolds, 13 C. P. 501; but being absent for a mere temporary purpose is not an abandonment: Gordon v. Rumble, 19 A. R. 440; Coffin v. Dyke, 48 J. P. 757; nor if they were left in the hands of a person who undertook to be responsible: Lossing v. Jennings, 9 U. C. R. 406; Duffus v. Creighton, 14 S. C. R. 740; and see cases cited in notes to section 173, *titlo* "Abandonment."

Where the bailiff placed a man in charge of goods seized under execution and the man left voluntarily and without any intention of returning, although what he did was without the sanction of the bailiff and in violation of duty, it was held that the goods were not in *custodia legis* and the landlord could distrain: Cross v. Davidson, 17 C. L. T.

Sec. 216. 180; see also Bagshaws (Ltd.) v. Deacon, 1898 2 Q. B. 173, and notes to section 173.

Seizure Must be Made.—Where at the time an execution was placed in the sheriff's hands there was a claim for unpaid rent, it was held that the sheriff could not delay the seizure until the execution creditor first paid off the rent. His proper course was to seize, but he was not compelled to sell until the rent was paid; and if the execution creditor would not pay it, he might withdraw from possession. In this case, the sheriff abstained from seizure on receiving notice of the rent being due, of which the execution creditor was aware when he issued the *fi. fa.*; and, before he seized, certain crops were removed, sufficient to pay the plaintiff's claim; it was held that the sheriff was liable: Locke v. McConkey, 26 C. P. 475. The same principle would apply in the case of a bailiff.

When the bailiff has received notice of rent due, he should endeavor to secure legal evidence on that point, and if possible, inspect the lease, or make inquiry about the terms of holding: Augustien v. Challis, 1 Ex. 279. He should also forthwith give a copy of the notice to the execution creditor or his solicitor, so that, if so advised, he might question the landlord's claim under section 216: see Rule 11 (h), or otherwise. Although goods seized by a bailiff could not be distrained in his custody, still such goods must be removed within a reasonable time after the sale in order to protect the rights of the purchaser against a distress for rent: Hughes v. Towers, 16 C. P. 287.

Notice of Landlord's Claim.—If the bailiff has not returned the execution, the notice is to be given to him, or if the money has been paid into court, the notice is to be given to the clerk: section 216 (2). Sub-section (2) effects an alteration in the law as it existed before 1897. It is intended to apply to cases where all the exigible goods of a tenant are seized and either removed or sold before the landlord has put in his claim. If all the goods of a tenant are necessary to satisfy an execution, and the landlord is by their removal or sale deprived of his remedy, there is no injustice to the execution creditor in requiring him to satisfy the landlord's claim to the extent of the proceeds of the goods. Where, however, all the goods are not removed or sold under the execution, but some remain on the premises, there is nothing to prevent the landlord distraining upon them. If he allows them to be removed, and thus loses his right of distress upon them, it seems unfair to make the execution creditor pay the rent. If they are not removed, but still remain on the premises after the sale by the bailiff, but before he has returned the execution, it does not appear at all clear that the bailiff could, under section 216 (3), then levy for the rent. The distress spoken of in that section appears to be one made as incident to and as part of a levy under an execution which has not been realized upon, which levy has become necessary because the goods which might otherwise be distrained are in the custody of the law. If the execution is returned within the ten days from the seizure, the right of the bailiff to then levy for the rent, would appear to be entirely gone.

Standing crops of a tenant seized and sold under execution, are liable to the landlord for the subsequent rent, so long as they remain on the land, unless there is other sufficient distress: R.S.O. 1914, c. 155, s. 56.

For form of notice, see Form 188.

Time for Giving Notice.—The notice must be given (1) before the return of the execution or (2) within ten days from the seizure: section 216 (2). Sec. 216.

Money to be Retained.—Where the goods are sold within ten days after the seizure, and the proceeds paid by the bailiff into court, the clerk must retain it until ten days from the seizure have expired: section 216 (2). Should the seizure be made on the tenth, the money could not be paid over till the twenty-first. Section 185 prescribes that the sale shall not take place until eight days after the seizure. But the debtor may probably waive that provision. In all cases, where a bailiff realizes by sale of goods seized, within ten days of the seizure, he should, in order to protect the rights of the landlord, notify the clerk, upon paying over the proceeds, of the date of the seizure.

Stating the Terms of Holding.—The terms should be particularly set out in the notice, so that the bailiff may receive such reasonable information as will enable him to decide upon what course to pursue: Tomlinson v. Jarvis, 11 U. C. R. 60. If the bailiff should disregard the notice, he would be liable: Galbraith v. Fortune, 9 C. P. 211; Robertson v. Fortune, 9 C. P. 427. The "writing" is by the statute required to contain particulars; and in that respect this section differs from the Statute of Anne: Sharpe v. Fortune, 9 C. P. 523. It must be *in writing*, under the hand of the landlord or his agent. Care should be taken in drawing up the notice, and the bailiff should have nothing to do with it; otherwise, in the event of dispute, he might have no right to an interpleader: Cox v. Baine, 2 D. & L. 718. The notice should be given before the sale, so that the bailiff might sell for the rent as well, under section 216 (3): see Arnitt v. Garnett, 3 B. & Ald. 440.

Landlord's Lien for Rent.—The landlord's lien for rent is limited by the statute, and although the lease may contain an acceleration clause wider in its terms than the statutory provision, the landlord would be entitled to no more than the statute gives him: see Langley v. Meir, 25 A. R. 372; Lazier v. Henderson, 29 O. R. 673; Tew v. Toronto S. & L. Co., 30 O. R. 76. As to landlord's claim generally, see 6 U. C. L. J. 228, 261; 7 U. C. L. J. 13, 141.

Under this Act, the lien only attaches when goods are "taken under an execution," and the lien for rent, of course, applies only to the premises upon which the goods are so taken.

The goods of a stranger upon the tenant's premises are not liable to seizure for rent: R.S.O. 1914, c. 155, s. 31; but this does not apply in favor of a person claiming title under an execution against the tenant, or in favor of a person whose title is derived by purchase, gift, transfer, or assignment from the tenant, absolutely or in trust, or by way of mortgage or otherwise: same section; and see that section for further provisions in this regard.

Shall Distrain.—Section 216 (3). The claim for rent under this Act appears to be enforceable as if it was an *additional amount* payable on the execution, and for the making of such additional sum a separate allowance is made. The formalities necessary in the case of distress for rent by a landlord do not seem to be required of a bailiff under this and the preceding section.

Goods exempt from seizure under execution cannot be seized for rent, but in the case of a monthly tenancy, such exemption only applies to two months' arrears: R.S.O. 1914, c. 158, ss. 30, 31, 32.

Sec. 216. But it was held that, notwithstanding this provision, such goods could not be distrained, though more than two months' rent was in arrear: Harris v. Can. Per. L. & S. Co., 17 C. L. T. 424; but if the landlord has given the notice required by section 34 of R.S.O. 1914, c. 155, and the tenant does not offer to give up possession as provided by section 33 of that statute, there would seem to be no reason why the exemptions could not be taken.

Goods belonging to persons who occupied the premises by permission of a house agent acting for the tenant, but who had no authority to grant such permission, were held not liable to seizure for arrears of rent due by the tenant: Farwell v. Jameson, 26 S. C. R. 588.

Goods under distress for rent are in *custodia legis*, and cannot be seized by a tax collector for arrears of taxes: Jones v. Burnstein, 1899 1 Q. B. 470.

The bailiff can be sued by the landlord for the money which he makes for rent, as money had and received: Lockhart v. Gray, 2 C. L. J. 163; and it would be garnishable in the bailiff's hands, in a suit against the landlord: *Ib.*

The bailiff cannot distrain for the rent upon the exempted goods of a third party, any more than he can seize such property on the execution: Beard v. Knight, 8 E. & B. 865; Fouiger v. Taylor, 5 H. & N. 202; see R.S.O. 1914, c. 155, s. 31. See also Hughes v. Smallwood, 25 Q. B. D. 306; *Re* Broster, *Ex parte* Pruddah, 1897 2 Q. B. 429.

Besides distraining for the amount of the rent claimed the bailiff may also levy the costs of distress: section 216 (3); and is entitled to the costs allowed by The Costs of Distress Act, R.S.O. 1914, c. 78, Schedules 1 and 2, section 210 (4).

Fees Allowed.—The fees allowed by The Costs of Distress Act are as follows:—

(*Where the Sum Demanded* and *Due for Rent* does not *Exceed $80.*)

1. Levying distress	$1 00
2. One man keeping possession, *per diem*	75
3. Appraisement whether by one appraiser or more, *two cents in the dollar on the value of the goods.*	
4. If any printed advertisements, not to exceed in all	1 00
5. Catalogues, sale and commission and delivery of goods, *five cents in the dollar on the net proceeds of the sale.*	
6. Where the amount due is satisfied in whole or in part, after seizure and before sale, *three cents in the dollar on the amount realized.*	

(*Where the Sum Due Exceeds $80.*)

1. Levying distress	$1 00
2. One man keeping possession, *per diem*	1 00
3. Appraisement, whether by one appraiser or more, *two cents in the dollar on the value of the goods.*	
4. Advertisements when reasonably published in a newspaper, the actual outlay not exceeding	5 00
5. If any printed advertisement otherwise than in a newspaper, the actual outlay not exceeding	3 00
6. The actual expense reasonably incurred in removing the goods distrained or part thereof, when such removal is necessary.	

7. Catalogues, sale and commission and delivery of goods, *five cents in the dollar on the net proceeds of the sale up to* $100, and where the proceeds of the sale exceed $100, in addition thereto, *two and a half per cent. on the excess over* $100.
8. Where the amount due is satisfied in whole or in part after seizure and before sale, *three cents on the dollar on the amount so realized.*

In case exempted goods should become liable to seizure (*see ante*), the fee of $2 in all and actual and necessary payments for possession money only, is allowed: R.S.O. 1914, c. 78, s. 3.

Under the English County Court Act, 51 & 52 Vic. c. 43, s. 160, providing that the poundage, appraisement, and sale are to be "the same as would have been payable if the distress had been an execution of the county court, and no other fees shall be demanded or taken," the bailiff was held to be entitled to fees and poundage in respect of both execution and the landlord's claim for rent: *Re* Hroster, *Ex parte* Prudlah, 1897 2 Q. B. 420.

Replevin of Property Distrained.—Section 217 (5). At common law a tenant had a right to replevy as for an illegal distress his goods distrained for rent, and this section preserves him that right: see notes to section 62 (4), in which the law relating to replevin is discussed.

The replevy can only be made so as to supersede the distress, and the bailiff would, notwithstanding the replevin, be entitled to retain the goods to the extent necessary to satisfy the execution, as to which replevin is prohibited by The Replevin Act, R.S.O. 1914, c. 69, s. 4. But under section 216 (6) the proceeds of such goods could not be paid over until the landlord was first satisfied.

OFFENCES AND PENALTIES.

Contempt of Court.

Contempt of Court.

217. If a person wilfully insults the Judge or any officer of a Division Court during his sitting or attendance in court, or interrupts the proceedings of the court, or creates a disturbance within the court room or within hearing of the court, any bailiff or officer of the court may, by direction of the Judge, take the offender into custody and bring him before the Judge, and the Judge may impose upon him a fine not exceeding $20, and in default of immediate payment may, by warrant under his hand and seal, commit the offender to the common gaol of the county for a period not exceeding one month, unless the fine and costs with the expense attending the commitment are sooner paid. 10 Edw. VII. c. 32, s. 218.

Contempt of Court.—Every Court of Record has an inherent power to punish for contempt: *Ex parte* Pater, 5 B. & S. 299; *Ex parte* Lees and the Judge of the County of Carleton, 24 C. P. 214. The statute

Sec. 217. here confers a power on the judge of a division court which would belong to a Court of Record as one of its inherent attributes. In Carus Wilson's case, 7 Q. B., p. 1015, Lord Denman, C.J., said: "But hers it appears that a contempt was supposed to have been committed. That is, a case in which it becomes the unfortunate duty of a court to act as both party and judge, and to decide whether it has been treated with contempt. We cannot decide upon the face of this return (to a writ of *Habeas Corpus*) that they have come to a wrong conclusion. A court may be insulted by the most innocent words, uttered in a peculiar manner and tone. The words here might or might not be contemptuous, according to the manner in which they were spoken, and that is what we must look to. If the words might be contemptuously spoken, that was an ample occasion for the decision of the Royal Court (of Jersey) with which no other court can meddle. Every court in such a case has to form its own judgment." At page 1017 of the same report, Williams, J., said: "It is quite obvious that contempt may be shown either by language or manner. We can imagine language which might be perfectly proper if uttered in a temperate manner, but might be grossly improper if uttered in a different manner. No one not present can be a competent judge of this." Speaking of the prisoner's conduct in that case, Wightman, J., said, at p. 1018: "It seems to me that it might be contemptuous as being highly disrespectful, although the words themselves are not necessarily so." In *Re* Judge of the Division Court of Toronto, 23 U. C. R. 376, Draper, C.J., is reported at page 378, as saying: "The power of punishing contempts by fine is given by statute to the judge of a division court, and such a power, though like any other power by which a man becomes, as it were, a judge in his own cause, and can exercise his authority without any direct control, and perhaps without any responsibility, is dangerous as open to abuse, is nevertheless found indispensible. Contempts are perhaps the most undefinable of offences, for they may consist in looks and demeanour, as well as in positive acts and expressions; and though our statute uses the words 'wilfully insults,' it does not appear to me to change the application or extent of the power given." Again, at page 379, the same learned judge said; "It is more easy to feel than describe how an advocate may exhaust the patience and wear the temper of any judge by continually keeping on the verge of what he well knows to be forbidden ground, and by occasionally overstepping the line after oft repeated check and caution from the bench, in the ardor, real or affected, of his zeal for his client. When such conduct is long persevered in, it produces almost inevitably in the judge's mind a sense that it requires scrupulous watching in order that the advocate may, if possible, be restrained within proper limits; or, if he will exceed them, may, if necessary, be promptly punished; and thus it may well happen that the judge may pronounce the advocate to be in contempt, where a by-stander, who knew nothing beyond the immediate occurrence, might deem the decision harsh or even unwarrantable." In *Ex parte* Pater, 5 B. & S., at page 312, Blackburn, J., said: "I agree that when we are considering a question of contempt, we ought to see whether the inferior court had reasonable grounds for adjudging that a contempt had been committed; but we must bear in mind that the court is the judge whether it has been treated with contempt, as Lord Denman said in the case of Carus Wilson, 7 Q. B. 984-1015, for, looking to the nature of the contempt, it may consist in the peculiar manner and tone with which words are spoken." The power conferred on the judge by this section is confined to contempts committed *in court*, and he would have no power under it to proceed against a person for a contempt committed out of court: R. v. Lefroy, L. R. 8 Q. B. 134: see also R. v. Brompton C. C. Judge, 1893, 2 Q. B. 195: *Re* Eliot, *Ex parte* Buchill, 41 Sol.

Jour. 625; 4 U. C. L. J. 243, and 4 U. C. L. J. 259; 11 C. L. J. 156, on the general question of contempt of court. Committals for contempt by publication of scandalous matter affecting the court are now obsolete: McLeod v. St. Aubyn, 1899, A. C. 549; see *Re* O'Brien, 16 S. C. R. 197. Should the judge act under this section, the penalty can be imposed and enforced instantly: Watt v. Ligertwood, L. R. 2 Scotch App. 391: see also Baird v. Story, 23 U. C. R. 624. In *Re* Pollard, L. R. 2 P. C. 106, the Judicial Committee held that where the court did not impose the fine on the committing of the contempt, but delayed it, and then on a subsequent day imposed the penalty, without an opportunity of the party's answering the charge, such proceeding was illegal. In *Re* Seaife, 5 B. C. R. 153, it was held that contempt being a criminal offence, nothing will be inferred, and the charge must be proved with particularity. Sec. 217.

The extent and authority of judicial officers for contempt of court is fully discussed in the case of Young v. Saylor, 23 O. R. 513; affirmed on appeal, 20 A. R. 645, and the authorities are fully quoted and considered.

An insult to the clerk or any officer during the sitting of the court, and, though not actually in the presence of the judge, within the precincts of the court, might be punishable under this section: see *Re* Johnson, 20 Q. B. D. 68.

A small room communicating with a larger one is not open court: Kenyon v. Eastwood, 57 L. J. Q. B. 454.

Wilfully Insults.—A "wilful insult" is one that arises from the spontaneous action of the will. It amounts to nothing more than this, "that he knows what he is doing and intends to do what he is doing and is a free agent:" *Re* Young and Harston, 31 Ch. D. 174; Wilson v. Manes, 26 A. R. 398.

To observe to a judge in court in the course of and in reference to his judgment, that "That is a most unjust remark," is an insult to the court in whatever manner it is expressed, and, if not withdrawn, it amounts to such a "wilful insult" as is contemplated by the section: R. v. Jordan, 36 W. R. 589, 797; or to reflect in anyway on the honesty or impartiality of the judge: R. v. Skipworth, 12 Cox C. C. 371.

Interrupts the Proceedings.—Anything unseemly said or done by any person which would interfere with the conduct of the business of the court, or that would be highly indecorous, might be the subject of a penalty under this clause.

The judge should, however, be careful that the misconduct justifies the punishment, and moreover, that he has not by his own words or conduct been to blame: see Clissold v. Machell, 25 U. C. R. 80; 26 U. C. R. 422.

Take the Offender into Custody.—Power is here given to the judge to order the person to be taken into custody, so that he may be brought before him to answer for his misconduct. The limit of the fine is twenty dollars, and no greater fine could be imposed.

Immediate Payment.—The word "immediate" here does not mean "instantly." A reasonable time would be allowed the delinquent for payment of the money: Toms v. Wilson, 4 B. & S. 455; Forsdike v. Stone, L. R. 3 C. P. 607; Massey v. Sladen, L. R. 4 Ex. 13; *Re* Sillence, 7 Ch. D. 238. As remarked by Cockburn, C.J., at page 453 of

Sec. 218. 4 B. & S., "he might require time to get it from his desk, or to go across the street, or to his banker's for it."

Under His Hand and Seal.—The plain words of the section require this commitment to be under the hand and seal of the judge: see also 3 L. C. G. 14. It differs in that respect from a commitment under section 191: *Ex parte* Heymann; *Re* Heymann, L. R. 7 Ch. 488; *Ex parte* Waters; *Re* Waters, L. R. 18 Eq. 701.

It will be necessary for the commitment to show whether the defendant is fined for insulting the judge or an officer, or for interrupting the proceedings. The nature of the insult need not be stated: Levy v. Moylan, 10 C. B. 189; but if the committal sets out the facts of the contempt, the Supreme Court on application to it for *habeas corpus* will not review the facts as stated in the warrant; but if the facts are not so stated the judge might be required to establish by evidence such facts as justified his course, if questioned: R. v. Jordan, 26 W. R. 589; *Ex parte* Porter, 5 B. & S. 299; *Ex parte* Lees v. Carleton, Judge, 24 C. P. 214; Young v. Saylor, 23 O. R. 513.

The order and warrant may be made notwithstanding the offender may have gone outside before arrest: Mitchell v. Smith, 1894, 2 Ir. R. 351.

Power is given to the division court to impose fines under certain circumstances, and as it is an extraordinary power, its exercise must be carefully guarded: *Re* Clements, 46 L. J. Ch. 375.

As remarked in Day v. Carr, 7 Ex. 887, by Martin, B., a power to imprison without the intervention of a jury, ought not to be exercised, except upon strong grounds.

In courts of record a contempt is usually punished by imprisonment.

For the contempts enumerated in this section, the judge in the division court now has power to make a direct order for imprisonment, the division court being now a court of record: section 8, and see notes thereto; *Ex parte* Pater, 5 B. & S. 299, and *Ex parte* Lees and the Judge of the County of Carleton, 24 C. P. 214.

Form of order to commit. No. 57.

Forms of warrant of commitment. Nos. 59, 60.

Resisting Officers.

Interfering with bailiff.

218.—(1) If a person interferes with a bailiff or officer, or his deputy or his assistant while in the execution of his duty, or makes or attempts to make a rescue of any property seized or attached under process of the court, he shall incur a penalty not exceeding $20, to be recovered by order of the court, or on summary conviction before a Justice of the Peace, and shall also be liable to be imprisoned, by order of the court or Justice, for any term not exceeding three months.

Arrest of offender.

(2) The bailiff or officer, or any peace officer, may take the offender into custody, with or without warrant, and bring him before the court or Justice. 10 Edw. VII. c. 32, s. 219.

Resisting Officers.—A bailiff leaving goods and going to a public house for refreshments a mile distant would be entitled to re-enter on his return and any assault on him to prevent such re-entry would make the offender liable under this section: Coffin v. Dyke, 48 J. P. 757. Where the bailiff seized goods under a writ of replevin, but left them in the possession of the defendant, taking an agreement from the latter to deliver up the goods when called upon, the bailiff was held to be acting under the agreement in a subsequent attempt to get the goods, in which he was assisted by a third person, and not in the execution of process against the goods under this section: R. v. Carley, 18 C. L. T. 26. See notes to section 173, *title* "Abandonment of Execution." Sec. 218.

This section, as originally framed, made provision for criminal procedure, but in the revision of the statutes its language has been changed so as to bring it within the authority of the Legislature of Ontario.

Form of summons for obstructing a bailiff. No. 31.

The following are the provisions of The Criminal Code:

168. Every one is guilty of an indictable offence and liable to ten years' imprisonment who resists or wilfully obstructs any public officer in the execution of his duty or any person acting in aid of such officer. Obstructing public officer.

169. Every one who resists or wilfully obstructs,—

(*a*) any peace officer in the execution of his duty or any person acting in aid of such officer;

(*b*) any person in the lawful execution of any process against any lands or goods or in making any lawful distress or seizure;

is guilty of an offence punishable on indictment or on summary conviction and liable if convicted on indictment to two years' imprisonment, and on summary conviction before two Justices, to six months' imprisonment with hard labor, or to a fine of one hundred dollars.

349. Everyone commits theft and steals the thing taken or carried away who, whether pretending to be the owner or not, secretly or openly, takes or carries away, or causes to be taken or carried away, without lawful authority, any property under lawful seizure and detention by any peace officer or public officer in his official capacity. Theft of things seized under process of law.

A fine imposed by the court under section 218, is enforceable by execution issued from the court: section 222. The fine may also be enforced by summary conviction proceedings before a justice of the peace; and the procedure would be regulated by Part XV. of the Criminal Code, which is made applicable by The Ontario Summary Convictions Act, R.S.O. 1914, c. 90. An appeal will lie from a conviction before a

Sec. 219. justice of the peace, under section 10 of the Ontario Summary Convictions Act: see notes and proceedings on "Appeals," section 125, *ante*.

There is no appeal from the order of the judge imposing a fine under this section: Lewis v. Owens, 184, 1 Q. B. 102.

Application of Fine.—The fine is payable to the clerk of the peace for transmission to the Provincial Treasurer, sections 39, 40; see also R.S.O. 1914, c. 99.

Remission of Fine.—The judge may remit the fine in whole or in part: R.S.O. 1914, c. 99, s. 6 (1); but a justice or magistrate cannot do so: section 6 (2); or it may be remitted by the Lieutenant-Governor in Council: section 7; costs incurred cannot be remitted: section 8.

Limitation of Proceedings.—Proceedings to recover fines before justices of the peace under the Criminal Code are barred after 6 months from the time when the matter of complaint arose: Criminal Code, section 1142, which is made applicable by R.S.O. 1914, c. 90, s. 4. There appears to be no time limited for proceedings to recover the fine before the judge in the division court; but no doubt he would not entertain proceedings upon a stale matter.

If an assistant bailiff wrongfully arrested a person, as for an offence under this section, the bailiff would be responsible: Gordon v. Rumble, 19 A. R. 446.

If there should be any question as to the liability of the party complained against, or if there should not be any necessity for his immediate arrest, a summons might be issued by the judge or justice.

For form of summons see Form 189.

If the bailiff proceed under this section he is not thereby prevented from suing and recovering for the assault upon him: Box v. Green, 9 Ex. 503.

Misconduct of Clerks, Bailiffs, Etc.

Misconduct of bailiffs and officers.

219.—(1) Upon a complaint in writing that a bailiff or officer, acting under color or pretence of process of the court, is guilty of extortion or misconduct, or does not duly pay or account for all money levied or received by him by virtue of his office, the Judge may, at a sittings of the court, enquire into the matter in a summary way, and for that purpose may summon and enforce the attendance of all necessary persons, and make such order thereupon for the repayment of any money extorted, or for the due payment of any money levied or received, and for the payment of such damages and costs to the person aggrieved, as he may think just.

Enforcing order for payment by bailiff.

(2) In default of payment of the money ordered to be paid by the bailiff or officer within the time mentioned in the order for the payment thereof, the Judge may, by warrant under his hand and seal, cause such sum to be levied by distress and sale of the goods of the offender, together with the reasonable charges

of the distress and sale, and in default of such distress or summarily in the first instance, or where payment is not made forthwith, if so ordered, may commit the offender to the common gaol of the county for a period not exceeding three months, unless the money and costs are sooner paid. 10 Edw. VII. c. 32, s. 220. Sec. 219.

Acting Under Color or Pretence of Process.—See English County Courts Act, 1888, s. 50. This would cover a case where a bailiff had not any process of the court, but *assumed* to act as if he had: see 7 U. C. L. J. 229, 230, and 260.

Extortion.—The offence of extortion consists in a public officer "taking under color of office from any person any money or valuable thing which is not due from him at the time when it is taken." "If the illegal act consists in inflicting upon any person any bodily harm, imprisonment, or other injury, not being extortion, the offence is called "oppression:" Stephens, Cr. 83. See R. v. Tisdale, 20 U. C. R. 272; Parsons v. Crabbe, 31 C. P. 151.

For an unintentional overcharge no penalty should be inflicted: Shoppee v. Nathan & Co., 1892, 1 Q. B. 245.

The wrong must be done with the *mens rea* or intention of committing the offence: Lee v. Dangar, 1892, 1 Q. B. 231: 1892, 2 Q. B. 337.

Misconduct.—The term "misconduct" is very vague. It is submitted that for the penal purposes of this section no greater meaning should be given to it than would be given to the same term in the covenant of the sureties: see notes to section 26.

In Clarke v. Moore, 94 L. T. Jour. 390, it was held that seizing exempted goods was misconduct, entitling the debtor to recover damages from the bailiff under this section, but this decision was reversed in Moore v. Brompton C. C. Bailiff, 62 L. J. Q. B. 498; 69 L. T. 140; and it was held that the seizure of such goods by the bailiff was not "misconduct," although he acted recklessly and committed a serious error of judgment.

Wilful misconduct is a criminal offence: see section 166 Criminal Code.

Duly Pay.—Great delay in payment would be a proper ground for punishing the officer: see Rule 99.

A bailiff should not mix moneys levied by him with his own money: Milltown v. Boardman, 10 C. L. T. 250.

Complaint in Writing.—The complaint must be in writing (*Re* McGregor v. Norton, 13 P. R. 223), but not necessarily, as was formerly the case, *by the party aggrieved*, and must be inquired into at some court sittings.

The bailiff and his witnesses, if any, must have an opportunity to be present: 4 U. C. L. J. 132; Osgood v. Nelson, L. R. 5 H. L. 636: note to section 34.

May Commit the Offender.—The judge has power only to order repayment of moneys extorted or withheld, or actual damage sustained by the party aggrieved. He has no power to fine under this section. The warrant of distress or commitment to gaol must be under the hand

Secs. 220, 221.

and seal of the judge. The judge need not go through the formality of distress, but may order committal as the only alternative of payment.

This being a *quasi* criminal proceeding, questions of doubt are to be construed favorably to the accused: North Ontario Election, H. E. C. 342; see *Re* Scaife, 5 B. C. R. 150.

For form of order see Form 166; and for warrant of commitment see Form 166 (1).

See section 51, as to forfeiture of fees by a bailiff for not returning process or execution within the time required by law. Also section 221 *post*, as to recovery of damages for neglect or misconduct by bailiff.

Extortion.

220. If a clerk, bailiff, or other officer is guilty of extortion he shall, upon proof thereof before the court, be forever disqualified to hold any office of profit or emolument in a Division Court, and shall also be liable in damages to the party aggrieved. 10 Edw. VII. c. 32, s. 221.

Extortion.—The former section 286 described the offence as exacting or taking any fee or reward other than the fees appointed and allowed by law for or on account of anything done by virtue of the office, or on any account relative to the execution of the Act. This is "extortion."

See also notes to section 52.

The clause is a penal one, and must be strictly construed: 4 U. C. L. J. 132; and the officer should have full opportunity of defending himself: notes to sections 34 and 219.

Negligence of Bailiffs.

Bailiff neglecting duty in relation to execution.

221. If a bailiff, by neglect, connivance or omission, loses the opportunity of levying an execution or taking property under an attachment, or unduly delays to levy or attach, the Judge, upon complaint of the party aggrieved, and upon proof of the fact alleged, may order the bailiff to pay such damages as the party aggrieved appears to have sustained, not exceeding the sum for which the execution or attachment issued; and upon demand being made therefor, and on his refusal to satisfy the same, payment may be enforced by such means as are provided for enforcing judgments. 10 Edw. VII. c. 32, s. 222.

Negligence of Bailiffs.—A summary power is here given to the judge to be exercised over the bailiff if he should neglect his duty in regard to an execution placed in his hands. Should damages be awarded and paid by the bailiff under this section, it is submitted that he could not be rendered civilly responsible otherwise. A summons must be issued and served on the bailiff: Mayer v. Burgess, 4 E. & B. 655.

Wilfully making a false return is a criminal offence: Criminal Code, section 166.

A bailiff acting under a transcript could not be proceeded against in the home court. The judge has power merely against the bailiffs of his own courts: R. v. Judge of County Court of Shropshire, 20 Q. B. D. 242. Secs. 222, 223.

Upon Demand.—This would be a necessary preliminary to execution: Davidson v. Chairman of Q. S. Waterloo, 24 U. C. R. 66; Trustees of the School Section No. 3 of the Township of Caledon v. Corp. of Tp. of Csiedon, 12 C. P. 301; Bamford v. Clewes, L. R. 3 Q. B. 729; see also 10 U. C. L. J. 236

Unduly Delays.—See sections 28 and 40 and notes.

Execution Against Bailiff.—May be issued to the bailiff of any other court within the county: section 173 (2).

Limitation of Time for Proceeding.—No damage can be recovered in any action brought against the surety of a clerk or bailiff for default or misconduct in office, except as to matters and causes of action which have arisen within 10 years next before the commencement of the action: R.S.O. 1914, c. 15, s. 13. See also notes to sections 26 *et seq.*, *ante*.

Damages Against Bailiff.—For neglect, see Watson v. White, 1896, 2 Q. B. 9; Partridge v. Elkington, L. R. 6 Q. B. 82.

ENFORCING PAYMENT OF FINES.

222. A fine imposed by the Judge under authority of this Act may be enforced by his order in like manner as a judgment. 10 Edw. VII. c. 32, s. 223. Enforcing payment of fines.

Fines, How Enforced.—Provision is here made for fines imposed, whether payable for contempt or otherwise. The judge cannot order the imposition and enforcement of any fine unless some statutory enactment expressly confers the power.

The payment of the fine would not bar another action for the wrong, *e.g.*, an assault: Box v. Green, 9 Ex. 503.

In Like Manner as a Judgment.—See notes to section 173.

And Shall be Accounted For.—See section 51. All fines must be paid quarterly to the clerk of the peace: sections 39 and 40.

See also notes to section 217 upon this and other points.

GENERAL PROVISIONS WITH REGARD TO ACTIONS FOR THINGS DONE UNDER THIS ACT.

223. A levy or distress by virtue of this Act shall not be deemed unlawful, or the person making the same be deemed a trespasser, on account of any defect or want of form in any proceeding relating thereto, nor shall the person levying or distraining be deemed a trespasser from the beginning, on account of any irregularity afterwards committed by him; but the person aggrieved by the irregularity may recover full satisfaction for the special damage sustained by him. 10 Edw. VII. c. 32, s. 224. Distress not to be deemed unlawful or persons making it trespassers, by reason of defect in proceedings.

Sec. 223.

Any Defect or Want of Form.—The tendency of modern legislation is in favor of preventing any formal defect, defeating the ends of justice, or subjecting a person who acts honestly to an action for damages: Crawford v. Beattie, 39 U. C. R. 13, and cases there cited; see Aldrich v. Humphrey, 29 O. R. 427.

This section bears a close resemblance to section 10 of the English statute, 11 Geo. II. c. 19, in respect of an action for an irregular and illegal distress for rent, which provides that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent, the distress shall not be deemed unlawful nor the distrainor a trespasser *ab initio;* but the party grieved may recover satisfaction for the damage in a special action of trespass on the case, at the election of the plaintiff, and if he recover he shall have full costs.

A Trespasser from the Beginning.—"When entry, authority or license is given by the law and he doth abuse it, he shall be a trespasser *ab initio*. But where an entry, authority or license is given by the party and he abuses it, then he must be punished for his abuse, but shall not be trespasser *ab initio*." Six Carpenter's Case, 8 Coke, 146*a*; 1 Smith's L. C. 261. Not doing, cannot make the party who has authority or license by the law a trespasser *ab initio*, because not doing is no trespass: *Ib.*

The distinction is that if the party be a trespasser from the beginning, the jury may award damages for the trespass, but if the party is merely punished for special damage, actual loss must be proved and the damages confined to such loss.

PROTECTION OF PERSONS ACTING UNDER WARRANTS, ETC.

Sections 293-296 of the former Division Courts Act (Bicknell & Seager, 2nd ed., 487, *et seq.*), are omitted from the present statute, but are embodied; with some variations, in R.S.O. 1914, c. 89, s. 12, as follows:

12.—(1) No action shall be brought against a constable, division court bailiff or other officer, or against any person acting by his order and in his aid, for anything done in obedience to a warrant issued by a justice of the peace or clerk of a division court until demand has been made or left at his usual place of abode by the person intending to bring such action or by his solicitor or agent in writing, signed by the person demanding the same, of the perusal and copy of such warrant, and the same has been refused and neglected for six days after such demand.

(2) If, after such demand and compliance therewith by showing the warrant to and permitting a copy thereof to be taken by the person demanding the same, an action is brought against such constable, bailiff or officer, or such person so acting, for any cause without making the justice or clerk who issued the war-

rant a defendant, on the production and proof of the warrant at the trial of the action judgment shall be given for the defendant notwithstanding any defect of jurisdiction in such justice or clerk. Sec. 223.

(3) If the action is brought jointly against said justice or clerk and such constable or bailiff or other officer or person so acting on proof of such warrant judgment shall be given for such constable, or bailiff or other officer and for such person so acting, notwithstanding such defect in jurisdiction.

(4) If the judgment is given against the justice or clerk the plaintiff shall, in addition to any costs awarded to him, be entitled to recover such costs as he is liable to pay to the defendant for whom judgment is given.

Acting Under Warrant.—Sub-section (1). A clerk issuing a warrant under the seal of the court and a bailiff and his assistants acting thereunder, are protected, even assuming that the judge has no jurisdiction to make the order under which the warrant is founded: Aspey v. Jones, 33 W. R. 217; London (Mayor) v. Cox, L. R. 2 H. L. 269; Davis v. Fletcher, 2 E. & B. 271.

Protection of Persons Acting Under Warrants, Etc.—The public interest requires that officers who really act in obedience to a warrant should be protected. In such cases, therefore, the Act has provided that the remedy of the party grieved shall be confined to the clerk as well where he has issued a warrant within his jurisdiction as where the warrant he has issued is improper. The Act takes it for granted, if after demand a perusal has been allowed, that the officer may be said to act in obedience to the warrant, though the clerk had no jurisdiction, and though the warrant be an absolute nullity: Price v. Messenger, 2 B. & P. 158; 5 R. R. 559.

The protection is given notwithstanding the defect appears by the warrant.

This protection is not merely conferred on the officer, but is extended to anyone, "acting by his orders and in his aid," in the due execution of the process of the court: see, also, 9 U. C. L. J. 317; Penrson v. Rutlan, 15 C. P. 79; Pedley v. Davis, 10 C. B. N. S. 492.

The bailiff is protected, under this section, only when he is sought to be made responsible for some defect in the process under which he acts: Steward v. Cowan, 40 U. C. R. 346.

Against any Person Acting by his Order.—The person must be acting under the authority of a bailiff, and in his aid: Postlethwaite v. Gibson, 3 Esp. 226.

A demand upon such person would be insufficient; it must be made upon the bailiff: Clarke v. Davey, 4 Moore 467.

A gaoler who received the person named in a warrant of commitment from the bailiff would be protected: Butt v. Newman, Gow. 97.

A constable *de facto*, while acting in the discharge of his duty, is entitled to the same protection as if his title to the office he professes to fill were undisputed: R. v. Gibson, 29 N. S. R. 4.

Sec. 223.

A Written Demand.—The demand should be made out in duplicate and signed by the party himself: Toms v. Cumming, 7 M. & G. 88, 92. But if signed by his solicitor or agent it will be sufficient: Clark v. Woods, 2 Ex. 395.

It would be unnecessary to make a demand where no action would lie against the clerk: Sturch v. Clarke, 4 B. & Ald. 113; Cotton v. Cadwell, 2 N. & M. 399; Sly v. Stevenson, 2 C. & P. 464.

If the warrant commands the bailiff to seize the goods of A., and he seizes those of B., no demand is necessary: Parton v. Williams, 3 B. & Ald. 330; or if he acts beyond what is required by the warrant or out of his own county: Gladwell v. Blake, 1 C. M. & R. 636; or does a wrong, not acting or believing he is acting in the discharge of his duty as bailiff: Stewart v. Cowan, 40 U. C. R. 346; or if he broke and entered a house to seize goods: Bell v. Onkley, 3 M. & S. 259; or if he seized other goods than those authorized by the warrant: Price v. Messenger, 2 B. & P. 158; Crozier v. Cundey, 6 B. & C. 232; or if he arrests A. under a warrant against B., though A. may have been the person intended: Hoys v. Bush, 1 M. & G. 775.

See English County Court Act, 1888, ss. 53 and 54; *Re* Locks, *Ex parte* Popperton, 62 L. T. 942; 63 L. T. 320.

Signed by the Person.—If signed by the party's solicitor it will be sufficient: Clark v. Woods, 2 Ex. 395.

Service.—See notes to sections 87 and 98.

Left at the Residence.—See notes to section 87. A notice left by the clerk of the party's solicitor is sufficient: Clark v. Woods, 2 Ex. 395.

Six Days After Such Demand.—The demand need not specify any time, and if a different time is mentioned than that allowed by the statute, it is immaterial: Collins v. Rose, 5 M. & W. 194.

The sections apply to actions of trespass and case only: Lyons v. Golding, 3 C. & P. 586; and not to assumpsit, replevin, or the like: Gay v. Matthews, 4 B. & S. 425.

By the Person Demanding the Same.—Sub-section (2). The bailiff should, within the prescribed time after such demand, show the warrant and permit a copy thereof to be taken by the person demanding the same. If he does so, and an action is brought against him or the person acting by his order or in his aid, either with or without making the officer of the court who issued the warrant a defendant, then, on the production and proof of such warrant at the trial, judgment shall be given for the bailiff, notwithstanding a defect of jurisdiction.

The bailiff should have the warrant in his possession when he acts upon it: Gulliard v. Laxton, 2 B. & S. 363; R. v. Chapman, 12 Cox C. C. 4; Codd v. Cabe, 1 Ex. D. 352.

Though the party may have obtained a copy of the warrant, before making the demand, the bailiff must comply with the demand: Clark v. Woods, 2 Ex. 395.

On Production and Proof of the Warrant.—The production and proof of the warrant is necessary to free the bailiff from responsibility: see Peppercorn v. Hoffman, 9 M. & W. 618; Kaiar v. Cornwall, 8 U. C. R. 168. And the fact that it was at the time with the gaoler is no answer: Arnott v. Bradly, 23 C. P. 1; unless the party on information

of this circumstance made no objection: Atkins v. Kilby, 11 A. & E. 777. Though the clerk may be joined with the bailiff in an action, the bailiff will not be discharged unless he has complied with the demand: Clark v. Woods, 2 Ex. 395. Sec. 224.

Proof of Warrant.—Should a judgment be given against the the clerk and for the bailiff, the clerk would be liable to pay the plaintiff the bailiff's costs against him.

The plaintiff cannot oust the defendant of this plea by waiving the tort and suing in contract: Calvert v. Moggs, 10 A. & E. 632.

Notice of Action.—The plea should refer to the statute which allows the plea as well as any other statute relied on by the defence: Van Natter v. Buffalo & Lake Huron Ry. Co., 27 U. C. R. 581.

Formerly when it was intended to rely upon the want of service of a notice of action, the particular section requiring notice had to be referred to: See R.S.O. 1897, c. 88, ss. 1, 14; which clauses were repealed by 1 Geo. V. c. 22, s. 18. Bond v. Conmee, 15 O. R. 716; 16 A. R. 398, but notice of action is not now required.

GENERAL RULES AND ORDERS.

224.—(1) The Lieutenant-Governor in Council may appoint five of the County Court Judges, who with the Inspector shall constitute a board which shall be called "The Board of County Judges." Board of County Judges.

(2) For the purposes of this section a retired County Court Judge shall be deemed a County Court Judge. Retired Judge may be appointed.

(3) The board may make rules for regulating any matter relating to the practice and procedure of the courts or to the duties of the officers thereof, or to the costs of proceedings therein, and every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors and carrying into effect the provisions of this Act and of all other Acts now or hereafter in force respecting such courts. Rules to be made by board.

(4) There may be paid out of the Consolidated Revenue Fund to each member of the Board the sum of $10 for every day's actual attendance at the meetings of the Board. 3-4 Geo. V. c. 18, s. 14 (4). Allowance to members.

(5) The Inspector shall not act as a member of the Board for the purpose of making rules or tariffs under any other Act. 10 Edw. VII. c. 32, s. 225. Proviso as to Inspector.

Scope of Board's Power.—The authority given by this section to the Board of County Judges is very extensive. All questions of the procedure by which legal or equitable rights, within the

Sec. 224. jurisdiction of the division courts, may be enforced or extinguished, may be dealt with. The word "practice" in the section, "denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer the machinery as distinguished from its product," *per* Lush, L.J., Poyser v. Minors, 7 Q. B. D. at p. 331. The board would have full power to pass a rule declaring that a nonsuit should have the same effect as a judgment upon the merits, for the defendant: Poyser v. Minors, 7 Q. B. D. 329.

But the board has no power to pass a rule altering the jurisdiction of the court in direct contradiction to the terms of the Act. Nor have they power to delegate to the clerks the jurisdiction conferred on the judges: Fellows v. Owners of The "Lord Stanley," 1893 1 Q. B. 98; Barraclough v. Brown, 1897 A. C. 615, 621. Nor have they power to pass a rule repugnant to the provisions of the Act: Irving v. Askew, L. R. 5 Q. B. 208, *per* Hannen, J., at p. 211; see also Weatherfield v. Nelson, L. R. 4 C. P. 571; R. v. Pawlett, L. R. 8 Q. B. 491; R. v. Liverpool (Mayor), 18 Q. B. D. 510; Weatherfield v. Nelson, 38 L. J. C. P. 220.

Where a rule is inconsistent with the statute, the latter impliedly repeals the former and the rule is therefore inoperative. The same principle applies to the conflict between a rule of the court and a provision of the Act, as is applicable in the case of conflicting enactments. If they are irreconcilable it is to be determined which is the leading and which the subordinate provision, and which must give way to the other. That would be so with regard to enactments and with regard to rules, which are to be treated as if within the enactment. In that case, probably, the enactment, then, would be treated as the governing consideration and the rule as subordinate to it; *per* Lord Herschell, Institute of Patent Agents v. Lockwood, 1894 A. C. 347, at p. 360; see Robinson v. Emerson, 4 H. & C. 352; Mitchell v. Brown, 1 El. & El., at p. 275; R. v. Rose, 27 O. R. 105.

Retired Judge.—A retired county court judge is a person who has filled the office of judge of a county court, and who at his own request has been relieved from the discharge of his duty, in contradistinction to one who has against his will been dismissed. He may resume legal practice, embark in commercial ventures, take Holy Orders or enter parliament, without losing his status as a retired judge: Macdonell v. Blake, 17 A. R. 312.

Regulating Duties of Officers.—The board has no judicial functions nor disciplinary power over clerks or bailiffs. Its functions are legislative. It has full power to make rules for the guidance of clerks and bailiffs, which rules have the same force, after approval, as a statutory enactment, and the non-compliance with which would render the officer liable to punishment under section 24 (2): McKenzie v. Ryan, 6 P. R. 323.

The legislature and the board have full control over the fees of officers. The board may even substitute fees fixed by themselves for fees fixed by a statute; in other words, they may virtually repeal a statute.

The board has the most ample powers of altering and amending rules from time to time, and, as there is no fixed date of sitting a rule may be altered or abrogated, or a new rule made at any time when the necessity for it appears.

The delay which would be necessary if the legislature had not delegated these powers may, therefore, be avoided. Sec. 225.

The board also has power to discriminate against city division courts in the matter of fees.

The authority of the legislature to delegate these powers is clear: R. v. Burah, 3 App. Cas. 889; Hodge v. Regina, 9 App. Cas. 117; Powell v. Apollo Candle Co., 10 App. Cas. 282. "Such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail:" 9 App. Cas. at p. 132.

225.—(1) The board, or four members thereof, shall certify to the President of the Supreme Court all rules so made, and the President shall submit the same to the Judges of that Court. Board to certify rules to the President of the Supreme Court.

The legislation of the board must be certified to the President of the Supreme Court, *i.e.* This doubtless refers to the Chief Justice of Ontario, who is the President of the Appellate Division of the Supreme Court of Ontario, as there is no one styled President of the Supreme Court: R.S.O. 1914, c. 56, ss. 4 and 5.

At least four of the board must certify the rules and forms framed by them, and at least ten judges of the Supreme Court must approve of them: Sub-section 2. There are five judges of the Appellate Division and fourteen judges of the High Court Division: The Judicature Act, R.S.O. 1914, c. 56, ss. 4 and 5.

Upon approval, they govern all future procedure and apply equally to pending actions and those commenced after their adoption: *Re* McKay v. Martin, 21 O. R. 104; Wright v. Hale, 6 H. & N. 227; Kimbray v. Draper, L. R. 3 Q. B. 160; Scott v. Wye, 11 P. R. 93. "No person who sues or is sued, on a cause of action which existed before the enactment as to procedure, has a vested right to have proceedings regulated by a particular method of procedure which the legislature has thought imperfect, and, therefore, has altered:" *per* Bowen, L.J., Turnbull v. Forman, 15 Q. B. D. 238.

(2) The Judges of the Supreme Court, or a majority of them of whom the President shall be one, may approve, disallow, or amend any such rules. Such rules to be approved of by the Judges.

The Judges of the Supreme Court have more than a power of assenting or dissenting. They may amend any rule or form framed by the board.

(3) The rules so approved shall be forwarded by the President to the Provincial Secretary who shall lay the same before the Assembly. Laying before Assembly.

(4) Notice that the rules so approved have been received by the Provincial Secretary shall be published in the *Ontario Gazette*, and from and after the first publication of the notice the rules shall come into operation and have the same force and effect as if they had been made and included in this Act. Notice of approval to be published in Gazette.

Sec. 226. The rules have no force till approved. After approval they have the same effect as if enacted by the legislature. They were first published in the *Ontario Gazette* of 28th March, 1914.

Expenses provided for. (5) The Lieutenant-Governor may direct the Treasurer of Ontario to pay out of the Consolidated Revenue Fund the expenses connected with the making, approval and printing of the rules. 10 Edw. VII. c. 32, s. 226.

Practice of the High Court may be followed in unprovided cases. **226.**—(1) In cases not expressly provided for by this Act or by the rules, the Judge may, in his discretion, adopt and apply the general principles of practice in the Supreme Court to actions and proceedings in the Division Courts.

Limitation as to costs. (2) Nothing herein contained shall authorize the taxation or allowance of costs to any officer of the court, other than those provided for by this Act, or in the tariff of fees authorized by the Board of County Judges. 10 Edw. VII. c. 32, s. 227.

Practice of the Supreme Court.—It is only in cases not expressly provided for in the statute or rules that the judges may apply the general principles of practice of the Supreme Court: Clark v. McDonald, 4 O. R. 310. And only the general principles of practice may be so applied.

Statutory enactments conferring powers upon or prescribing particular procedure for the Supreme Court, cannot be extended under this section to division courts. For instance, the provisions of the Consolidated Rules as to service upon corporations are not applicable to division courts: Ahrens v. McGilligat, 23 C. P. 171; *Re* Guy v. G. T. Ry. Co., 10 P. R. 372. Nor are the provisions as to discovery by examination and production of documents: *Re* Willing v. Elliott, 37 U. C. R. 220.

Those rules are rules of procedure applying only to the courts to which they are in terms made applicable: Bank of Ottawa v. McLaughlin, 8 A. R. 543; but see Wood v. Leetham, 61 L. J. Q. B., where it was said the practice of the High Court is to be followed when not inconsistent. In *Re* Jones v. Julian, 28 O. R. 601, it was said that the practice of the High Court, under this section, is applicable to trial by jury in the division court in so far as the right of the judge to submit questions to the jury is concerned; and the judge has now that right by section 144 (2).

General principles of practice may be applied, *e.g.*, the judges may exercise the same discretionary power as to allowing parties to sue *in forma pauperis* which the judges of the Supreme Court exercise: Chinn v. Bullen, 8 C. B. 447.

In the Supreme Court the granting or refusing of security for costs is purely discretionary and a matter of practice and not a rule of law or a decided right: *per* Cameron, J., *Re* Fletcher v. Noble, 9 P. R. 257; and a division court judge may, therefore, adopt the principles of the Supreme Court and order security for costs in proper cases: *Ib.*

The section will also authorize the appointment of a stranger to execute a warrant of execution or commitment against a bailiff, issued out of his own court, notwithstanding that the appointment of bailiffs is by section 22 vested in the Lieutenant-Governor. This is analogous to the appointment of elisors in the Supreme Court where a sheriff and coroner are interested: Bellamy v. Hoyle, L. R. 10 Ex. 220; see notes to section 221. Secs. 227, 228.

The principles of practice of the Supreme Court as to amendments may be applied to the division courts: *Re* White v. Galbraith, 12 P. R. 513.

Perhaps a judge of a division court would have power to order a married woman, against whom a judgment had been recovered, to appear and be examined for the purpose of discovering the particulars of her separate estate: See *Re* Stewart v. Edwards, 11 O. L. R. at p. 380. This could be done, perhaps, under the inherent power of the court to enforce its own judgments, if not by judgment summons: see Order 25, of the English County Court Rules of 1892: Ayleaford v. Great Western Ry. Co., 8 T. L. R. 786; 1892, 2 Q. B. 626; Metropolitan Loan & Savings Co. v. Mara, 8 P. R. 355; Pearson v. Esseery, 12 P. R. 466; *Re* Teasdill v. Brady, 18 P. R. 104; but see McLeod v. Emigh, 12 P. R. 450, and notes to ss. 190, 191, and cases cited there.

The powers conferred upon judges, under the Judicature Act, of setting aside verdicts of juries and entering judgments are not applicable to division courts: Pryor v. City Offices Co., 10 Q. B. D. 504; see also Cowan v. McQuade, 19 C. L. T. 108; Macnee v. Ontario Bank, 3 C. L. T. 360; Building & Loan Assn. v. Helmrod, 3 C. L. T. 361; "High Court Practice in Inferior Courts," 3 C. L. T. 374. See also R. v. Bayley, 8 Q. B. D. 411; *Re* Payne, 23 Ch. D. 288, as to stay of frivolous and improper actions.

The court in the exercise of its inherent powers can correct an error arising from an accidental slip or omission in its order: Cousins v. Cronk, 17 P. R. 348.

227. The existing rules made by the Board of County Judges, except in so far as they are inconsistent with the provisions of this Act, are hereby confirmed. 10 Edw. VII. c. 32, s. 228. Existing Rules confirmed.

The section providing that the rules are to continue in force was probably unnecessary, for notwithstanding the formal repeal of the Acts under which they were made, the revision really preserves them in unbroken continuity: License Commissioners of Frontenac v. County of Frontenac, 14 O. R. 741.

The rules now governing proceedings came into force on the 28th March, 1914 (see *The Ontario Gazette* of that date), and the rules then in force ceased to be operative. They apply to all proceedings begun after that date and to proceedings commenced prior to that date as far as necessary, if applicable, otherwise the former rules govern such last mentioned proceedings: Rule 1.

PROCEEDINGS NOT TO BE SET ASIDE FOR MATTERS OF FORM.

228. No proceedings shall be quashed or vacated for any matter of form. 10 Edw. VII. c. 32, s. 229. Defects in form.

Sec. 228.

Matter of Form.—Though an adjudication be informal, it will be upheld if it be a substantial decision of the cause: Oliphant v. Leslie, 24 U. C. R. 398; see also Crawford v. Beattie, 39 U. C. R. 28; *Re* Jones v. Julian, 28 O. R. 60.

For instances of formal defects, see *Ex parte* Vanderlinden, 20 Ch. D. 289; *Ex parte* Johnson, 25 Ch. D. 112; but see *Ex parte* Tindall, 6 De G. M. & G. 741; McMurray v. Northern Ry. Co., 22 Gr. 476.

Non-compliance with the rules shall not render any proceeding void, unless the judge so directs, but it may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge thinks fit: sections 97 and 104; Rule 35. Where a notice of motion has been irregularly given, but the opposite party has not been injured, the irregularity may be disregarded and the motion heard: Dawson v. Beeson, 22 Ch. D. 504. It is not to be treated as void: Petty v. Daniel, 34 Ch. D. 172, 180.

A judgment irregularly signed is not a mere non-compliance with the rules which may be remedied hereunder: Anlaby v. Prætorius, 20 Q. B. D. 764.

If a cause of action should be improperly joined with an action of replevin it would be an irregularity within this rule: *Re* Derbon, 36 W. R. 667.

A mere irregularity in practice is not a ground for prohibition: Field v. McIlhargey, 9 P. R. 327; Carter v. Smith, 4 E. & B. 696; Barker v. Palmer, 30 W. R. 59; *Re* Gerow v. Hoyle, 28 O. R. 405; and other cases cited in notes on Prohibition, *ante*.

See sections 97 and 104 and Rule 35 for provisions giving almost unlimited powers of amendment and adding or striking out parties.

Secs. 229-231.

PART II.

APPLICABLE ONLY TO PROVISIONAL JUDICIAL DISTRICTS.

TRIAL BY JURY.

Who liable to serve as jurors.

229. Unless exempt under *The Jurors' Act* all male persons between twenty-one and sixty years of age who reside in the division, and who are subjects of His Majesty by birth or naturalization, may be summoned to serve as jurors at any Division Court. 10 Edw. VII. c. 32, s. 230.

Who to select jurors.

230. The clerk and a Justice of the Peace resident in the division, or in case there is no Justice of the Peace so resident, then a Justice of the Peace residing in an adjoining division, shall select the persons to serve as jurors for the trial of actions required to be tried by or before a jury. 10 Edw. VII. c. 32, s. 231.

Sections 229 to 236 apply only to Provisional Judicial Districts.

As to the qualifications, exemptions and disqualifications of jurors see The Jurors' Act, R.S.O. 1914, c. 64, ss. 3, 4, 5, 6.

Deposit by person requiring.

231. The party applying for a jury shall deposit with the clerk for the expenses of such jury the sum of six dollars, and each juror who attends shall be paid by the clerk the sum of 50 cents. 10 Edw. VII. c. 32, s. 232.

When Entitled to a Jury.—Either party may require a jury in an action

(a) of tort or replevin, where the sum or value of the goods sought to be recovered exceeds $20;

(b) in other actions, where the amount sought to be recovered exceeds $30;

(c) in interpleader: section 130 and notes thereto.

Notice Required for Jury.—Plaintiff shall give notice to the clerk one week before sittings. Defendant or claimant shall give notice to clerk within five days after service of the summons on him and deposit the fees: section 131 (1).

In an action transferred from one court to another only three clear days' notice before the sittings is required: section 131 (2).

Clear Days.—In calculating clear days or where "at least" is mentioned, both days are excluded: Reg. v. Shropshire Justices, 3 A.

Secs. 232, 233.

& E. 173; Webster v. Leys, 3 C. L. T. 504; Rumobr v. Marx, 18 C. L. T. 444, 19 C. L. J. 10, 3 C. L. T. 31.

Even in a statuto wbere the time withln whicb an act is to be done is to run from a certain date or event the day of the date or evert must be excluded in tbe computation of tbe time: Goldsmitbs Co. v. Metropolitan Ry. Co., 1904 1 K. B. 1.

JURISDICTION.

Jurisdiction of Courts.

232. The courts, in addition to the jurisdiction conferred by Part I., shall have jurisdiction in personal actions otherwise within the jurisdiction of a Division Court where the amount claimed does not exceed $100. 10 Edw. VII. c. 32, s. 233.

"Personal actions:" see notes to section 62 (a). Except in a provisional judicial district under this section, unless all the parties consent thereto, tbera is jurisdiction only up to $60: section 62 (a) and (b).

"Personal actions" at common law were "actions where a man claims debt or other goods and chattels or damages for them or damages for wrong done to the person:" Terms de la Ley, 18; Attorney-General v. Churchill, 8 M. & W. 192; Whidden v. Jackson, 18 A. R. 440, 3 Bl. Com. 117. They comprise debt, covenant, detinue, trespass, replevin and trespass on the case; the last including all cases of wrong where the injury is not immediate or direct, but purely consequential or indirect: Scott v. Sbepberd, 2 Bl. 892; Hawkes v. Richardson, 9 U. C. R. at p. 232, 1 Sm. L. C. 737.

ORDER FOR ARBITRATION ON CONSENT.

Matters in dispute not over $800 may be referred by Judge with consent to arbitration.

233.—(1) The Judge may, with the consent in writing of the parties, order an action with or without other matters in dispute between the parties and within the jurisdiction of the court as to subject-matter, irrespective of amount if not exceeding $800, to be referred to arbitration to such persons, and in such manner and on such terms as he thinks just.

Consent in Writing.—Under section 164, the judge, with the consent of the parties or tbeir agents, may order a reference under this section. The consent must be in writing and may only be given by the parties. The subject matter must be within the jurisdiction, but must not exceed $800: compare section 164 (1).

Sections 164, 165, 166, 167, 168 apply, except where inconsistent witb section 233 (1): see notes to these sections.

Application of Part I.

(2) All the provisions of Part I. as to arbitration shall in other respects apply to a reference under this section. 10 Edw. VII. c. 32, s. 234.

TRIAL BY JUDGE ON CONSENT.

Secs. 234-236.

234. —(1) If the parties agree by writing signed by them to refer causes of action, claims and demands to a Judge and that he may try and determine the same, the Judge shall have power and jurisdiction so to do, if the subject matter in dispute does not exceed $800 in amount, and is otherwise within the jurisdiction of a Division Court. Parties may agree that the Judge shall try any matter not over $800.

(2) The agreement shall be in duplicate, and one of the duplicates shall be filed with the Judge and the other with the clerk of the court in which the action is to be tried, and the court shall thereupon have jurisdiction in respect of the matter referred. Submission to be made in duplicate.

(3) Upon the agreement being filed the plaintiff may enter his claim in such division, and sue out a summons thereupon as in ordinary cases, and the proceedings in the action may be conducted to judgment and execution, irrespective of the amount recovered if it does not exceed $800, in the same manner as other actions in such court. 10 Edw. VII. c. 32, s. 235. May be filed and proceedings thereon had to judgment in the Division Court.

APPEAL.

235.—(1) An appeal shall lie to a Divisional Court from a judgment under the next preceding section and from an order setting aside an award made pursuant to a reference made under the provisions of section 233. Appeal.

(2) The provisions of Part I. as to appeals shall apply to an appeal under this section. 10 Edw VII. c. 32, s. 236. Application of Part I.

236. Upon an application for a new trial, in an action wherein either party may appeal, personal service may be effected, or all papers requiring service may be delivered to the clerk of the court where the action was tried, or left at his office for the person entitled thereto, and the clerk shall forthwith send by registered post all such papers to the person entitled to the same or his agent. 10 Edw. VII. c. 32, s. 237. Service on application for new trial.

FORMS

(The following forms are the only forms given in the Statute. Further forms are given post, pp. 621 et seq.)

FORM 1.

(Section 26.)

[*See similar Form to Rules: Form 8, post.*]

COVENANT BY CLERK OR BAILIFF.

Know all men by these presents, that we *J. B.*, Clerk (*or* Bailiff *as the case may be*) of the Division Court, in the County (*or* United Counties *or* District) of *S. S.* of , in the said County or District of (*Esquire*), and *P. M.*, of (*Gentleman*) in the said County or District of do hereby jointly and severally for ourselves, and for each of our heirs, executors and administrators, covenant and promise that *J. B.*, Clerk (*or* Bailiff) of the said Division Court shall duly pay over to every person entitled to the same, all such moneys as he shall receive by virtue of the said office of Clerk (*or* Bailiff) and shall and will well and faithfully do and perform the duties imposed upon him as such Clerk (*or* Bailiff) by law, and shall not misconduct himself in the said office to the damage of any person being a party in any legal proceeding; (*in the case of a Clerk's Covenant insert*; and shall pay over to any Bailiff or Bailiffs of the Division Courts the fees to which he or they may become entitled under the tariff of fees, unless where the Clerk and the Bailiff otherwise agree in writing); nevertheless, it is hereby declared that no greater sum shall be recovered under this covenant against the several parties hereto than as follows, that is to say:

Against the said *J. B.*, in the whole, — dollars.
Against the said *S. S.*, in the whole, — dollars.
Against the said *P. M.*, in the whole, — dollars.

In Witness Whereof, we have to these presents set our hands and seals, this day of 19 .

Signed, sealed and delivered, in the presence of

FORM 2.

(Section 36, also referred to in section 35.)

[See similar form to Rules: Form 5, post, p. 624.]

PROCEDURE BOOK.

No. Division Court of the 19

Ensuing Sittings the day of 19

of vs. of

19

			No. of initial letter of item of tariff.	Bailiff	Clerk	$
		Received particulars of plaintiff's claim ( ) for $, and $ towards costs. Issued ( ) summons to Summons ret'd. Served the day of 19 , by miles. The defendant having been served with special summons and particulars of claim, and not disputing the same, it is adjudged that the plaintiff recover $ for debt, and $ for costs.				

Clerk.

FORM 3.

(Section 36.)

[See similar form to Rules: Form 6, post.]

FOREIGN PROCEDURE BOOK.

Division Court of the

No.

vs.

19

Received summons from County of Issued summons to Bailiff Summons ret'd. Served the by Ret'd to Clerk of County of	Division Court, Rec. Aff. day of Post. Division Court, Bailiff's fees Miles Ser. Att.	

(For forms of other books to be kept by clerks and bailiffs see post, pp. 621-626.)

FORM 4.

(Section 155.)

[This Form is for Garnishee Summons, before judgment has been obtained against the primary debtor. For Form of Garnishee Summons after judgment, see forms to Rules: Form No. 46.]

SUMMONS IN GARNISHEE PROCEEDINGS.

No. , A.D. 19 .

In the Division Court, of the County *or* District of

Between *A. B.*, Primary Creditor,
and
C. D., Primary Debtor,
and
E. F., Garnishee.

To the above named Primary Debtor and Garnishee:—

Take notice that the above named Primary Creditor claims from you, the Primary Debtor, dollars, as shown by his particulars of claim herewith. If the amount of the claim with lawful costs be paid to the clerk of this court within days from the service hereof upon you, the Primary Debtor, no further proceedings shall be taken.

Unless within days after the service of this summons on you, the Primary Debtor, you enter with the clerk of this court a notice in writing that you intend to dispute the claim, the clerk may enter judgment and issue execution against you.

In case you, the Primary Debtor, give such notice disputing the claim, the action will be tried at the sittings of this court to be held at in the said County or District of next after the expiration of days from the time this summons is served on you and the sittings of the court are set forth below.

Given under the seal of the court, this day of A.D. 19 .

G. H.,
Clerk.

NOTICES AND WARNINGS TO PRIMARY DEBTOR AND GARNISHEE.

No. 1. If the primary debtor disputes the primary creditor's claim, or any part of it, he must leave with the clerk within days after the day of the service hereof a notice to the effect that he disputes the claim, or if not the whole claim, how much he disputes, in default whereof final judgment may be signed for the whole claim, or such part as is not disputed at any time within one month after the return of the summons, or afterwards by leave of the Judge, without prejudice to the primary creditor's right to recover for the remainder of the claim.

No. 2. If the primary debtor desires to set off any demand or counterclaim against the primary creditor at the trial or hearing, or to take the benefit of any statute of limitations or other statute, notice thereof in writing together with the particulars of the set-off or counterclaim must be left with the clerk of the court and served on the primary creditor, or left at his usual place of abode, if he is living within the division, not less than five days before the day on which the action will be tried, and in case the primary creditor does not reside within the division such notice and particulars must be left with the clerk for him.

No. 3. On the day of trial the primary debtor must bring all the books and papers necessary to prove his case, or in any way connected with it or with his transactions with the primary creditor.

No. 4. Summonses for witnesses and the production of documents may be obtained at the office of the clerk upon payment of the proper fee.

No. 5. The ensuing sittings of the court will be held as follows, viz.:

At o'clock a.m., on Monday, the day of A.D. 19 , at o'clock a.m., on Tuesday, the day of , A.D. 19 , etc.

(*Here may be inserted the time of one or more subsequent sittings specifying the hour of the day of the week and month, plainly written in words at full length, and not expressed by figures or contraction of words.*)

No. 6. In any case in which an order may be made changing the place of trial, application must be made therefor to the judge of the court within eight days after the day of service hereof (where the service is required to be ten days before the return) or within twelve days after the day of such service (where the service is required to be fifteen days or more before the return).

No. 7. The garnishee is entitled to set up any statutory or other defence or set-off, or to dispute or admit liability in whole or in part, and the garnishee and all other persons interested in or in any way affected by the proceedings may also show any other just cause why the debt sought to be garnisheed should not be paid to or applied in or towards satisfaction of the claim of the primary debtor, and if they desire to do so they must file with the clerk notice thereof, with particulars of such defence or set-off, or an admission of the amount owing or accruing from them, or either of them, within eight days after the service of the summons.

No. 8. You, the said garnishee, are hereby notified that from and after the time of the service of this summons on you all debts owing or accruing from you to the above-named primary debtor, are attached, and if you pay the same otherwise than into court, you will be liable to re-pay it in case the court so orders.

No. 9. In the absence of any notice of such defence or set-off the judge may in his discretion give judgment against you or either of you.

If the debt sought to be garnisheed is for wages or salary add as follows:—

The debt alleged to be due by the Primary Debtor to the Primary Creditor was (*or was not as the case may be*) incurred for board of lodging.

And when the primary debtor is unmarried and has no family depending upon him for support, add

The primary debtor is an unmarried person having no family depending upon him for support.

No. 10. The primary debtor resides at the of , in the Province of Ontario, and his occupation is that of an engine driver (*or as the case may be*) on the railway of the garnishees (the Grand Trunk Railway Company of Canada) and is occupied as such on said railway between the cities of Toronto and Hamilton (*or as the case may be*).

NOTE.—*The following are forms of judgments on this summons:*

The Primary Debtor having been served with Summons and Particulars of Claim, and not disputing the same, it is adjudged that the Primary Creditor recover $ for debt and $ for costs.
19 . *Clerk,*

ON HEARING

It is adjudged, that the Primary Debtor is indebted to the Primary Creditor in $ debt, and $ costs to be paid in days. SECOND, that the Garnishee is indebted to the Primary Debtor in $ which, (to the extent of the two first mentioned sums) ought to be applied in satisfaction thereof. THIRD, that the Primary Creditor do recover against the Garnishee the said sum of $ in days in satisfaction as aforesaid:
Dated day of A.D. 19 .

Judge.

ON HEARING

It is adjudged that the Garnishee is indebted to the Primary Debtor in $ which ought to be applied in

satisfaction of the judgment herein dated the day of 19 , and that the Primary Creditor to recover against the Garnishee the said sum of $ in days, in satisfaction as aforesaid.

Dated the day of A.D. 19 .

Judge.

FORM 5.

(*Section 173.*)

EXECUTION AGAINST GOODS.

No.
A.D. 19 ,
In the Division Court of the Count or
District of

Between *A. B.*, Plaintiff,
and
C. D., Defendant,

Whereas on day of A.D. 19 , the recovered in the said court judgment against the for dollars for debt (*or* damages) and dollars for costs which remains unsatisfied (*when the judgment has been revived*, add, "and on the day of A.D. 19 , the said judgment was duly revived.") You are hereby required to levy of the goods and chattels of the in the said County or District (not exempt from execution) the said moneys amounting together to the sum of dollars and interest thereon at the rate of five per cent. per annum from the day of A.D. 19 , and your lawful fees so that you may have the same immediately after the execution hereof and pay same over to the Clerk of this Court for the

Given under seal of the Court, this day of
A.D. 19 .

X. Y.,
Clerk.

To *V. W.*
Bailiff of said Court.

Judgment .....$
Interest .....
Subsequent costs .....
This execution .....

Levy the sum of .....$

and your lawful fees upon this precept.

FORM 6.

(*Section 182.*)

EXECUTION AGAINST LANDS.

In the Division Court of the County or District of

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Whereas, on the day of , A.D. 10 , the plaintiff recovered in the said Court, judgment against the defendant for $ for debt, and $ for costs of suit, which remain unsatisfied (*when judgment has been revived, add* "and on the day of A.D. 10 , the said judgment was duly revived.") You are hereby required to levy of the lands and tenements of the defendant in the said county, the said moneys, amounting together to the sum of $ and interest thereon at the rate of five per cent. per annum, from the day of A.D. 10 , together with your own fees, poundage, and incidental expenses; so that you may have the same immediately after the execution hereof, and pay the same over to the Clerk of this Court for the plaintiff.

Given under the seal of the Court, this day of A.D. 19 .

Z. Y.,
Clerk.

To *V. W.*,
Sheriff of the County or District of

RULES OF COURT

We, the undersigned, Herbert Stone McDonald, Austin Cooper Chadwick, Alexander David Hardy, John Elley Harding and Edward Cornelius Stanbury Huycke, and James Bruce Macdonald, being the Board of County Judges appointed and authorized to frame General Rules and Forms concerning the Practice and Procedure of the Division Courts in the Province of Ontario, and the execution of the process of such courts: with power also to frame Rules and Orders in relation to the provisions of the Division Courts Act, and of any future or subsequent Act respecting such Courts, have, by virtue of the powers vested in us thereby and of all other powers enabling us in this behalf, framed the following Rules and Orders, and do hereby certify the same under our hands to the President of the Supreme Court of Ontario, to be by him submitted to the Judges of the said Supreme Court, according to law.

HERBERT S. McDONALD, *Chairman.*
County Judge, Leeds and Grenville.

A. C. CHADWICK,
County Judge, Wellington.

A. D. HARDY,
County Judge, Brant.

J. E. HARDING,
County Judge, Victoria.

E. C. S. HUYCKE,
County Judge, Peterborough.

J. B. MACDONALD,
Inspector of Division Courts.

RULES.

TIME OF OPERATION.

1. The rules of practice and the forms now in use in the several Division Courts shall, from and after the first publication in the *Ontario Gazette* of the notice required by subsection 4 of section 225 of the Division Courts Act, cease to be used, and in lieu thereof, the following shall, on and from such day, be the rules, orders and forms in force and used in said courts. But any action, process, order, judgment, or proceeding, pending, existing or in force in any Division Court at that time, shall not be thereby affected, but shall continue and remain, and so far as necessary, be proceeded with under these rules and forms, if applicable, or otherwise under the rules and forms hitherto in use, or as the Judge may direct.

Rules.—These Rules were made under the authority of section 224 of the Act.

The notice referred to in the above Rule 1, was first published in the Ontario Gazette of 28th March, 1914, and the Rules came into force on that day: section 225 (4).

INTERPRETATION.

2. In construing these rules and forms, unless otherwise declared or indicated by the context the following words shall have the several meanings hereby assigned to them over and above their several ordinary meanings, viz.:—

(1) The word "Act" shall mean the Division Courts Act.

(2) The word "party" shall mean a party to a suit or proceeding, and shall include every person served with notice of, or attending any proceeding, although not named in the summons or particulars of claim.

(3) The word "person" shall include any body corporate or politic or party, and the heirs, executors, administrators, successors or other legal representatives of such person.

(4) The word "oath" shall be construed as meaning and including a solemn affirmation or statutory declaration, and the word "sworn" shall include the words "affirmed" and "declared."

Oath, etc.—See R.S.O. 1914, c. 1, s. 29 (b).

(5) The words "Home Court" and "Home Division" shall mean respectively, the court and division from which process originally issued.

(6) The words "Foreign Court" and "Foreign Division" shall mean all courts and divisions other than the Home Court and "Home Division."

(7) Otherwise than as hereinbefore provided, The Interpretation Act of Ontario, the interpretation clauses of The Judicature Act and the Consolidated Rules of practice and procedure of the Supreme Court of Ontario shall apply to these rules and forms, unless there be anything repugnant thereto.

Interpretation Act.—This sub-section seems to be misplaced; the section presumes to interpret certain *words*, but this incorporates the Interpretation Act of Ontario, and the interpretation clauses of the Judicature Act, and presumably the interpretation clauses of the Consolidated Rules of Practice and not the whole of the Rules.

(8) The word "Process" shall include any summons, writ or warrant issued under the seal of the court.

(9) The word "mile" shall include fraction of a mile.

CLAIM AND PARTICULARS.

3. All actions shall be commenced by summons under the seal of the court, and signed by the clerk (Form No. 32) and shall be endorsed with or have attached thereto the plaintiff's claim as provided by the Act.

Seal.—See s. 7.

Plaintiff's Claim.—See s. 83, Forms 9-12.

4. Where the excess is not abandoned in the claim, the Judge may upon such terms as he shall see fit at any time thereafter, but before judgment, permit the abandonment, and an entry thereof shall be made in the proceedings.

Abandonment of Excess.—That is, in the case of a claim provided for by s. 62 (d) (iii).

5. Leave to bring an action under the 73rd section of the Act may be granted by the Judge, on production of an affidavit and in the summons it shall be stated "Issued by leave of the Judge."

Leave to Bring an Action.—That is, in case the plaintiff desires to bring the action in the division adjacent to that in which one of the defendants resides.

6. Where there are more defendants than one, and they reside in different counties, concurrent summonses may issue for service on the defendants residing out of the county in which the action is brought, but the costs only of the summonses actually served shall be allowed on taxation, unless the Judge directs otherwise; and such concurrent summonses shall correspond with the original, and be marked in the margin "Concurrent."

Note.—This is somewhat similar to the practice under C.R. 8, where one of the defendants is out of Ontario.

RENEWAL OF SUMMONS.

7. No original summons shall be in force more than twelve months from the day of the date thereof, including the day of the said date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Judge for an order renewing the summons for a further period of twelve months from the date of such order.

Renewing the Summons.—See notes to s. 87, p. 195.

(*a*) The clerk upon delivery to him of the Judge's order shall endorse upon the summons, "renewed by order of the Judge for 12 months from the day of ."

(*b*) In such case the original summons shall be available to prevent the operation of any statute whereby the time for the commencement of the action is limited, and for all other purposes, from the date of the original issue of the summons.

Statute of Limitations.—See notes to s. 113.

INTERPLEADER.

See sections 214 *et seq.*, and Forms 62-64.

8. When goods and chattels are seized or attached while in the possession of the claimant, the case shall proceed with the attaching creditor as plaintiff, and the claimant as defendant. In all other cases, it shall proceed with the claimant as plaintiff and the execution or attaching creditor as defendant.

9. The claimant shall, within five days after the day of service of the summons upon him, deliver to the bailiff, or leave

at the office of the clerk of the court, particulars of the goods, chattels, property or securities claimed by him, and the grounds and particulars of his claim, or, in case of a claim for rent, the amount and particulars thereof, provided that by consent of all parties, or without such consent, if the Judge shall so direct, an interpleader claim may be tried, although these rules may not have been complied with.

10. In case the claimant shall not have complied with the rule in respect of delivering particulars of his claim, the Judge may, upon such terms as he may direct, allow him to deliver the same.

11. On dismissal of a claim to any goods, chattels, property, or securities taken in execution or attached, the costs of the bailiff shall be allowed to him, unless the Judge shall otherwise order.

See notes to s. 215, p. 546.

(*a*) The Judge in his discretion may change the place of trial.

(*b*) In case it be alleged that there be an incumbrance or lien upon the property, or in case a claim is made thereto, under the Act, the bailiff shall forthwith give notice thereof to the party who issues the process, and should such party require the seizure to be maintained he shall within five days after such notice to him pay to the clerk a sum of money sufficient to secure to the clerk and bailiff their costs of an interpleader, and should he not pay such sum the bailiff may abandon the seizure and such party shall, unless the Judge otherwise direct, be barred, and he shall pay to the bailiff his costs.

(*c*) In case a claimant in whose possession the goods were when seized, so desires, he may deposit with the bailiff an amount equal to the value of the property seized or attached, or to the amount for which the seizure or attachment has been made, whichever shall be the lesser sum, to be by such bailiff paid into court to abide the decision of the Judge upon such claim, and thereupon the bailiff shall re-deliver the property to such claimant. In case of disagreement as to the value of the property seized or attached, the matter shall be decided by the clerk, subject to an appeal to the Judge.

12. The Judge may upon the application of a party to an action or matter pending in court and upon being satisfied that the goods, chattels, property or effects seized are of a perishable nature or that charges for food or keeping may be necessary, or for other good cause, make an order for the sale of the said property or of any part thereof.

REPLEVIN.

Replevin Act.—See The Replevin Act *ante*, and notes to section 92 (4): Forms of proceedings in replevin Nos. 38-45, 54.

13. No summons in replevin shall issue out of any Division Court:—

(1) Unless an order is granted for the summons on an affidavit by the person claiming the property, or some other person, shewing to the satisfaction of the Judge, the facts of the wrongful taking or detention which is complained of, as well as the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof, as the case may be.

(2) Or unless the person claiming the property, his servant or agent, makes an affidavit, which shall be entitled and filed in the court out of which the summons is to issue, stating:—

(*a*) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof, (describing the property in the affidavit).

(*b*) The value thereof, to the best of his belief.

(*c*) That the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession, within two calendar months next before the making of the affidavit.

(*d*) That the deponent is advised and believes that the claimant is entitled to the summons.

(*e*) And that there is good reason to apprehend that unless the summons is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect to the property.

(3) Or (in case the property was distrained for rent or damage feasant), unless the person claiming the property, his

servant, or agent, makes an affidavit (which shall be entitled and filed in the court from which the summons is to issue) stating:—

(*a*) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof (describing the property in the affidavit).

(*b*) The value thereof to the best of his belief.

(*c*) That the property was taken under colour of a distress for rent or damage feasant, and in such case the summons shall state that the defendant has taken and unjustly detains the property under colour of a distress for rent, or damage feasant as the case may be.

14. Where an application for an order is made, the Judge may proceed on the *ex parte* application of the plaintiff, or may direct notice to be served on the defendant to show cause why the summons should not issue, and may on the *ex parte* application, or on the return of the motion to show cause, grant or refuse the summons, and in case of the summons being granted may direct the bailiff to take a bond in double the value of the property, or may direct him to take and detain the property until the further order of the Judge, or may impose any terms or conditions in granting the summons, or in refusing the same, as under the circumstances may seem just.

15. In action of replevin, the first process shall be a summons in replevin (Form No. 41).

16. On entering a claim in replevin, the plaintiff shall specify and describe in the particulars of claim, the goods, chattels, property or effects distrained, taken or detained, and of the distress or other taking or detention of which he complains.

Form 40.

17. Subject to the Judge's order, the bailiff shall before acting on the summons, take a bond with two or more sufficient sureties, in double the value of the property to be replevied, as stated in the summons. The bond shall be assignable to the defendant; and such bond and assignment thereof may be in the words or to the effect in the Form No. 42.

The conditions may be varied to correspond with the summons.

Bond or Deposit.—Under C. R. 362, the plaintiff may instead of giving a bond pay into Court twice the value of the goods. As the taking of the bond is subject to the Judge's order, the Judge would seem to have jurisdiction to permit a payment into Court instead of giving a bond.

The bailiff is bound to see that the bond is sufficient to answer the damages recoverable, should the plaintiff fail: Norman v. Hope, 13 O. R. 556, 14 O. R. 287.

There must be two or more sufficient sureties; one sufficient and one insufficient surety would not do. An action will lie against the bailiff, if he refuses to assign the bond: Pocaud v. McEwan, 31 U. C. Q. B. 328.

An action on the bond will lie:—

(*a*) For not prosecuting the suit with effect, *i.e.*, unsuccessfully: see Welch v. O'Brien, 28 U. C. R. 405; Mulvaney v. Hopkins, 18 U. C. R. 174; Patterson v. Fuller, 31 U. C. R. 323, 32 U. C. R. 240;

(*b*) For delay in prosecuting: Belcher v. Brown, 24 U. C. R. 124; Churchill v. Denham, 29 C. P. 474; but see O'Donnell v. Duchenault, 14 O. R. 1;

(*c*) For non-return of the property if a return be adjudged: Patterson v. Fuller, 31 U. C. R. 323, 32 U. C. R. 240. As to damages: Norman v. Hope, 13 O. R. 556, 14 O. R. 287; as to solicitor and client costs: Williams v. Crow, 10 A. R. 301; see Rule 25.

18. In case the summons issues without an order, the bailiff shall take and detain the property and shall not replevy the same to the plaintiff without the order of the Judge in that behalf, but may, within fourteen days from the time of his taking the same re-deliver it to the defendant, unless in the meantime the plaintiff obtains and serves on the bailiff a Judge's order directing a different disposition of the property.

19. In case the property to be replevied, or any part thereof, is secured or concealed in any dwelling house or other building or enclosure of the defendant, or of any other person holding the same for him, and in case the bailiff demands from the owner or occupant of the premises delivery of the property to be replevied, and the same is not delivered to him within twenty-four hours after such demand, he may, and if necessary, shall break open such house, building or enclosure, for the purpose of replevying such property or any part thereof, and shall make replevin according to the summons.

Twenty-four Hours.—Notes to s. 62; also The Replevin Act, R.S.O. 1914, c. 69, s. 5, (set out in full in the notes to section 62, *ante*, p. 109), which differs from this Rule in important respects.

Sections 6 and 7 of The Replevin Act, also provide for breaking and entering the premises of persons other than the defendant; and also for searching the persons of the defendant and others

20. The bailiff shall with the summons file with the clerk a memorandum containing:—

(*a*) The names of the sureties in the bond, its date, the name or names of the witnesses thereto and the amount of the penalty contained therein.

(*b*) The residence and additions of the sureties.

(*c*) A list and description of the articles replevied; and in case he has replevied only a portion of the property mentioned in the summons, and is unable to replevy the residue by reason of the same having been removed or carried (*eloigned*) out of the county, or not being in the possession of the defendant, or of any other person for him, he shall state in his return the articles which he is unable to replevy, and the reason therefor.

21. The copy of the summons shall not be served upon the defendant until the bailiff has replevied the property or some part of it, if he cannot replevy the whole.

22. In case a summons of replevin is issued, or in case an order is made therefor, the defendant may at any time, on notice to the plaintiff, apply to the Judge on affidavit, to discharge or vary the summons or order, or to stay proceedings under the same, or for any other relief, to be specified in the notice, and the Judge may make such order as to him may seem meet.

23. In case the defendant has been duly served with a copy of the summons and statement of particulars, then, unless he has left with the clerk within the time mentioned in the summons a notice in writing that he intends to dispute the claim, the plaintiff may proceed with the action in the same manner as if the defendant had appeared and had admitted the plaintiff's right to the possession of the goods, and final judgment may be entered as if by default. But the Judge may, on sufficient grounds shewn, and on such terms as to costs and otherwise, as he thinks fit, let the defendant in to defend.

24. In case the plaintiff becomes entitled to sign judgment by default, he shall be at liberty to sign judgment for the sum of two dollars and costs.

25. Where the defendant succeeds, the judgment shall be for the return of the goods to him with such costs and damages as may be awarded.

GARNISHEE PROCEEDINGS.

Note.—See sections 146 *et seq.* and Forms 46-48.

26. Any person who wishes to avail himself of the benefit of the garnishee proceedings provided by the Act, may apply to the Judge for directions how to proceed. Upon such application the Judge may make such order as seems proper.

The procedure is pretty well defined by the Act and Rules, but cases frequently arise where directions are necessary, such as under s. 148, for the issue of a roving attaching order, s. 157 providing for other parties shewing cause why the debt should not be paid to the primary creditor: s. 162, adverse claims.

27. If the primary creditor is obliged to issue execution against the garnishee, the cost of such execution and the bailiff's fees thereon, shall be levied on the garnishee.

28. Where the summons is to be issued from any court other than that in which the primary creditor has obtained judgment against the primary debtor, a transcript of such judgment shall be filed with the clerk of such first mentioned court, previous to the issuing of the summons against the garnishee.

COUNTERCLAIM.

(See s. 113, and Form 15.)

29. Should the action of the plaintiff be stayed, discontinued or dismissed, or should he not appear, a counterclaim or set-off may nevertheless be proceeded with.

DEFENCE.

Notice Disputing Claim or jurisdiction: see notes to s. 98. Forms of defences, Nos. 13, *etc.*

30. A defendant's notice disputing the plaintiff's claim, or disputing the jurisdiction of the court, filed with the clerk,

must state in detail the grounds of such dispute and of his defence, with particulars (a copy of which notice shall be by the clerk forthwith transmitted to the plaintiff, his solicitor or agent) and in case the notice does not contain such statement of grounds the clerk may enter judgment in the plaintiff's favour upon the order of the Judge, or in case the grounds stated are frivolous or without merit, the Judge may, on the application of the plaintiff, and on notice to the defendant, order the defence to be struck out and judgment to be entered in the plaintiff's favour.

Grounds of Defence.—It is imperative that the dispute notice give in detail the grounds of the dispute of the jurisdiction and the grounds and particulars of the defence, failing which the clerk upon an order of the Judge may enter judgment.

If there is no merit in the defence, or it is frivolous, the plaintiff may on notice, move for judgment.

REVIVING JUDGMENT, ETC.

(See notes to ss. 173, 179.)

31. During the lives of the parties to a judgment, execution or other process may be issued at any time within six years from the recovery of the judgment. In case of death see the Act.

Note.—See s. 179.

32. In other cases execution or other process shall not issue without leave or order of the Judge, such order only to be made after at least three days' notice to the party against whom it is sought to issue execution, unless the Judge shall otherwise direct, and there shall be endorsed on the execution the words:—"Issued by leave of the Judge." The Judge, instead of making such order, may direct an issue on questions necessary to be determined, to be tried upon such terms as to him may seem just.

Other Cases.—Where any change has taken place in the parties entitled or liable to execution (see C.R. 566), at least three days—clear days: Rex v. Shropshire Justices, 3 A. & E. 173; Webster v. Leys, 3 C. L. T. 504; Rumohr v. Marx, 18 C. L. J. 444; 3 C. L. T. 31; see also C.R. 173, s.-s. 2.

JUDGMENT DEBTORS.

(See notes to s. 190.)

33. A judgment debtor residing more than three miles from the place of examination, when summoned for examination

shall be paid or tendered, when summoned, the sum of seventy-five cents for his attendance, and ten cents for each mile from his place of residence to the place of sitting of the court. Such payment to be costs in the cause, unless otherwise ordered by the Judge.

Mileage.—A judgment debtor living over three miles from the place to which he is summoned, is entitled to be paid seventy-five cents and ten cents per mile one way; unless he were paid or tendered the amount, he should not be ordered to be committed.

WARRANT OF COMMITMENT.

(See notes to s. 191.)

34. Warrants of Commitment shall bear date on the day on which the order for commitment is made, and shall continue in force for six calendar months from such date and no longer, unless renewed by an order of the Judge made upon affidavit, showing the cause of non-execution, and that the moneys payable thereunder have not been satisfied, and such renewal may be for a period not exceeding six calendar months.

Renewal.—There can only be one renewal: Section 191, notes on pp. 512, 515.

AMENDMENTS AND CHANGE OF PARTIES.

(See notes to ss. 97 *et seq.*)

35. In any case wherein it appears to the Judge that a party defendant has been improperly added for the purpose of giving the court jurisdiction or colourable jurisdiction over a cause of action, to the prejudice or inconvenience of another defendant or party, the Judge may, in his discretion, strike out the name of such party improperly added and disallow all costs that may have been incurred by making him a defendant, and allow to him such costs as have been incurred by reason of his having been made such defendant.

Note.—Section 97 gives the Judge wide power to strike out or add parties; see notes to that section.

INFANTS.

(See notes to s. 66.)

36. An infant who applies to enter a suit for any cause of action other than for wages, or work or services, or is a claimant

in an interpleader proceeding, shall procure the written authority of a next friend (form No. 72), and shall file the same with the clerk at the time of entering the suit, and the cause shall proceed in the name of the infant by such next friend.

Infant or Minor.—See s. 66, an infant must sue or make a claim in an interpleader proceeding by a next friend; the only exception is where the action is for wages or work or services.

FORMS AND PROCEEDINGS.

37. All proceedings, books and documents, shall be in the prescribed forms to the rules appended.

Forms.—Additional Forms to those so approved have been added by the compilers of this book, and are printed in Italics.

(*a*) Any printed forms or books which with the approval of the Inspector of Division Courts have been used previous to the framing and approval of these rules, may be used, unless and until the Inspector shall otherwise order.

38. All summonses, executions and warrants, shall be printed on half sheet foolscap paper.

PAYMENT INTO COURT.

(See ss. 111, 112.)

39. In an action of Detinue the defendant may with a tender of the subject of the action for the detention whereof the action is brought, pay money into court as compensation for damages for the detention thereof, and for injury caused thereto, or either or both, with costs of the action.

The payment should be made not less than six days before the day appointed for the trial: s. 112.

40. The Judge may upon application of any party to an action or matter, and upon such terms as he may deem proper, make an order for the detention, preservation, inspection, surveying, or measuring of any property or thing being the subject of such action or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid may authorize any person to enter upon or into any land or building in the possession of any party to such action or matter, and for all or any of the purposes aforesaid, may authorize any persons to

enter upon or into any land or building in the possession of any party to such action or matter, and for all or any of the purposes aforesaid may authorize samples to be taken, or observations, plans, or models to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

Inspection, etc., of Subject Matter.—This is taken from C.R. 370; see also C.R. 266.

Inspection of property: Keyes v. McKeon, 23 O. L. R. 529; Shaw v. Smith, 18 Q. B. D. 193; Lamb v. Beaumont, 27 Ch. D. 356.

Mineral trespass: Right of Way Mining Co. v. La Rose Mining Co., 14 O. L. R. 80.

Inspection of samples: Munn v. McConnell, 7 C. L. T. 109.

Preservation of subject of action: Velati & Co. v. Braham & Co., 46 L. J. C. P. 415.

Photographs: Lewis v. Londesborough, 1893, 2 Q. B. 191.

Experiments: Badische Anilin v. Levinstein, 24 Ch. D. 156.

41. When by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Judge may make an order for the preservation or interim custody of the subject matter of the litigation, or may order that the amount in dispute be brought into court or otherwise secured.

AFFIDAVITS AND OATHS.

(See notes to s. 120.)

42. Every affidavit shall be divided into numbered paragraphs, and shall state concisely such matters and facts as may be necessary to truly inform the court.

43. Every affidavit shall be drawn in the first person stating the name of the deponent at the commencement in full, and his description and true place of abode, and shall be signed by him, and in any proceeding in the court must be entitled in the court and cause (if a cause has been commenced) stating the names in full of the parties as in the summons.

Note.—Full name, abode and occupation is required.

44. In every affidavit made by more than one deponent, the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents be taken at one time by the same officer, it shall be

sufficient to state that it was sworn by all the above named deponents.

45. Affidavits shall be confined to the statement of facts within the knowledge of the deponent, but on interlocutory motions, statements as to his belief, with the grounds thereof, may be admitted.

Grounds of Belief.—C.R. 293; to the same effect, see Eng. (1883), R. 523.

The grounds of statements made on belief must be stated, but not the means of knowledge, for positive allegations: Bidder v. Bridges, 26 Ch. D. 1; Quartz Hill Con. Gold Mining Co. v. Beall, 20 Ch. D. 501; Edwards v. Davison, W. N. (1888), 59.

An affidavit of information and belief founded on statements made to deponent by an informant, who declined to repeat them on affidavit, unless subpœnaed, was not admitted, as the informant might have been but was not subpœnaed: *In re* Anthony Birrell Pearce & Co., Doig v. Anthony, 1899, 2 Ch. 50.

If the affidavit fails to disclose the grounds of the information and belief, it is not evidence, and need not be answered: *Re* J. L. Young Mfg. Co., 1900, 2 Ch. 253; Niemenen v. Dome Mines, 4 O. W. N. 301; see Gilbert v. Stiles, 13 P. R. 121; Robinson v. Morris, 15 O. L. R. 649.

46. Where an affidavit is sworn by a person who appears to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, who seemed perfectly to understand it, and signed it in his presence, otherwise such affidavits shall not be used without leave.

Jurat.—C.R. 296, see Eng. (1883), R. 533.

Form of jurat to such affidavit: No. 30 (n).

Where the affidavit did not appear to have been read over in the presence of the Commissioner, it was taken off the files: Blenkham v. Longslaffe, 52 L. T. 681: 54 L. J. Ch. 516.

47. For ordinary affidavits in a cause the general heading and conclusion given in the prescribed form shall be used.

Prescribed Form.—No. 16.

48. An affidavit having in the jurat or body thereof any interlineation, alteration or erasure shall not be used without leave, unless the interlineation, alteration or erasure is authenticated by the initials of the officer taking the affidavit.

Interlineations, etc.—C.R. 295, Eng. (1883), R. 532. A line drawn through words is an erasure: Williams v. Clough, 1 A. & E. 326.

If the interlineation is not initialled by the Commissioner, it should not be read without leave: Boyd v. McNull, 9 P. R. 493; see *Re* Cloche, 65 L. T. 455, 61 L. J. Ch. 69.

No alteration can properly be made after the affidavit is sworn; see W. N. 1882, Pt. 2, 81.

49. Oaths and affirmations administered to witnesses in open court or upon any *viva voce* examination before the Judge and to jurors and others may be in the forms prescribed.

Forms of oaths and affidavits: Nos. 16 and 30.

50. An affidavit sworn before the solicitor of the party on whose behalf it is made, or before the clerk or partner of such solicitor, shall not be used except by leave of the Judge.

Solicitor, etc., not to take Affidavits.—C.R. 297, see Eng. RR. (1883), 536, 537.

Section 120 (2) also bars affidavits sworn before the "agent" of the party or before the "clerk or partner of such agent."

This Rule and s. 120, s.-s. 2, only applies to affidavits in actions or proceedings in Court: Canada Perm. v. Todd, 22 A. R. 515.

ACTIONS PENDING IN ANOTHER COURT FOR SAME CAUSE.

51. Where, at the trial, it shall appear that an action for the same cause at the suit of the same plaintiff is pending in another court, the Judge may order the trial to stand adjourned until the determination of the action so pending in the other court.

INSPECTION OF DOCUMENTS.

(See notes to s. 114.)

52. The Judge may, upon application of any party to an action or matter, upon notice, and upon such terms as he may deem proper, make an order for the production and inspection of any books, writings, instruments, or documents, relating to or affecting the question in issue, and in the possession, power, custody or control of any other party to the action or matter, at such time and place as he may appoint, and in default of such production for inspection as so directed, the Judge may in his discretion exclude such books, writings, instruments or documents from being given in evidence in such action or matter.

Note.—Production and inspection can only be obtained by order of the Judge made after notice.

FEES AND COSTS.

Counsel Fees.

(See ss. 170, 171, 172.)

53. Where in a contested case for more than $100 an agent has been employed by the successful party in the conduct of the

cause or defence, the Judge shall not direct a fee to be taxed pursuant to the Act, unless such agent is a barrister or solicitor.

Counsel Fee.—This limits the scope of s. 171; only a barrister or solicitor is allowed a counsel fee.

54. A case shall be considered "contested":—

(*a*) Where a defence is put in, disputing a claim for more than $100, and a counsel or solicitor has been retained to prosecute or defend the claim in court at the sitting, and the case comes for trial, whether an actual contest is made at the court or not.

(*b*) Where a defence is put in, disputing a claim for more than $100 and a counsel or solicitor has been retained to make an application under the Act and an order is made therein by the Judge empowering the clerk to enter final judgment.

(*c*) Where a defence is put in, disputing a claim for more than $100 and a counsel or solicitor has been retained to prosecute the claim in court and the defendant afterwards and before the opening of the court, confesses judgment, or pays or settles the claim.

(*d*) Where a defence is put in, disputing a claim for more than $100, and the defendant has retained a solicitor or counsel to defend the action for him in court, and the plaintiff does not prosecute his action.

Officers' Fees.

(See ss. 47, 48, 224 (3).)

55. The fees set forth in the tariff marked "Schedule of clerks' fees" and "Schedule of bailiffs' fees" shall be the fees to be received by the several clerks and bailiffs, on and after the day that these rules shall come into force for and in relation to the duties and services to be performed by them as officers of the said courts, and shall be in lieu of all other fees heretofore receivable for the same proceedings.

See Tariffs, *post*. Form 1.

56. In case an attachment has issued against an absconding debtor, or an execution issued against the property of a judgment debtor, and a plaintiff or defendant, judgment creditor or other person interested in the claim, judgment or execution,

insists upon the bailiff making an attempt to find property, he shall deposit with the clerk the amount of bailiff's fees and mileage, and provided a *bona-fide endeavour* has been made by the bailiff to secure such property, he shall be entitled to such fees and mileage, subject to appeal to the Judge.

Attachment.—See "Absconding Debtor," s. 199 of statute.

57. Letters enclosing any papers sent from one Division Court officer to another, or to a party to a suit, or to the Judge, unless otherwise provided for in the Act or by these rules, shall be prepaid and registered; postage stamps for return postage shall in all cases be enclosed to the Judge. The costs of postage and registration shall in all cases be costs in the cause.

58. Either party may deposit the judgment of an appellate court duly certified with the clerk of the Division Court, and upon being so deposited, such judgment may be enforced as if it had been made by such Division Court.

Appellate Court.—See "Appeal," s. 125.

59. A new trial in pursuance of the judgment of an appellate court shall be entered for trial at the sitting of the Division Court, which shall be holden next after twelve clear days from the time when such judgment, or a certified copy thereof, shall have been deposited as aforesaid, unless the Judge otherwise orders.

New Trial after Appeal.—See notes to s. 125.

BOARD OF COUNTY JUDGES.

(See ss. 224, 225.)

60. Regular meetings of the Board of County Judges, when necessary, may be held upon the call of the Chairman, or of any two members of the Board.

ABSCONDING DEBTORS.

(See ss. 199-213, and Forms 18-22, 37, 77.)

61. In all cases where an attachment shall issue (whether the suit be commenced by attachment in the first instance or not), unless the defendant shall have been personally served, the hearing or trial shall not take place until one month after the

seizure under the attachment, unless the Judge shall otherwise order.

62. When several persons sue out warrants of attachment against an absconding, removing, or concealed debtor, each one of such attaching creditors may enter a defence, set-off or counterclaim, and call and examine, and cross-examine witnesses as to any debt or claim proved or attempted to be proved against the debtor, or as to such set-off or counterclaim, in the same way and to the same extent as the debtor himself might do, were he personally to appear and defend the suit on any ground whatever.

Any Attaching Creditor has the right to dispute the claim of any other attaching creditor.

63. Before issuing an attachment against an absconding, removing or concealed debtor, it shall be the duty of the clerk to see that immediately following the statement in the affidavit of the amount due to the attaching creditor, the cause and subject of such indebtedness is properly set forth according to prescribed form No. 19.

Issuing Attachment—Clerk's Duty.—It is incumbent on the clerk to see that the Act is complied with as to the cause and subject of the indebtedness, but this would not relieve the plaintiff, as he must compiy with the Act.

64. In case several judgments have been recovered against an absconding debtor, it shall not be necessary to issue execution upon each such judgment; but one execution against the property seized upon the attachment shall issue for the sale thereof, to satisfy the judgments of those creditors, and so much of such property as shall be sufficient to satisfy the said judgment and costs, may be sold thereunder, or if the property has been previously sold as perishable, enough of the proceeds may be applied by the clerk to satisfy such judgments and costs, without execution.

Several Judgments.—The judgments would necessarily have to be in the same court. It is submitted that if a transcript was issued from another court the clerk could include it in the amount to be levied under the execution.

NEW TRIAL.

(See s. 123, Form 74.)

65. Application for new trial may be made *viva voce,* and determined on the day of hearing, if both parties be present; but

otherwise it shall be in writing, and show briefly the grounds on which it is made, which grounds, if matters of fact requiring proof, shall be supported by affidavit.

New Trial.—The application may be made *viva voce* at or after the trial on the day of hearing, if both parties be present; otherwise it must be in writing.

(*a*) A copy of the application and of every such affidavit, shall be served by the party making the same on the opposite party or his solicitor or agent, or left at his usual place of business, if within the division; or if without the division, then with the clerk.

(*b*) The application and affidavits (if any), together with an affidavit of the service thereof, shall be delivered to the clerk, who shall forthwith on receiving the fees and necessary postage, transmit to the Judge all papers in the suit, which delivery to the clerk shall operate as a stay of proceedings, until the Judge's final decision on the application is communicated to the clerk, unless the Judge shall otherwise order.

Admission of Service.—If an admission of service by the solicitor of the opposite party is endorsed on the application it would not be necessary to have an affidavit of service. Unless the Judge otherwise orders, the delivery to the clerk of the application and affidavit with proof of service, operates as a stay of proceedings.

(*c*) The Judge may refuse the application, or hold the same undisposed of, upon such terms as he may see fit to impose upon the applicant, until the opposing party shall have had opportunity of answering the same.

(*d*) Any answer to the application shall be made in writing, and shall, with affidavits in support thereof, if any, be delivered to the clerk within six days after receipt of the notice of such application, who shall forthwith transmit the same to the Judge. The Judge, upon receiving said papers, shall dispose of the application.

(*e*) The Judge, before deciding the same, may hear the parties on the matter of such application at the next sitting of the court, or at such other time or place as he may appoint. The decision of the Judge shall be delivered to the clerk, or transmitted to him by mail, and such clerk shall notify the parties thereof, by mail or otherwise, and if a new trial be granted, the suit shall be tried at the next sitting of the court, unless the Judge shall otherwise order.

(*f*) If the application be refused, or if the party complying shall fail to comply with the terms imposed by the Judge, the proceedings in the suit shall be continued as if no application had been made.

Complying.—This should read "applying," and is apparently a typographical error. If the Judge imposes terms and they are not complied with, the order for new trial drops and execution or other process could be issued.

CLERK'S DUTIES.

(See ss. 22, *et seq.*)

66. The following books shall be kept by the Clerk, and the necessary entries made therein in a neat and proper manner, viz:—

(1) A book to be called the "Procedure Book" (at the commencement of which shall be an alphabetical index, such index to be ruled and lettered suitable to the size of the book), in which shall be entered a note of all process issued, and of all orders, judgments, transcripts received and issued, warrants, executions and returns thereto, and all other proceedings.

Form 5.

(2) A book to be called the "Cash Book," the pages to be numbered, in which shall be entered from day to day, an account of all suitors' moneys paid into and out of court.

Form 1.

(3) A book to be called "Foreign Procedure Book," for the purpose set forth in the Act.

Form 6.

(4) A "Fee Book," as provided by the Act, in which shall be entered from day to day all fees and emoluments received by him by virtue of his office.

Form 2.

(5) An "Order Book," in which all orders for the issuing of executions, transcripts, etc., shall be entered.

Form 4.

(6) A "Judgment Debtor's Index" (which shall be found with the index to the Procedure Book), in which shall be

entered the date upon which each judgment debtor was examined and discharged, together with the number and style of the cause, as provided by the Act.

Form 3.

67. The clerk shall enter in the Procedure Book the full amount of moneys returned by the bailiff, with an execution, and shall show therein the amount which he has taxed and paid the bailiff as his fees for executing the same.

68. All the papers in the cause received or filed by the clerk shall be kept by him, together with the original summons, and be produced at the hearing of the cause, or on application to the Judge.

69. Every clerk, upon being paid his proper fee and necessary postage, is required to answer promptly all reasonable enquiries made touching suits by the parties thereto, their solicitors or agents.

Proper Fee.—Every necessary letter written to any party to any cause, matter or proceeding in the court, 15c.: Item 31 of Tariff.

70. The clerk shall not withhold any moneys received from suitors, except for unpaid costs in the action in which such moneys are recovered.

Clerk's Duties as to Suitors' Moneys: Section 42.—Immediately after the receipt of any sum of money for any person, the clerk shall forward a notice thereof by registered post to the person entitled to receive the same, and file the registration certificate among the papers.

Under s. 41, the Judge may require the clerk to furnish him with a full account in writing, verified by affidavit, of the moneys paid into or out of court under orders, judgments or process of the court, and of the balance in court belonging to suitors. If the clerk or bailiff fail to pay over to every person entitled to the same all such moneys as he shall receive by virtue of his office or should not well and faithfully do and perform the duties imposed upon him, there would be a breach of his covenant: See s. 26, Form 1.

71. Where money is received by the clerk on a suit entered by a solicitor or agent, who has paid the deposit or is responsible for the costs to the clerk, such money shall not without notice to such solicitor or agent, be paid out to the person beneficially interested therein, unless upon the order of the Judge.

Note.—This assumes that the clerk may pay the person beneficially entitled after notice to the solicitor or agent, without an order of the Judge.

72. The clerk shall in the case of courts held in cities and towns at least once in three months and in all other cases, at every sitting of the court report in writing to the Judge as to the several sureties of himself and the bailiff or bailiffs of the court, showing whether any of them have died, become insolvent or left the county, since his last report, or, if bonded by a Guarantee Company, the date of the renewal of the bond, and mention any facts in connection therewith, that ought to be made known to the Judge.

See ss. 27, *et seq.*

73. On payment of a fee of ten cents and necessary postage the clerk, when required by the parties paying costs, shall give a statement in writing of items thereof, including bailiffs' fees.

74. Every judgment and order of the court shall be entered by the clerk in the Procedure Book, and when an order is made for the payment of any debt, damages, costs, or other sum of money, the same shall be payable at the office of the clerk.

75. The clerk shall determine (subject to appeal to the Judge), what witness fees shall be allowed on taxation of costs; and before allowing disbursements to witnesses, the clerk shall be satisfied that they attended, and shall be furnished with an affidavit of disbursements in the prescribed form No. 29.

Witness Fees.—See ss. 122, 172, *ante*, and Tariff of Witness Fees, *post*.

All witnesses should be paid before taxation and only the sums actually paid are taxable: Ham v. Lasher, 24 U. C. R. 357. Where it is discovered that fees have been allowed on a false affidavit, and nothing has been paid, they may be disallowed: Harding v. Knust, 15 P. R. 80; Howick v. Romney, 11 C. L. T. 390.

76. In case of process or papers received for service or execution from a "Foreign Court," the clerk shall, on returning the same, give a full and correct statement in detail of the items of all charges made for fees and disbursements, and the clerk of the Home Court shall report to the Inspector of Division Courts any charges in excess of the fees allowed by the tariff.

See ss. 2 (6), 37.

77. It shall be the duty of the clerk upon receipt of a notice of appeal from the decision of a Justice of the Peace, to make an entry in the Procedure Book, as is done in case of an ordin-

ary suit, and to give to the parties to the appeal a notice in writing of the date of the two next sittings of the court.

Appeals shall be entered in the docket at the foot of the list.

Appeals from Justices' Convictions.—See notes to ss. 125-129, and notes.

78. When a notice required to be given to any of the parties to a suit is sent through the post-office the clerk shall register such notice, and shall obtain and preserve with the papers in the suit a certificate of such registration.

79. In case the plaintiff has signified in writing his intention to proceed with the action the clerk shall notify the defendant by post or by sending notice to his usual place of abode or business, and such notice shall state when and where the cause is to be tried.

Proceed with the Action.—See s. 111 and notes.

80. In case the proceedings in any suit shall be hindered or delayed by the neglect or misconduct of a clerk or bailiff, such clerk or bailiff shall forfeit all fees in such suit and shall, in addition thereto, pay any loss or damage that may result from such hindrance or delay to the parties suffering therefrom.

See s. 219 and notes.

81. A clerk shall not take or receive any money from any person unless a suit has been commenced in his own court against such person or the claim is actually in his hands for suit, or a transcript of judgment against such person has been sent to him from some other court.

Note.—This prohibits the clerk from acting as a debt collector.

82. The entries of proceedings on a transcript under the Act may be made in the Procedure Book of the court to which it has been sent in the form of an ordinary suit, or as near as may be.

Transcript.—See s. 188 and notes.

83. Where a plaintiff or defendant is substituted or added, or there is a change of parties, the Procedure Book shall show the same by proper entries, and the cause may thereafter be entered in a new place in the Procedure Book, retaining the original year

and number, and all subsequent proceedings are to be carried on under the altered title with the same year and number.

Adding Parties, etc.—See s. 97 and notes.

Under the Supreme Court practice in the subsequent proceedings the title of the revived action is added to the original style: Miller v. Huddlestone, W. N., 1881, 171; Scear v. Lanson, 16 Ch. D. 121. This provides that all subsequent proceedings are to be carried on under the altered title.

84. The plaintiff, at the time of entering his claim for suit, and the defendant or other party, at the time of giving notice of set-off, counterclaim or other defence, shall give the clerk his address or that of his solicitor or agent, and the delivery of any notice to such plaintiff, defendant or other party, his solicitors or agent, or the mailing thereof by the clerk to such address, shall be sufficient service.

85. The renewal of writs of execution may be made from time to time before the expiration thereof by the clerk of the court issuing the same, by marking on the margin of the writ a memorandum to the following effect:—

"Renewed for six months from date hereof."
"Dated day of 19 . "X. Y., Clerk."

(Note.)—This form is to be printed on the execution.

Renewal of Execution.—See s. 180 and notes.

Executions are in force for one month, but may be renewed from time to time for six months at a time.

86. Judgment summons cases shall be entered at the foot of the trial list in the order in which the summonses for examination were issued.

Judgment Summons.—See s. 190 and notes.

87. Whenever a notice claiming an interest in an action or proceeding other than that of the plaintiffs or defendants has been give to the clerk, he shall at once notify the parties to the action or their agents.

88. Renewal of a warrant of commitment shall be made by the clerk on the margin of the warrant by endorsing thereon:—

"Renewed by Judge's order for calendar months from the day of A.D. "X. Y., Clerk."

(Note.)—This form is to be printed on the warrant.

89. All moneys are payable to the parties at the office of the clerk without the payment of any fee whetever. In case a party desires that money shall be transmitted to him, he shall give to the clerk written directions as to the mode of transmission, and in the ebsence of such directions the clerk shell not in any case trensmit moneys to suitors. All necessary expenses incurred in transmission of moneys shall be borne hy the perty to whom trensmitted, and may be deducted by the clerk.

Where Suitors' Moneys Payable.—This is a very important Rule. The clerks only keep suitors' moneys till called for in the absence of written directions as to the mode of transmission. If solicitors desire prompt returns from the clerk, it would therefore be wise to give such written directions.

90. The list of unclaimed moneys required hy the Act shall be madc under oath. and copies shall be sent to the Treasurer of the Province and the Inspector.

91. Every clerk shall, in the month of January in eech year, make a statement in detail of the money in his hands and forward the same to the Inspector.

Bailiff's Duties.

92. The book or books to be kept by thc bailiff shall be in such form as the Inepector shell direct.

See Form No. 7 *post*, of Bailiff's Book.

93. The bailiff shall at all reasoneble times give to e party interested such reasonable information as he may reqnire respecting any process in his hands.

94. The bailiff shall attend every sitting of the court, and shall see that ell suitahle preparations and accommodations are madc therefor. He shall make all proclamations, prescrve order, call the parties and witnesses, and perform such other duties as mey be imposed hy the Judge.

95. The hailiff shall return an execution within the thirty days prescribed hy the Act, unless it has heen renewed, or unless the seizure has been so recent that he has heen unable to realize thereon, in which letter case hc shall report to the clerk, who shall notify the execution creditor thereof.

96. In case the bailiff has been unable to effect a sale for a reasonable amount, he shall return the execution "property on hand for want of buyers."

97. If an execution is returned, "property on hand for want of buyers," the clerk shall, at the written request of the execution creditor, issue another execution, directing the bailiff to sell the property on hand for what it will bring.

98. The whole of the money realized shall be paid over by the bailiff to the clerk, who shall forthwith after taxation pay the bailiff his proper fees and disbursements.

Bailiff not to Retain Fees.—The bailiff is not permitted to retain his fees, but must pay the whole of the money to the clerk, who in turn pays the bailiff his fees after taxation.

99. Every bailiff receiving any money by virtue of his office shall immediately after the receipt thereof pay over the same to the clerk.

Immediately Pay Over.—As the bailiff receives money by virtue of his office, he shall at once pay it to the clerk so that suitors will be informed of the payments made: See s. 42 and Rules 70, 71, and notes.

100. The bailiff receiving an execution shall immediately endorse on the same a statement of the day and the hour of the day when he received such execution, and in addition to the formal return in the prescribed form, on every execution returned he shall give a statement of the particulars of all his fees and disbursements in the execution thereof, and give a similar statement in making returns of writs of replevin and warrants of attachment.

101. In the case of courts held at cities and towns at least once in each half-year, or oftener, if so directed by the Judge, and in other cases at every sitting and at such other times as the Judge shall require, the bailiff shall deliver to the clerk of the court for submission to the Judge, a statement or return on oath in the prescribed form, of every warrant and writ of execution in his hands, and of what has been done since his last return, under any warrant and writ of execution which he shall have been required to execute.

Bailiff's Returns.—In cities and towns the return must be made at least once every half-year and in other places at every sitting, and at such other times as the Judge requires.

102. The return mentioned in the last rule shall be filed by the clerk in his office, and shall without fee be open to the inspection of any person interested; and the clerk shall examine the return, and if it be found correct and complete, shall within ten days after the receipt thereof endorse thereon a memorandum in the following words: "I have carefully examined the within return, the same is full, true and correct in every particular, to the best of my knowledge and belief. Dated the day of 19 . Clerk." If no such return is made, or if when made it be found by the clerk to be incorrect or incomplete, he shall forthwith notify the Judge.

Suitors may Inspect Return.—Suitors or their solicitors or agents are entitled to inspect the return, and from it may ascertain what has been done under any execution or warrant.

103. A bailiff shall not take or receive money from any person except as payment on an execution or warrant of commitment in his hands against such party.

Bailiff's Fees.—See ss. 52, 220. The clerk or bailiff may only take such fees as are provided by the tariff.

104. When a warrant of commitment is issued, the defendant may at any time before his body is delivered into the custody of the gaoler, pay to the bailiff the amount endorsed on the warrant, as that on the payment of which he may be discharged, and the bailiff shall forthwith give a receipt therefor. On receiving such amount, or at the request of the judgment creditor in writing, the bailiff shall discharge the defendant, and shall within twenty-four hours after receiving such amount pay over the same to the clerk of the court who issued the warrant.

105. When a summons has not been served in time for the sitting of the court mentioned therein, the bailiff shall return the same to the clerk for insertion of the dates of the two next ensuing sittings, and the clerk shall return the same to the bailiff immediately.

106. In case such summons has been sent to a Foreign Court the bailiff shall return it to the clerk of that court for transmission to the clerk of the Home Court, who shall add the notices above provided for.

DIVISION COURT TARIFF.

Fees to be received by the several Clerks and Bailiffs of Division Courts.

Form I.

Clerk's Fees.

1. Receiving claim, numbering and entering in procedure book ..... (This item to apply to entering in the procedure book a transcript of judgment from another Court, but not an entry made for the issue of a judgment summons.)	$0 25
2. Issuing summons, with necessary notices and warnings thereon, or judgment summons (as provided in forms) in all.	
Where claim exceeds $10 and does not exceed $20.	50
Where claim exceeds $20 and does not exceed $60.	60
Where claim exceeds $60 and does not exceed $100	80
Where claims exceed $100..... (N.B.—In replevin and interpleader suits the value of goods to regulate the fee.)	1 50
3. Copy of summons, including all notices and warnings thereon	25
4. Copy of claim (including particulars), when not furnished by plaintiff	25
5. Copy of set-off or counterclaim or notice of defence (including particulars), when not furnished by defendant ..... (Note.—In either of the last two preceding items the fee may be taxed against the party ordered to pay costs.)	25
6. Receiving and entering bailiff's return to any summons, writ or warrant issued under the seal of the Court (except summons to witness and return to summons or paper from another division).....	15

7. Taking confession of judgment $0 10
(This does not include affidavit and oath, chargeable under item 8.)

8. Every necessary affidavit, if actually prepared by the clerk, and administering oath to the deponent... 25

9. Furnishing duly certified copies of the summons and notices and papers with all proceedings, for purposes of appeal, as required by either party, per folio of 100 words 05

10. Certificate therewith 25

11. Certifying under seal of the Court and delivering to a judgment creditor a memorandum of the amount of judgment and costs against a judgment debtor, or garnishee, under The Creditors' Relief Act, or for any other purpose 25

12. Copies of papers, for which no fee is otherwise provided, necessarily required for service or transmission to the Judge, each 10
If exceeding two folios per folio 05

13. Every notice of defence or admission entered, or other notice required to be given by the Clerk to any party to a cause or proceeding, including mailing, but not postage 15

14. Entering final judgment by Clerk, on special summons, where claim not disputed.
Where claim does not exceed $60..... 50
Where claim exceeds $60..... 75

15. Entering every judgment rendered at the hearing, or final order made by the Judge.
Where claim does not exceed $60..... 50
Where claim exceeds $60 75
(Note.—This fee does not apply to any proceeding on judgment summons.)
(These fees shall include the service of recording at the trial and afterwards entering in the procedure book the judgment, decree and order in its

entirety, rendered or made at the trial. If a garnishee proceeding before judgment, these fees will be allowed for the judgment in respect to the primary debtor, and like fees for the adjudication, whenever made, in respect to the garnishee.)

16. Subpœna to witness $0 25
(The subpœna may include any number of names therein, and only one original subpœna shall be taxed, unless the Judge otherwise orders.)

17. For every copy of subpœna required for service.... 10

18. Summons for jury (including copy for each juryman), when required by parties 1 25

19. Calling and returning jury ordered by the Judge.. 25

20. Every order of reference, or order for adjournment, made at hearing, and every order requiring the signature of the Judge, and entering the same, including final order on judgment debtor's examination .....
(Any warning necessary with order form part of the order.) 25

21. Transcript of judgment to another Division Court.. 50

22. Every writ of execution, warrant of attachment or warrant of commitment and delivering same to bailiff.
Where claim does not exceed $60..... 50
Where claim exceeds $60 and does not exceed $100 75
Where claim exceeds $100..... 1 00

23. Renewal of every summons or writ of execution, when ordered by the judgment creditor, or warrant of commitment, when ordered by the Judge 25

24. Every bond, when necessary, and prepared by the Clerk (including affidavits of justification and of execution) 1 00

25. Transmitting transcript of judgment; or transmitting papers for service to another division; or to the Judge, on application to him, including neces-

sary entries and mailing, but not including postage $0 25

26. Receiving papers from another division for service, entering the same, handing to the bailiff, receiving and entering his return and transmitting the same (if return made promptly, not otherwise).. 30

27. Search by person not party to the suit or proceeding, to be paid by the applicant 10
Search by party to the suit or proceeding, where the suit or proceeding is over one year old..... 10
(No fee is chargeable for search to a party to the suit or proceeding, if the same is not over one year old.)

28. Taxing costs, in defended suits, after judgment pronounced 25

29. Making out statement of costs in detail (including bailiff's fees) at the request of any party..... 10
(Neither item 28 or 29 applies to statement of costs endorsed on summons or copy to be served.)

30. Taxing bailiff's costs, under section 179 of the Act 25
(Now s. 178.)

31. Every necessary letter written to any party to any cause, matter or proceeding in the court 15
(A letter shall not be considered necessary when a notice contains the same information.)

2.—BAILIFF'S FEES.

1. Service of summons issued under the seal of the Court, or Judge's summons or order on each person, except summons to witness and summons to juryman:
Where claim exceeds $10 and does not exceed $20 $0 40
Where claim exceeds $20 and does not exceed $60 50
Where claim exceeds $60 and does not exceed $100 75
Where claim exceeds $100 ..... 1 00
(In interpleader suits the value of the goods to regulate the fee.)

2. For every return as to service under item 1; attending at the clerk's office and making the necessary affidavit $0 15

3. Service of summons on witness or juryman, or service of notice 25

4. Taking confession of judgment and attending to prove 10

5. For calling parties and their witnesses at the sitting of the court, in every defended case, and at the hearing of every judgment summons..... 15

6. Enforcing every writ of execution or summons of replevin, or warrant of attachment or warrant against the body, each:
Where claim does not exceed $20..... 65
Where claim exceeds $20 and does not exceed $60 1 00
Where claim exceeds $60..... 1 50

(Where goods replevied, the value of goods to regulate the amount of the fee. This fee does not include service of summons in replevin on defendant.)

Fees under Creditors' Relief Act (see section 188 of 10 Edw. VII., cap. 32; and section 26 of R.S.O., cap. 48, 9 Edward VII.) shall be taxed according to the tariff.

Note.—"Section 188" is now s. 187 of the Act, and "section 26," etc., is intended to be 9 Edw. VII., c. 48, s. 26, and R.S.O. 1914, c. 81, s. 26.

7. Every mile or fraction of a mile necessarily travelled to serve summons, or process, or other necessary papers, or in going to replevy goods, or to seize on attachment, or in going to seize on a writ of execution, where money paid on demand, or made on execution, or case settled after seizure..... 15

8. Mileage going to arrest under warrant, when arrest made, per mile 15

9. Mileage carrying delinquent to prison, including all expenses and assistance, per mile, or fraction of a mile 25

10. Every schedule of property seized, attached, or replevied, including affidavit of appraisal, when necessary:

Exceeding $10 and not exceeding $20	$0 30
Exceeding $20 and not exceeding $60	50
Exceeding $60	75

11. Every bond, when necessary, when prepared by the bailiff, including affidavit of justification and execution 1 00

12. Every notice of sale, not exceeding three, under execution, or under attachment, each 25

13. Reasonable allowances and disbursements, necessarily incurred in the care and removal of property:

(*a*) If a bailiff removes property seized, he is entitled to the necessary disbursements, in addition to the fees for seizure and mileage.

(*b*) If he takes a bond, then to $1.00, instead of disbursements for removal of property.

(*c*) If assistance is necessary in the seizure, or securing, or retaining of property, the bailiff is entitled to the disbursements for such assistance.

(*d*) All charges for disbursements are to be submitted to the clerk for taxation, subject to appeal to the Judge.

(*e*) The bailiff must in all cases endorse a memorandum of all his charges on the back of the execution, or state them on a separate slip of paper, so that the clerk may conveniently tax the bailiff's charges for fees and disbursements.

(*f*) The Clerk in all cases to sign the memorandum of his taxation and preserve it among the papers in the cause, together with the execution, for future reference, and thereby enable the clerk to certify the bailiff's returns properly.

14. If execution or process in attachment in the nature of execution be satisfied in whole or in part, after seizure and before sale, whether by action of the

parties or otherwise, the bailiff shall be entitled to charge and receive 3 per cent. on the amount directed to be levied; or on the amount of the value of the property seized, whichever shall be the lesser amount.

15. Poundage on executions, and on attachments in the nature of executions, 5 per cent., exclusive of mileage for going to seize and sell, upon the amount realized from property necessarily sold.

3.—FEES TO WITNESSES AND APPRAISERS.

Allowances to Witnesses.

Attendance, per diem, to witnesses within three miles of the place where the Court is held, if within the county	$0 75
And if without the county	1 00
Attendance, if witness resides over three miles from the place of sittings and within the county, per diem	1 00
Attendance, if witness resides without the county and more than three miles of the place of sittings, per diem	25
Barristers and solicitors, physicians and surgeons, engineers and veterinary surgeons, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give professional opinions, per diem	4 00

(Note.—Disbursements to surveyors, architects and professional witnesses, such as are entitled to specific fees by statute, are to be taxed, as authorized by such statute.)

Professional and Expert Witnesses.—See notes to s. 170, as to witness fees to surveyors, architects, professional and expert witnesses, and witness fees generally.

If witnesses attend in one case only, they will be entitled to the full allowance.

If they attend in more than one case, they will be entitled to a proportional part in each case only.

The travelling expenaes of witnesses, over threc miles, shall be allowed according to the suma reasonably and actually paid, but in no case shall exceed 20 centa per mile, one way.

Mile.—The word "mile" in the tariff includes "fraction of a mile:" Rule 3 (9)

FEES OF APPRAISERS.

Fees to Appraisers of Goods, etc., Seized under Warrant of Attachment.

To each appraiser, $1.00 per day, during the time actually employed in appraising goods—to be paid in the first instance by plaintiff and allowed as costs in the causc.

FEES IN SUITS NOT EXCEEDING $10.

(Section 48 D.C. Act.)

Clerk.

For all services, from entering action, or suing out a jndgment or interpleader snmmons, up to and including the entering of final judgment, or final order on any such jndgment or interpleader summons, in case the action proceeds to judgment or final order $1 25

In case the action does not proceed to judgment or final order, the fees heretofore, or that may hereafter be payable, bnt not exceeding in the whole sum.

For issning writ of execntion, warrant of attacbment, or warrant for arrest of delinqnent and entering the return thereto 50

Bailiff.

For all services rendered in serving summons and making return, and any other service that may be necessary before the judgment is entered by the clerk or pronounced by the Judge, mileage excepted.. $0 50

For enforcing execution, schedule of property seized, or attached, bond, when necessary, and all other necessary acts done by him, after seizure, mileage excepted, if money made or case settled, after levy 1 00

(Necessary disbursements incurred in the care and removal of property shall be allowed to be first taxed by the clerk, subject to the approval of the Judge.)

FORMS

[NOTE.—*Of the following Forms, those printed in ordinary type are provided and authorized by the Rules; while those printed in italics have been added by the compilers.*]

FORM 1.

[*See notes to section 36, and Rule 66 (2).*]

RECEIPTS. CLERK'S CASH

Suitors' money paid into the Division Court in the County of for the commencing 19 .

When received, D. 19	Style of Cause.	No. of Suit and Year.	From whom Received.	When paid out by the Clerk.	Signature of person to whom paid.	Amount.
April 1...	Bird v. Fish..	100, 19	Bailiff.....	April 2	James Bird...	94 48

BOOK.

EXPENDITURES.

Suitors' money paid out of the Division Court in the County of for the commencing 19 .

When paid out.	Style of Cause.	No. of Suit and Year.	To whom paid or how remitted.	Amount.
April 2.....	Bird v. Fish.....	100, 1893	Plaintiff.....	94 48

[This book is to be paged.]

2. Clerk's Fee Book.

[See Rule 66 (4) and notes to section 36.]

From . to 19 .

FEE.	Rate.	Monday.		Tuesday.		Wednesday.		Thursday.		Friday.		Saturday.		Aggregate.	
		No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.	No.	Amount.
	$ cts.		$ cts.		$ cts.		$ cts.		$ cts.		$ cts.		$ cts.		$ cts.
1. Receiving Claim	0 25														
2. Issuing Summons	50 60 80 1 50														
3. Copy of Summons	25														
4. Copy of Claim	25														
5. Copy of Set-off or defence	25														
6. Receiving and entering Bailiff's return	15														
7. Taking confession of judgment	10														
8. Every necessary Affidavit	25														
9. Furnishing duly certified copies	05														
10. Certificate therewith	25														
11. Certifying under seal of the Court	25														
12. Copies of papers, for which no fee is otherwise provided	10														
If exceeding two folios, per folio	05														
13. Every notice required to be given by the Clerk	15														

14. Entering final judgment by Clerk	50 75											
15. Entering every judgment rendered at the hearing	50 75											
16. Subpœna to witness	25											
17. For every copy of subpœna	10											
18. Summons for jury	1 25											
19. Calling jury ordered by the judge	25											
20. Every order of reference	25											
21. Transcript of judgment to another Division	50											
22. Every writ of execution	50 75 1 00											
23. Renewal of every writ of execution	25											
24. Every bond, when necessary	1 00											
25. Transmitting transcript of judgment	25											
26. Receiving papers from another division	30											
27. Search	10											
28. Taxing costs after judgment	25											
29. Making out statement of costs	10											
30. Taxing bailiff's costs	25											
31. Every necessary letter	15											
Totals			$		$		$		$		$		$	

NOTE.—The No. in the left hand column refers to the No. in the Schedule of Clerk's Fees, where the items are given in full.

[See schedule of fees, ante, p. 611.]

3. Form of Judgment Debtors' Index.

[See notes to section 36, and Rule 66 (6).]

Name of Debtor. (Surname first.)	Date when the Examination took place.	Number and the style of the Cause in which he was examined.
Brown, Henry.....	16th January, 19	38, 19 , Hiblert v. Brown.
Brawberg, Joseph	4th March, 19	39, 19 , Filchett v. Brawberg.
Benson, Patrick	16th February, 19	41, 19 , Platt v. Benson.

[Note.—This Index to be bound up in the Home Procedure Book—at the back.]

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4. Form of Order Book.

[See notes to section 36, and Rule 66 (5).']

Date, 19 .	(If Cause existing or Judgment signed.] Style of Cause.		Process or proceeding to be issued or taken.	Signature of Party or Solicitor.
Jan. 12th, 19 .	Smith v. Jones,	No. 76, 19	Issue execution.	H. Smith.
Feb. 6th, "	Henry v. Jeffrey,	" 17, "	Issue subpœna..	B. Henry.
" 9th, "	Jackson v. Jones,	" 29, "	Enter judgment.	B. Bell, Solic'r
" 19th, "	Peter v. Bray,	" 14, "	Issue alias exec'n	Geo. James, Agent.

Form 5.

[See notes to section 36, and Rule 66 (1); also similar form in Forms to Statute, ante.]

Procedure Book.

Division Court of the

No. 19 .

Ensuing Sittings of the day of 19 .

vs.

of of

19 .

		No. of initial letter of item of tariff.	Bailiff	Clerk	$
	Received [illegible] claim ($ [illegible] Issued ([illegible] Summons [illegible] of [illegible] The defendant having [illegible] with special [illegible] ticulars of claim [illegible] ing the same, it is adjudged that the plaintiff recover $ [illegible] for costs.				

Clerk.

FORM 6.

[See notes to section 56, and Rule 66 (3); also similar form in Forms to Statute, ante.]

FOREIGN PROCEDURE BOOK.

No. Division Court of the

vs.

19 . Amount of claim, .. $

	Received summons from County of Issued summons to Bailiff Summons ret'd. Served the by Ret'd to Clerk of County of	Division Court, Rec. Aff. day of Post. Division Court, Bailiff's fees Miles Ser. Att.			

7. Form of Bailiff's Book.

[See Rule 92.]

BOOK OF GEO. SMITH, BAILIFF OF THE 1st DIVISION COURT OF THE COUNTY OF BRANT.

Number of Court wherein the Process issued.	Number of the Cause.	Style of Cause.		Nature of Process.	When Received.		Amount of Claims.	When Executed.		Amount of Bailiff's Charges.	Miles necessarily travelled.	Amount Paid to Clerk.	When Paid.		Clerk's Signature.	Remarks.
		Plaintiff.	Defendant.		Month.	Day.		Month.	Day.				Month.	Day.		

8. Covenant by Clerk or Bailiff.

[*Section 26; see similar form, No. 1, to Statute.*]

Know all men by these presents, that we, *J. B.*, Clerk (*or* Bailiff *as the case may be*) of the Division Court, in the County (*or* United Counties or District) of , In the said County (*or* District) of *S. S.*, of (*Esquire*), and *P. M.*, of (*Gentleman*) in the said County or District of do hereby jointly and severally for ourselves, and for each of our heirs, executors and administrators, covenant and promise that *J. B.*, Clerk (*or* Bailiff) of the said Division Court shall duly pay over to every person entitled to the same, all such moneys as he shall receive by virtue of the said office of Clerk (*or* Bailiff) and shall and will well and faithfully do and perform the duties imposed upon him as such Clerk (*or* Bailiff) by law, and shall not misconduct himself in the said office to the damage of any person being a party in any legal proceeding; (*in the case of a Clerk's Covenant insert*: and shall pay over to any Bailiff or Bailiffs of the Division Courts the fees to which he or they may become entitled under the tariff of fees, unless where the Clerk and the Bailiff otherwise agree in writing); nevertheless, it is hereby declared that no greater sum shall be recovered under this covenant against the several parties hereto than as follows, that is to say:

Against the said *J. B.*, in the whole, — dollars.
Against the said *S. S.*, in the whole, — dollars.
Against the said *P. M.*, in the whole, — dollars.

In Witness Whereof, we have to these presents set our hands and seals, this day of 19 .

Signed, sealed and delivered,
in the presence of

[*The bond must be executed by the clerk or bailiff, as well as the sureties; and the following forms of affidavit of execution and justification must be annexed.*]

---

8 (a) Affidavit of Execution of Bond.

(*Section 26.*)

Province of Ontario,
County of Huron.

I, Albert William Jones, of the Town of Goderich, in the County of Huron, Carpenter, make oath and say as follows:

1. That I am the person whose name is subscribed to the hereto annexed instrument as a witness to the execution thereof, and that the signature "A. W. Jones" set and subscribed thereto as such attesting witness is of my own proper handwriting and that my name and addition are correctly set forth above.

2. That I was personally present and did see the said instrument executed by John Brown, Samuel Smith and William Alfred Mitchell, the parties thereto.

3. That I am well acquainted with all the said parties.

Sworn before me at the Town of Goderich in the County of Huron this day of A.D. 19 . } *A. W. Jones.*

A Commissioner, etc. (or a Justice of the Peace) for the said County of Huron.

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8 (*b*). AFFIDAVIT OF JUSTIFICATION BY SURETIES.

(*Section 26.*)

Province of Ontario,
County of Huron.

I, Samuel Smith, of the Town of Goderich, in the County of Huron, Contractor, one of the sureties in the hereunto annexed instrument named, make oath and say as follows:

1. That I am the owner in fee simple of real estate in the Province of Ontario of the actual value of (state value) dollars over and above all charges upon and incumbrances affecting the same; and that the said real estate consists of lands, tenements and premises following, with the appurtenances, that is to say: lot number in the concession of the Township of in the County of (fill in the description).

2. That the said property is not incumbered (or if incumbered, state amount, etc).

3. That I am a freeholder in the said County of and reside at (state place of residence).

4. That exclusive of household effects, I am worth (state amount).

Sworn before me at the in the County of this of day of A.D., 19 . } *Samuel Smith.*

A Commissioner, etc. (or a Justice of the Peace) in and for the said County of .

NOTE.—*A similar affidavit is required to be made by the other surety.*

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9. PARTICULARS OF CLAIM AND DEFENCE, INCLUDING COUNTERCLAIMS.

[*See Section 83 and Rules 3 and 84.*]

Particulars in Cases of Contracts.

No. A.D. 19 .

A. B., of , claims of C. D., of , the sum of $, the amount of the following account, viz.:—

(*Here give the account in reasonable detail, stating dates, items and sums.*)

Or, The amount of the note (a copy of which is underwritten), together with the interest thereon.

Or, For that the said *C. D.* promised (*here state shortly the promise*), which undertaking the said *C. D.* hath not performed.

Or, For that the said *C. D.* by deed, under his seal, dated the day of , A.D. 19 , covenanted to, etc., and that the said *C. D.* hath broken said covenant whereby the said *A. B.* hath sustained damages to the amount aforesaid.

Or, For money agreed by the said *C. D.* to be paid by the said *A. B.* together with a horse of the said *C. D.* in exchange for a horse of the said *A. B.*, delivered by the said *A. B.* to the said *C. D.*

Or, For that the said *C. D.*, by warranting a horse to be then sound and quiet to ride, sold the said horse to the said *A. B.*, yet the said horse was not then sound and quiet to ride.

Or, For that the said *C. D.*, in consideration that the said *A. B.* would supply *E. F.* with goods on credit, promised the said *A. B.* that he, the said *C. D.*, would be answerable to the said *A. B.* for the same to the extent and value of $75, that the said *C. D.* did accordingly supply the said *E. F.* with goods to the price of $59 and upwards:—

Or, Butcher's ment supplied to you, full particulars entered in your pass book from time to time, from 27th August, 1889, to 12th September, 1890. $24.75.

Or A. B., of claims of *C. D.*, of executor (*or* administrator) of the estate of *E. F.*, late of deceased, the amount of the following account (*here give particulars of the claim*).

And the plaintiff says that the said deceased left assets and property to the amount of $, and that the defendant has wasted the said assets and property come into his hands to be administered, by reason whereof the defendant has become legally bound to pay the amount of the said claim and costs out of his own property.

(*a*) On a Guaranty.

A. B., of , in the county of , claims against *C. D.* of , in the county of , as principal, and against *E. F.*, of , in the county of , as surety (or guarantor) $100 for the price of goods sold by *A. B.* to *C. D.*

The following are the particulars:

Guaranty by *E. F.* of the price of *woollen* goods supplied to *C. D.* as follows:

1889, February 2,	To goods (give details)	$25 00
March 3,	To goods (give details)	10 00
March 17,	To goods (give details)	65 00
	Total	$100 00

(*b*) On Promissory Note against Maker.

A. B., of , in the county of , claims against *C. D.* in the county of , as maker of a promissory note payable to *E. F.* or bearer (*or* order, *as the case may be*) of which plaintiff is the holder.

The following are the particulars:

To promissory note, dated 1st January, 1890	(principal)	$50 00
Interest from to	at %	3 39
	Total	$53 39

(c) On a Promissory Note Against Maker and Endorser.

Same form of commencement as (a) (*ante*), against *C. D.*, of , in the county of , as maker, and *E. F.*, of , in the county of , as endorser, of a promissory note (here state particulars as in form (*b*) *ante*).

(d) On a Bill of Exchange Against Acceptor and Drawer.

A. B., of , in the county of , claims against *C. D.*, of , in the county of , as acceptor, and against *E. F.*, of , in the county of , as drawer of a bill of exchange.

The following are the particulars:

Bill of Exchange for $75, dated 1st January, 1889, drawn by the said *E. F.* upon and accepted by the said *C. D.*, payable three months after date.

Principal	$75 00
Interest from to at % ..	2 75
Total	$77 75

(e) On a Bill of Exchange Against Acceptor.

A. B., of , claims of *C. D.*, of , in the county of , as acceptor of a bill of exchange.

The following are the particulars:

Bill of exchange, drawn by Amas Bentley, endorsed to plaintiff, accepted by you, due 17th June, 1890, for.....	$29 00
17th December, to Interest, 6 months	0 87
Total	$29 87

(f) On a Bond.

A. B., of , in the county of , claims on *C. D.*, of , in the county of , $79.40 for principal and interest due upon a bond due to *A. B.*

The following are the particulars:

Bond dated 1st January, 1889, condition for payment to *A. B.*, of $70 on the 26th December, 1889.

Principal due	$70 00
Interest from to at %....	9 40
Total	$79 40

(g) On a Covenant.

A. B., of , in the county of (same as above form (e) substituting the word "covenant" for "bond") to *A. B.*

The following are the particulars:

Deed dated 26th January, 1889, covenant to pay $70 and interest to *A. B.*

Principal due	$70 00
Interest from to at %....	9 40
Total	$79 40

10. PARTICULARS OF PLAINTIFF'S CLAIM IN ACTIONS OF TORT.

A. B., of , claims from *C. D.*, of , $60 for damages.

For that the said *A. B.* has suffered damages from personal injuries to the said *A. B.* and damages to his carriage and harness, caused by the said *C. D.* (*or* his servant) on the 15th January, 1892, negligently driving a wagon and horse on Talbot Street, Southwold.

Particulars of Expenses.

Charges of Dr. VanBuskirk, surgeon	$25 00
Charges of Mr. Jones, carriage-maker	10 00
Charges of Robert McCully, harness-maker	5 00
	$40 00
Personal injuries	20 00
The said *A. B.* claims	$60 00

Or *For that the said *C. D.* deprived the plaintiff of and converted to his own use the following goods of his, viz.:

Sept. 10, 1889—One table-cloth	$3 00
One piano	50 00
A lot of chairs	7 00
Total	$60 00

Or *For illegally distraining his goods at No. 67 Charles Street, Toronto.

Or *For illegally arresting and imprisoning him at Colborne Street, Brantford.

Or *For that the said *C. D.* did on or about the day of , A.D. 19 , at the township of , unlawfully [break and injure a wagon of the said *A. B.*] or [falsely represent *L. O.* as fit to be trusted, the said *C. D.* at the same time knowing that the said *L. O.* was insolvent, whereby the said *A. B.* was induced to give him credit] or [assault and beat the said *A. B.*] (*or as the case may be, stating the tort sued for in concise language*).

Any of the foregoing forms of particulars of causes of action may be used as forms for counterclaim, reversing the names of parties.

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10. (*a*) PARTICULARS IN CASES OF DETINUE.

A. B., of , states that *C. D.*, of , on the day of , A.D. 19 , unlawfully detained from the said *A. B.* his goods and chattels, that is to say, a horse named "Spectacles," also a harness and sulky.

The said *A. B.* claims a return of the same or their value, and $ for their detention.

11. Particulars of Claim in Action for Damages to Lands by Flooding.

Note.—This applies only to cases of claims not exceeding $20, under R. S. O. 1014, c. 86, s. 15, and only to the County of Hallburton and the Electoral Districts of East Victoria, East Peterborough, North Hastings and North and South Renfrew: see s. 3 of above Act.

1. For that the defendant constructed a drain and flooded 4 acres of the plaintiff's lands, being Lot No. , in the concession, and thereby has done damage to the plaintiff to the extent of $20, of which damages the following are the particulars:

4 acres of land rendered useless	$10 00
Value of crop of oats on the land	10 00
Total	$20 00

A. B.,
Plaintiff.

---

12. Particulars in Actions Against a Clerk or Bailiff and his Sureties.

(*Section 26.*)

No. , A.D. 10 .

Henry Bray, of , claims of John Noakes, Clerk (*or* Bailiff) of the Division Court for the County of , and of E F , of , and G L , of (sureties for and parties with the said John Noakes to a covenant for the due performance of the duties of his said office) the sum of for moneys had and received by the said John Noakes as such Clerk (*or* Bailiff) as aforesaid, in a certain cause in the said Division Court, wherein the said Henry Bray was plaintiff, and one H S was defendant, to and for the use of the said Henry Bray, the payment whereof the said John Noakes unduly withholds. And also (*stating in like manner any other similar claim*)—[*or* the sum of for damages sustained by the said Henry Bray through the misconduct (*or* neglect) of the said John Noakes in the performance of the duties of his said office: For that on the day of , at (*describe in ordinary language the neglect or misconduct, whereby the damage was occasioned*)].

Henry Bray.

[*For particulars in cases of Replevin, see Form No. 40, post.*]

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13. Defences.

[*See Sections 78, 98, 111 and 113, and Notes.*]

Title of Court and Style of Cause.

Take notice that I will admit, on the trial, the first, second and third items of the plaintiff's particulars to be correct (*or* the signing or endorsement of the promissory note sued upon) (*or as the case may be*) or,

Take notice that I dispute the claim of the plaintiff (*or here specify all or any of the grounds of defence, statutory or otherwise, set forth in the form for clerk's notices*).

Dated this day of , A.D. 19 .

X. Y.

To the clerk of the Court and to the said plaintiff.

[NOTE.—*Rule 30 requires that in a notice disputing the claim or the jurisdiction of the Court, detailed grounds, with particulars, must be given.*]

In actions against an executor or administrator: [*See notes at p. 332, ante.*]

(1) The defendant does not admit, but denies the plaintiff's claim.

Or (2) The defendant admits the plaintiff's claim, but not the assets.

Or (3) The defendant admits assets, but not the plaintiff's claim.

Or (4) The claim is barred by the Statute of Limitations.

Or (5) Payment was made by deceased.

Or (6) The claim is fraudulent in the following particulars.

(Here set out particulars briefly.)

Or (7) The defendant is entitled to a set-off, of which the following are the particulars.

(Here show particulars.)

Or (8) The claim was released by deed dated the day of , 19 .

Or (9) Notice was given and assets distributed under Revised Statutes of Ontario.

Particulars of the notice:

Advertisement in the *Chronicle* newspaper, of January 10th, 1890; *Toronto Mail*, 5th January, etc.

(Here set forth the titles of the papers and dates of issue in which the advertisements were inserted.)

(Sgd.) A. B.,
Defendant.

Or (*10*) *Take notice that I dispute the jurisdiction of this Court, the cause of action if any not having arisen within this division; or the claim being one in which the right or title to land (or incorporeal hereditament) is in question; or the claim being for spirituous liquor drunk in a tavern, and the defendant sets up section 73 of the Liquor License Act as a defence (or as the case may be stating the particulars of the defence: Rule 30).*

Or, the defendant sets up the statute (naming it) as a defence to this action.

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11. SET-OFF.

[*See Section 113.*]

Style of Cause.

In the Division Court in the county of
No. , A.D. 19 .

(*Style of Cause.*)

Take notice that I intend to avail myself of the law of set-off, and at the hearing of this cause will claim a set-off against the plaintiff's

demand, the particulars of which set-off are hereto annexed, *or* (hereunder written).

Dated the day of A.D. 19 .
To the above named plaintiff and to the clerk of the said court. } W. W. ELLIS, Defendant.

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15. COUNTERCLAIMS.

[*See Notes to Section 71; and Rule 29.*]

In the Division Court, in the County of .

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

The promissory note was given as the consideration for a horse sold by the plaintiff to the defendant.

The plaintiff warranted the horse to be sound, but it was wholly unsound and of no value.

The defendant counterclaims damages for breach of warranty, $100.

The defendant disputes (or admits) the plaintiff's claim.

The plaintiff was indebted to one John Orr in $100 on account of goods sold and delivered by the said John Orr to the plaintiff, a statement which is as follows, viz.:

(Here copy the account.)

The plaintiff by writing assigned the said account to the defendant on the third day of June, 19 , before this suit.

The defendant counterclaims $100.

The defendant has suffered damage by the plaintiff's breach of a contract for the sale and delivery, by the plaintiff to the defendant, of 100 tons of Pennsylvania cannel coal at $5 per ton, f.o.b. at Port Stanley, by equal monthly deliveries over the first five months of 1892.

The April and May instalments were not delivered.

Particulars of the damages are as follows:—

Difference between the market price in April and May and the contract price, at $2.50 per ton on forty tons—$100.

The defendant counterclaims $84, arising from the following facts:—

Downs & Company contracted with the plaintiff to erect certain buildings for him in the city of St. Thomas, at a schedule of prices and to complete them by the 1st October, 1891. The plaintiff entered into possession of them. At that time there was due from the plaintiff to Downs & Company, in respect of the contract, a balance of $84, and all conditions had been performed and all times had elapsed necessary to entitle Downs & Company to recover that sum from the plaintiff.

By deed of the 5th November, 1892, Downs & Company assigned to the defendant, all their interest in the debt of $84, and on the 6th November the defendant gave the plaintiff notice of the assignment, but the plaintiff never paid the debt.

The defendant says that the contract contained a clause, whereby it was provided that the plaintiff should complete the work by the 31st

March, 1889, and in default thereof should pay the defendant $2 for every subsequent day during which the work should remain unfinished, and it so remained unfinished for 31 days to the 1st of May. The defendant counterclaims $62.

The plaintiff's claim is for a horse sold by the plaintiff to the defendant for $75. The plaintiff warranted the horse to be sound and good for work, but it was unsound and balky.

The defendant in due time tendered the horse back to the plaintiff in liquidation of the debt, but the defendant refused to accept the horse or to cancel the sale or any part of the debt.

The defendant sold the horse at public auction for $25 without warranty, that being the best price he could obtain for the horse, and counterclaims $60, as an equitable defence, and for a breach of warranty, and for the keep of the horse and expenses of sale: and pays the $15 into Court.

On the 20th day of July, 1889, the plaintiff unlawfully assaulted, beat and wounded the defendant, whereby he became sick, sore and injured, and was unable to follow his employment, and so remained for three weeks.

The defendant was obliged to employ a surgeon to heal his wounds, and to administer medicines during his sickness, and thereby incurred expense.

The defendant counterclaims $60 damages.

The plaintiff claims wages for work done for the defendant under an entire contract to serve him during the five summer months of 1890, from the beginning of the spring work until the end of the harvest, at $25 per month and board and washing. Before the termination of the contract, the plaintiff, without leave of the defendant, wrongfully quitted work, and left his employ without cause.

The defendant was obliged to employ other workmen, and suffered loss by being obliged to pay larger wages to laborers during harvest time, and counterclaims for $35.

AFFIDAVITS AND OATHS.

16. General Form of Heading and Conclusion of Affidavits.

(Except where Otherwise Given.)

[*For provisions as to affidavits, see section 120 and notes and Rules 42-50; and as to forms of oaths, see Form 30, post.*]

In the Fifth Division Court in the County of Brant,

Between Aaron Burr, Plaintiff.
and
Charles C. Dyke, Defendant.

I, Aaron Burr, of *Paris*, in the County of Brant, cordwainer, make oath and say as follows:

Sworn at Paris in the County of Brant, this day of , 19 . }

Before me

Clerk. } (*Signature.*)

17. AFFIDAVIT FOR ORDER TO EXAMINE A SICK, AGED, OR INFIRM WITNESS [OR ONE ABOUT TO LEAVE ONTARIO].

[*See Section 113 (3).*]

(Commence as in Form 16.)

1. This action is brought for (here state concisely the cause of action sued for).

2. The summons herein was served on or about the day of , A.D. 19 , and this action can be heard at the sittings of the court which will be held on the day of next (or instant).

3. The defendant has (or, if he makes an affidavit, I have) filed a notice disputing the plaintiff's claim herein.

4. That E F , of etc. (a person residing within the province), is a material and necessary witness on my behalf, as I am advised and verily believe, and I cannot safely proceed to the trial hereof without his evidence, and that the materiality of his evidence consists in this (here in a general way describe it).

5. That said E F is sick, being dangerously ill with (here describe disease), and not expected to recover (or, as the case may be, or that he is aged, or infirm, being now years of age, or that he is about to leave the province, as the case may be), and that his attendance at court as a witness cannot by reason thereof be procured.

6. I am advised and believe that I have a good cause of action (or defence) herein on the merits, and that this application is made *bona fide* and not for the purpose of delay.

Sworn, etc. (form 16).

(The affidavit should clearly show that the person proposed to be examined is weak, aged, or infirm, or about to leave the province, and that his attendance at court as a witness cannot by reason thereof be procured. If possible, this should not be left to a general statement merely, but facts and circumstances should be given. If founded on sickness of the witness, an affidavit by or a verified certificate of the medical attendant should form part of the application, the former being preferable. The affidavit had better be made by the applicant, his solicitor, or agent. As a general rule, the materiality of the proposed evidence need not be given as appears in the 4th paragraph; but if the application is likely to be opposed, or there is anything exceptional in the circumstances, it had better be stated with particularity.)

See Form of Notice of Motion, No. 56 (c), post.

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17 (1). ORDER FOR EXAMINATION OF SICK WITNESS, ETC.

[*Section 113 (3).*]

In the Division Court in the County of
His honor
Judge.

(*Style of Cause.*)

1. Upon the application of the (plaintiff or defendant, as the case may be) *and upon reading the affidavit of filed, and upon hearing the parties* (or as the case may be).

2. It is ordered that a witness on behalf of the be examined viva voce on oath or affirmation before Esquire, special examiner, the his solicitor or agent giving to the his solicitor or agent notice in writing of the time and place where the examination is to take place.

3. And it is further ordered that the examination be filed in the office of the clerk of this court, and that the same may be read and given in evidence on the trial of this cause, saving all just exceptions, without any further proof of the absence of the said witness than the affidavit of the or his solicitor or agent as to his belief, and that the costs of this application and of such examination be costs in the cause.

NOTE.—*Two days' notice of the examination must be given with a copy of the order: section 118 (5).*

The Con. Rules of the Supreme Court apply: section 118 (6); see those Rules in notes to that sub-section.

Similar proceedings may be taken to take the evidence of a witness who resides in a remote part of Ontario: see section 118 (4) and notes there.

A commission may also be obtained under section 118 (1), to take the evidence of a person residing out of Ontario.

In that case a commission must issue out of and under the seal of the Court; but on order without a commission is sufficient under section 118 (3) or (4).

For forms of affidavit and order, etc., to examine a witness residing out of Ontario, under section 118 (1), see Forms 55 and 56.

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18. PLAN FOR DISTRIBUTION.

[*Distribution of Absconding Debtor's Goods: Section 199 et seq. See Notes thereto, ante.*]

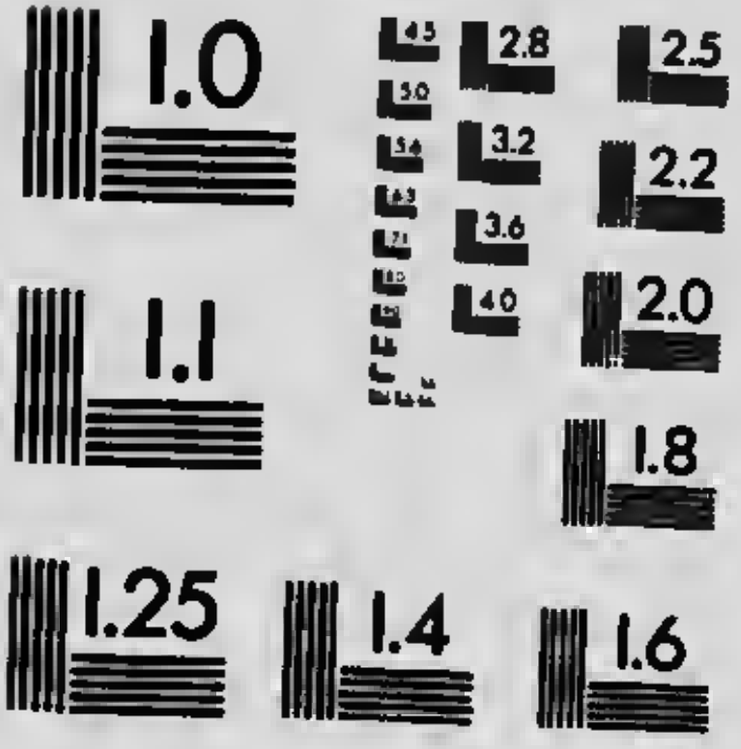
In the Division Court, in the County of
In the matter of Albert Jones, absconding debtor.

Plan for distribution of the amount levied by the bailiff of the said court of the goods of the said debtor.

To total amount levied by sale of goods		$175 80
By bailiff's fees	$10 20	
By taxed costs of attaching creditor under whose attachment the seizure was made, Smith *v.* Chapman	7 15	
By costs of execution, Smith *v.* Chapman	0 65	
		18 00
Total amount for distribution		$157 80

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

List of attaching creditors entitled to share in moneys levied of the goods of Albert Jones. Interest computed to February 15th, 1913.

No.	Creditor.	Principal.	Costs.	Interest.	Total claim.	Pro rata share 68⅔ on $	Remarks.
1	John Smith	$110 00	.....	$0 52	$110 52	$75 70	
2	George Brown	53 25	$3 15	15	56 55	38 73	
3	Sarah Jones	60 00	3 07	23	63 30	43 37	
					$230 37	$157 80	

Dated at this 15th day of February, 1913.

X. Y.,
Clerk.

For Form of Judge's Order changing plan of distribution: See No.

19. AFFIDAVIT FOR ATTACHMENT AGAINST ABSCONDING DEBTOR.

[*See Sections 199, et seq., and Notes thereto.*]

(*If made after suit commenced, insert style of Court and cause.*)

I, *A. B.*, of the , in the County of (*or* I, *E. F.*, of, etc., agent for the said *A. B.*, of, etc.), make oath and say:

1st. That *C. D.*, of (*or* late of) , in the County of , is justly and truly indebted to me (*or* to the said *A. B.*) in the sum of dollars and cents, (*the amount here stated must not exceed $100, or be less than $4. If the claim is for a sum in excess of $100, such excess must be abandoned, unless the claim be for the recovery of a debt or money demand the amount or balance of which does not exceed $200, and the amount or original amount of the claim is ascertained by the signature of the defendant*), on a promissory note for the payment of dollars and cents, made by the said *C. D.* payable to me (*or* the said *A. B.*) at a day now past;

Or for goods sold and delivered
Or for goods bargained and sold
Or for crops bargained and sold
Or for money lent
Or for money paid for the said *C. D.*

} by me (*or* the said *A. B.*) to the said *C. D.*;

Or for and in respect of my (*or* the said *A. B.*) having relinquished and given up to and in favor of the said *C. D.*, at his request, the benefit and advantage of work done and materials found and provided and moneys expended by me (*or* the said *A. B.*) in and about the farming, sowing, cultivating and improving of certain land and premises;

Or for the use by the said *C. D.*, by my permission (*or* by the permission of the said *A. B.*) of messuages and lands of me (*or* the said *A. B.*);

Or for the use by the said *C. D.* of pasture land of me (*or* the said *A. B.*) and the agistment of cattle thereon, by the permission of me (*or* the said *A. B.*);

Or for the wharfage and warehouse room of goods deposited, stowed and kept by me (*or* the said *A. B.*) in and upon a wharf, warehouse and premises of me (*or* the said *A. B.*) for the said *C. D.*, at his request;

Or for fodder, stabling, care and attendance provided and bestowed by me (*or* the said *A. B.*) in feeding and keeping horses for the said *C. D.*, at his request; *or* for work done and materials provided by me (*or* the said *A. B.*) for the said *C. D.*, at his request;

Or for expenses necessarily incurred by me (*or* the said *A. B.*) in attending as a witness for the said *C. D.*, at his request, to give evidence upon the trial of an action at law then depending in the Court, wherein the said *C. D.* was plaintiff and one *E. F.* defendant.

Or for money received by the said *C. D.* for my use (*or* for the use of the said *A. B.*);

Or for money found to be due from the said *C. D.* to me on an account stated between us (*or* to the said *A. B.* on an account stated between them) (*or other cause of action, stating the same in ordinary and concise language*).

2nd. I further say that I have good reason to believe, and do verily believe that* the said *C. D.* with intent and design to defraud me (*or* the said *A. B.*) of my (*or* his) said debt, hath absconded from this pro-

vince, leaving personal property liable to seizure under execution for debt in the said County of .*

(*Or instead of matter between the asterisks.*)

The said *C. D.* is attempting to remove his personal property liable to seizure under execution for debt out of this Province, or from the County of to the County of in this Province; with intent and design to defraud me (*or* the said *A. B.*) of my (*or* his) said debt; (*or* the said *C. D.* keeps concealed in the County of in this Province to avoid service of process) with intent and design to defraud me (*or* the said *A. B.*) of my (*or* his) said debt.

3rd. That this affidavit is not made by me, nor the process thereon to be issued, from any vexatious or malicious motive whatever.

A. B.

Sworn, etc.

---

20. AFFIDAVIT OF SERVICE OF SUMMONS.

(*Commence as in Form 16.*)

I, Lachlan Weir, Bailiff of the First Division Court of the County of Oxford (*or* of the said Court, *or* of the Third Division Court of the County of Kent) make oath and say, that I did, on the day of 19 , duly serve the above-named defendant with a true copy of the Summons, Notices and Warnings therein and endorsed thereon, and the particulars of claim therewith in this cause, by delivering the same personally to the said defendant, (*or* defendants), (*or, if but one served,* "to *C. D.*, one of the said defendants,") (*or, if the service was not personal, state how and on whom served,*) by delivering the same to his wife, *or* to his servant, *or* to *one* Henry Roe, a grown-up inmate of the defendant's dwelling-house, or usual place of abode or business, and that I necessarily travelled miles to make such service.

The service may be otherwise than personal where the amount claimed does not exceed $15.

The service must be personal where the amount claimed exceeds $15.

Sworn, etc.

V——— W———,
Bailiff.

(*Or, this form may be used when the affidavit is endorsed on the summons.*)

I swear that this summons and claim therewith were served by me on the day of by delivering a true copy of both, personally, to the defendant, (*or* to the wife *or* servant of the defendant, *or* to Henry Roe, a grown-up inmate of the defendant's dwelling-house, or usual place of abode, or business), and that I necessarily travelled miles to do so.

Sworn, etc.

V——— W———,
Bailiff.

N.B.—This affidavit must not be prepared in a perfunctory way, in all cases, it must be prepared by the Clerk, and with care, as to its correctly and amply complying with the Statute in every respect.

[*See section 120 and notes thereto, and Rules 42-50, as to what is necessary to compliance with the statute.*]

21. AFFIDAVIT OF SERVICE OF SUMMONS ON AN ABSCONDING DEBTOR BY LEAVING COPY, ETC., WITH PERSON DWELLING AT HIS LAST PLACE OF ABODE.

[*See section 210 (1).*]

(*Commence as in Form 16*)

1. That I did on tha day of A.D. 19 , serve (*naming him*) the above-named defendant in this cause with the within (*or "annexed"*) summons, notices and warning therein, and the particulars of claim therewith in this cause, by leaving a true copy of each at the last place of abode, or business, of the above-named defendant, with a grown person residing there, and that I necessarily travelled miles to make such service.

Sworn, etc.

---

22. AFFIDAVIT OF SERVICE OF SUMMONS ON AN ABSCONDING DEBTOR BY LEAVING COPY, ETC., AT LAST PLACE OF ABODE OR DWELLING OF DEBTOR, NO PERSON BEING THERE FOUND.

[*See section 210 (1).*]

(*Commence as in Form 16*)

1. That I did on tha day of A.D. 19 , serve (*naming him*) the above-named defendant in this cause with tha within (*or "annexed"*) summons, notices and warnings the . and the particulars of claim therewith in this cause,* by leaving ..e copy of each at the last place of abode or business of the defendan in this Province, and that at the time of so leaving them there, no grown person could be there found, and that I necessarily travelled miles to make such service.

Sworn, etc.

---

23. AFFIDAVIT OF EXECUTION OF CONFESSION.

[*Section 169.*]

(*Commence as in Form 16.*)

I, Clerk (*or* bailiff) of the Division Court in the county of (*or* of the said Court) make oath and say, that I saw the above (*or* annexed confession) duly executed by the defendant, and that I am a subscribing witness thereto, and that I have not received, .. that I will not receive, anything from the plaintiff *or* defendan . . ny other person, except my lawful fees, for taking such confessi . d that I have no interest in the demand, sought to be recovered . this action.

Sworn before me, etc. X. Y. (*or* V. W.).

[*See Form of Judgment on Confession: No. 49.*]

23 (1) FORM OF CONFESSION.

In the Division Court, in the County of

Between A..... B..... *Plaintiff.*
and
C..... D....., *Defendant.*

I acknowledge that I am indebted to the plaintiff in the sum of and consent that judgment for that amount and costs may be entered against me in this cause, according to the practice of the court.

Dated the day of , 19 .

C..... D.....,
Defendant.

Witness:
Clerk (*or* Bailiff.)

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24. AFFIDAVIT FOR JUDGMENT SUMMONS, UNDER THE ACT.

[*Refer particularly to section 190 and notes thereto as to the requirements of this affidavit.*]

(*Title of Court and style of cause.*)

I, , of the of , in the County of and Province of Ontario, , make oath and say.

1. That I am the above-named plaintiff (*or* "the solicitor or agent" for the above-named plaintiff (*as the case may be*) in this cause.

2. That judgment was recovered in this cause on the day of , in the year of our Lord, 19 , for the sum of dollars, debt (*or* "damages" or "costs," *as the case may be*) and the sum of dollars for costs of suit, and that the whole (*or* dollars, "part") of the said judgment remains unsatisfied.

3. That I believe *C. D.*, the defendant, sought to be examined herein, is able to pay the amount due in respect of the said judgment, or some part thereof (*or* "that *C. D.*, the defendant, sought to be examined herein, has rendered himself liable to be committed to gaol under the Division Courts Act").

Sworn, etc.

[*See form of judgment summons on above affidavit. No. 33, post.*]

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25. AFFIDAVIT AGAINST A JUDGMENT DEBTOR UNDER THE ACT.

[*This is on an application to the Judge to permit a second examination of a judgment debtor under section 190 (7); for summons, see Form 34 (1).*]

(*Insert title of Court and style of cause.*)

I, *A. B.*, of , in the County of , merchant, make oath and say as follows:—

1. That I am the plaintiff (*or the solicitor or agent of the plaintiff*) in this cause, and have personal knowledge of the facts hereinafter set forth.

2. That the plaintiff recovered judgment against the defendant in this cause on the day of , A.D. 19 , for the sum of dollars, and cents, which is still wholly (*or partly*) due and unpaid (*state how much*).

3. That the defendant was summoned and examined as a judgment debtor on the day of , A.D. 19 , upon the application and at the suit of , being a creditor of the said , defendant, (*or if of this plaintiff, then state it*) and after his said examination was discharged by the Judge.

4. That the defendant resides in the county of .

5. That the following facts, which were not then before the Court, upon the said examination, have since come to my knowledge, (*here state the facts*).

6. That the said defendant did not at the said examination make a full disclosure of his estate, effects and debts because (*here state in what respect the defendant did not make such disclosure*) and the reasons for making this statement are (*here fully state the reasons of the deponent for making the allegation*).

Or, instead of the foregoing paragraphs, No. 5 and 6, state:

That since the said examination, the said defendant hath acquired the means of paying the said judgment or some part thereof (*here state what the means were and how the deponent is aware of the facts stated as to the defendant having acquired such means*).

Sworn, etc.

A. B.

---

26. AFFIDAVIT FOR REVIVAL OF JUDGMENT.

[*See section 179 and notes thereto.*]

(*Title of Court and style of cause.*)

I, *A. B.*, of the , of , in the County of , yeoman, make oath and say as follows:—

1. On the day of , A.D. 19 , I recovered a judgment of this court against the above-named defendant for $ debt (*or damages*), and $ costs of suit.

2. No part of said moneys so recovered has been paid or satisfied, and the said judgment remains in full force (*or, the sum of , part only of the said moneys has been paid, and the judgment remains in full force as to the residue of the said moneys so recovered thereby*).

3. I am entitled to have execution of the said judgment and to issue execution thereupon for the sum of $, as I verily believe.

Sworn, etc.

MEMO.—If the affidavit be made by the plaintiff's attorney or agent, make the necessary alterations in the above form and add—

4. I am the duly authorized attorney (*or* agent) of the plaintiff in this matter, and have a personal knowledge of the facts herein set forth.

Sworn, etc.

A. B.

27. AFFIDAVIT ON APPLICATION OF EXECUTOR OR ADMINISTRATOR TO REVIVE A JUDGMENT.

[*Section 179.*]

(*Insert title of Court and style of cause.*)

I, Aaron Barr, of, etc., make oath and say as follows:—

1. On the day of , A.D. 19 , the plaintiff, now deceased, recovered a judgment of this Court against the defendant above named for $, debt, and $, costs of suit.

2. That no part of the said judgment so recovered has been paid or satisfied and the said judgment remains in full force (*or* the sum of $, part only of the said moneys, has been paid, and the said judgment remains in full force for the residue).

3. That I was (*or* Charles Fox, of the Town of , in the County of , yeoman), was on the day of , 19 , duly appointed the executor (*or* administrator) of the property of the said deceased plaintiff.

4. That I am, as such executor (*or* administrator), entitled (*or* the said Charles Fox, as such executor *or* administrator is entitled) to have execution of the said judgment and to have execution issued thereupon, as I verily believe, for the sum of $.

Sworn, etc. A. B.

---

28. AFFIDAVIT FOR REVIVAL OF JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR.

[*Section 179 and notes.*]

(*Insert title of Court and style of cause.*)

I, Aaron Barr, of the Town of St. Mary's, in the County of Perth, yeoman (*if the affidavit be made by the plaintiff's solicitor or agent, make the necessary alteration*), make oath and say as follows:—

1. On the day , A.D. 19 , I recovered a judgment of this Court against the above-named George Raymond, since deceased, for $, debt, and $, costs of suit.

2. No part of the said moneys so recovered has been paid or satisfied, and the said judgment remains in full force (*or* "the sum of , part only of the said moneys, has been paid, and the judgment remains in full force as to the residue of the said moneys so recovered thereby").

3. That William Bush, of the township of Woodhouse, in the county of Norfolk, yeoman, was duly appointed the executor (or administrator) of the property of the deceased.

4. I (*or* "the said plaintiff") am entitled to have execution of the said judgment; and to issue execution thereupon for the sum of $, as I verily believe.

A.B.

Sworn, etc.

20. AFFIDAVIT OF DISBURSEMENTS TO SEVERAL WITNESSES.

[See Notes to sections 122, 170, 172 and Rule 75.]

No. 18.

(*Title of Court or style of cause*).

I, *A. B.*, of , the above plaintiff (*or C. D.*, the above defendant, *or E. F.*, agent, or solicitor for the above plaintiff *or* defendant) make oath and say:—

1st. That the several persons whose names are mentioned in the first column of the schedule at the foot hereof, were necessary and material witnesses on my behalf (*or* on behalf of the said plaintiff *or* defendant) and attended at the sittings of this Court on the day of , as witnesses on my behalf (*or* on behalf of the said defendant *or* plaintiff, and that they did not attend as witnesses in any other cause; (*if otherwise, state the facts*).

2nd. That each of the said witnesses necessarily travelled in going to said Court and attending the said trial, the number of miles, respectively, mentioned in figures in the second column of the said schedule opposite to the names of each of the said witnesses, respectively.

3rd. That each of the said witnesses was necessarily absent from his (*or her*) home, in order so to attend the said trial, the number of days set forth in the third column of the said schedule opposite the names of them respectively.

4th. That the several and respective sums of money mentioned in figures in the fourth column of the said schedule, opposite to the names of the said witnesses, respectively, have been paid by me (*or* by the plaintiff *or* defendant) to the said witnesses respectively, as in the said schedule set forth for their attendance and travel as witnesses in this cause.

5th. That I was a necessary and a material witness on my own behalf, and I would not have attended the Court, except for the purpose of giving evidence in the cause. (Conclude with jurat, as in other affidavits.)

A. B.

SCHEDULE REFERRED TO IN THE FOREGOING AFFIDAVIT.

Names of Witnesses.	Miles.	Absent from home.	Sums paid.
1	2	3	4

Note.—Where the party seeks to be allowed his own expenses for attendance, he must swear both that he was a necessary and material witness on his own behalf, and that he would not have attended the Court, except for the purpose of giving evidence in the case.

[Witnesses resident in Ontario, but out of the county, are entitled to witness fees on the County Court tariff: Section 117 and notes.]

30. Forms of Oaths, Etc.

(a) To a witness at the trial who swears upon the Bible:

"The evidence you shall give to the Court (and jury sworn) touching the matters in question between the parties, shall be the truth, the whole truth, and nothing but the truth. *So help you God.*"

(b) To a witness who swears with uplifted hand:

Add to the foregoing, after the last word "*truth*," "and this you do swear in the presence of the everliving God, and as you shall answer to God at the great judgment day. *So help you God.*"

(c) To a Jew:

He is to be directed to cover his head, the Pentateuch is to be opened and placed before him, then proceed as in the first form, only make use of the name "*Jehovah*," instead of "*God.*"

(d) To a Quaker, Mennonite or Tunker, or member of the church known as *Unitas Fratrum* or United Brethren, or other person allowed by law to affirm:

The witness is to be directed to repeat his name, after the clerk, and the following: "I, *K. L.*, do solemnly, sincerely and truly declare and affirm that I am one of the society called Quakers," (*or* Mennonite, Tunkers or *Unitas Fratrum* or Moravians, *as the case may be*), after which, the affirmant, repeating his name, "I, *K. L.*, do solemnly, sincerely, and truly affirm and declare that the evidence I shall give to this Court, touching the matters in question, etc."

(e) To any other person desiring to affirm:

I, *M. N.*, do solemnly, sincerely and truly affirm and declare that the taking of an oath is, according to my religious belief, unlawful; and I do solemnly, sincerely and truly affirm and declare, etc. (*as in Form d above*).

(f) To an interpreter (where witnesses cannot speak English, or are deaf or dumb).

"You shall truly interpret between the parties in this cause the evidence of, and the witness produced. *So help you God.*"

(g) To jury called by parties:

"You and each of you shall well and truly try the matters in difference between the parties, do justice between them, and a true verdict give according to the evidence. *So help you God.*"

(h) To jury called by the judge:

"You and each of you shall well and truly try the facts controverted in this cause between the parties, and a true verdict give according to the evidence. *So help you God.*"

(i) To a defendant who appears upon a judgment summons:

"You shall true answers make to all such questions as shall be put to you touching the subject upon which you have been now summoned to appear for examination, and what you shall state respecting

the same shall be the truth, th· ·ole truth and nothing but the truth. *So help you God.*"

(*j*) To the officer who conducts a retiring juror out of Court:

"You shall retire with such jurors as have leave of absence from this Court, you shall not speak to them yourself in relation to the subject of this trial, nor suffer any person to speak to them, and you shall return with them without unnecessary delay. *So help you God.*"

(*k*) To the officer, when the jury retire to consider their verdict:

"You shall keep every person sworn on this jury in some private and convenient place; you shall not suffer any person to speak to them, or speak to them yourself, except to ask them whether they have agreed on their verdict. *So help you God.*"

(*l*) To a deponent or affirmant making an affidavit or affirmation:

"You do swear (or affirm) that the contents of this affidavit (*or* affirmation) to which you have subscribed your name (*or* made your mark) are just and true. *So help you God.*" (*Or* "and so you solemnly, sincerely and truly declare and affirm.)

(*m*) OATH TO BE ADMINISTERED TO WITNESS BY ARBITRATOR OR UMPIRE.

[*Section 168.*]

The evidence which you shall give before me as arbitrator (*or* umpire), touching the matters in difference in this reference, shall be the truth, the whole truth, and nothing but the truth. *So help you God.*

(*n*) JURAT TO AFFIDAVIT BY ILLITERATE OR BLIND DEPONENT.

Sworn by the above-named deponent, *A. B.*, at , in the county of , an , and I certify that the affidavit was first read in my presence to said A. B., who seemed perfectly to understand the same, and wrote his signature (*or* made his mark) thereto in my presence.

X. Y., Clerk, etc.
Or as the case may be.

(o) AFFIRMATION BY QUAKERS, ETC., AND JURAT THERETO.

(*Insert title of Court and style of cause*).

I, *A. B.*, of , etc., do solemnly, sincerely and truly declare and affirm that I am one of the society called Quakers (*or* Mennanites, Tunkers, *Unitas Fratrum*, or Moravians, as *the case may be*), and I do also solemnly, sincerely and truly declare and affirm as follows, that is to say (*state the facts*).

Solemnly affirmed at , }
in the county of , }
on , before me. , } .t.

X. Y., Clerk, etc.
Or as the case may be.

(p) FORM OF STENOGRAPHER'S OATH.

(*Section 118.*)

You swear that you shall truly and faithfully report the evidence to be given in this case; so help you God.

---

31. SUMMONS FOR ASSAULTING A BAILIFF OF THE COURT WHILST IN THE EXECUTION OF HIS DUTY.

[*Section 218 and notes.*]

In the Division Court, in the County of
In the matter of a complaint made by *C. D.*, of

Bailiff of the said Court.
To *A. B.*, of

You are hereby summoned to appear at a sitting of the Division Court to be holden at , on the day of , 19 .

Dated this day of 19 .

, at o'clock in the forenoon, to answer a complaint made against you by *C. D.*, the Bailiff of the said Court, and to show cause why an order should not be made against you, under the Division Courts Act, for payment of a sum not exceeding $20 for an assault committed by you on , the day of upon the said Bailiff whilst in the execution of his duty as such Bailiff (and also for that you did on the same day rescue, or attempt to rescue, certain goods levied by the said Bailiff under process of this Court).

_____,
Judge.

(To be served personally ten clear days before the return day.)

.]

32. SPECIAL SUMMONS.

[*Sections 83-88 and 98-100.*]

No. , A.D. 19 .

In the Division Court in the County of

Between HENRY BRAY, *Plaintiff.*
and
[Seal.] JOHN NOKES, *Defendant.*

To the above named defendant:—

Take notice that the above named plaintiff claims from you dollars, as shown by his particulars of claim herewith. If the amount of the claim, with lawful costs, be paid to the clerk of this court within days from the service hereof upon you, no further proceedings will be taken.

Unless within days after the service of the summons on you, you leave with the clerk a notice in writing that you dispute the claim or dispute some part thereof and how much, with particulars, it will be considered that you have no defence, and final judgment may be entered by the clerk on the return of the summons or at any time within one month therefrom, for the amount claimed in the particulars, or so much thereof as has not been disputed. In case you give such notice disputing the claim, the cause will be tried at the sittings of this court to be held at , in the said county, next after the expiration of days from the time this summons is served on you, and the sittings of the court are set forth below.

Given under the seal of the court this day of A.D. 19 .

H. A. LOCKE,
Clerk.

NOTICES AND WARNINGS TO THE DEFENDANT.

No. 1. If the action be for the recovery of a debt or money demand, where the particulars of the claim are endorsed on or attached to the summons, if the defendant disputes the plaintiff's claim or any part of it, he shall leave with the clerk within days after the service thereof, a notice to the effect that he disputes said claim, and leave the particulars of the dispute, or if not the whole claim, how much thereof he disputes, with particulars, in default whereof, final judgment may be signed by the clerk for the whole claim or such part as is not disputed at any time within one month after the return of the summons, without prejudice to the plaintiff to recover for the remainder of the claim.

No. 2. If the defendant desires to set-off a demand or counter claim against the plaintiff at the trial or hearing of this cause, or take the benefit of any statute of limitations or other statute, notice thereof in writing, together with particulars of the set-off or counter claim, shall be left with the clerk of the court and served on the plaintiff, or left at his usual place of abode, if he is living within the division, not less than 5 days before the day on which the cause will be tried; In case the plaintiff does not reside within the division, such notice and particulars shall be left with the clerk for him.

No. 3. In cases of tort or replevin, where the sum or value of the goods or damages sought to be recovered exceeds $20, and in all other cases, where the amount sought to be recovered exceeds $30, the defendant may have the action tried by a jury, by giving notice in writing at the clerk's office, five days after service of this summons on him, and on payment of the prescribed fees.

No. 4. On the day of trial the plaintiff and the defendant shall bring all the books and papers necessary to prove their cases respectively, or in any case connected therewith or with the transactions between them.

No. 5. Summonses for witnesses and for the production of documents may be obtained at the office of the clerk upon payment of the proper fee.

No. 6. Any application by the defendant to change the place of trial must be made within the time limited for disputing the plaintiff's claim.

No. 7. The ensuing sittings of the Court will be held as follows, viz.:—

at o'clock a.m. on Monday, the day of A.D. 19 .
at o'clock a.m. on Tuesday, the day of A.D. 19 .

33. Summons to Defendant after Judgment.

[*See Form 2½, ante, of Affidavit for this Summons.*]

In the Division Court in the County of
No. , A.D. 19 .

Between *A. B.* plaintiff,
and
C. D. defendant.

[Seal.]

To the above-named defendant.

Whereas on the day of , A.D. 19 , the plaintiff duly recovered judgment against you in said Court for $ for debt, and $ for costs of suit, which remains unsatisfied, you are therefore hereby summoned to appear at the next sittings of this Court, to be held at , in the said County , on the day of , A.D. 19 , at the hour of o'clock in the noon, to be then and there examined touching your estate and effects, and the manner and circumstances under which you contracted the said debt (*or* incurred the damages *or* liability) which was the subject of the action in which the said judgment was obtained against you, and as to the means and expectations you then had, and as to the property and means you still have, of discharging the said debt (*or* damages *or* liability), and as to the disposal you may have made of any of your property. And take notice, that if you do not appear in obedience to this summons, you may, by order of this Court, be committed to the common gaol of the county.

Given under the seal of the Court this day , 19 .

By the Court.

X——— Y———, *Clerk.*

Amount of judgment.....$
Costs of this summons.....$

---

34. Judgment Summons After Default.

[*Section 191* (2).]

Whereas at the sittings of the above court, held on the day of , 19 , the plaintiff recovered against you judgment for and $ costs.

And whereas you were subsequently summoned to appear before the said court to be examined touching your ability to satisfy the said debt, and it appeared to the satisfaction of the judge that you had means and ability to satisfy the same, and you were then and there ordered to pay the said debt by instalments of $ per month until the said debt was satisfied.

And whereas the plaintiff alleges that you have not made the said payments so ordered.

You are therefore hereby summoned to appear at the sittings of the said court to be holden at the of in the County of on the day of , 19 , at

the hour of o'clock in the forenoon, to show cause why you should not be committed to the common gaol of the county for not complying with the said order of the court.

Given under the seal of the Court this day , 19 .
By the Court.

Amount of judgment .....
Costs of this summons .....

F. W. MACQUEEN,
Clerk.

---

34 (1). SUMMONS FOR RE-EXAMINATION OF JUDGMENT DEBTOR.

[See section 190 (7); for affidavit therefor, see Form 25.]

In the Division Court in the County of
No. A.D. 19 .

Between A. B., Plaintiff.
and
C. D., Defendant.

To the above-named defendant.

Whereas on the day of A.D., 19 , the plaintiff duly recovered judgment against you in the said court for $ for debt and $ for costs of suit, which remains unsatisfied. And whereas it has been made to appear upon affidavit satisfying the Judge that since your former examination as a judgment debtor you have acquired the means of paying, or that you did not then make a full disclosure of your estate and effects (as the case may be);

You are therefore hereby summoned (proceed as in Form 33).

---

35. SUMMONS TO JURORS.

[Sections 133, et seq.]

[Seal.]

In the Division Court in the County of

You are hereby summoned to appear and serve as a juror in this Court, to be holden at on , the day of , A.D. 19 , at the hour of a.m.: herein fail not at your peril.

Given under the seal of the Court this day , 19 .

To

X. Y.,
Clerk.

---

35 (1) *[For form of Jurors' Pay List, see Form 81, post.]*

36. Summons to Witness.

[*Section 114.*]

(*Insert title of Court and style of cause.*)

[Seal.]

You are hereby required to attend at the sittings of the said Court, to be holden at , on Tuesday, the 7th day of July, A.D. 19 , at the hour of in the forenoon, to give evidence in the above cause, on behalf of the above-named [and then and there to have and produce (*state particular documents required*) and all other papers relating to the said action in your custody, possession or power.]

Given under the seal of the Court this day of , 19 .

X. Y.,
Clerk.

To

---

36 (*a*) Subpoena under The Damage by Flooding Act. Section 8.

[*See notes at p. 299.*]

County (or *District*) of
to wit.

To C. D.

You are hereby required to appear before Judge of the County (or *district*) *Court of the County* (or *district*) *of at in the of , an the day of , 19 , at o'clock in the noon, being the time and place appointed by the Judge by him from* (naming the defendant) *under the Damage by Flooding Act, and then and there to testify to all and singular those things which you know in respect of the matters in question in the application.*

Given under the seal of the Division Court of the County (or *district*) *of , at the day of 19 .*

E. F.
Clerk.

---

36 (*b*) Notice of Judgment, under Same Act.

In the matter of applicant and defendant.

Take notice that there was this day duly filed in this Court the award of the Judge of the County (or *district*) *Court of the County* (or *district*) *of in the above matter, and that the same was thereupon duly entered of judgment against the defendant for $ damage and $ costs.*

(Whereas the damages exceed $100 add, if you are dissatisfied with the award you may within 14 days from this date apply to the Judge for a rehearing or for a new trial.)

E. F.
Clerk of the Division Court of
the County (or district) of .

Dated at this day of , 19 .

To (state name and post office address).

37. ATTACHMENT AGAINST AN ABSCONDING OR REMOVING DEBTOR.

[*Section 199, et seq.*]

To *A. B.*, bailiff of the Division Court in the County of (*or* to *A. B.*, a constable of the County of , *as the case may be.*)

You are hereby commanded to attach, seize, take and safely keep, all the personal estate and effects of *C. D.* (*naming the debtor*), an absconding, removing or concealed debtor, of what nature or kind soever, liable to seizure under execution for debt within the County of (*here name the county*), or a sufficient portion thereof to secure *A. B.* (*here name the creditor*) for the sum of (*here state the amount sworn to be due*), together with the costs of his suit thereupon, and to return this warrant, together with an inventory and appraisement of such property as you shall have attached, to the clerk of the (*here state the number of the division*) Division Court in the County aforesaid forthwith; and herein fail not.

Witness my hand and seal (*or* the seal of the said Court) the day of , one thousand nine hundred and

[Seal.]

X—— Y——,

Clerk (*or* Justice of the Peace, *as the case may be*).

[*Form of Affidavit for Attachment, No. 19, and Forms Nos. 84, 85, 84(1) of Inventory, of Oath of Appraisers and Appraisement; also Forms 21, 22 of Affidavit of Service of Summons on Absconding Debtor. The summons will be in accordance with Form 32.*]

REPLEVIN.

[*Section 62 (4) and Notes.*]

38. AFFIDAVIT TO OBTAIN JUDGE'S ORDER FOR WRIT OF REPLEVIN.

In the Division Court in the County of

I, *A. B.*, of make oath and say:

1. That I am the owner of (*describe property fully*) at present in the possession of *C. D.*; or that I am entitled to the immediate possession of (*Describe property*) as lessee, (bailiff or agent) of *E. F.*, the owner thereof (*or as trustee for E. F.*), (or as the case may be) at present in the possession of *C. D.*

2. That the said goods, chattels and personal property are of the value of dollars and not exceeding sixty dollars.

3. That on or about the day of , the said goods, chattels and personal property were loaned to the said *C. D.* for a period which has expired, and that although the said goods, chattels and personal property have been duly demanded from the said *C. D.*, he wrongfully withholds and detains the same from me the said *A. B.*, or, that on or about the day of , the said *C. D.* fraudulently obtained possession of the said goods, chattels and personal property by falsely representing that (*here state the false representation*) and now wrongfully withholds and detains the same from me, or, that the said goods, chattels and personal property were on the day of distrained or taken by the said *C. D.* under color of a distress for rent,

alleged to be due by me to one *E. F.*, when in fact no rent was due by me to the said *E. F.* (or as the case may be, setting out the facts of the wrongful taking or detention complained of with certainty and precision).

4. That the said *C. D.* resides (*or carries on business*) at , within the limits of the Division Court, in the County of , (or that the said goods, chattels and personal property were distrained), (or taken and detained), (*or detained*) at , within the limits of the Division Court, in the County of .

Sworn, etc.

---

39. Affidavit to Obtain Writ of Replevin Without Judge's Order, in the First Instance.

The first four sections may be as in last form, except that the third sectio. must show that the property was wrongfully taken ont of the possession of the claimant, or was fraudulently got out of his possession, and it will not be sufficient to show merely a wrongful detention of the property, and the following must be stated in addition.

5. That the said personal property was wrongfully taken (or fraudulently got) out of my possession within two calendar months before the making of this affidavit, that is to say, on the day of inst.

6. I am advised and believe that I am entitled to an order for the writ of replevin now applied for, and I have good reason to apprehend and do apprehend that unless the said writ is issued without waiting for an order, the delay will materially prejudice my just rights in respect to the said property (or if the property was distrained for rent or damage feasant, the statement given in the last specific alternative under the 3rd clause of the above form will be sufficient to obtain the writ without order.)

---

40. Claim in Replevin.

No. , A.D. 19 .

In the Division Court in the County of

A. B., of , states that *C. D.*, of , did on or about the day of , A.D. 19 , take and unjustly detain (or detain, as the case may be) and still doth detain his goods, chattels and personal property, that is to say (*here set out the description of property*), which the said *A. B.* alleges to be of the value of dollars, whereon he hath sustained damages, and the said *A. B.* claims the said property, with damages on this behalf, as his just remedy.

A. B.

---

41. Summons in Replevin.

No. A.D. 19 .

In the Division Court in the County of

[Seal.]

To Henry McPhail, the bailiff of the said Court, and to John Nokes:

You, tha snid bailiff, are commanded that without delay you do take the security required by law and cause to be replavied to Henry Bray his goods, chattels and personal property following, that is to say: (*here set out the description of the property as in the affidavit filed*) which the snid Henry Brny alleges to be of the vnlne of $ (*here set out value as in the affidavit filed*), in order that the snid Henry Brny may hnve his just remedy in that behalf.

And you, the said John Nokes, are hereby required to take notice that a statement of the claim of the said Henry Bray is hereto annexed, and that unless within dnys after the service of this summons on you, you enter with the clerk of this Court a notice in writing that you intend to dispute the claim, it will be considered that you hnve no defence, and the said Henry Bray may either cause judgment to be entered against you by default for $2 and costs, or may at the sitting of this Court to be held at next, after the expiration of days from the time this summons is served on you, proceed in the action in the same manner as if you had appeared and had admitted his right to the possession of the goods.

The days of sittings of the Court are set forth below.

Given under the seal of the Court the day of , 19 .

W. W. ELLIS,
Clerk.

Claim for return of goods and dnmages, $
Costs, exclusive of mileage ..... $

WARNING.

If you claim a right to the possession of the goods by reason of any claim which you may have to urge under any statute, or to take the benefit of any statute of limitations or other statute notice thereof in writing must, not less than 5 days before the day on which the case will be tried, be left in the office of the clerk of the Court and given to the said plaintiff, or left at his usual place of abode, if living within the division, and in case the said plaintiff does not reside within the division, such notice shall be left with the clerk for him.

Ensuing sittings of the Court will be held as follows, viz.:

At 10 o'clock A.M.—
Tuesday, the 9th day of January, 19 .
Tuesday, the 6th day of March, 19 .

(Here may be inserted the time of one or more subsequent sittings.)

Any application by the defendant to change the place of trial must be made within the time limited for disputing the plaintiff's claim.

---

42. REPLEVIN BOND.

Know all men by these presents that we, Henry Bray, of, etc., Robert Leslie, of, etc., and Horace Kilborn, of, etc., are jointly and severally held and bound to Henry McPhail, bailiff, of the Division Court in the County of , in the sum of $, to be

paid to the said bailiff or his certain attorney, executors, administrators or assigns, for which payment, to be well and truly made we bind ourselves, and each and every of us in the whole, our and each, and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this day of , A.D. 19 .

The condition of this obligation is such that if the above bounden Henry Bray do prosecute his suit with effect, and without delay, against John Nokes for the taking and unjustly detaining (*or* unjustly detaining, as *the case may be*), of his goods and chattels, to wit: (*here set forth the property distrained, taken or detained*), and do make a return of the said property, if a return thereof shall be adjudged, and also do pay such damages as the said John Nokes shall sustain by reason of the issuing of the writ of replevin, if the said Henry Bray fails to recover judgment in the suit (*if the goods were not taken under distress for rent or damage feasant, and if the case comes under the provisions of Rule No. here insert*, and shall also indemnify and save harmless the said John Nokes from all loss and damages which he may sustain by reason of the seizure and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges and expenses which the said John Nokes may incur), and further do observe, keep and perform all orders made by the judge in the suit: then this obligation shall be void, or else remain in full force and effect.

Signed, sealed and delivered in the presence of } (L.S.) (L.S.) (L.S.)

---

43. FORM OF ASSIGNMENT TO BE ENDORSED, IF REQUIRED.

Know all men by these presents that I, Henry McPhail, bailiff of the Division Court in the County of , have, at the request of the within-named John Nokes (*the defendant*) assigned over this replevin bond unto the said John Nokes, pursuant to the Rule in such case made and provided.

In witness whereof I have hereunto set my hand and seal this day of A.D., 19 .

Signed, sealed and delivered in the presence of } [Seal.]

---

44. BAILIFF'S RETURN TO WRIT OF REPLEVIN.

In the Division Court in the County of .

Between HENRY BRAY, *Plaintiff*,
and
JOHN NOKES, *Defendant*.

In pursuance of the Division Court Rules in that behalf, I have taken from the said plaintiff a bond conditioned as by the said Rules required, made by him, and two sureties, namely, Robert Leslie, of the Village of Kemptville, in the County of Grenville and Province of Ontario, Esquire, and Horace Kilborn, of the Village of Newboro',

in the County of Leeds and Province of Ontario, Esquire, which bond bears date the day of , 19 , and is witnessed by Samuel McCammon, of the Town of Gananoque, in the County of Leeds, Esquire. And by virtue of the annexed writ to me directed, I have seized and delivered to the plaintiff the goods mentioned in said writ, that is to say: (*here describe the goods by number, quantity and quality; [or if only a part had been replevied, say,* a portion of the goods in the said writ mentioned, that is to say (*here describe them*), and I cannot make replevin of the residue of said goods, namely (*shortly describe them*), as by said writ commanded, by reason of the same having been removed or carried out of this county by the defendant (*or as the case may be*)]. Dated the day of , 19 .

Henry McPhail, bailiff.

---

45. Inventory of Goods Replevied.

In the Division Court in the Count of

Between

Henry Bray, *Plaintiff.*
and
John Nokes, *Defendant.*

An inventory of property and effects by me this day replevied in the Township of Elizabethtown, in the County of Leeds, by virtue of a writ of replevin, issued by David B. Jones, clerk of the Division Court in the Count of , on behalf of the plaintiff against the defendant: that is to say (*here state all the articles replevied*).

Dated the day of , 19 .

Bailiff.

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45 (1) Order of Withernam; Section 62 (4), Notes on "Replevin."

No. , *A.D. 19* .

In the Division Court, in the Count of

Between Henry Bray, *Plaintiff,*
and
John Nokes, *Defendant.*

[Seal.]

Upon application of the plaintiff, and it appearing by the return of the bailiff of this court that the order of replevin made herein on the day of , 19 , that the goods, chattels, and personal property (or a portion of the goods, chattels and personal property as the case may be) mentioned in the said writ had been removed or carried and eloigned by the defendant out of this county so that the said bailiff could not make replevin of the same;

It is ordered that the said bailiff do forthwith take in withernam the goods, chattels, and personal property of this said defendant in this county, to the value of the goods, chattels, and personal property by the said defendant before taken, and do forthwith deliver them to the said

plaintiff, to be kept by him until the said defendant delivers the goods, chattels, and personal property last aforesaid to the said plaintiff.

And it is further ordered that if the said plaintiff shall give security to the said bailiff, as provided by law, for the prosecution of the plaintiff's claims and for the return of the goods, chattels, and property, so to be taken in withernam, as aforesaid, if the return thereof shall be adjudged, then the said bailiff do take security with two sufficient sureties from the said defendant to answer to the said plaintiff for the taking and unjustly detaining of his goods, chattels and personal property aforesaid.

And it is further ordered that the said bailiff do forthwith make return to the clerk of this court what he shall have done in the premises, and do also return this order.

Given under the seal of the court the day of , 19 .

Judge.

---

45 (2a). Notice of Payment into Court in Replevin: Notes on "Replevin," *ante.*

(Court and Cause.)

The defendant brings into court the sum of $, damages and the costs to this date, and consents that the replevin bond be delivered up to be cancelled, and waives all right to the property replevied.

Dated, etc.

_____,

Defendant.

(This should be signed by defendant.)

JUDGMENTS IN REPLEVIN.

[Section 62 (4).]

45 (2). In Favor of Plaintiff.

It is adjudged (if case tried with a jury, add: on verdict of jury) that the defendant does unjustly detain the goods and chattels of the plaintiff, viz.: (here enumerate and shortly describe the goods), *and it is ordered that the defendant do return the same to the plaintiff forthwith and that a warrant of delivery do issue therefor, and that the defendant do pay $ damages for the unjust detention thereof, and $ the costs of this suit, amounting together to the value of $, to the clerk forthwith, and in default of his so doing that execution do issue therefor immediately.*

---

45 (3). In Favor of Defendant in Replevin for Rent.

Adjudged that the plaintiff do return to the defendant the goods and chattels (or *cattle*) (stating the particulars), *and pay $ for costs in days* [*or adjudged that the amount due for rent in arrear from the plaintiff to the defendant is $, and that the goods and chattels* (or *cattle*) *were of the value of $, and that the plaintiff do in days pay the said sum of $ and also the sum of $ for costs of suit.*]

45 (4). In Favor of Defendant in Replevin of Cattle, Damage Feasant.

Adjudged that the plaintiff do return to the defendant the cattle (here specify the cattle) or do pay in days the sum of $, which is adjudged as the amount of damage sustained by the defendant, and that the plaintiff do pay within days $ for costs.

---

45 (5). In Favor of Defendant Where Replevin is Not for Rent or for Damage Feasant.

Adjudged that the plaintiff do return to the defendant the goods and chatels (or the cattle) (stating the particulars thereof) forthwith (or in days), and that the plaintiff do pay the defendant in days $ for costs of suit (if damages be awarded, add: and $ for damages sustained by the defendant).

GARNISHEES.

[*See sections 148-154 and notes thereto, and Rules 26-28.*]

46. Summons to Garnishee and Primary Debtor (After Judgment).

In Division Court, in the County of

[Seal.]

No. , A.D. 19 .

Between Abraham Berner, Primary Creditor, and Charles Doolittle, Primary Debtor, and Emery Wheeler, Garnishee.	Judgment recovered on the day of A.D. 19 , in the Division Court in the County of Amount unsatisfied, $.

You, the above-named garnishee, and the primary debtor, are hereby summoned to appear at the sittings of this Court, to be held at in the said county, next after the expiration of days from the time this summons is served on you, to state and to show whether or not you the said garnishee owe any, and what debt to the above-named primary debtor, and why you should not pay the same into Court, to the extant due on the above-named judgment, to satisfy the same.

You, the said garnishee, are hereby notified that from and after the time of the service of this summons on you all debts owing or accruing from you to the above-named primary debtor, are attached, and if you pay the same otherwise than into Court, you will be liable to repay it in case the Court so orders, but if you pay the same to the clerk of the Court at any time prior to the said sittings of the Court, you need not attend the said sittings, unless subpœnaed and paid for your attendance thereat.

The garnishee is entitled to set up any statutory or other defence or set-off, or to dispute or admit liability in whole or in part, and the garnishee and all other persons interested in or in any way affected by the proceedings, may also show any other just cause why the debt sought

to be garnisheed should not be paid to or applied in or towards satisfaction of the claim of the primary debtor, and if they desire to do so, they must file with the clerk notice thereof, with particulars of such defence or set-off, or any admission of the amount owing or accruing from them, or either of them, within eight days after the service of the summons.

The ensuing sittings of the Court will be held as follows, viz.:—

at o'clock a.m., on the day of , A.D. 19 ,
at o'clock a.m., on the day of , A.D. 19 ,

Given under the seal of the Court, this day of A.D. 19 .

Clerk.

NOTICES AND WARNING TO GARNISHEE.

In the absence of any notice of such defence or set-off, the Judge may, in his discretion, give judgment against you or either of you.

(In case the debt sought to be garnished is for wages or salary, add as follows: "The primary debtor resides at in the County of in the Province of Ontario, and his occupation in the service of the garnishee is that of an engine driver (*or as the case may be*) on the railway of the garnishee (the Grand Trunk Railway Company of Canada), and is occupied as such on said railway between the cities of Toronto and Hamilton (*or as the case may be*).

46(1) *The debt adjudged to be due by the primary debtor to the primary creditor, was incurred for board and lodging.*

[*For form of garnishee summons before judgment, see Form 4 to the Statute, ante, p. 579.*]

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47. AFFIDAVIT FOR ORDER TO ATTACH DEBT.

[*Sections 148 et seq. and notes.*]

(*Insert title of Court and style of cause.*)

I, *A*——— *B*———, of the of in the county of , the plaintiff in this suit (*if the affidavit be made by the plaintiff's solicitor or agent make the necessary alteration*), make oath and say that judgment was recovered in this cause against the above-named defendant on the day of , A.D. 19 , for the sum of $ debt and costs (*or according to the judgment, in case the judgment has been transferred to another Court, here state the fact*). That the said judgment remains wholly unsatisfied (*or* that $, part thereof, yet remains unsatisfied).

That I have reason to believe, and do believe, that *E. F.*, who is residing at , within this Province is (*or if the person indebted to the defendant be not known, say* "that one or more persons who are residing within this Province, whom I am unable to name, are") indebted to the defendant in the sum of $, (*or if the amount be unknown, say* "in an amount which I am unable to name").

Sworn before me at the of
in the county of this } A——— B———.
day of A.D. 19 .

48. Judge's Attaching Order.

[*Sections 148 et seq.*]

In the Division Court in the County of

Between *A B* and *C D*, Plaintiff, Defendant. } Judgment entered in the Division Court in the County of on the day of A.D. 19 ,

Amount unsatisfied $

On application of the plaintiff, and upon reading his affidavit, [*or* the affidavit of *A. B.*, his solicitor (or "agent," *as the case may be*)], it is ordered that all debts now owing or accruing to the defendant from *E. F.* or from any party in this Province, be and the same are hereby attached, to satisfy the judgment in this cause.

Dated the day of A.D. 19 .

_____,
Judge.

Add warning as in next form.

---

48 (a). Warning to Garnishee.

[*To be Endorsed on Attaching Order.*]

To *E. F.* and all others, Garnishees.

You are hereby notified that from and after the time of the service of this order on you, all debts owing or accruing, from you to the above-named *C. D.*, are attached, and if you pay the same to any one other than to the person holding the proper order to receive the same, or into Court, you will be liable to re-pay it, in case the Court or judge so order.

---

49. Judgment on Confession After Action.

[*Section 169.*]

The defendant having been served with summons and particulars of claim for a debt amounting to $ (or the plaintiff having consented to take the defendant's acknowledgment for the sum of , part thereof, and abandoned the residue; or having allowed the defendant's set-off thereout; or made certain deductions claimed therefrom), and the defendant having confessed the same in writing before *G. L.*, clerk (or bailiff), and the confession being duly proved and produced, it is adjudged that the said *A. B.* do recover against the said *C. D.* the said sum of $ for debt, and $ for costs.

[*See form of confession and affidavit of confession, No. 23 ante.*]

50. AFFIDAVIT FOR SPEEDY JUDGMENT.

[*Section 100 and notes.*]

In the Division Court of the County of , Plaintiff.
Between and , Defendant.

I, , of the City of , in the County of ,
make oath and say:

1. That I am the solicitor or agent for the above-named plaintiff, and have personal knowledge of the matters herein deposed to.

2. That the above-named defendant is justly and truly indebted to me or to (as the case may be), the plaintiff, in the sum of $ (state the facts and verify the cause of action).

3. That, in my belief, there is no defence to this action. That immediate judgment should be granted for the following reasons, viz.: (herein state the reasons fully).

Sworn before me at the City of ,
in the County of ,
this day of , 19 . H. A. LOCKE, *Clerk.*

NOTE.—*See Forms of Notice of Motion and orders for Speedy Judgment, etc., Nos. 119 and 120.*

---

51. ORDER TRANSFERRING CAUSE WHEN ENTERED IN WRONG COURT.

[*Section 79.*]

(*Court and Cause.*)

It appearing that the cause has been entered in the wrong Division Court, I hereby order that all papers and proceedings in this cause be transferred to Division Court, in the County of , in pursuance of the Division Courts Act, upon the terms (that the defendant shall in no case have taxed against him or pay more costs than if he had been originally sued in such last-mentioned Court, and that the plaintiff do pay to the defendant forthwith the sum of $ as fees for the attendance of himself and his witness at this Court, as the case may be, or any other term that the Judge may think proper to impose).

Dated this day of , 19 .

_____, *Judge.*

51 (1). AFFIDAVIT FOR ORDER TRANSFERRING ACTION TO ANOTHER DIVISION COURT.

[*Section 79.*]

(*Court and Cause.*)

I, A. B., etc. (residence and occupation), *the plaintiff herein, make oath and say:—*

1. That this action is brought upon an agreement signed by the defendant in the Township of in the County of not to be operative until proved and signed by me at the of in the County of .

2. That pursuant to the said agreement I shipped at Hamilton the goods for the price of which this action is brought in this Court.

3. That the defendant resides at the said Township of within the limits of the Division Court of the County of .

4. That the defendant has filed a notice objecting to the territorial jurisdiction of this Court in this action, and I am advised to believe that the whole cause of action did not arise within the limits of this Court.

Sworn, etc.

---

51 (2). NOTCE OF MOTION TO TRANSFER ACTION.

[*Section 79.*]

(*Court and Cause.*)

Take notice that a motion will be made on behalf of the above named plaintiff, before the Judge of this Court at his Chambers in the Court House on the of in the County of Huron (or) *at the sitting of this Court at the Town Hall in the Township of in the County of on the day of , A.D. 19 , at o'clock in the forenoon or so soon as the motion can be made for an order under section 79 of the Division Courts Act, transferring this action into the Division Court in the County of Huron, and upon such motion will be read the affidavit of the plaintiff filed.*

Dated this day of , A.D. 19 .

To the defendant.

Plaintiff.

EXECUTIONS.

52. Execution Against Goods.

[*Section 173.*]

No.
A. D. 19 .

In the Distrlet of — Division Court of the — Count — or

Between *A. B.*, Plaintlff,
and
C. D., Defendant.

Whereaa on day of A.D. 19 , ths recovered in the sald court judgment against the for dollars for debt (or damages) snd dollars for costs which remsins unsatisfied (*when ths judgment has been revived, add*, "and on the day of A.D. 19 , the said judgment was duly revived.") You nre hereby required to levy of the goods nnd chatteis of the In the said County or Dlstrict (not exempt from execution), the said moneys amounting together to the sum of doiisrs and interest thereon at the rate of five per cent. per annum from the day of A.D. 19 . and your lawfui fees so that you may hsve ths same immediately after the execution hereof and pay ssme over to ths Clerk of thls Court for the

Given under seal of the Court, this day of A.D. 19 .

X. Y.,
Clerk.

To *V. W.*,
Bailiff of aaid Court.

Judgment .....$
Interest .....
Suhsequent costs .....
Thia execution .....

Levy the sum of .....$
nnd your lawfui fees upon this precept.

[*Scc similar Form No. 5 to the statute, ante.*]

---

53. Execution Against Lands.

[*Section 182.*]

In the District of — Divialon Court of the — County *or*

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

Whereas, on the day of . A.D. 19 , the plaintiff recovered in the said Court, judgment against the defendant for $ for debt, and $ for costs of suit, which remain unsatisfied

(*when judgment has been revived, add* "and on the day of A. D. 19 , the said judgment was duly revived.") You are hereby required to levy of the lands and tenements of the defendant in the said county, the said moneys, amounting together to the sum of $ and interest thereon at the rate of five per cent. per annum, from the day of A.D. 19 , together with your own fees, poundage, and incidental expenses; so that you may have the same immediately after the execution hereof, and pay the same over to the Clerk of this Court for the plaintiff.

Given under the seal of the Court, this day of , A.D. 19 .

Z. Y.,
Clerk.

To *V. W.*,
Sheriff of the County *or* District of

[*See similar Form No. 6 to statute, ante.*]

---

54. FORM OF EXECUTION IN REPLEVIN AGAINST PLAINTIFF WHEN RETURN OF GOODS ADJUDGED WITH DAMAGES AND COSTS.

[*See Notes to Section 62 (4), ante.*]

No. , A.D. 19 .
In the Division Court in the County of

Between HENRY BRAY, *Plaintiff*,

and

JOHN NOKES, *Defendant*.

[Seal.]

Upon hearing this action of replevin at a sitting of the Court holden at in and for the said division on the day of 19 , it was adjudged that the plaintiff do return to the defendant the goods and chattels (*stating the particulars thereof*) forthwith *or* in days), and that the plaintiff do pay the defendant in days $ for costs of suit (*if damages have been awarded add* and also $ for damages sustained by the said defendant) and the plaintiff has not returned to the said defendant the said goods and chattels, or paid the said costs (*if damages have been awarded and have not been paid* add and damages), these are therefore to require and order that without delay you cause the said goods and chattels to be returned to the defendant and that you levy of the goods and chattels of the plaintiff in the said County of (not exempt from execution), the said moneys, amounting together to the sum of $ and your lawful fees so that you may have the same within thirty days after the date hereof, and pay the same over to the clerk of this Court for the plaintiff.

And you are also required and ordered forthwith to make return to the clerk of this Court of what you shall have done in and about returning the said goods and chattels to the defendant.

Given under the seal of the Court this day of 19 .

To Henry McPhail,
Bailiff of said Court,

H. A. LOCKE,
Clerk.

Judgment	$
Interest	$
Subsequent costs	$
This execution	$
Levy the sum of	$

besides your lawful fees on this precept.

---

54 (1). EXECUTION AGAINST DEFENDANT IN REPLEVIN.

[*Section 118 (1)*].

[*See other Replevin Forms: 54. Form of execution against plaintiff when goods ordered to be returned with damages and costs; also Forms 38 et seq., ante.*]

In the Division Court in the County of Huron.
No. , A.D. 19 .

Between Henry Bray, Plaintiff,
and
John Noakes, Defendant.

[*Seal.*]

Upon hearing this action of replevin at the sittings of this Court held at in and for the said division on the day of A.D. 19 , it was adjudged that judgment be entered for the plaintiff for $ and $ costs to be paid by the defendant to the plaintiff within days.

These are therefore to require you to levy of the goods and chattels of the defendant not exempt from execution in the said county, the sum of $ and your lawful fees so that you may have the same within thirty days after the date hereof and pay the same over to the clerk of this court for the plaintiff.

And you are also required and ordered forthwith to make return to the clerk what you shall have done.

Given under the seal of the Court this day of A.D. 19 .

Clerk.

To
Henry McPhail,
Bailiff of the said Court.

Judgment	*$*
Interest	*$*
Subsequent costs	*$*
This execution	*$*
Levy the sum of	*$*

besides your lawful fees on this precept.

55. AFFIDAVIT FOR COMMISSIAN TO EXAMINE WITNESSES.

[*Section 118 (1)*].

(*Court and Cause.*)

I, make aath and ssy:—

1. That this actioa is brought for the recovery of (hers state shortly the cause of action).

2. That the defendant haa filed a dispute aotice herein.

3. Thnt *E. F.* ia a materiai nnd necessary witness for me in the said cause, snd I am advised, and veriiy heiieve, thnt I csnaot safeiy proceed to the trial of it without his evidence.

4. Thst the said *E. F.* is at preseat residiag at , without the iimits of the Province of Ontario. (If made hy the defeadaat, add the foiiowiag:—

5. That I bavc a good defence in thia action on the merits, as I am advised, and veriiy heiieve (*or if made by a solicitor or his clerk, say*: Thc defendant has, as I am instructed, and veriiy helieve, a good defence, .c.).

6. Thia application for a commission is made *bona fide* for the purpose of procuring the evidence of the said , and not for deiay.

Sworn, etc.

---

56. ORDER FOR COMMISSION.

[*Section 118 (1).*]

(*Court and Cause.*)

Upon hearing the solicitor for the piaintiff snd defendant aad upoa reading the nfidavit of fiied, it is ordered as foiiows:—

1. A commission may issue directed to of for the examination *viva voce* of witnessea on hehalf of the said piaiatiff and defeadaat respectiveiy at aforesaid hefore thc said commissioaer.

2. days previouaiy to the sending out of the aaid commiasion the ssid , or hia soiicitor, ahaii give to *X. Y.*, or his solicitor , notice in writing of the maii or other conveyance hy which the commission is to he sent out.

3. Thc costs of this order and of the commission to he issued, aad aii other mattera which may be donc ia pursuance hereof, shaii he costs in the cause.

Dated day of , A.D. 19 .

———,

Judge.

56 (a). Commission to Examine Witnesses.

[Section 118 (1)].

(Court and Cause.)

George V., by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India.

To *Greeting.*

Know ye that We, in confidence of your prudence and fidelity, have appointed you a Commissioner for the purpose of taking evidence in the above cause now depending in Our said Court; and We do hereby give you full power and authority to administer all necessary oaths and do all things necessary for the taking of the evidence more particularly mentioned in the order for the issue of this Commission, a copy of which is hereto attached.

Forthwith after taking such evidence you will return the same, together with these presents. In the execution of this Commission you will have due regard to the general rules of practice relating to Commissions, hereto appended, and the terms of the order hereto attached and the instructions hereunder written.

Witness his honor *Judge of Our said Court at* *this* *day of* *in the year of Our Lord one thousand nine hundred and* .

Clerk.

Issued from the office of the clerk of the said Court under and pursuant to the order of the said Court, bearing date the *day of* *A.D. 19* .

Clerk.

Instructions to Commissioner.

(1) See that proper notice is given to the parties concerned.

(2) Follow strictly all the requirements of the general rules and special order attached.

(3) Before acting on this Commission take the Commissioner's oath hereon indorsed.

(4) After the Commission has been executed, attach the depositions, exhibits and all other papers to the Commission, and complete and sign the "Commissioner's Return" indorsed thereon.

(5) Securely enclose the Commission and attached papers, and mail them in a sealed envelope to *, postage prepaid. Indorse the envelope as follows: "Commission in* *v.* .

(Signature of Commissioner.)

(6) Use the following forms of oath:

Clerk's Oath.

You shall truly, faithfully and without partiality to any or either of the parties in this cause, take, write down, transcribe and engross all and every the questions which shall be exhibited or put to all and

every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said Commissioner named in the Commission within written, as far forth as you are directed and employed by the Commission to take, write down, transcribe or engross the said questions and depositions. So help you God.

Witnesses' Oath.

You are true answer to make to all such questions as shall be asked you, without fear or favor to either party, and therein you shall speak the truth, the whole truth and nothing but the truth. So help you God.

Interpreter's Oath.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations which shall be administered to, and all and every the questions which shall be exhibited or put to all and every the witness and witnesses produced before and examined by the Commissioner named in the Commission within written, so far forth as you are directed and employed by the said Commissioner, to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. So help you God.

(7) Notice of the execution of this commission is to be given to representing the plaintiff and to representing the defendant.

Clerk.

NOTE.—*The Commissioner's oath may be taken: In England or Ireland before a Commissioner authorized to administer oaths in the Supreme Court of Judicature of England or Ireland; in England or Ireland before a Judge of the Supreme Court of Judicature of England or Ireland; in Scotland before a Judge of the Court of Session or the Justiciary Court of Scotland; before a Judge of any of the County Courts of Great Britain or Ireland, within his county; in Great Britain or Ireland or in any Colony of His Majesty, or in any foreign country, before the Mayor or Chief Magistrate of any City, Borough or Town corporate, certified under the Common Seal of such City, Borough or Town corporate; in any Colony belonging to the Crown of Great Britain, or any dependency thereof, or in any foreign country before a Judge of any Court of Record or of supreme jurisdiction; in the British Possession in India before any Magistrate or Collector certified to have been such under the hand of the Governor of such Possession; in Quebec, before a Judge or Prothonotary of the Supreme Court or Clerk of the Circuit Court; in any foreign place, before any Consul, Vice-Consul or Consular Agent of His Majesty exercising his functions; before a Notary Public and certified under his hand and official seal; or before a Commissioner authorized by the laws of Ontario to take such affidavits.*

The Commissioner's Oath.

I, , the Commissioner within named, do hereby swear that I will, according to the best of my skill and knowledge, truly and faithfully and without partiality to any or either of the parties in this case, take the evidence of each and every witness produced and examined

by virtue of this Commission, and will cause the said depositions so taken to be truly and faithfully transcribed and returned. So help me God.

(Signature of the Commissioner.)

Sworn before me at this day of 19.

(Signature of person before whom oath taken.)

Return of the Within Commission.

The return to the within Commission appears by the depositions and papers hereto annexed; and I, the undersigned Commissioner, do hereby certify that the proper oaths were administered by me to the clerk taking down and transcribing the said evidence, and to the witnesses whose depositions are hereto attached (and to any interpreter called upon by me to interpret the evidence of any of the said witnesses), and that the said depositions were truly and properly taken by me, and that the evidence was duly and correctly transcribed.

(Signature of Commissioner.)

Con. Rules of Supreme Court, 277-290.

These Rules apply, so far as applicable; and are to be found in notes to section 118 (6).

The Order or Commission need not set out the particulars contained in these Con. Rules, but shall be read as if containing the same: Con. R. 200.

The above forms of Commission, etc., are to be found in the Forms to Holmested's Judicature Act, 4th ed., Form 60.

---

56 (b). Order for Examination of Witnesses, where no Commission is to be Issued.

[*See Section 118 (3), (4).*]

(Style of Cause.)

1. Upon the application of and upon reading the affidavit of filed:

2. It is ordered that a witness on behalf of the be examined viva voce on oath before on two days notice in writing of the time and place where the examination is to take place being given to the or his agent.

For order for Examination of Sick Witness, etc. *See Form 17 (1) ante.)*

---

56 (c). Notice of Application for Order for Commission to Examine Witness Residing out of Ontario or for an Order to Examine Sick, Aged, or Infirm Witness, or one Residing in a Remote Part of Ontario.

(Insert title of Court and Style of Cause.)

Take notice, that a motion will be made on behalf of the above-named plaintiff (or defendant) to the judge of the court, at his chambers in the Court House, in the City of Hamilton (or as the case may be), on

the day of , 19 , at o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order for the issue of a Commission under section 118 of the Division Courts Act, for the examination before , Esquire, Commissioner of E. F., a person residing out of Ontario, namely at , or for an order under section 118 (3), (4), of The Division Courts Acts, to examine E—— F——, a material and necessary witness in this cause for the plaintiff (or defendant), under the provisions of said section, and that on such motion will be read the affidavits of , true copies of which are hereto annexed.

Dated the day of , 19 .

To (*Signature of the party, his solicitor, or agent.*)

(*Name of party to whom notice given.*)

See Form of Affidavit for above order, No. 17, ante.

---

56 (*d*). Notice of Opening Commission.

(*Style of Court and Cause.*)

Take notice that the return to the Commission to take the evidence of witnesses in this cause will be opened at the office of the clerk of the Court on the day of , 19 , at o'clock in the noon.

Dated day of 19 .

(*Signature.*)

To the (plaintiff or defendant), or to Esq., agent for the (plaintiff or defendant).

---

57. Warrant of Commitment in Default of Appearance on Judgment Summons.

[*Section 191 (a) and Notes.*]

In the Division Court in the County of
No. , A.D. 19 .

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

[Seal.]

To *V. W.*, Bailiff of the said Court, and to all constables and peace officers of the County of and to the jailer of the common jail of the County of

Whereas, at the sittings of this Court, or of the Division Court in the County of , holden at , on the day of 19 , the plaintiff, by the judgment of the said Court, in a certain suit wherein the Court had jurisdiction, recovered against the defendant, the sum of $, for his debt (or damages) and costs of

suit, which were ordered to be paid at a day now past (or in case the judgment has been removed by transcript insert here) "and whereas the said judgment has by transcript been duly removed from the said Division Court in the County of to this Court. And whereas, the defendant, not having made such payment upon application of the plaintiff, a summons was duly issued from and out of this Court, against the defendant, by which summons the defendant was required to appear at the sittings of this Court, holden at an, etc., to answer such questions as might be put to him, touching (*set out as in the summons*)*: And whereas, it was duly proved on oath, at the said last mentioned sittings of this Court, that the defendant was personally served with the said summons: And whereas, the defendant did not attend, as required by such summons, nor give sufficient reason for not so attending: And whereas it appeared to the satisfaction of the judge that such non-attendance was wilful:

And thereupon it was ordered by the judge of this Court that the defendant should be committed for the term of days, to the common jail of this County, being the County in which he resides, according to the form of the statute in that behalf. These are therefore to require you, the said bailiff and others, to take the defendant, and to deliver him to the jailer of the common jail of this county: And you, the said jailer, are hereby required to receive the defendant, and him safely to keep in the said common jail for the term of days from the arrest under this warrant, or until he shall be sooner discharged by due course of law; for which this shall be your sufficient warrant.

Given under the Seal of the Court this day of A.D. 19 .

Debt and costs up to the time of the delivering of this warrant for execution .....$

Amount.

W. W. ELLIS,
Clerk.

[*For Forms of Affidavit and Summons, see Nos. 24, 25, ante.*]

---

58. WARRANT OF COMMITMENT AFTER EXAMINATION.

[*Section 191.*]

In the Division Court in the County of

(*As in last Form, down to the asterisk* *, *conclude as follows*):

And whereas, the defendant having duly appeared at the said Court pursuant to the said summons, was examined touching the said matters: And whereas, it appeared, on such examination that [here insert the particular ground of commitment in the language used in the statute.]

And thereupon it was ordered by the said judge that the defendant should be committed for the term of days to the common jail of the said county, according to the form of the statute in that behalf, or until he should be discharged by due course of law.

These are therefore to require you, the said bailiff and others, to take the said defendant, and to deliver him to the jailer of the common jail of the said county; and you, the said jailer, are hereby required to receive the defendant, and him safely keep in the said common jail, for

the term of days from the arrest under this warrant, or until he shall be sooner discharged by due course of law, for which this shall be your sufficient warrant.

Given under the seal of the Court, this day of A.D. 19 .

X——— Y———,
Clerk.

Debt and costs up to the time of the delivery of warrant of execution $.

If default be in non-payment of the instalment ordered by the judge, then upon payment of this instalment not so paid and of the costs up to the time of the delivery of the warrant of execution.

---

59. ORDER FOR IMPOSITION OF FINE FOR CONTEMPT.

[*Sections 217, 222.*]

It is adjudged that *E. F.*, at the sittings of this Court now holden, in open Court, is guilty of a contempt of the said Court, by wilfully insulting , judge (*or* deputy *or* acting judge) of the said Court (*or* "in view of the Court, by wilfully insulting , clerk (*or* bailiff) of the said Court, during his attendance at such Court" (*or* by wilfully interrupting the proceedings of the said Court," or by creating a disturbance within the Court room or within hearing of the Court)); and it is ordered that the said *E. F.* forthwith pay a fine of $ for such offence, and, in default of immediate payment, be committed to the common jail of this county for days, unless such fine, the costs herein, and the expense attending the commitment be sooner paid.

---

60. WARRANT OF COMMITMENT FOR CONTEMPT IN OPEN COURT.

[*Sections 217, 222.*]

In the Division Court in the County of

To *V. W.*, bailiff of the said Court, and to all constables and peace officers of the County of , and to the jailer of the common jail of the said County of

Whereas at the sittings of this Court holden on at it was adjudged that *E. F.* did, then and there in open Court, wilfully insult me, , judge (*or* deputy *or* acting judge) of the said Court [*or* did, in view of the Court, wilfully insult clerk (*or* bailiff) of the said Court, during his attendance at such Court (*or* did unlawfully interrupt the proceedings of the said Court)], and it was ordered, that the said *E. F.* should forthwith pay a fine of $, for such offence, and in default of immediate payment, be committed to the common jail of the County of for days; and whereas the said *E. F.* did not pay the said fine, in obedience to the said order: These are therefore to require you, the said bailiff and others, to take the said *E. F.*, if he shall be found within the said County of , and

deliver him to the said jailer of the common jail of the said County of ; and you, the said jailer, are hereby required to receive the said *E. F.*, and him safely keep in the common jail aforesaid, for the term of days from the arrest under this warrant, unless the said fine and costs, the costs amounting to $, and also the expenses attending the commitment, amounting to the sum of $, be sooner paid.

Given under my hand and seal this of , 19 .

[L.S.)
Judge.

Sealed with the seal of the Court, [L. S.]

X. Y.,
Clerk.

---

61. TRANSCRIPT OF JUDGMENT FROM ONE DIVISION COURT TO ANOTHER.

[*Section 188.*]

In the Division Court in the County of
Transcript of the entry of a judgment recovered on the day of , A.D. 19 , in said Court, holden in and for said division in a suit numbered , A.D. ,

Between *A*——— *B*———, Plaintiff.
and
C——— *D*———, Defendant.

[Seal.]

Amount of judgment.	
Debt,	$
Costs,	$
	$
Additional costs,	$
Total,	$
Amount paid,	$
19	
19	
Total paid,	$
Amt. due,	$

Judgment for plaintiff for $ debt, and $ costs of suit; execution issued on the day of , A.D. 19 , and returned on the day of , A.D. 19 (*here state the return*). (*If the judgment was revived, add the following words,* "and on the day of , A.D. 19 , the said judgment was duly revived.") Pursuant to the provisions of the Act.

I, X——— Y———, Clerk of the said Division Court, do certify that the above transcript is correct, and duly taken from the Procedure Book of the said Court, and that judgment in the above cause was recovered at the date above stated, viz.:

the day of A.D. 19 , and further, that the amount unpaid on said judgment is $, as stated in the margin hereof. The post-office address of the person applying for this transcript is as follows: [here set out name and post-office in full.]

Given under the seal of the said Court this day of A.D. 19 .

X———, Y———,
Clerk.

To
Clerk of the
Division Court in the County of

61 (1). AFFIDAVIT AFTER TRANSCRIPT HAS BEEN ISSUED UNDER SECTION 188 (2).

(Style of Court and Cause.)

(Commencement as in other affidavits.)

1. That I have a personal knowledge of the facts connected with judgment rendered in this cause.

2. That the said judgment remains unsatisfied in the whole (or in part, as the case may be, showing how much remains unpaid).

That the execution issued in the Division Court, of the County of , to which a transcript was issued from this Court has been returned nulla bona (or I believe the defendant has not sufficient goods in that division to satisfy the said judgment).

(Add the grounds for such belief; and add the jurat as in other affidavits.)

INTERPLEADER.

[Sections 214-216 and Rules 8-12.]

62. APPLICATION OF BAILIFF FOR INTERPLEADER.

(Insert title of Court and style of Cause.)

By virtue of a writ of execution (*or* "attachment") in this cause, dated the day of , 19 , from this Court, I did, on the day of , 19 , seize and take in execution (*specify goods, chattels, etc., seized*) as the property of the defendant. *E. F.*, of the Township of , etc., now claims the same as his property (*or* now claims the said and as his property) and that the value thereof is $, you will therefore be pleased to issue an interpleader summons to the plaintiff and to the said *E. F.*, according to the statute in that behalf.

Dated , 19 .

To the Clerk of the said Court.

V——— W———,
Bailiff.

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63. SUMMONS IN INTERPLEADER.

[Section 215.]

In the Division Court in the County of
No. , A.D. 19 .

[Seal.]

Between Henry Barr,———Plaintiff,
and
John Nokes,——Defendant,
and
Robert Roy,———Claimant.

You, the said Robert Roy, are hereby summoned to appear at the sitting of this Court to be holden on Friday, the first day of

November, A.D. 19 , at the hour of ten o'clock in the forenoon, at the township hall, in the village of Markham, in the said county, touching a claim made by you to certain goods and chattels (*or moneys, or securities, as the case may be*), viz.—(*Here specify the goods, etc., claimed*), seized and taken in execution (*or attached*) under process issued out of this Court in this action (*or by attachment issued by O. R., a Justice of the Peace*), at which time and place you will be required to maintain your claim to the said goods and chattels, and in default of your then establishing such claim, the said goods and chattels will be sold (or the said moneys be paid and delivered over) according to the urgency of the said process.

And take notice that you are required, within five days after the day of service hereof upon you, to deliver or leave at the clerk's office, particulars of the goods and chattels (*as the case may be*), so claimed by you and the grounds of your claim.

And you, the said Henry Hray, are also hereby summoned to appear at the said sitting of the said Court, and maintain your right to have the said goods, etc. (*or as the case may be*), sold to satisfy your claim.

And all the said parties are required to take notice, that every claim will, at the said sitting of the said Court, be adjudicated upon.

Any application by the defendant to change the place of trial must be made within the time limited for disputing the plaintiff's claim.

Given under the seal of the Court, this day of January, A.D. 19 .

M. TRACY,
Clerk.

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64. PARTICULARS OF CLAIM IN INTERPLEADER.

[*Rule 9.*]

In the First Division Court in the County of Brant.

Between Aaron Barr, Plaintiff,
and
Colin Duffy Defendant,
Edgar French, Claimant.

To whom it may concern:

Edgar French, of , claims as his property the following goods and chattels (*or moneys, etc.*) seized and taken in execution (*or attached*) as it is alleged, namely (*specify the goods and chattels, or chattels or moneys, etc., claimed*), and the grounds of claim are (*set forth in ordinary language the particulars, on which the claim is grounded, as how acquired, from whom, when, and the consideration paid or to be paid and when*), and this the said Edgar French will maintain and prove.

E. FRENCH.

Dated this day of , 19 .

N.B.—*If any action for the seizure has been commenced, state in what Court and how the action stands.*

64. (1) Order for Sale of Perishable Goods. Section 211.

(Court and Cause.)

Upon the application of and upon reading the affidavit of and it appearing that the peaches seized under the attachment in this action are liable to become decayed and lost, and that it is proper that the same should be sold at once;

It is ordered that the said peaches be forthwith sold by the bailiff of this court by public auction, and that the proceeds thereof shall be paid into court to abide the event of this action.

And it is further ordered that the said sale shall be without prejudice to the rights of the parties in any question which may arise in the action.

And it is further ordered that the costs of this application and of such sale be costs in the cause.

---

64 (1a). Affidavit for Above Order.

[Rule 12, Section 215.]

(Court and Cause.)

I of in the County of , (occupation) , the plaintiff herein, make oath and say:

1. That I am informed by the bailiff of this Court that he has seized under attachment in his hands in this action against the defendant, amongst other property, fifty baskets of peaches.

2. That the said peaches are of a perishable nature, and unless forthwith sold, will become partly or wholly decayed and lost.

Sworn, etc.

For form of bond, see No. 70.

---

64 (2). Claim of Damages by Claimant in Interpleader: Section 215 (3).

(To be added to Form 64, when damages claimed.)

And take notice that the said Edgar French claims $60 damages from the said Aaron Barr, the above-named plaintiff, and from John Smith, the bailiff of the said court, for or in respect of the seizure of the said property and that the grounds of the said claim are that the said plaintiff and bailiff broke into and entered his house at , and that they there seized and took away the said goods and chattels under the said execution (or judgment).

64 (3). CLAIM OF DAMAGES BY CREDITOR.

(*Court and Cause, as in Form 64.*)

Take notice that I, the said execution creditor, claim the sum of $ *from you, the bailiff of this court, for damages arising out of a certain execution in this action, and that the grounds of my claim are as follows:—*

[*Here state the grounds of the claim.*]

That you having seized certain goods and chattels of and belonging to the execution debtor, under process issued from this court at my instance, wrongfully, and without lawful excuse, withdrew from the possession of the said goods and chattels, whereby I was deprived of the fruits of the said execution.

Dated, etc. ———,
Execution Creditor.

To ———,
The Bailiff of this Court.

---

64 (4). ADJUDICATION ON INTERPLEADER.

[*See notes to section 62 (4).*]

Adjudged, that the goods [*or the goods, chattels, and moneys, or proceeds of the goods, etc.,* (as the case may be)] *mentioned in the interpleader summons* [if only for a part of the goods, etc., add the words, "*hereafter mentioned, that is to say* (here enumerate them)] *are* (or are not) *the property of E.... F....* (*the claimant*), *or that rent to the amount of* $ *is due to E..... F.....* (*the claimant*): *Ordered that* $, *the costs of this proceeding, be paid by* (here insert such order as the costs or the subject in dispute, if any, as the judge shall have made) *in* *days.*

---

64 (5). WHERE DAMAGES CLAIMED OR ADJUDGED.

It is also adjudged that the said E.... F.... (*the claimant*) *has sustained damages arising or capable of arising out of the execution of the process by which said* (or as the case may be) *were taken in execution* (or *attached*) *to the amount of* $, *and that the same is recoverable from and payable by A. .. B....* (*the execution creditor, or L.... M....., the bailiff*) *to the said E.... F....* (*the claimant*), *and which said sum is hereby ordered to be paid forthwith* (or as the case may be).

---

64 (6). WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO NEITHER IS ESTABLISHED.

Adjudged, touching the claim of E.... F.... to certain goods, etc. (as in the preceding form), *and for damages arising out of the said execution, referred to in the interpleader summons, and which E.. F.. claims against* (*the execution creditor*) *and the bailiff of the court that*

the said goods, etc. (*or moneys*) *or part thereof* (describe the part), *are the property of* (*execution debtor*), *and that the said E.... F.... is not entitled to receive any damages from either* (*the execution creditor*), *or the said bailiff: Order it that the costs, etc.* (as in the preceding form).

---

64 (7). WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO BOTH IS ESTABLISHED.

Adjudged, touching the claim of E.... F.... to certain goods, etc. (proceed here as in 64 (3)), *and for damages arising* (same as in form 64 (3)), *that the said goods and chattels* (or moneys), *or part thereof* (specifying them), *are the property of E ... F ... and that E ... F ... is entitled to recover the sum of $ for damages arising out of the said execution against the bailiff of this court: Ordered that the bailiff of this court do pay the said E.... F.... the sum of $ for damages, and the sum of $ for costs, and the said A.... B.... (the execution creditor) do pay the said E.... F.... the sum of $ for costs.*

---

64 (8). WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND MONEY IS PAID INTO COURT, IN RESPECT OF THE LATTER, AND THE CLAIM TO THE GOODS IS ESTABLISHED, AND THE MONEY PAID INTO COURT IS FOUND TO BE SUFFICIENT TO SATISFY THE DAMAGES.

It is adjudged (proceed here as in form 64 (3)), *and for damages arising out of the said execution, and which E.... F.... claimed against E.... G...., the bailiff of this court, and in respect of which he hath paid into court the sum of $ that the said goods and chattels, etc.* (or *moneys, etc.*) or *part thereof* (specifying them or it), *are the property of E.... F.... but that the said sum paid into court is sufficient to satisfy all damages arising out of the said execution: Ordered that A.... B.... (the execution creditor) do pay to the said E.... F.... for her costs, and that E.... F.... do pay to the said E.... G...., the said bailiff, the sum of $ for her costs.*

(Conclude as in form 64 (3).)

(The foregoing form may be adapted to the case where money is paid into court in respect of damages or the claim to the goods is estsblished and the money paid into court is adjudged insufficient): *Ordered that A.... B.... (the execution creditor) do pay the sum of $ for costs, and that E.... G...., the said bailiff, do pay the said E.... F.... the further sum of $ for damages, and also the sum of $ for costs.*

(Conclude as in form 64 (4), ante.)

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64 (9). ADJUDICATION FOR DAMAGES, IN A CASE WHERE THE EXECUTION CREDITOR RECOVERS AGAINST THE BAILIFF, WHO PAYS MONEY INTO COURT.

Adjudged touching the claim, etc. (as in preceding forms), *and in respect of damages arising out of an execution in this action, in which*

process given from the court at the instance of the said A.... B.... (the execution creditor), directing the said bailiff to this court to levy the sum of $ of and from the goods and chattels of C.... D.... (the execution debtor), and in respect of which damages E.... G...., the bailiff of this court, hath paid into court the sum of $ ...., that the sum paid into court is not sufficient to satisfy all damages arising out of the said execution, (or that the sum paid into court is not sufficient to satisfy the damages arising out of the said execution), and that the said A.... B.... (the execution creditor) is entitled to recover the further sum of $ for damages from the said E.... G...., the said bailiff: Ordered that the said A.... B.... do pay the said E.... G.... the sum of $ for costs (or that the said E.... G.... do pay to the said A.... B.... the further sum of $ for damages, and also $ for costs).

(Conclude as in form 64 (4).)

---

64 (10). WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO THE GOODS IS, BUT THAT TO DAMAGE IS NOT, ESTABLISHED.

Adjudged, touching the claim of E.... F.... to certain goods, etc. (as in form 64 (2)), *and for damages, etc.* (as in form 64 (3)), *but that the said E ... F ... is not entitled to recover any damages from either the said A ... B ... (the execution creditor) or the said bailiff: Ordered that A.... B.... (the execution creditor) do pay to the said E.... F.... the sum of $ for the costs, and that the said E.... F.... do pay to the said bailiff the sum of $ for his costs of defending the said claim for damages.*

(Conclude as in form 64 (4).)

---

64 (11). WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO THE GOODS IS NOT, BUT THE CLAIM TO DAMAGES IS ESTABLISHED.

Adjudged, touching the claim of E.... F.... etc. (as in preceding form 64 (3)), *that the said goods and chattels, etc.* (as in preceding form 64 (3)), *are the property of the said C.... D.... (the execution debtor), and that the said E.... F.... (the claimant) is entitled to recover $ for damages from the said bailiff of this court, but not any damages from A.... B.... (the execution creditor): Ordered that the said E.... F.... do pay to the said A.... B.... the sum of $ for his costs, and that the said bailiff of this court do pay to the said E.... F.... the sum of $ for damages, and $ for costs.*

(Conclude as in form 64 (4).)

(From the foregoing, forms may easily be framed to suit other circumstances, as where the execution creditor makes claim for damages from the bailiff; and the claim to damages is established, or where it is not established.)

65. Order of Reference.

[Section 164.]

In the Division Court in the County of

[Seal.] Between *A. B.*, Plaintiff,
and
C. D., Defendant.

By consent of the plaintiff and defendant (*or their solicitors*) (*or as the case may be*) given in open Court (*or* produced in writing to the Court) it is ordered that all matters in difference in this cause (*and if consented to, add,* "and all other matters within the jurisdiction of this Court in difference between the said parties") be referred to the award of (if there be 3 arbitrators, here insert, or of any two of them) so as said award be made in writing, ready to be delivered to the parties entitled to the same, on or before the day of , or such further day as the said arbitrator may by writing under his hand, endorsed hereon, enlarge the time for making his said award, and that the said award may be entered as the judgment in this cause (*add any terms that the judge may prescribe, or the parties may agree upon*).

Dated this day of , 19 .

X. Y., Clerk.

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65. (1) Consent to Reference to Arbitration: Section 164.

In the Division Court in the County of

Between A. B., Plaintiff,
and
C. D., Defendant.

We the undersigned being the plaintiff and defendant (or the duly authorized agents for the plaintiff and defendant) in this action respectively do hereby consent, in accordance with section 164 of The Division Courts Act, to an order being made by the Judge that this action be referred to the arbitration of
in such manner and on such terms as the said Judge may deem just.

Dated this day of A.D. 19 .

(*Signatures*).

---

66. Appointment of Third Arbitrator or Umpire to be Endorsed.

[See Notes to Sections 164 et seq.]

We hereby appoint , of, etc., as a third arbitrator with us for determining the matters in dispute within referred to us.

Or,—We hereby appoint , of, etc., as an umpire as to certain differences of opinion which have arisen between us as arbitrators of the matters within referred.

67. APPOINTMENT FOR MEETING ON REFERENCE.

[*See Notes to Sections 164 et seq.*]

In the, etc., (state title of Court and style of cause).

B. } I appoint the day of next, at the
v. } hour of , at , for proceeding on this
D. } reference. , Arbitrator.

To (*both parties*).

68. ENLARGEMENT TO BE ENDORSED.

[*See Notes to Sections 164 et seq.*]

I enlarge the time for making my award respecting the matters referred to me by the within order of reference, until the day of , 19 . , Arbitrator.

Dated, etc.

69. AWARD.

[*See Notes to Sections 164 et seq.*]

After hearing and considering the proofs laid before me (*or* us) in the matter of the within reference, and in full determination of the matters to me (*or* us) referred, I (*or* we) do award that the within named *A. B.* is entitled to recover from the within named *C. D.* the sum of , together with the costs of this suit, and also the costs of this reference (*or as the case may be*), and that the same shall be paid by the said *C. D.* within days, and that judgment be entered in the within mentioned case accordingly.

Dated this day of , 19 .

Witness. } , *Arbitrator.*

(*Add affidavit of execution*: see Form 8 (*a*), *ante*.)

70. BOND ON SEIZURE OR SALE OF PERISHABLE PROPERTY.

[*Section 211 et seq. and notes.*]

In the Division Court in the County of

Between *A. B.*, Plaintiff,

and

C. D., Defendant.

Know all men by these presents, that we, *A. B.*, of (*insert place of residence and addition*) the above-named plaintiff, *E. F.*, of, etc., and *G. H.*, of, etc., are, and each of us is, jointly and severally held and firmly bound to *C. D.*, the above-named defendant, in the sum of $ (double the appraised value of the property)

to be paid to the defendant, his certain attorney, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, and each and every of us, binds himself, his heirs, executors and administrators firmly by these presents.

Sealed with our respective seals, and dated this day of , A.D. 19 .

Whereas the above-named plaintiff hath sued out of the said Court (*or* from a Justice of the Peace) a warrant of attachment against the goods and chattels of the defendant, and hath requested that certain perishable property, to wit (*specifying property*) belonging to the defendant, may be seized, and forthwith exposed and sold, under and by virtue of the said warrant of attachment [*or* whereas certain perishable property, to wit , belonging to the defendant, hath been seized under and by virtue of a warrant of attachment, issued out of the said Court (*or* by a Justice of the Peace) in the above-named cause, and hath been duly appraised and valued at the sum of $ and is now in the hands of the clerk of the said Court; and whereas the plaintiff hath requested the said clerk to expose and sell the said goods and chattels as perishable property] according to the form of the statute in that behalf.

Now the condition of this obligation is such, that if the said plaintiff, his heirs, executors or administrators, do repay to the said defendant, his executors, or administrators, the value of the said goods and chattels, together with all costs and damages, that may be incurred in consequence of the seizure and sale thereof, in case judgment be not obtained by the plaintiff, according to the Act: Then this obligation to be void or else to remain in full force and virtue.

Sealed and delivered in presence of)

A. B. [L. S.]
E. F. [L. S.]
G. H. [L. S.]

(*Add affidavits of executions, Form 8 (a), and of justification, Form 8 (b), ante.*)

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71. BOND FOR SECURITY FOR COSTS, WHERE PLAINTIFF OUT OF ONTARIO.

[*See Notes to Sections 119, 170, ante, pp. 319, 448.*]

(*Title of Court and style of cause.*)

Know all men by these presents—(*proceed with penal part of bond as in ordinary cases*).

Whereas, an action was upon the day of , A.D. 19 , entered by the above-named plaintiff against the above-named *G. H.* in the First Division Court of the County of Brant.

And whereas it has been made to appear that the said plaintiff does not reside in the Province, and it has been ordered that proceedings herein shall be stayed until security for costs of the defendant shall have been given to the satisfaction of the clerk of the said Court, or until deposit of a sufficient sum to meet and pay the said costs

shall have been made with the clerk of the said Court: and no such deposit having been made.

And whereas, the said plaintiff and the above bounden *C. D.* and *E. F.* as sureties for the said plaintiff, have agreed to give such security pursuant to the said order by entering into this obligation with the condition hereunder written; and this security has been approved by the clerk of the said Court.

Now, the condition of this obligation is such that if the said plaintiff, or any plaintiff substituted in his stead discontinues, become non-suit in the said action, or in case the said action is referred to arbitration, and an award is made against the said plaintiff, or any substituted plaintiff therein, shewing that he is not entitled to recover therein, or if the said defendant or any substituted defendant, obtain judgment, or verdict, or award, therein, then or in either of the said cases, if the above bounden *A. B., C. D.* and *E. F.* or either of them, their or either of their heirs, executors or administrators, do pay or cause to be paid to the said defendant, his executors, administrators or assigns, his or their costs to be taxed in the said action, then this obligation to be void and of no effect, or otherwise to remain in full force and virtue.

Sealed with our Seals and dated this day of . A.D. 19 .

Signed, sealed and delivered in presence of

E. F. [Seal.]
A. B. [Seal.]
C. D. [Seal.]

(*Add affidavits of execution, and of justification.* Forms 8 (*a*) and 8 (*b*), ante.)

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71 (1). Demand of Security for Costs.

(*Court and style of cause.*)

I hereby on behalf of the defendant require you to give the defendant security for the costs of this action, otherwise I shall apply for an order to compel you to give such security.

Dated, etc.

Yours, etc.,
(Signature.)
Defendant or Agent for defendant.

To the plaintiff.

---

71 (*a*). Notice of Motion for Order for Security for Costs.

(*Court and Cause.*)

Take notice that an application will be made on behalf of the defendant before his honor Esquire, Junior Judge of the County of at his Chambers in the Court House in the on day the day of A.D. 19 , at 11 o'clock in the forenoon or so soon thereafter as the application can be heard, for an order that the plaintiff herein give the defendant security for his costs of defence herein on the grounds stated in the affidavit of this day filed, and that in the meantime all proceedings herein be stayed.

And take notice that on such application will be read the affidavit of this day filed.

Dated this day of A.D. 19 .

Yours, etc.,
Defendant's Solicitor.

To the Plaintiff and to
Esq., his Solicitor.

---

71 (*b*). AFFIDAVIT FOR SECURITY FOR COSTS.

(*Court and style of cause.*)

1. I am the defendant herein.

2. The plaintiff is a permanent resident at out of the jurisdiction of this County and out of the Province of Ontario.

(Shew means of knowledge)

Sworn, etc.

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71 (*c*). ORDER FOR SECURITY FOR COSTS.

(*Court and Cause.*)

Upon the application of the defendant, and it appearing that the plaintiff ordinarily resides at Rochester, in the State of New York:

It is ordered that all proceedings in this action be stayed until the plaintiff shall give security for the costs of the defendant, either by payment into court of the sum of $, or by a bond with one surety for the sum of $, to be approved of by the judge of this court, or by the defendant or his solicitors.

It is further ordered that on the approval of the said bond the same shall be filed with the clerk of this court, and that the stay of proceedings shall thereupon be at an end.

It is further ordered that the bond, when given, or the money, when paid in, shall be subject to the further order of the judge of this court.

And it is further ordered that the costs of this application be costs in the cause; and leave is hereby reserved to the plaintiff, notwithstanding the stay of proceedings, to move for an adjournment of the trial of this action at any sittings of the court when the same shall come on for trial.

Judge.

---

72. UNDERTAKING BY NEXT FRIEND OF INFANT TO BE RESPONSIBLE FOR DEFENDANT'S COSTS.

[*Rule 36, and Notes to Section 66.*]

In the Division Court in the County of

I, the undersigned *E. F.*, being the next friend of *A. B.*, who is an infant, and who is desirous of entering a suit in this Court against *C. D.*, of, etc., hereby undertake to be responsible for the costs of the said *C. D.* in such cause, and that if the said *A. B.* fail to pay the said *C. D.* all such costs of such cause as the judge shall direct

him to pay to the said *C. D.*, I will forthwith pay the same to the clerk of the court.

Dated this day of 19 .

(Signed) E. F.

Witness

---

72. (1) AFFIDAVIT OF EXECUTION OF ABOVE UNDERTAKING.

In the Division Court in the County of Huron.

I of the of
in the County of (occupation) *make oath and say:*

1. That I was personally present and did see the hereto annexed undertaking duly signed and executed by E.F. therein named.

2. That the said undertaking was so executed at the of *in the County of* .

3. That I am the subscribing witness to such execution.

4. That I am well acquainted with the said E.F.

Sworn before me at the of *in the County of* this day of *A.D. 19* .

A Commissioner, etc., or Clerk of said Court.

---

73. ACCEPTANCE OF MONEY PAID INTO COURT.

(*Insert title of Court and style of cause.*)

Take notice that the plaintiff accepts the sum of $ paid by you into court in satisfaction of the claim in respect of which it is paid in.

Dated the day of , 19 .

N. G., Clerk.

To the said defendant.

---

74. CLERK'S NOTICE OF TRIAL BY JURY AND NEW TRIAL.

[*Sections 123 et seq. and Rule 65.*]

(*Insert title of Court and style of cause.*)

Take notice that this cause will be tried by a jury, the plaintiff (or defendant) having demanded a jury therein; or, take notice that the judge has ordered a new trial upon payment of costs (or with costs to abide the event, *or as the case may be*) and has ordered the next trial to be had before a jury (*or as the case may be*) and that such trial will be held at the town hall in Paris on the day of , A.D. 19 , at the hour of o'clock a.m.

Yours, etc.,
R. ROE, *Clerk.*

To the above-named plaintiff, defendant, primary debtor, or garnishee or other party (*as the case may be*).

74 (1). NOTICE REQUIRING JURY.

[*Section 131.*]

(*Court and Cause.*)

Take notice that the plaintiff (or defendant) requires that this case be tried by a jury.

Dated, etc.

To the Clerk of the above named Court. *Plaintiff (or defendant)*

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75. CLERK'S NOTICE UNDER THE ACT [OF TRANSFER OF CASE.]

[*Section 79.*]

(*Insert title of Court and style of cause.*)

Take notice that the proceedings in this action having been duly transferred to this Court the same will be placed on the list for trial at the sittings thereof to be held in the town hall at Castleford in the County of on , the day of . A.D. 19 , at the hour of o'clock a.m.

Dated this day of , A.D. 19 .

Yours, etc.,
R. ROE, *Clerk.*

To the above-named parties and their agents.

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76. GENERAL HEADING AND CONCLUSION OF ALL NOTICES, ADMISSIONS, ORDERS, ETC.

No. , A.D. 19 .

In the Division Court, in the County of

Between *A. B.*, *Plaintiff*,
and
C. D., *Defendant.*

. . . . . .

Dated this day of , 19 .

To
(the person to whom notice is sent.)

Clerk (or person sending notice) or making admission, or signing order.)

77. ATTACHMENT UNDER THE WOODMAN'S LIEN FOR WAGES ACT.

[*See The Woodman's Lien for Wages Act, R. S. O. 1914, c. 141; Form of Lien and Affidavit are given in the schedule to that Act: See Forms infra.*]

To *G. F.*, Bailiff of the Division Court in the District of

You are hereby commanded to attach, seize, take and safely keep the logs and timber of *C. D.*, of , composed of (here describe the logs ; timber to be attached), situated at , or a sufficient portion thereof to secure *A. B.* (the creditor) for the sum of (here state the amount sworn to be due), together with the costs of his suit and of the proceedings to enforce his lien thereupon, and to return this warrant to the Clerk of the Division Court in the district aforesaid; and herein fail not.

Witness my hand and seal this day of , 19 .

W. W. ELLIS, *Clerk.*

N.B.—The warrant must be issued under the hand and seal of the clerk, not under the seal of the court, though the clerk could probably adopt the court seal as his own. The warrant must be directed to the bailiff of the Division Court. It cannot be executed by a constable as in the case of an attachment under the Division Courts Act.

77(1) AFFIDAVIT FOR ATTACHMENT UNDER THE WOODMAN'S LIEN FOR WAGES ACT.

(*Court and Style of Cause.*)

I, A.B. (the claimant) *of the* of in the (district or county) of *make oath and say:*

1. That C.D. (the defendant) *of* (or late of) is justly and truly indebted to me in the sum of (the amount stated must not be less than $10, nor more than $200) for work done for the said *C.D.* in respect of the logs and timber hereinafter described, that is to say (here describe particularly the logs and timber for which the attachment is sought) as set forth in the statement of claim, a copy of which is hereunto annexed.

2. That the said statement of claim with the affidavit attached thereto duly sworn as required by *The Workman's Lien for Wages Act*, were filed by me in the office of the clerk (or deputy clerk) of the district court of on the day of A.D. 19 , in accordance with the provisions of said Act.

3. That I have good reason to believe and do believe that the said logs or timbers are about to be removed out of the Province of Ontario (or that the said *C.D.* has absconded from the province with intent to defraud or defeat his creditors, or that the said saw logs or timbers are about to be cut into lumber or other timber, so that the same cannot be identified) and that I am in danger of losing my said claim if an attachment do not issue.

Sworn, etc.

N.B.—*This affidavit must be corroborated by other affidavits as to the facts stated in paragraph 3, and a copy of the statement of claim and of the affidavit must be produced and filed with it in the office of the proper Division Court.*

77 (2) CLAIM OF LIEN.

A. B., (name of claimant) of (state residence of claimant), (if claim made as assignee then say as assignee of, giving name and address of assignor) under The Woodman's Lien for Wages Act claims a lien upon certain logs or timber of (here state the name and residence of the owner of logs or timber upon which the lien is claimed if known) *which logs and timber are composed of* (state the kinds of logs and timber, such as pine sawlogs, cedar or other posts or railway ties, shingle bolts or staves, etc., also where situate at time of filing of claim) *in respect of the following work, that is to say,* (here give a short description of the work done for which the lien is claimed) *which work was done for* (here state the name and residence of the person upon whose credit the work was done) *between the day of and the day of at per* (month or day as the case may be).

The amount claimed as due (or to become due) *is the sum of* (and when credit has been given, *the said work was done on credit, and the period of credit will expire on the day of*).

Dated at this day of 19 .

(Signature of Claimant).

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77 (3). AFFIDAVIT TO BE ATTACHED TO CLAIM.

I make oath and say that I have read (or *have heard read*) *the foregoing claim, and that the facts therein set forth are, to the best of my knowledge and belief, true, and that the amount claimed to be due to me in respect of my lien is the just and true amount due and owing to me after giving credit for all sums of money, goods or merchandise to which the said* (naming the debtor) *is entitled to credit.*

Sworn before me at in the district of this day of , 19 .

A Commissioner.

---

78. CERTIFICATES OF ENTRIES IN PROCEDURE BOOK.

[Seal.]

I, A. B., clerk of the Division Court in the County of do hereby certify as follows:

That in the procedure book of the said Division Court the following entries (and no others) appear in a certain cause in the said Division Court wherein one *C. D.* is plaintiff and one *E. F.* is defendant, which said entries are in the words and figures following, that is to say: (here copy entries verbatim.)

And I further say that the page of the said procedure book, on which said entries are made, is signed with the name of ; and such signature is of the proper handwriting of me, *A. B.*, as such clerk (*or* of *G. H.*, the then clerk) of the said Court.

Given under my hand and the seal of the said Court this day of A.D. 19 .

A. B.,
Clerk of said Division Court.

79. CLERK'S CERTIFICATE OF PROCEEDINGS TO APPELLATE COURT.

(*Title of Court and style of cause.*)

I, , clerk of the said Court, do hereby certify to the clerk of the Central office, Osgoode Hall, Toronto, that the annexed papers contain the summons in this cause, with all notices endorsed thereon, the claim, and any notice or notices of defence and of the evidence and all objections and exceptions thereto, and of all motions or orders made, granted or refused herein ("together with such notes of the judge's charge as have been made, if the cause tried by a jury"), the judgment or decision in writing (or "the notes thereof") and all affidavits filed or used in the cause, together with all other papers filed in the cause affecting the questions raised by the appeal.

Given under my hand and the seal of the said Court this day of , A.D. 19 .

Clerk.

[Seal of Court.]

MISCELLANEOUS FORMS.

80. LIST OF UNCLAIMED MONEYS VERIFIED.

[*Section 70.*]

List of unclaimed moneys paid into Court or to me as clerk thereof which remain unclaimed for six years ending on the 31st day of December last past.

For whom or on whose account money paid.	When paid.	Style and No. of Suit	Amount. $ cts.

I, X. Y., clerk of the , Division Court in the County of , make oath and say that *the foregoing return is full and correct in every particular* (or *if no moneys remain unclaimed, instead of the matter between the asterisks say,* "no such moneys paid into Court, or to me as clerk therefore remain unclaimed for six years next before 31st day of December last past.")

X. Y.,
Clerk.

Sworn, etc.

81. Pay List of Jurors.

[Section 145 (6).]

Summoned to attend at a sitting of Division Court of the county of , on the day of , A.D. 19 , and Judge's Certificate to County Treasurer.

No. on list.	Names of Jurors.	Date of service.	Attendance		Amount paid each Juror.		Mileage.	Signature of Juror acknowledging receipt of money.
			1st day.	2nd day.	$	c.		
1								
2								
3								
4								
5								
6								
7								
8								
9								
10								
11								
12								
	Total amount paid by Clerk ..... $							

I, , presiding judge of the above-mentioned Court, do hereby, in pursuance of the Division Courts Act, certify to the Treasurer of the said county of , that the above is a true statement of the amount paid by the clerk of the said Court to each of the jurors mentioned in the above list, amounting in the whole to $.

Dated this day of , 19 .

Judge.

---

82. Form of Bailiff's Bond for Security for Chattels Seized Under Execution.

KNOW ALL MEN BY THESE PRESENTS.

That we, John H. Johnson and Edward E. Clarkson, are and each of us is jointly and severally held and firmly bound unto Richard Hamilton, Bailiff of the Third Division Court of the County of Brant, in the penal sum of two hundred dollars (200.00) of lawful money of Canada, to be paid to the said bailiff, his certain attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, and every of them, firmly by these presents.

Sealed with seal dated this day of in the year of our Lord one thousand nine hundred and

Whereas the above-named bailiff has taken under an execution issued out of the Third Division Court of the County of Brant, in the case of Henry Johnson vs. Ernatus Clouse, certain chattels, to wit (specify chattels), belonging to the said execution debtor to the

value of $, and whereas the execution debtor has requested the bailiff to leave the said chattels in his possession pending a settlement of the claim.

Now the condition of this obligation is, that if the said execution debtor do pay to the said bailiff, his executors, administrators or assigns, the amount of the execution with his lawful costs, or pay the same to the clerk of the court, or effect a settlement with the execution creditor, then this obligation shall be void.

Signed, sealed and delivered in the presence of } A. B. E. F. G. H.

---

83. CONFESSION OF DEBT, AFTER SUIT COMMENCED.

In the Division Court in the County of

Between A. B., Plaintiff, and C. D., Defendant.

I acknowledge that I am indebted to the plaintiff in the sum of and consent that judgment for that amount and costs may be entered against me in this cause, according to the practice of the Court.

C. D.

Dated the day of , 19 .
Witness , clerk (*or bailiff*).

(*Add affidavit of execution.*)

BAILIFF'S FORMS.

84. APPRAISER'S OATH IN ATTACHMENT CASES.

You, and each of you, shall well and truly appraise the property and effects mentioned in this inventory (*holding it in his hand*) according to the best of your judgment. *So help you God.*

---

84 (1). MEMORANDUM TO BE ENDORSED ON INVENTORY.

On the day of *A.D. 1915, B.B., of* and *B.D., of* *were duly sworn by me well and truly to appraise the goods, chattels and effects mentioned in the above inventory.*

V. W.
Bailiff.

---

85. APPRAISEMENT TO BE ENDORSED ON INVENTORY.

We, *B. B.* and *B. D.*, having been duly sworn by the bailiff, *V. W.*, to appraise the property and effects mentioned in the within inventory, to the best of our judgment, and having examined the same, do appraise the same at the sum of $.

Witness our hands this day of , A.D. 19 .

B. B.
B. D.

85 (1). INVENTORY OF GOODS TAKEN IN ATTACHMENT.

An inventory of property and effects taken in attachment by me by virtue of the order of attachment issued by A.B., clerk of the Division Court in the County of (or by C.D., a Justice of the Peace for the County of) on behalf of G.H. against J.K.: that is to say (here state the articles seized).

Dated, etc.

V. W.
Bailiff.

---

86. NOTICE OF SALE.

By virtue of an execution issued out of the Division Court for the county of , and to me directed, against the goods and chattels of , at the suit of , I have seized and taken in execution, one bay horse, etc.

All which property will be sold by public auction, at on , the day of , 19 , at the hour of o'clock in the noon.

V. W.,
Bailiff.

Dated day of , 19 .

RETURNS TO EXECUTIONS, ETC.

87. *Nulla Bona.*—The within defendant (*or* plaintiff) hath no goods or chattels in the said county of , whereof I can make the moneys to be levied, or any part thereof as within commanded.

Dated day of , 19 . V. W.,
Bailiff.

88. *Feci.*—By virtue of the within execution, I have made of the goods and chattels of the defendant (*or* plaintiff) the moneys within mentioned, and have paid the same to the said clerk as within commanded.

Dated day of , 19 . V. W.,
Bailiff.

89. *Any part made.*—By virtue of the within execution, I have made of the goods and chattels of the defendant (*or* plaintiff) $, and have paid the same to the said clerk, and the defendant (*or* plaintiff) hath no more goods or chattels in the said county of whereof I can make the residue of the said moneys, or part thereof.

Dated day of , 19 . V. W.,
Bailiff.

---

90. WHEN RENT PAID BY BAILIFF.

(*Section 46, and 216 (6).*)

By virtue of the within execution, I have made of the goods and chattels of the plaintiff (*or* defendant) $ part whereof, $ I have paid to O. B., landlord of said plaintiff (*or* defendant) for one quarter's rent in *respect* of premises when levy made; and a further part, $, I have retained as fees on execution. The residue, $, I have paid to the said clerk as within commanded.

Dated day of , 19 . V. W.,
Bailiff.

91. FORM OF BAILIFF'S RETURN.

B.—This form is to be used in making returns under the Rules, which are to be read and understood in connection with the provisions of the Act, touching the execution and return of Writs of Executions. As the return is made and sworn to every Court day, the dates are to be filled in as noted.

RETURN OF *V. W.*, Bailiff of the Division Court in the County of made in pursuance of the Rules of Practice touching all Warrants, Precepts and Writs of Execution, acted on or in hand, between the (*a*) day of A.D. 19 , and the (*b*) day of , A.D. 19 .

Numbers.	Style of Cause.	When Writ of *Fieri Facias* received.	Amount to be levied.	Amount levied.	When levied.	Amount of Bailiff's charges.	Amount paid to Clerk.	When paid.	Remarks.
		A.D. 19	$ cts.	$ cts.	A.D. 19	$ cts.	$ cts.	A.D. 19	

I, *V. W.*, above named, make oath and say, that the foregoing return is full, true and correct in every particular.

Sworn before me at in the County of this day of , A.D., 19 . *X. Y.*, Clerk.

V. W., Bailiff.

92. AFFIDAVIT FOR PROHIBITION.

In the Supreme Court of Ontario.

In the matter of a certain action pending in the Division Court, in the County of , Between A.... B.... plaintiff, and C.... D.... defendant.

I, A.... B.... of the of , in the County of and Province of Ontario, make oath and say:—

1. That, on the day of , A.D. 19 , I was served with the annexed copy of summons and particulars of demand thereto attached, marked "A."

2. That I am the defendant (or *one of the defendants*) *in the suit mentioned in the said summons of against myself* (if others, naming them also), *in the Division Court for the* (said) *County of .*

3. That I attended at the sittings of the said Division Court, held on the day of , A.D. 19 , and did there and then (through *C.... D.... my counsel or agent*, as the case may be) *object to the jurisdiction of the said Division Court to entertain the said suit, inasmuch as I claimed to justify the said alleged trespass by right and title to the said close at the time when the said trespass was alleged to have been committed* (or here set out any other ground of objection which the deponent made, according to the circumstances of the case).

4. That I did there and then offer to prove, before the judge of the said court, that I did bona fide *claim the right and title to the said close, and that the same was my close, soil, and freehold* (or whatever other fact or facts were relied on before the judge as showing a want of jurisdiction, or what the defendant otherwise offered to prove.)

5. That the said close in which the said supposed trespass was committed is part of lot No. , in the concession of the Township of , in the County of .

6. That I did, at the time when the said supposed trespass was committed, bona fide *claim, and from thence continually hereto have* bona fide *claimed, the soil or freehold of the said land by virtue of a conveyance* (or as the case may be) *thereof heretofore made to me by one G.H., bearing date the day of , A.D. 19* (or in such other way as the defendant claims title to the land).

7. That the said close is part and parcel of the said land so conveyed (or as the case may be) *as aforesaid, and that the said the plaintiff in said Division Court suit, claims the said close adversely to me, and contends, as I believe, that the said close belongs to him, but which I say is not the case.*

8. That the said judge, notwithstanding my first objection, and notwithstanding my said offer to prove my said title as aforesaid, did proceed to hear and determine the said cause, and gave judgment against me for $ damages, together with costs (or as the case may be), *on the said day of , A.D. 19 , payable in days* (or *forthwith*, or *otherwise*, as the case may be).

9. That I have not paid the said damages or costs.

10. That execution has (or *has not*) *issued against me therefor*

Sworn, etc.

93. NOTICE OF MOTION FOR MANDAMUS, CERTIORARI, OR PROHIBITION.

(*Court and Cause as in Previous Form.*)

Take notice that a motion will be made on behalf of A.... B...., the above-named plaintiff (or *C.... D....*, the above-named defendant), before the presiding Judge in Chambers at Osgoode Hall, in the City of Toronto, on Monday (or Friday), the day of , A.D. 19 , at the hour of ten oclock in the forenoon, or as soon thereafter as the motion can be heard, for an order of mandamus requiring the judge (or junior judge) of the County Court of the County of , commanding him to hear and determine the above-mentioned action pending in the said court between the said *A.... B....* and *C.... D....*, and to adjudicate upon the same, or for such other order as may seem just.

(Or for an order that the judge of the County Court of the County of , do forthwith send to the clerk of the Central Office of the Supreme Court of Ontario, at Osgoode Hall, Toronto, the proceedings and papers in a certain action in the said Division Court, between the said *A.... B....* plaintiff, and *C.... D....* defendant, with all things touching the same, that the said court may further cause to be done thereupon what it shall see fit to be done, and for an order staying all further proceedings in the said Division Court until further order of the said Supreme Court or a judge.)

(Or for an order that the said *A.... B....* be prohibited from further proceeding with the said action, or for such further or other order as to the said judge may be just.)

And take notice that in support of such application will be read the certified copy of the entries in the procedure book of the said Division Court, duly certified by the clerk thereof, pursuant to The Division Courts Act, the affidavit of this day filed and the exhibits therein referred to.

Dated the day of , A. D. 19 .

X.... Y....,
Solicitor for the said

To the judge of the said division court,
and
To the above-named A.... B.... or C.... D....

Filed on behalf of the said X.Y.

For form of order of mandamus see Holmested & Langton's Forms, No. 1251.

— —

93(1). ORDER FOR PROHIBITION.

(*Court and Cause as in the Next Preceding Form*)

1. Upon the application of the above-named C.... D.... and upon reading, etc., and it appearing that the said *A.... B....* has entered an action against the said *C.... D....* in the Division Court, in the County of , and that the said court has no jurisdiction to hear and determine the said action by reason that (state facts showing want of jurisdiction);

2. It is ordered that the said A.... B.... be and he is hereby prohibited from further proceeding in the said action in the said court.

94. AFFIDAVIT ON MOTION FOR MANDAMUS.

(Proceed as in Form 92, to the end of paragraph 2.)

3. The said action came on for trial on the day of ,A.D. 19 , and during the course of the said trial the defendant by his counsel objected to the jurisdiction of the said court upon the ground that the cause of action did not arise within the limits of the said Division Court, and that the defendant did not reside or carry on business there.

4. It was shewn in evidence on the said trial, and the fact is, that the goods for the price of which this action is brought were ordered by the defendant of the plaintiff by a telegram sent by the defendant from the City of Hamilton, in the County of Wentworth, to the plaintiff, at Severn River, in the District of Algoma, as follows:—

"Send one ton most white fish, if good, dressed, at 5c. Ans."; to which the plaintiff replied:—

"Fish are shipped to-day in eight boxes."

5. It was further shewn in evidence that the fish arrived at Hamilton, but the defendant contends that the same were in such a state as to be of no value, and refused to pay therefor.

6. The learned judge acceded to the objections of the defendant, to the jurisdiction of the court, and refused to further proceed with the trial of the said action in the said court.

7. I declined to move for an order for the transfer of the said action to the Division Court within the limits of which the defendant resides.

8. The learned judge thereupon ordered me to pay the costs of the said action.

Sworn, etc.

This affidavit is filed on behalf of the said A.... B....

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95. NOTICE OF MOTION FOR MANDAMUS.

[*See Form 93.*]

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96. AFFIDAVIT FOR CERTIORARI BY PLAINTIFF: SECTION 69.

In the High Court of Justice, Division.

In the matter of a plaint in the Division Court, in the County of , wherein is plaintiff, and is defendant.

I, , of the City of , in the County of , make oath and say:—

1. I am the above-named plaintiff.

2. This action was commenced by me on the day of , 19 , and the particulars of my claim therein, as annexed to the summons issued out of the said court, are as follows:—

3. The defendant duly filed a notice disputing my said claim.

4. The action came on for trial on the day of , 19 , before the judge of the said court, and during the course of the trial the defendant, by his counsel, asserted that the devise under which I claimed

the lands and premises in respect of the trespass to which by the defendant this action was brought was invalid, and that the defendant, as heir-at-law of A.... B...., the testator, was entitled to the lands and premises in question herein. The learned judge of said court thereupon decided that he had no jurisdiction to proceed with the trial of the said action, and the same was adjourned to enable me to move to transfer the same into this court, pursuant to the statute in that behalf.

*Sworn before me at the of
in the County of , this
day of , A.D. 19 .*

A Commissioner, etc.

This affidavit is filed on behalf of the said A.... B....

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97. NOTICE OF MOTION FOR CERTIORARI.

[*See Form 93.*]

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98. ORDER FOR CERTIORARI.

*In the Supreme Court of Ontario.
The Hon. Mr. Justice
in Chambers*
, the day of , 19 .

In the matter of a plaint in the Division Court, in the County of , wherein A.... B.... is plaintiff, and C.... D.... is defendant.

1. Upon the application of the above-named , and upon reading the affidavit of filed, and a certified copy of the entries in the procedure book in the said Division Court, duly certified by the clerk thereof, pursuant to The Division Courts Act, and upon hearing solicitor (or counsel) for the said A.... B.... and C.... D....;

2. It is ordered that the judge of the County Court of the County of , ex-officio judge of the Division Court, in the County of , do forthwith send to the Central Office at Osgoode Hall, Toronto, the proceedings and papers in a certain action in the said Division Court between A.... B...., plaintiff, and C.... D...., defendant, with all things touching the same, as fully and entirely as they remain in his power, together with this order, that this court may further cause to be done thereupon what it shall see fit to be done, and no further proceedings are to be taken in said court, in said action, until further order of this court.

99. RETURN BY JUDGE TO CERTIORARI.

In the Supreme Court of Ontario.

The answer of me, A.... B...., Judge of the County Court of the County of , who, by virtue of this order, to me directed and delivered, do, under my hand and seal, certify unto His Majesty, in His Supreme Court of Ontario, at Toronto, the (here describe what the order calls for), *of which mention is made in the same order. The return to this order further appears by a certain schedule annexed thereto.*

In witness whereof, I, the said A.... B...., have to this affixed my hand and seal this day of , 19 .

A.... B.... [*L.S.*]

(The following schedule will be annexed to the certiorari:—)

SCHEDULE.

Referred to in the return to the annexed order of certiorari *indorsed thereon.*

(Here give in regular order the papers in the suit returned with the certiorari, and annex the original papers to the schedule.)

A.... B....,
Judge of the County Court of the County of .

---

100. AFFIDAVIT FOR LEAVE TO SUE A PARTY IN AN ADJOINING DIVISION.

(*See Section 73.*)

In the Division Court in the County of .

I, A.... B...., of , Yeoman, (or I, E.... F...., of , Yeoman, agent for A.... B...., of, etc.,) make oath and say:—

1. That I have a cause of action against C.... D.... of , Yeoman, who resides in the Division, in the County of .

(If by agent, "*That the said A.... B.... has a cause of action against C.... D...., of , Yeoman.*")

2. That I (or the said *A.... B....*) *reside in the Division, in the County of .*

3. That the distance from my residence (or *from the said A.... B....'s residence*) *to the place where this court is held is about miles, and to the place where the court is held in the Division in the County of is about miles.*

4. That the distance from the said C.... D....'s residence to the place where the court is held in the division where he resides is about miles, and to the place where this court is held about miles.

101. NOTICE OF SUMMONS FOR SERVICE ON FOREIGNER OUT OF BRITISH DOMINIONS.

(*Style of Court and Cause.*)

To G.... H...., of etc.

Take notice that A.... D.... of has commenced an action against you, *G.... H....* in the Division Court in the County of by summons of that court, dated the day of , A.D. 19 , a copy of which summons is hereto annexed, and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action by causing a notice of defence to be delivered to the clerk of the said court, and served on the plaintiff in accordance with the endorsements and notices accompanying this notice; and in default of your so doing, the said A.... B.... may proceed therein and judgment may be entered in your absence, and you may be deemed to have admitted the plaintiff's claim, and will not be entitled to any further notice therein.

Dated, etc.

Signed,
A.... B....
Plaintiff.

---

102. BOND OF INDEMNITY AGAINST LOST NEGOTIABLE INSTRUMENT.

[*See Notes to Section 83.*]

Know all men by these presents that we (name all the obligors, with places of residence and occupations), *are jointly and severally held and firmly bound unto* (name the obligee: the defendant, with place of residence and occupation), *in the penal sum of* dollars, *for which payment well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators respectively, formally by these presents.*

Dated this day of , A.D. 19 .

Whereas an action is now pending in the Division Court, in the County of Huron, wherein the above bounden A.... B.... is plaintiff, and the above obligee C.... D.... is defendant, brought to recover the amount of a bill of exchange (or *promissory note*) *for $.*

And whereas the said bill (or *note*) *is alleged to be lost, and by an order made herein on the day of , A.D. 19 , it was ordered that the loss of the said bill* (or *note*), *should not be set up as a defence to the said action on the said A.... B.... giving an indemnity to the satisfaction of the clerk of the said court.*

Now the condition of the above written obligation is such that if the above bounden A.... B.... etc. (names of obligor and sureties). *or some or one of them or their or some one of their heirs, executors or administrators, do and shall save harmless, and keep indemnified*

the said (name of obligee), *his executors, administrators and assigns, and his and their lands and tenements, goods and chattels of, from and against all claims and demands of any other person or persons whomsoever, save and except the said A.... B...., his executors or administrators, claiming payment of any sum or sums of money upon or in respect of the said bill of exchange* (or *promissory note*), *and also from all actions, suits and other proceedings whatsoever, which at any time or times shall or may be brought or prosecuted against the said* (name of obligee) *his heirs, executors or administrators upon the said bill* (or *note*), *and also from all costs, damages and expenses which he or they may bear or incur for or by reason of any such claim as aforesaid being made upon the said bill* (or *note*), *then this obligation to be void, otherwise to remain in full force and virtue.*

Signed sealed and delivered in the presence of } (*Signature and seals.*)

---

103. Order for Renewal of Summons.

[*See Rule 7, and notes at p. 195.*]

(*Court and Cause.*)

His Honor Judge . }
in Chambers. } The *of* *19* .

1. Upon application of the plaintiff and upon reading the affidavit of filed.

2. It is ordered that the summons in this action be renewed by the clerk of the court for twelve months from the date of this order.

Judge.

103 (1). Affidavit for Renewal of Summons.

[*See Notes at Page 195; and Rule 7 (a) for Form of Renewal.*]

In the Division Court in the County of .

(*Style of Cause.*)

I, of the of in the County of (*occupation*), *make oath and say:*

1. I am the plaintiff herein (or *the agent of the plaintiff herein and have a personal knowledge of the facts herein stated*).

2. That a summons was issued herein a true copy of which is now shown to me marked exhibit "1."

3. (State what efforts have been made to serve the defendant with the summons and the reasons why it has not been served.

Sworn, etc.

104. AFFIDAVIT FOR ORDER FOR SUBSTITUTIONAL SERVICE: SECTION 88.

(Court and Cause.)

I, E..... F....., of the of , in the County of , Bailiff of the above-mentioned court (or as the case may be), make oath and say:

1. That on or about the day of , last past (or instant), I received from the clerk of this court the annexed summons and particulars of claim thereto attached for service on the above-named defendant.

2. That, in accordance with my duty in that respect, I did, on the day of , instant (or last past), attend at his place of residence, at the of , and, on enquiring there for the said defendant, was informed by a person at and in the said place of residence, who represented herself to be, and whom I believe to have been, the wife (or as the case may be; and if the name of the other person is known it had better be stated), of the said defendant, that the said defendant was not at home (here state the answer given), and I then stated to the said person the nature of my business, and told her (or him) that I called to serve the defendant with the said summons and claim, and that I would call again for that purpose, at the said place of residence, on the day of , then next, at or about of the clock, in the noon.

(Here state what calls and other attempts were made to effect service, what, if anything, was done, and what the wife or other members of the family said in reply to the questions asked about the defendant: the affidavit should here state when he absconded, and where he has gone to, if that can be ascertained, and his post office address there, and for what purpose or with what object he went away. The post office address of the defendant while he lived in Ontario should also be given, and generally such facts and circumstances should be shown as to make a judge believe that all reasonable efforts had been made to effect personal service, and that either the summons had come to knowledge of defendant or that he wilfully evaded service of the same, or had absconded.)

3. That I have used all the due means in my power to serve the said defendant personally with a true copy of the said summons and claim, but have not been able to do so; and, for the reason aforesaid, I verily believe that the said summons has come to the knowledge of the defendant (or that he wilfully evades the service of the same, or that he has absconded to (naming the place particularly, if possible, to which he went, and when).

Sworn, etc

(The affidavit should state that the calls have been made at the defendant's place of residence, unless the defendant has no known place of residence, and that reasonable efforts had been made to ascertain it (Chitty's Forms, 13th ed., 75-79). What the officer said (Dubois v. Lowther, 4 C. B. 228), and the answers to his enquiries (Fisher v. Goodwin, 2 C. & J. 94), should be distinctly stated in the affidavit.)

104 (1). ORDER FOR SUBSTITUTIONAL SERVICE.

[Section 88.]

(Court and Cause.)

Upon reading an affidavit of of in the County of , sworn the day of , 19 :—

It is ordered that the delivery of a copy of the summons issued in this action, to some adult inmate nt the usual or last known place of residence or business of the above-named defendant C.... D...., situate and being at , in the County of (or that the delivery of a copy of the summons issued in this action to E.... F...., the agent of the defendant, at his office, as such agent in the of ; or that mailing of n copy of the summons issued in this action by letter, prepaid and registered, addressed as follows:—C.... D.... 109 Bathurst Street, Toronto; or that notice of the issue of the summons in this action be published in the , and that the publication of such notice) shall be deemed to be good and sufficient service of the summons upon the said C.... D...., on the day of such delivery (mailing or publication).

It is further ordered that all further notices and orders in the suit, up to judgment, may be served in the same manner.

It is further ordered that n sealed copy of this order be delivered (or mailed) with the said copy of the said summons.

Dated this day of , 19 .

.....
Judge.

105. APPLICATION FOR NEW TRIAL.

[Section 123.]

(Court and Cause.)

The above-named defendant hereby applies for a new trial of this action, and asks that judgment of non-suit be entered, or that the action be dismissed on the following among other grounds:—

1. The judgment was contrary to law and evidence and the weight of evidence.

2. The learned judge should have found that the claim of the plaintiff had been paid.

3. The learned judge should have found that the plaintiff's claim was barred by the Statute of Limitations.

4. A.... B.... was a necessary and material witness for the defendant, and the defendant was unable, notwithstanding reasonable diligence, as is shown by the affidavit hereto annexed, to obtain his attendance.

5. One A.... B...., whose affidavit is hereto annexed, could have given material evidence on behalf of the defendant, and the defendant did not know and could not by reasonable diligence have discovered that the said A.... B.... could have given such evidence prior to the trial.

6. The evidence given by C.... D.... at the said trial, and which was objected to by the defendant, was inadmissible, and should not have been received.

7. The evidence tendered by the defendant at the said trial, and which was refected by the learned judge, should have been received.

(WHERE ACTION TRIED BY JURY.)

8. The learned Judge was wrong in directing the jury that it was necessary for the defendant to produce a receipt showing the payment made by him.

9. The learned judge was wrong in directing the jury that in the absence of a written acknowledgment by the defendant the debt was barred by the Statute of Limitations.

And in support of such application the defendant annexes the affidavit of himself, and of *A.... B....* and *C.... D.....*

Dated, etc.

X.... Y....,
Defendant's Solicitor.

---

106. NOTICE TO BE SERVED WITH SUMMONS ON PERSON REPRESENTING A FIRM AND BEING ALSO ALLEGED TO BE A MEMBER OF THE FIRM.

[*See Section 93 (7) and Notes There.*]

(*Court and Cause.*)

To *C.... D....*, of, etc.

You are informed by this notice that you are served with the summons in this action now served on you herewith, that you are so served as a partner in the defendant firm named in the said summons, and also as a person having control and management of the partnership business of the said firm.

Dated the day of , *A.D. 19* .

Plaintiff.

---

107. DEMAND FOR STATEMENT OF NAMES AND PLACES OF RESIDENCE OF PERSONS CONSTITUTING PLAINTIFF'S FIRM.

[*Section 93 (5)*]

(*Title of Court and Style of Cause.*)

On behalf of the above-named defendant (or plaintiff) *E.... F..... I require of you, forthwith, to declare to me, in writing, the names of all persons who are partners in the firm of A.... B.... & Co., the above-named plaintiffs* (or *defendants*), *pursuant to section 93 (5), of The Division Courts Act.*

Dated, etc.

Yours, etc.,
M.... N.....
Solicitor for the defendant (or the plaintiff).

To Mr. X.... Y....,
Solicitor for the plaintiffs (or the defendants).

108. NOTICE OF APPLICATION FOR ORDER FOR NAMES OF MEMBERS OF FIRM.

[*Section 93 (5).*]

(*Title of Court and Style of Cause.*)

SIR,—*Take notice that a motion will be made on behalf of the above-named defendant to the judge of this court, at his Chambers in the Court House, in the City of Hamilton* (or as the case may be), *on the day of , 19 , at ten o'clock in the forenoon, or so soon thereafter as the motion can be heard, or an order under section 93 (5) of The Division Courts Act, directing a statement to be furnished to me of the names of all the persons who are co-partners in the firm of A.... B.... & Co., the above-named plaintiffs. That on such application will be read the affidavit of , copies of which are thereto annexed.*

Dated, etc.

Yours, etc.
M.... N....,
Solicitor (or agent) for the defendant E.... F....

To Mr. X.... Y....,
The plaintiff's solicitor (or agent, as the case may be).

---

100. AFFIDAVIT FOR ORDER DISCLOSING NAMES OF MEMBERS OF FIRM

[*Section 93.*]

(*Court and Cause.*)

Formal parts as usual.

1. That I am the plaintiff herein (or *the defendant*, or as the case may be.)

2. That the demand hereto annexed was on the day of instant duly served on the solicitor or agent of the defendant firm (naming it; or as the case may be).

Sworn, etc.

---

110. FORM OF ORDER FOR STATEMENT OF THE NAMES OF ALL THE PERSONS WHO ARE CO-PARTNERS IN THE PLAINTIFF'S FIRM.

[*Section 93 (5).*]

(*Title of Court and Style of Cause.*)

Upon the application of the above-named defendant in this cause, and upon reading the affidavit of service of demand herein, and of (*if any other affidavit filed*), *and upon hearing the parties by their solicitors* (or *agents*);

It is ordered that the above-named plaintiffs do, within days of the service of this order, *furnish to the defendant, his solicitor* or ogent, *a statement of the names of all the persons who are co-partners in the firm of A.... B.... & Co., the above-named plaintiffs.*

(Any other terms may be here added.)

.....
Judge.

Dated, etc.

---

110 (1). DECLARATION IN ANSWER THERETO.

[*Section 93 (5).*]

(*Title of Court and Style of Cause.*)

SIR,—*The names and places of residence of all the persons constituting the firm of A.... B.... & Co., the above-named plaintiffs, (or defendants), are as follows:—*

A.... B...., who resides at, etc.
G.... H...., who resides at, etc.
L.... M...., who resides at, etc.

Yours, etc.,
X.... Y....,
Solicitor for plaintiff (*or defendant*).

To Mr. M.... N....,
Solicitor for the defendant (*or* plaintiff).

---

111. FORMS OF JUDGMENT AND EXECUTION AGAINST A FIRM, ETC.: SECTION 94.

Judgment for the plaintiff against the said firm of A.... B.... & Co., and also against O.... P...., the partner thereof served with a copy of summons herein, and who has failed to appear (and also against R.... S...., who has admitted in the notice of dispute or defence filed that he is, or who has been adjudged a partner of the said firm), for $, and $ costs, to be paid forthwith (or as the case may be).

EXECUTION AGAINST A FIRM.

(*Court and Cause.*)

No. , A.D. 19 .

[Seal.]

Whereas on the day of A.D. 19 , the plaintiff duly recovered judgment in the said court against the said firm of & Co., and also against O.... P...., the partner thereof served with a copy of the summons herein, and who has failed to appear, and against R.... S...., who has admitted in the notice of defence filed, that he is (or who has been *adjudged*), *a partner of the said firm, for $ and $ costs of suit, which remains unpaid, and unsatisfied.*

You are hereby required to levy of the goods and chattels of the said firm, and of the said O.... P.... and R.... S...., in the said County (not exempt from execution), *the said moneys with subsequent costs and interest amounting together to the sum of $, and your lawful fees, so that you may have the same immediately after the execution hereof, and pay the same over to the clerk of this court for the plaintiff.*

Given under the seal of the court this day of A.D. 19 .

To Clerk.

V.... W....
Bailiff of the said Court.

Judgment .....$
Interest .....
Subsequent costs .....
This execution .....

Total the sum of .....$
upon this precept.

---

112. APPLICATION FOR LEAVE TO ISSUE EXECUTION AGAINST A PERSON LIABLE AS A PARTNER.

[*Section 94 (2).*]

In the Division Court in the County of .

(*Style of Cause.*)

Take notice that an application will be made to the presiding judge at his Chambers in the Court House in the Town of , on behalf of the plaintiff on the day of , 19 , at o'clock in the forenoon, or as soon thereafter as the application can be heard, for an order that the plaintiff be at liberty to issue execution against J.... K.... as being a member of the above-named firm of E.... & Co., upon the judgment in this action dated the day of , A.D. 19 .

And upon such application will be read the affidavit of this day filed, and a certificate of the said judgment and the proceedings in this action.

Dated, etc.

To the ..... above-named J.... K.... Plaintiff.

---

112 (1). AFFIDAVIT FOR THE ABOVE APPLICATION.

(*Court and Cause*).

I of the of in the County of (occupation) make oath and say:

1. That I am the above-named plaintiff herein.

2. On the day of , A.D. 19 , judgment was recovered by me against the above-named firm of E.... & Co., for $ and $ costs.

3. No part of the said sums has been paid or satisfied, and the said judgment remains in full force (or as the case may be).

4. That I am informed and believe that J.... K.... of the of in the County of was at the time of the accruing of the debt the subject of this action, liable as a partner in the said firm of E.... & Co. (state the grounds of belief).

5. I am entitled to have execution of the said judgment, and to issue execution against the said J.... K.... thereon for the amount thereof (or as the case may be), *as I am advised and verily believe.*

Sworn, etc.

---

112 (2). Order Thereon.

His Honour Judge. The day of , A.D. 19 .

(Court and Cause.)

1. Upon the application of the plaintiff and upon reading the affidavit of filed, and the proceedings in this action; and upon hearing what was alleged by or on behalf of the plaintiff and J.... K.... of the of in the County of .

2. It is ordered that the plaintiff be at liberty to issue execution on the judgment herein for the amount due thereon, against the said J.... K...., it appearing that the said J.... K.... was at the time of the accruing of the debt, the subject of this action, liable as a member of the above-named firm of E. & Co.

(Or *that the plaintiff and the said J.... K.... do proceed to the trial of an issue at the next sittings of this court on the day of , A.D. 19 , at the court house in the Town of , in the County of , in which the said plaintiff shall be plaintiff and the said J.... K.... shall be defendant, and that the question to be tried shall be whether the said J.... K.... was at the time of the accruing of the debt subject of this action, liable as a partner in the said firm of E. & Co.*).

5. (Insert order as to costs).

Judge.

---

113. Notice to be Served with Summons.

[*Section 96.*]

(Court and Cause.)

To C.... D.... of, etc.

You are hereby notified that you are served with the accompanying summons in this action, as the person carrying on the business of the defendant firm of E.... & Co., and as the person having the control and management of the said business.

Dated, etc.

Plaintiff.

114. CONSENT OF ADDED PLAINTIFF.

[*Section 97.*]

(*Court and Cause.*)

I G.... H...., hereby consent to my name being added as a plaintiff in this action.

Dated, etc.

Witness. *G.... H....*
L.... M....

---

115. AFFIDAVIT OF EXECUTION OF CONSENT OF ADDED PLAINTIFF.

[*Section 97.*]

(*Court and Cause.*)

I L.... M.... of, etc., *make oath and say:*
1. That I am well acquainted with L.... M...., whose name is subscribed to the annexed consent, and I was personally present, and did see him duly sign the said consent in his own handwriting.
2. I am the subscribing witness to the said consent.

Sworn, etc.

---

116. JUDGMENT AGAINST MARRIED WOMAN: SEE NOTES TO SECTIONS 98, 100, 190.

It is adjudged that the plaintiff recover $ and $ costs against the defendant, such sum and costs to be payable out of her separate property as hereinafter mentioned and not otherwise.
And it is ordered that execution hereon be limited to the separate property of the defendant not subject to any restriction against anticipation, unless by reason of section 21 of The Married Woman's Property Act, the property shall be available to execution notwithstanding such restriction.

NOTE.—This form is in accordance with the form given in Scott v. Morley, 20 Q. B. D. 120.

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116 (1). EXECUTION AGAINST MARRIED WOMAN.

[*See Notes to Sections 98, 100, 190.*]

No. , A.D. 19 .

Seal. (*Title of Court and Style of Cause.*)

Whereas on the day of , A.D. 19 , the plaintiff duly recovered in the said court, holden in and for said division, judg-

ment for $ and costs, payable out of the separate property of the defendant A.... B...., which remains unsatisfied: You are hereby required of the goods and chattels being the separate property of the defendant A.... B.... (not subject to any restriction against anticipation unless by reason of The Married Woman's Property Act the property shall be liable to execution notwithstanding such restriction), in the said county (not exempt from execution), the said moneys, amounting together to the sum of $, and your lawful fees.

(Conclude as in other forms of execution.)

---

117. Judgment under Section 98.

The defendant, having been served with "Special Summons," and particulars of claim, and not disputing same (or "not disputing $ part thereof"), it is adjudged that plaintiff recover $ for debt, and $ for costs.

R. ROE,
Clerk.

Dated the day of , 19 .

---

118. Judgment under Section 99.

(*Court and Cause.*)

The defendant having been served with a "Special Summons," and particulars of claim and not appearing in person or by agent in open court at the trial: It is adjudged that the plaintiff recover $ for debt and $ for costs.

Judge.

Dated, etc.

---

119. Order for Speedy Judgment under Section 100.

Upon hearing and upon reading the affidavit of filed and

It is ordered that the plaintiff be at liberty to have the clerk of this court enter, and the clerk is hereby empowered to enter, final judgment in favor of the plaintiff against the defendant for the amount of the plaintiff's debt, or money demand, sought to be recovered in this action, as appears by the particulars of claim, endorsed on (or attached to) the special summons herein, with interest (if any), and costs to be taxed.

Dated the day of , 19 .

Judge.

120. NOTICE OF MOTION FOR SPEEDY JUDGMENT.

(*Court and Cause.*)

Take notice that a motion will be made on behalf of me, the above-named plaintiff, before the judge of this court, at his chambers, in the Court House, in the of , in the said County of on day the day of , A.D. 19 , at o'clock in the noon, or so soon thereafter as the motion can be heard, for judgment herein; and the above-named defendant is hereby required to show cause before the said judge why the plaintiff should not be at liberty to have final judgment entered in his favor by the clerk of this court for the amount of the debt sought to be recovered in this action with interest and costs.

And take notice that in support of such motion will be read the affidavit of filed.

Dated this day of , A.D. 19 .

Yours, etc.,
A.... B...., Plaintiff; *or,*
E.... F..... Solicitor (or *agent*) for the above-named plaintiff in this action.

To C.... D....,
The above-named defendant herein.

[NOTE.—*If given to any other person who has authority to receive the notice, address it accordingly; and if any other affidavit is to be used reference should be made to it and a copy served.*]

The Form of Affidavit for Speedy Judgment is given *ante*, Form 50.

---

120 (1). JUDGMENT UNDER SECTION 100.

The defendant having been served with special summons and particulars of claim, and the plaintiff having made application to the judge for an order for judgment, as provided by section 100 of the Act, and upon due notice to the defendant, the judge, on the day of , A.D. 19 , made an order empowering the clerk to sign final judgment herein for the amount of the debt (or *money demand*) *set forth in the said particulars, together with interest and costs. it is adjudged, that the plaintiff recover $ for debt and interest and $ for costs.*

Dated, etc. Clerk.

---

121 ORDER FOR THE EXAMINATION OF THE DEFENDANT, ETC., ON MOTION FOR SPEEDY JUDGMENTS SECTION 100 (2).

(*Court and Cause.*)

Upon hearing and upon reading the affidavit of sworn the day of , A.D. 19 , and , it is

ordered that the defendant do (upon payment of the proper charges for conduct money) attend before the judge of this court, at his chambers in the Court House, in the of , on the day of , instant, at ten of the clock in the forenoon, or at such time as chambers may thereafter be held, and be examined upon oath, and there and then produce any books, or documents, or copies of or extracts therefrom, pursuant to section 100 (2) of the Division Courts Act, and particularly the following:—(here describe them shortly.)

Dated this day of , A.D. 19 .

.....
Judge.

(Should the order be for the examination and production before some one else, the above form may be changed.)

---

121 (1). ORDER FOR LEAVE TO DEFEND UNCONDITIONALLY.

[*Section 100.*]

(*Court and Cause.*)

Upon hearing and upon reading the affidavit of sworn the day of , A.D. 19 , and , it is ordered that the defendant be at liberty to defend this action unconditionally, and that the cost of this application be

Dated this day of , A.D. 19 .

.....
Judge

---

121 (2). ORDER FOR LEAVE TO DEFEND AS TO PART ON PAYMENT INTO COURT, AND UNCONDITIONALLY AS TO RESIDUE.

[*Section 100.*]

(*Court and Cause.*)

Upon hearing and upon reading the affidavit of sworn the day of , A.D. 19 , and , it is ordered that if the defendant pay into court within days from the date of this order the sum of $ he be at liberty to defend this action as to the whole of the plaintiff's claim in this cause, and it is ordered that if that sum be not so paid the plaintiff be at liberty to have the clerk of this court forthwith enter judgment for that sum, which the said clerk is hereby empowered to do, and the defendant be at liberty to defend this action as to the residue of the plaintiff's claim; and it is ordered that the cost of this application be

Dated this day of , A.D. 19 .

.....
Judge.

121 (3). ORDER FOR IMMEDIATE JUDGMENT FOR PART OF CLAIM UNDER SECTION 100 (3).

(Court and Cause.)

Upon hearing the solicitors for the plaintiff and defendant, upon reading the affidavits of filed, and it appearing that the defence set up by the defendant applies only to a part of the plaintiff's claim (or it appearing that $ of the plaintiff's claim is admitted to be due);

It is ordered at the request of the plaintiff that the plaintiff be at liberty to have the clerk of this court, enter, and the clerk is hereby empowered to enter, final judgment in favor of the plaintiff against the defendant for $, part of the amount sought to be recovered in this action, without prejudice to the plaintiff's right to proceed with this action against the defendant for the remainder of the amount claimed.

It is further ordered that the costs of this application be, etc.

Dated this day of , A.D. 19 .

.....
Judge.

---

121 (4). ORDER FOR LEAVE TO DEFEND ON PAYMENT INTO COURT UNDER SECTION 100 (5).

(Court and Cause.)

Upon hearing and upon reading the affidavit of sworn the day of , A.D. 19 , and , it is ordered that if the defendant pay into court within days from the date of this order the sum of $, he be at liberty to defend this action, but if that sum be not so paid the plaintiff be at liberty to have the clerk of this court, which the clerk is hereby empowered to do, enter final judgment for the amount of the plaintiff's debt or money demand sought to be recovered in this action, as appears by the particulars of claim or demand endorsed on (or attached to) the special summons herein, with interest, if any, and costs, and that in either event the costs of this application be

Dated the day of , A.D. 19 .

.....
Judge.

---

121 (5). AFFIDAVIT TO SET ASIDE JUDGMENT AND BE ALLOWED TO DEFEND ON THE MERITS: SECTION 98 (3).

(Court and Cause.)

I, , of the of , in the County of , and Province of Ontario (occupation), *make oath and say:—*

1. That I am the (or *one of the*) *above-named defendants in this cause.* (If made by a solicitor or agent it may be in this form:—*That I am the solicitor* (or *duly authorized agent*) *of the above-named*

defendant in this cause, and, when not otherwise herein expressed, that I have a personal knowledge of the matters herein deposed to).

2. That the summons herein was served on me (or the above-named defendant, as I am informed and believe), on or about the day of , last past.

3. That notice disputing the plaintiff's claim (or of the Statute of Limitations, etc., as the case may be as mentioned in General Rule 20) was intended to be given herein, but (here set out particularly the reason why such notice was not given in time, and accounting for the delay).

4. That I have (or the said defendant has) a good defence to this action on the merits, as I am advised and verily believe (or if made by a solicitor or agent:—As I am instructed and verily believe), and such defence consists in this:—(Here particularly show one or more of the grounds of defence relied on, so that the judge may see that there is something to be tried should the application be granted).

5. That the application to be made herein is not for the purpose of delaying the plaintiff in the recovery of judgment and execution against me (or the said defendant) in this cause, but solely for the purpose of my (or the above-named defendant) being allowed in to dispute the plaintiff's claim, and to defend this action on the merits aforesaid.

Sworn, etc.

---

122. NOTICE OF WITHDRAWAL OF DEFENCE. SECTION 102.

(Title of Court and Style of Cause.)

Take notice that I withdraw my defence, of which I gave you notice, and consent that judgment be entered against me for the sum of $.

Yours, etc.,

Dated, etc.

C.... D....,
Defendant.

To the clerk.

---

122 (1). ADMISSION OF CLAIM OR PART OF CLAIM. SECTION 102.

(Title of Court and Style of Cause.)

I, the defendant, having filed a notice of defence in this action, withdraw such defence and consent that judgment be entered against me, and I do hereby confess and admit that the sum of $, the amount claimed (or the sum of $, being part of the amount claimed by the plaintiff in this action), is due to him from me.

Dated this day of , 19 .

Signed in the presence of }

123. AGREEMENT NOT TO APPEAL UNDER SECTION 107.

(Insert Title of Court and Style of Cause.)

Pursuant to section 107 of The Division Courts Act, we hereby agree not to appeal in this action.

Dated, etc.
To the clerk of this court.

(Signed by the parties.)

---

124. CLERK'S NOTICE OF PLEA OF TENDER: SECTION 111.

[*See Form No. 178 (j).*]

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125. PLEA OF TENDER: SECTION 111.

(Insert Title of Court and Style of Cause.)

The defendant, for a plea herein to the plaintiff's claim (or if only to a part of such claim, then specify such part), *says that he always was, and still is, ready and willing to pay to the plaintiff the sum of* $, *and before action* (or, if the debt was payable on a day certain, naming that or some day anterior to it on which the tender was made), *he tendered and offered to pay the same to the plaintiff, and the plaintiff refused to accept it, and the defendant now brings the said sum into court ready to be paid to the plaintiff.*

C.... D....
Defendant.

---

126. JUDGMENT IN DETINUE FOR DELIVERY OF GOODS.

It is adjudged that the plaintiff do recover against the defendant the following goods and chattels of the plaintiff wrongfully detained by the defendant, that is to say:—

(Here enumerate the chattels which the court decides have been detained) *or* $ *their value, and also the sum of* $ *for damages, for their said detention, and the sum of* $ *for costs.*

And it is ordered that the defendant do return the said goods to the plaintiff, or do pay the sum of $, *their value, to the clerk of this court on the day of , A.D. 19 .*

And it is further ordered that the defendant do pay the said damages and costs, amounting together to the sum of $, *to the clerk of the court, on the day of , A.D. 19* (or *forthwith*).

If the judge makes an order at the trial for a return of the goods and chattels without giving the defendant the option of returning them, omit the words in brackets and substitute the following:—

And it is ordered that the defendant do return the said goods and chattels to the plaintiff on the day of , A.D. 19 , and that in default of his so doing a warrant of delivery do issue.

127. EXECUTION IN DETINUE.

(*Title of Court and Style of Cause.*)

Whereas upon hearing this action of detinue at a court holden at in and for the said division on the day of A.D. 19 , it was adjudged that the plaintiff do recover, and that the defendant do deliver to the plaintiff, the deeds (or the goods, or chattels, as the case may be) (stating particulars thereof) forthwith, and also that the defendant should pay to the plaintiff the sum of $, the value of the said goods and chattels, in case the same are not returned, upon your demanding the same, and also the sum of $ for costs of said plaintiff, and if the defendant does not return to you the said deeds (or the said goods and chattels), forthwith, or pay the said damages and costs upon demand, you are therefore required and ordered that, without delay, you cause the same to be returned to the plaintiff, and that if the said deeds, goods, or chattels cannot be found in the said county that you levy of the goods and chattels of the defendant in the said county (not exempt from execution) the said moneys, amounting altogether to the sum of $, and your lawful fees, so that you may have the same within thirty days after the date thereof, and pay the same over to the clerk of this court for the plaintiff.

Given under the seal of the court this day of , A.D. 19 .

To V.... W...., Bailiff of the said court. X.... Y...., Clerk.

(*Add memo. as in Form 52.*)

---

128. NOTICE OF REFUSAL TO ACCEPT MONEY PAID INTO COURT: SECTION 111.

(*Insert Title of Court and Style of Cause.*)

Take notice that I decline to accept the sum of $ paid by the defendant into court in satisfaction of the claim in respect of which it is paid in, and that I intend to proceed for the remainder of my claim.

Dated the day of , 19 .

Plaintiff.

To the Clerk of the Court.

---

129. NOTICE TO PARTIES WHOSE NAMES ARE ADDED AS DEFENDANTS. [*Section 97.*]

(*Court and Cause.*)

I hereby give you notice that by an order of this court, dated the day of 19 , a copy of which order is hereunto annexed, together

with a copy of the summons in the action, you were ordered to be added as one of the defendants in the above action.

And further take notice that the hearing of the above action has been adjourned to the day of 19 , at o'clock in the forenoon, and that if you do not attend at the Court House at upon the day and at the hour above mentioned, either in person or by your solicitor, such order will be made and proceedings taken as the judge may think fit.

....,
Clerk.

---

130. CERTIFICATE FOR DISCHARGE OF A JUDGMENT DEBTOR FROM CUSTODY: SECTION 105 (*a*).

No. , A.D. 19 .

(Insert Title of Court and Style of Cause.)

I, X..... Y....., certify that the defendant, now in your custody under warrant of commitment in this cause, has, since the issuing of the said warrant, satisfied the moneys for the non-payment whereof he was so committed, together with all costs and charges in respect thereof; and the said defendant may, in respect of such warrant, be forthwith discharged from and out of your custody.

Given under the seal of the court this day of , A.D. 19 .

Seal.

X..... Y.....,
Clerk,

To the keeper of the common gaol of the County of .

---

131. JUDGE'S ORDER FOR DISCHARGE OF JUDGMENT DEBTOR: SECTION 195 (*c*).

(Formal parts as usual.)

1. Upon the application of the defendant and it appearing that he has since the issuing of the warrant of commitment herein satisfied the moneys for the non-payment whereof he was ordered to be committed, together with all costs and charges in respect thereof;

2. It is ordered that the said defendant be, in respect of the said warrant, forthwith discharged from custody thereunder.

---

132. JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHO HAS WASTED ASSETS.

[Section 121]

Judgment for plaintiff for $, and $ costs, to be paid in days, to be levied of the goods and chattels of the deceased; failing such goods, then the whole (or the sum of $ and the said costs) to be levied of the defendant's proper goods and chattels; the defendant having wasted the goods of the deceased to that amount.

132 (1). JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR, WHERE THE DEFENDANT ADMITS HIS REPRESENTATIVE CHARACTER, BUT DENIES THE DEMAND, AND ALLEGES TOTAL OR PARTIAL ADMINISTRATION OF ASSETS, AND THE PLAINTIFF PROVES HIS DEMAND, AND THE DEFENDANT DOES NOT PROVE ADMINISTRATION.

[*Section 121.*]

Judgment for plaintiff for $ for debt, and also $ costs, to be paid in days, to be levied of the goods and chattels of the deceased; failing such goods, then the said costs to be levied of the defendant's proper goods, and the debt to be levied of the goods and chattels of the deceased, hereafter to come to the defendant's hands to be administered, the plaintiff's demand having been proved, which was denied, and administration, which was alleged, not having been proved.

---

132 (2). JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHERE HE ADMITS HIS REPRESENTATIVE CHARACTER, BUT DENIES THE DEMAND, AND ALLEGES TOTAL OR PARTIAL ADMINISTRATION OF ASSETS, AND THE PLAINTIFF PROVES HIS DEMAND, AND THE DEFENDANT PROVES ADMINISTRATION.

[*Section 121.*]

Judgment for the plaintiff for $ for debt, and also $ costs, to be paid in days; the plaintiff's demand, which was denied, having been proved, and full (or partial) administration also having been proved, which was denied, the said costs to be levied of the goods and chattels of the deceased; failing such goods, then of the defendant's proper goods; the said debt to be levied of the goods and chattels of the deceased, hereafter to come to the defendant's hands to be administered; and ordered that $, the costs of proving such administration, be paid to the plaintiff in days.

---

132 (3). ORDINARY JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR.

[*Section 121.*]

Judgment for plaintiff for $, and $ costs, to be paid in days, to be levied of the goods and chattels of the deceased; failing such goods, the costs to be levied of the defendant's proper goods and chattels.

---

132 (4). JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHO ADMITS HIS REPRESENTATIVE CHARACTER, AND DENIES THE DEMAND.

[*Section 121.*]

The same as in ordinary judgment against Executor or Administrator; *See next preceding Form.*

132 (5). JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHO HAS DENIED HIS REPRESENTATIVE CHARACTER, OR PLEADED A RELEASE TO HIMSELF.

[Section 121.]

The same as in ordinary judgment against executor or administrator, *see next preceding Form.*

---

132 (6). SUMMONS TO EXECUTOR OR ADMINISTRATOR WHERE PLAINTIFF INTENDS TO APPLY TO THE COURT, AFTER JUDGMENT, BECAUSE ASSETS HAVE COME TO THE DEFENDANT'S HANDS SINCE JUDGMENT.

No. *A.D. 19* .

In the *Division Court in the County of*

Between A.... B...., Plaintiff,

and

[Seal.] *C.... D...., Executor (or Administrator) of E.... F...., deceased,*

Defendant.

The plaintiff having learned that property of the said deceased has come to your hands as executor (or administrator) since the judgment herein, to be administered, and that you have withheld and wasted the same, intends to apply at the sitting of this court to be held at in the said County of , next, after the expiration of days from the time this summons is served on you, for an order that the debt and costs be levied of the goods and chattels of the said deceased, if you have so much thereof to be administered, and that, if you have not, then that it shall be levied of your own proper goods and chattels, and that the costs be levied of your proper goods and chattels.

You are, therefore, hereby summoned to appear at the said court, to answer touching the matter aforesaid. The sittings of the court are set forth below.

Given under the seal of the court this day of , 19 .

To

The above-named defendant.

Add warnings and notices as in the ordinary summons.

Add dates of sittings of court.

And endorse notice under section 86; See Form 32 (6).

---

133. CONSENT TO APPEAL TO SUPREME COURT: UNDER SECTION 125 (c).

(Court and Cause.)

We hereby consent that this action may be entered to be heard and disposed of in the Divisional Court of the Appellate Division of the Supreme Court of Ontario. Pursuant to section 125 of the Division Courts Act.

Dated, etc.

(Signed by both parties.)

134. REQUEST TO CLERK OF COURT TO TRANSMIT PAPERS TO SUPREME COURT.

[*Section 129.*]

(*Style of Cause.*)

Pursuant to section 127 of the Division Court Act, you are hereby requested to certify under your hand, to the clerk of the Central Office of the Supreme Court of Ontario, at Osgoode Hall, Toronto. The summons and all notices, the claim and notice of defence, the evidence and all other papers filed in your office in this action for the purpose of an appeal of the said court.

Dated, etc.

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134 (1). APPOINTMENT OF AGENT FOR SERVICE: SECTION 126 (1)..

(*Court and Cause.*)

Take notice that the above-named has appointed , of Street, in the City of Toronto, in the County of York, solicitor, as his agent, upon whom any notice of appeal and all other papers hereafter requiring service herein may be served for him.

Dated this day of , A.D. 19 .
To the clerk of the said court.

---

134 (2). ORDER STAYING PROCEEDINGS WITH A VIEW TO APPEAL TO SUPREME COURT.

Upon the application of the plaintiff (or *defendant*). *I hereby order that proceedings herein be stayed for ten days, from the day of , A.D. 19 , in order to afford the plaintiff* (or *defendant*) *time to appeal.*

Dated this day of , 19 .

.....
Judge.

NOTE.—No security is now required on an appeal to the Supreme Court.

---

135. NOTICE OF APPEAL TO THE SUPREME COURT: SECTION 128.

In the Supreme Court of Ontario.

In a cause in appeal from the Division Court for the County of , in which A.... B.... is plaintiff, and C.... D.... defendant.

Take notice that this cause has this day been set down for hearing before a Divisional Court of the Appellate Division of the Supreme

Court of Ontario, for the *day of* , *A.D. 19* , *and the grounds of such appeal are as follows:—*

1. [Here, in separate paragraphs, set out clearly and concisely the grounds of appeal relied on.]

Dated this *day of* , *A.D. 19* .

A.... B....,
Appellant (or solicitor for appellant).

To C.... D....

The respondent (or *to the counsel, solicitor, or agent, of the respondent, as the case may be, naming him*).

[*It is difficult to comply strictly with the ambiguous words, "shall give notice thereof and of the appeal." It has, however, been attempted in the above form. The notice must be served according to section 128.*]

---

136. NOTICE OF APPEAL FROM CONVICTION, ETC.

[*Cr. Code, Section 750 (b): see Notes to Section 129.*]

To A.... B.... of (insert name in full, residence and occupation of respondent) *and to C.... D.... of* (insert place of residence of justice), *Esquire, a justice of the peace for the County of* .

NOTE.—If the case was one which by law could only be tried by *two* justices, insert the names of both justices, and both must be served with the notice of appeal: See notes *ante*, p. 369.

Take notice that I, E.... F.... of (insert place of residence, etc.), *intend to appeal to the* *Division Court of the County of* (Insert the number of the Division Court in which division the offence was committed: see notes, *ante*, p. 370), *at its sittings to be held at the* *of* *on the* *day of* , *A.D. 19* , (insert the date and place of the next sittings which are to take place not less than 14 clear days after the conviction or order was made), *against a certain conviction* (or *order*) *made by you the said C.... D.... Esquire, a justice of the peace* (or *C.... D.... and G.... H....*, *Esquires, two justices of the peace*), *for the County of* *on the* *day of* , *A.D. 19* , *whereby I was convicted of having* (or *was ordered to pay, etc.* (here set out the offence as stated in the information, summons or conviction, or the effect of the order with particulars as fully and certainly as possible).

Dated at *this* *day of* , *A.D. 19* .

E.... F....
by
J.... K.....
His solicitor

NOTE.—*This notice must be served on the respondent* and *on the justice or justices: Cr. Code section 750.*

136 (1). AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL.

In the Division Court in the County of .
In the matter of an appeal from a conviction (or order).
Between:—

E.... F...., Appellant.

and

A.... B...., Respondent.

I, of the of in the County of , (occupation), make oath and say:

1. That I did on day the day of , A.D. 19 , at the of in the County of , personally serve the hereto annexed Notice of Appeal on A.... B...., whom I personally knew to be the person by whom the complaint upon which the conviction (or order) referred to in the said Notice of Appeal was laid, and on C.... D.... (and G.... H....), whom I knew to be the justice (or justices), by whom the said conviction (or order) was made, by delivering to and leaving with each of them, the said A.... B.... and C.... D.... (and G.... H....), at the said last mentioned time and place personally, a true and exact copy of the said Notice of Appeal.

Sworn before me at the of in the County of this day of , A.D. 19 .

NOTE.—*The affidavit may be made before a Commissioner, Justice of the Peace, or Notary Public: See R.S.O. 1914, ch. 1, sec. 23 (1).*

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136 (2). FORM OF RECOGNIZANCE TO TRY THE APPEAL.

[*See Form 51 to Cr. Code, and Notes to Section 129, ante.*]

County of , Province of Ontario, Canada,

Be it remembered that on , E.... F...., of , (labourer), and L.... M.... of . (grocer), and N.... O...., of , (yeoman), personally came before the undersigned , a justice of the peace in and for the said County of , and severally acknowledged themselves to owe to our Sovereign Lord the King, the several sums following, that is to say, the said E.... F.... the sum of , and the said L.... M.... and N.... O.... the sum of , each, of good and lawful money of Canada, to be made and levied of their several goods and chattels, lands and tenements respectively, to the use of our said Lord the King, his heirs and successors, if he the said E.... F.... fails in the condition endorsed (or hereunder written).

Taken and acknowledged the day and year first above written, before me.

J.... P.... (name of County).

The condition of the above written recognizance is such that if the said E.... F.... personally appears at the sittings of the Division Court for the County of Huron, to be holden at (name the building and municipality where the Division Court is to be held), *on the day of , A.D. 19 , and tries an appeal against a certain conviction* (or order), *bearing date the day of , A.D. 19 , and made by me* (or by *K.... I...., Esquire, a justice of the peace for the said County*, as the case may be), *whereby he, the said E.... F.... was convicted, for that he, the said E.... F.... did on the day of , A.D. 19 , at the of in the County of* (here set out the offence as stated in the conviction; *or whereby the said E.... F.... was ordered to pay* etc., (here set out the order), *and also abides by the judgment of the court upon such appeal, and pays such costs as are by the court awarded, then the said recognizance to be void, otherwise to remain in full force and virtue.*

(Add affidavits of justification and execution.)

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136 (3). AFFIDAVIT OF JUSTIFICATION ON RECOGNIZANCE ON APPEAL.

[*See Notes to Section 129, at p. 372, and Form No. 8 (b) ante.*]

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136 (4). AFFIDAVIT TO LET IN DEPOSITIONS AS EVIDENCE ON APPEAL. CR. CODE 752 (3).

In the Division Court of the County of
In the matter of an appeal.
Between

A.... B....

Appellant.

and

C.... D....

Respondent.

I. , of the of , in the County of (occupation, e.g., *constable*, or as the case may be), *make oath and say:*

1. That on the day of , A.D. 19 , I was directed on behalf of (the appellant or respondent, as the case may be) *to serve a subpœna or summons then delivered to me for that purpose upon one, , of the of in the County of* (occupation), *who was one of the witnesses, and who gave evidence at the hearing of the said charge before , Esquire, the convicting justice, in order to obtain the personal attendance of the said as a witness at the present sitting of this court on the hearing of the appeal herein now pending in said court.*

2. That on the day of , A.D. 19 , I accordingly called at the place of residence of the said , at the said for the purpose of serving him with the said subpœna and enquiring there for the said , I was informed by the wife of the said (or as the case may be, shewing the person to be a grown up resident of the place mentioned), *that the said*

was not then at home. I then stated to the said wife of the said (or other person spoken to) *the nature of my business, and told her* (or him) *that I would call again for the purpose of serving the said subpœna at* (naming the day and hour at which the call was to be made), *and that I accordingly* (here state whatever calls were made and other attempts to effect service, and if the witness has a place of business, shew what efforts were made to serve him there; also, state what the persons seen at the witness' residence and place of business said in reply to the questions asked as to the whereabouts of the witness, giving the questions and answers. If the witness has gone abroad, shew if possible where he is alleged to have gone to, and state such facts and circumstances as would satisfy the court that all reasonable efforts have been made to obtain the personal attendance of the witness to give evidence. What the officer said: and the answers to his questions should be distinctly stated: Dubois v. Lowther, 4 C. B. 228; Fisher v. Goodwin, 2 C. & J. 94; Tomlinson v. Goatley, L. R. 1 C. P. 230).

3. *That I have made all reasonable efforts and used all due means in my power to serve the said with the said subpœna, and to procure his personal attendance at the hearing of the said appeal, and I have not been able to do so.*

Sworn, etc.

A similar form of affidavit to the above may be used on an appeal from a conviction under an Ontario law, the proof required being that witness is "dead, or so ill as not to be able to attend and give evidence, or is absent from Ontario," or after diligent enquiry cannot be found to be subpœnaed: R.S.O. ch. 90, sec. 10.

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136 (5). Order on Appeal, When Appeal Dismissed.

In the Division Court *in the County of Huron.*

His Honor Judge } *The day of , A.D. 1915.*
In the matter of an appeal from a conviction (or order).

Between: *E.... F....,* *Appellant.*

and

A.... B.... *Respondent.*

1. *This appeal coming on this day to be heard before this court, in the presence of the solicitors for both parties:*

Upon hearing the evidence adduced, and what was alleged by the said solicitors;

2. *It is ordered that the said appeal be and the same is hereby dismissed, and the said conviction is affirmed, and that the appellant be punished according to the said conviction* (or *that the appellant do pay the amount adjudged by the said order*), *with costs to be paid by the appellant to the clerk of this court to be paid over by the said clerk to the respondent within 15 days.*

136 (6). ORDER ON APPEAL, WHEN APPEAL ALLOWED.

[*Formal Parts as in Next Preceding Form.*]

It is ordered that the said appeal be and the same is hereby allowed, and that the said conviction be and the same is hereby quashed with $ costs, to be paid by the respondent to the clerk of this court, to be paid over by the said clerk to the appellant.

---

136 (7). WARRANT OF DISTRESS FOR COSTS OF AN APPEAL AGAINST A CONVICTION OR ORDER.

[*Form 53 to Cr. Code.*]

Canada,
Province of Ontario,
County of .

To all or any of the constables and other peace officers in the said county of .

Whereas A.... B.... of the of in the County of (occupation) was on the day of , A.D. 19 , duly convicted before , a justice of the peace in and for the County of , for that (set out the offence as stated in the conviction) [*or if the appeal was from an order for the payment of money the following will be substituted for the above recital—see* Form 40 to the Cr. Code) : "*Whereas on the day of , A.D. 19 , a complaint was made before , a justice of the peace in and for the said county, for that* (set out the matter complained of as in the order), *and thereupon the matter of the said complaint having been considered, the said A.... B.... was adjudged to pay the said C.... D.... the sum of , on or before the day of , A.D. 19 , and also to pay to the said C.... D.... the sum of for his costs in that behalf*]. *And whereas the said A.... B.... appealed to the* (name of court), *against the said conviction or order, in which appeal the said A.... B.... was the appellant, and the said C.... D.... was the respondent, and which said appeal came on to be tried and was heard and determined at the sittings of the said court, holden at , on ; and the said court thereupon ordered that the said conviction* (or *order*) *should be confirmed* (or *quashed*) *and that the said* (appellant) *should pay to the said* (respondent) *the sum of , for his costs incurred by him in the said appeal, which said sum was to be paid to the clerk of the said Division Court on or before the day of , one thousand nine hundred and , to be by him handed over to the said C.... D....; and whereas the said sum for costs had not been paid: *These are, therefore, to command you, in His Majesty's name, forthwith to make distress of the goods and chattels of the said A.... B...., and if, within the term of days next after the making of such distress, the said last-mentioned sum, together with the reasonable charges of taking and keeping the said distress, are not paid, then to sell the said goods and chattels so by you distrained, and to pay the money arising from such sale to the clerk of said Division Court, that he may pay and apply the same as by law directed; and*

if no such distress can be found, then to certify the same unto the said clerk, that such proceedings may be had therein as to law appertain.

Given under my hand and seal of the said court this day of in the year , at , in the county aforesaid.

E.... F.... [seal.]
Clerk, Division Court, County of .

CONSTABLE'S RETURN TO A WARRANT OF DISTRESS.

I, J.... K...., constable, of the of , in and for the County of , hereby certify to , Esquire, clerk of the Division Court for the County of , that by virtue of this warrant I have made diligent search for the goods and chattels of the within named A.... B.... and that I can find no sufficient goods or chattels of the said A.... B.... whereon to levy the sums mentioned in the within warrant.

Witness my hand, this day of , A.D. 19 .

(Signed)
J.... K....,
Constable.

---

136 (8). WARRANT OF COMMITMENT FOR WANT OF DISTRESS IN THE LAST CASE.

[*Form 54 to Cr. Code.*]

Canada,
Province of Ontario,
County of ,

To all or any of the constables and other peace officers in the said County of .

Whereas (etc., as in form 136 (7) to the asterisk* and then thus): *And whereas, afterwards, on the day of , in the year aforesaid, I, the undersigned, issued a warrant to all or any of the peace officers in the said County of commanding them, or any of them, to levy the said sum of , for costs, by distress and sale of the goods and chattels of the said A.... B....; And whereas it appears to me, as well by the return to the said warrant of distress of the peace officer who was charged with the execution of the same, or otherwise, that the said peace officer has made diligent search for the goods and chattels of the said A.... B...., but that no sufficient distress whereupon to levy the said sum above mentioned could be found: These are, therefore, to command you, the said peace officers, or any one of you, to take the said A.... B...., and him safely to convey to the common gaol of the said County of , at aforesaid, and there deliver him to the said keeper thereof, together with this precept: And I do hereby command you, the said keeper of the said common gaol, to receive the said A.... B.... into your custody in the said common gaol, there to imprison him (and keep him at hard labour) for a term of , unless the said sum and all*

costs and charges of the said distress (and for the commitment and conveying of the said A.... B.... to the said common gaol amounting to the further sum of), are sooner paid unto you the said keeper; and for so doing this shall be your sufficient warrant.

Given under my hand and seal this day of A.D. 19 , at the of in the County aforesaid.

E.... T...., [seal]

Clerk Division Court, County of .

---

130 (9). Form of Notice of Abandonment of Appeal from a Conviction: Cr. Code, Section 760.

In the Division Court of the County of

In the matter of an information (or complaint) laid before Esquire, a justice of the peace in and for the County of , by A.... B.... against C.... D.... for that (set out the charge).

Take notice that I do hereby abandon my appeal to this court against the conviction of me, the said C.... D...., for the alleged offence above mentioned.

Dated this day of , A.D. 19 .

C.... D....,
by F.... F...., his Solicitor.

---

137. Attorney-General's Fiat.

The King on the information of A.... B.... vs. C.... D....

[*See Page 3.*]

In this case the above-named was charged before police magistrate for the of in the County of with unlawfully selling liquor without the license therefor by law required, and the said police magistrate having acquitted the said I direct an appeal to be taken to the judge of the County Court for such order of dismissal.

Dated, etc.

Attorney General for Ontario.

---

138. Notice of Appeal by Inspector under Ontario Liquor License Act.

[*See Page 382.*]

To and to , Esq., his solicitor.

Take notice of appeal, by direction of the Honorable, the Attorney-General for the Province of Ontario, to the judge of the County Court of the County of , without a jury, by the undersigned License Inspector for the license district of , the prosecutor

in the information or complaint laid before , Esquire, police magistrate, for the of in the County of by the said as such inspector, on the day of 19 , against you for that you the said within days next before the laying of the said information or complaint, to wit on the day of at the of in the said County of did unlawfully sell liquor without the license therefor by law required contrary to the provisions of the Liquor License Act, from an order made by the said as such magistrate on the day of , 19 , dismissing the said information or complaint.

Dated this day of , A.D. 19 .

License Inspector, appellant above named.

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138 (1). AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL.

In the County Court of the County of .

In the matter of an appeal from an order of dismissal of an information or complaint.

BETWEEN:

The King on the information of , license inspector, Appellant.

and

Respondent.

I, of the of in the County of , license inspector, make oath and say:

1. That I did on the day of , 19 , at the of in the County of personally serve the above-named and also his solicitor each with a true and exact copy of the appeal hereto annexed, by delivering to and leaving with each of them the said and on the said day at the said of personally, such true duplicate, each of which was then duly signed by me with my own hand.

2. That I did on the said date and place also personally serve and deliver to and leave with , Esquire, police magistrate, for the said of the magistrate from whose order the said notice of appeal was given, a true and exact duplicate of the said notice of appeal.

Sworn before me at the Town of in the County of this day of , A.D. 19 .

A Commissioner, etc.

Filed on behalf of the appellant.

130. NOTICE OF APPEAL BY LICENSEE OR DRUGGIST OR IN RESPECT OF LICENSED PREMISES.

[*Ont. Liq. Lic. Act, s. 110 (2), as amended by Ont. Statutes, 1914, c. 37, s. 2.*]

To C. D. of (*name and addition of prosecutor*).

Take notice that I, the undersigned A. B., of intend to enter and prosecute an appeal to the Judge of the County Court of the County of , sitting in Chambers at the Court House in the Town of on the day of , A.D. 19 , at the hour of o'clock noon, or so soon thereafter as the appeal can be heard, against a conviction bearing date the day of , A.D. 19 , made by J... S..., Esquire, and R.... I...., Esquire, two of His Majesty's Justices of the Peace for the said County of , whereby I was convicted of having (state the alleged offence as in the conviction.)

Dated at this day of . A.D. 19 .

[*Signed.*] A.... B....

---

130 (1). RECOGNIZANCE ON APPEAL BY LICENSEE FROM A CONVICTION, UNDER ONTARIO LIQUOR LICENSE ACT, SECTION 110, WHERE THE PENALTY IS IMPRISONMENT.

Canada.
Province of Ontario, } *Be it remembered that on the day*
County of , } *of A.D. 19 . A.... B.... of the*
of in the County of (occupation),
C.... D...., of the of in the
County of (occupation), and E.... F...., of the
of in the County of (occupation), personally came before the undersigned N.... H...., a justice of the peace in and for the said County of and severally acknowledged themselves to owe to our Sovereign the King the several sums following, the said A.... B.... the sum of two thousand dollars, the said C.... D.... the sum of two hundred dollars, and the said E.... F...., the sum of two hundred dollars, each of good and lawful money of Canada, to be levied of their several goods and chattels, lands and tenements respectively, to the use of our said Sovereign the King, his heirs and successors, if the said A.... B.... fails in the condition hereunder written.

Taken and acknowledged the day and year first above written at the of in the said County of before me.

G.... H.... .
J. P., County of .

The condition of the above written obligation is such that if the said A.... B.... personally appears before his honor the judge of the County Court of the County of at his Chambers in the court house at the Town of in the said County of and tries an appeal against a certain conviction, bearing date the day of . A.D. 19 . and made by me, the said G.... H..... a justice of the peace in

and for the said County of , whereby he the said A.... B.... was convicted, for that he the said A.... B.... (set out the offence as stated in the conviction), and also abides by the judgment of the said judge upon such appeal, and pays such costs as the said judge may order thereupon, then the said recognizance to be void, otherwise to remain in full force and virtue.

[Signed.] *G... H....*
J. P.

---

140. Recognizance where the Penalty is by Fine.

Similar Form to No. 130, except as to the statement of the conviction.

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141. Form of Summons on Appeal.

[*See Page 382.*]

In the County Court of the County of , the day of , A.D. 19 .

Before his Honor
Judge.

In the matter of an appeal from an order of dismissal of an information or complaint.

BETWEEN:
The King on an information of *license inspector.*
Appellant.

and

Respondent.

Upon the application of the above-named and upon reading the fiat of the honorable the Attorney-General of the Province of Ontario, directing the appeal and upon reading the information or complaint laid by the said , license inspector, for the viding of against before , Esquire, police magistrate for the Town of , in the said County of the day of , 19 , charging the said with having at the Town of , in the said County of , within thirty days then last past, to wit, on or about the day of , 19 , unlawfully sold liquor without the license therefor by law required, and upon reading the order of the said , police magistrate, dated the day of , 19 , dismissing the said information or complaint; and upon reading the notice of appeal and affidavit of service thereof filed and the proceedings and evidence taken before the said police magistrate; and in pursuance of section 10 of the Liquor License Act:

Let the above-named and the said , Esquire, police magistrate, attend before me at the chambers in the court house in the Town of in the County of on the day of , 19 , at the hour of o'clock noon, to shew cause why the said order of dismissal should not be reversed and the case reheard.

Judge.

142. NOTICE REQUIRING JURY.

[See Page 384.]

(Court and Cause.)

Take notice that the plaintiff (or defendant) requires that this action shall be tried with a jury.

Dated, etc.

To

The clerk of this court. Plaintiff (or defendant).

---

143. SUMMONS TO CLERK OF MUNICIPALITY: UNDER SECTION 139.

In the Division Court in the County of .

In the matter of sections 134 and 139 of The Division Courts Act.

To A.... B...., clerk of the Township of :—

Take notice that it is alleged that you have neglected or refused to furnish the clerk of this court, within the limits of which the municipality for which you are clerk is partly (or wholly) situate, with a correct copy of the voters' list of the said municipality, published in the present year, and you are hereby summoned to appear at the sittings of this court, to be holden at , in the said County of , on the day of , A.D. 19 , at the hour of o'clock in the noon, to shew cause why you have refused or neglected to comply with the provisions of sections 134 and 139 of The Division Courts Act.

.....

Clerk.

---

144. JUDGMENT AGAINST GARNISHEE.

ON HEARING

It is adjudged, that the garnishee is indebted to the primary debtor in $, which ought to be applied in (or towards) satisfaction thereof. Second, that the primary creditor do recover against the garnishee the said sum of $ in days in satisfaction as aforesaid.

Dated the day of , A.D. 19 .

---

144 (1). EXECUTION AGAINST GARNISHEE ON JUDGMENT ALREADY RECORDED AGAINST PRIMARY DEBTOR.

In the Division Court, in the County of .

BETWEEN:

A.... B...., Primary Creditor,

and

[Seal.] *C.... D....*, Primary Debtor,

and

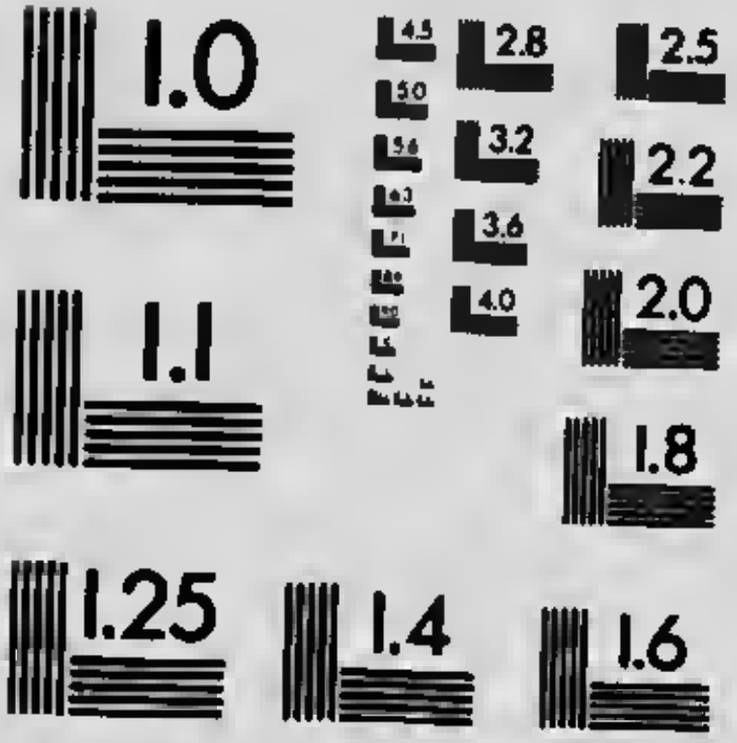
E.... F...., Garnishee.

Judgment recovered on the day of , A.D. 19 , in the Division Court in the County of .

Amount unsatisfied $.

MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



APPLIED IMAGE Inc

1653 East Main Street
Rochester, New York 14609 USA
(716) 482 - 0300 - Phone
(716) 288 - 5989 - Fax

Whereas on the day of , A.D. 19 , it was ordered that the garnishee should pay the primary creditor the sum of $ (or, if by instalments, state the fact), being the (or so much of the amount of the debts found to be due from him to the primary debtor (or as is sufficient to satisfy the judgment of the primary creditor), and default having been made therein (or $, part thereof, being in default), according to the said order;

You are hereby required to levy of the goods and chattels of the garnishee, in the County of (not exempt from execution), $ so owing from him to the primary debtor, and ordered to be paid, and your lawful fees.

And what you shall have done, etc. (Proceed the same as in ordinary executions.)

---

145. JUDGMENT IN FAVOR OF GARNISHEE.

ON HEARING

It is adjudged that the garnishee is not indebted to the primary debtor as claimed by the primary creditor , and that the primary creditor pay the garnishee $ for costs, to be paid in days.

Dated the day of , A.D. 19 .

....., Judge.

---

145 (1). EXECUTION AGAINST GARNISHEE WHERE GARNISHEE DEFENDS.

(Title of Court and Style of Cause.)

[Seal.]

Amount adjudged due from the primary debtor to the primary creditor the day of , A.D. 19 , for debt..$
For costs .....

Total sum .....$

Amount adjudged to primary creditor for money owing from the garnishee the day of , A.D. 19 , ...$

To V.... W...., Bailiff of the said court:—

You are hereby required to levy of the goods and chattels of the garnishee (not exempt from execution), in the said County of , $ money owing from him to the primary debtor; and inasmuch as the said garnishee set up a defence to the said claim which he knew (or ought to have known), was untenable, the judge ordered that he should pay the costs of the said proceeding, amounting to $. You are therefore further required to levy of the said goods and chattels of the said garnishee (not exempt as aforesaid) the said sum of $. to satisfy the said costs and your lawful fees, and what you shall have done herein return with this writ within thirty days after the date hereof.

Given under the seal of the court the day of , 19 .

N.... Y....,
Clerk.

146. NOTICE ON GARNISHEE SUMMONS WHERE CLAIM IS FOR BOARD OR LODGING.

See notice No. 10, at end of Form 4 to statute, ante, p. 581; and notice 46 (1), ante, p. 660.

---

147. JUDGMENT AGAINST PRIMARY DEBTOR AND AGAINST GARNISHEE.

On hearing all parties [or "*on hearing the primary creditor* (or as the case is), *the primary debtor* (or as the case is) *having made default*], *it is adjudged, 1st, That the primary debtor is indebted to the primary creditor in $, and that he do pay the same and $ costs in days. 2nd, That the garnishee is indebted to the primary debtor in $, which* (if the garnishee's debt be larger than the primary creditor's claim, say: "*to the extent of the two first-mentioned sums*") *ought to be applied in satisfaction thereof. 3rd, That the primary creditor do recover against the garnishee the said sum of $, to be paid in days* (as time may be given for payment of debt becomes due), *in satisfaction as aforesaid.*

---

147 (1). EXECUTION AGAINST PRIMARY DEBTOR AND GARNISHEE.

[*Section 156.*]

No. , A.D. 19 .

In the Division Court, in the County of

BETWEEN:

A.... B...., Primary Creditor.

and

[Seal.] *C.... D....*, Primary Debtor.

and

E.... F...., Garnishee.

Amount adjudged due from the primary debtor to the primary creditor the day of , A.D. 19 , for debts ....$

For costs .....

Total debt and costs .....$

Amount adjudged to the primary creditor, for money owing from the garnishee, the day of , A.D. 19 , ...$

To V.... W...., Bailiff of the said court:—

You are hereby required to levy of the goods and chattels of the primary debtor, in the said County of K. (not exempt from execution), $ above adjudged to be due to the primary creditor from the primary debtor, together with the costs of this precept, and your lawful fees in executing the same. And if so much goods and chattels of the primary debtor be not found in the said county as will satisfy the said judgment, then that you levy of the goods and chattels of the garnishee in the said county (not exempt from execution), (or so much thereof as may be necessary to satisfy the said judgment) money owing from the garnishee to the primary debtor, and which has been adjudged to the primary creditor, and your lawful fees, and what you shall have done herein return with this writ within thirty days after the date hereof.

(Conclude as in other executions.)

147 (2). EXECUTION AGAINST GARNISHEE ON JUDGMENT RECOVERED AGAINST HIM AND PRIMARY DEBTOR.

In the *Division Court, in the County of*

BETWEEN:

A.... B...., Primary Creditor,
and
C.... D...., Primary Debtor,
and
E.... F...., Garnishee.

[Seal.]

Amount adjudged due from the primary debtor to the primary creditor the day of , A.D. 19 , for debt..$
For costs .....

Total sum .....$

Amount adjudged to the primary creditor, for money owing from the garnishee, ; the day of , A.D. 19 , ...

To V.... W...., Bailiff of the said court:—

You are hereby required to levy of the goods and chattels of the garnishee, in the said County of (not exempt from execution), $, money owing from him to the primary debtor, and which has been adjudged to the primary creditor, to satisfy his said claim against the primary debtor, and, the costs of this execution together with your lawful fees, [See Rule 27], and what you shall have done herein return with this writ within thirty days after the date hereof. (Conclude as in other executions.)

---

147 (3). JUDGMENT IN FAVOR OF GARNISHEE, PRIMARY DEBTOR, OR CLAIMANT.

On hearing all parties (or *on hearing the garnishee, the primary creditor having made default*), *it is adjudged that the garnishee is not indebted to the primary debtor, as claimed by the primary creditor, and that the primary creditor pay the garnishee $ for his costs, to be paid in days.*

---

147 (4). JUDGMENT WHERE PRIMARY CREDITOR FAILS IN RECOVERY OR PROVING FOR CLAIM AND PROCEEDINGS HAVE BEEN CONTINUED AS BETWEEN THE PRIMARY DEBTOR AND THE GARNISHEE.

The primary creditor having failed to prove his claim against the primary debtor, or become non-suited, and upon hearing the matter in controversy between the primary debtor and the garnishee, it is adjudged that (here follow any other form of judgment suitable to the case of an ordinary proceeding between plaintiff and defendant). *and it is ordered that the primary creditor do pay the primary debtor* (or *garnishee*). Here state whatever the judgment may be as to costs or otherwise.)

147 (5). *Judgment for the primary debtor (or for the garnishee, or for the third-party claimant) against the primary creditor for $ costs (or for $ for his trouble and attendance, and for his costs), to be paid forthwith (or within fourteen days).*

---

147 (6). *It appearing that the set-off of the primary debtor exceeds the claim of the primary creditor, as proved, by over $100, it is adjudged that the claim of the primary creditor proved at $ be discharged, and that the set-off of the primary debtor to $ be satisfied; and, further, that the primary debtor do recover against the primary creditor $ for his costs, to be paid in days, and that the attachment of the debt garnished be discharged.*

---

147 (7). SUMMONS WHERE A THIRD PARTY CLAIMS THE MONEY GARNISHED.

[*Section 162.*]

(*Title of Court and Style of Cause.*)

Upon reading the garnishee summons issued in this cause, and upon hearing the primary creditor [the primary debtor] and the garnishee;

It is ordered that the further hearing of the parties to the said summons herein do stand adjourned until the day of A.D. 19 , at (or "the next sittings of this court"), and that G.... H...., who claims to be entitled to the said debt, the primary creditor, the primary debtor, and the garnishee, their solicitors or agents, attend before the presiding judge at the next sittings of this court at , on the day of , A.D. 19 , at o'clock in the noon of the same day (or such other time as may be appointed), and state the nature and particulars of their respective claims to such debt, and maintain or relinquish the same, and abide by such order as may by the said presiding judge be made herein, and that the costs of the adjournment and of this order be costs in the cause.

Dated, etc.

....., Judge.

---

147 (8). EXECUTION WHERE CLAIM MADE BY SOME ONE OTHER THAN THE PRIMARY CREDITOR OR PRIMARY DEBTOR, TO DEBT SOUGHT TO BE ATTACHED, AND JUDGE GIVES EFFECT TO CLAIM UNDER SECTION 162 OF ACT, WITH COSTS TO BE PAID TO CLAIMANT.

(*Insert title of Court and Style of Cause.*)

Whereas, upon this cause coming on to be tried, and upon its being proved that a debt was owing from the garnishee to the primary debtor, it appeared that G.... H...., of , claimed to be entitled to the said debt by assignment thereof or otherwise.

And whereas the judge at the sittings of this court, holden at , in the said County of , upon the day of , A.D. 19 , having duly called the said G.... H...., and all other proper parties, before him by summons, for the purpose, as provided by the 162nd section of The Division Courts Act, enquired into and decided upon the said claim, and allowed and gave effect to it, and judgment was given that the primary creditor* (or as the case may be) *do pay to the said G.... H...., the sum of $ for his cost of so establishing his right to the said debt, which remains unpaid.*

You are hereby required to levy of the goods and chattels of the said primary creditor (or as the case may be), *in the said County of* (not exempt from execution), *the sum of $ for the said costs of the said G.... H.... in so establishing his right to the said debt, together with your lawful fees.*

(Proceed as in form 52.)

---

147 (9). Execution where Claim made by some one other than the Primary Creditor or Primary Debtor, to Debt Sought to be Attached, and Judge holds the Claim void as against the Primary Creditor under Section 162 of Act, with Costs to be paid by Claimant.

As in last form to asterisk* and then proceed: *and held the same void as against the primary creditor for being a fraud upon creditors* (or otherwise, stating the ground), *and judgment was given that the said G.... H.... do pay to the primary creditor the sum of $ for his costs of opposing the said claim, which remains unsatisfied.*

You are hereby required to levy of the goods and chattels of the said G.... H...., in the said County of (not exempt from execution), *the said sum of $ for the said costs of the said primary creditor in so opposing the said claim, together with your lawful fees.*

(Proceed as in form 52.)

---

148. Bond under Section 161.

(Commencement and conclusion same as in replevin bond, Form 42, except that the bond must be to the clerk by his name of office, conditioned as follows:)

Whereas, in a certain garnishee proceeding under The Division Courts Act, wherein the said A.... B.... is primary creditor, C.... D.... primary debtor, and E.... F.... garnishee, a certain debt of $, due from the garnishee to the primary debtor, has been garnished to answer the debt of the primary creditor; and whereas the judge of the said court, acting under the 196th (210th) section of the said Act, ordered that upon payment of the said debt by the garnishee to the primary creditor security should be given by or on behalf of the primary creditor for the repayment thereof into court by the primary creditor: Now the condition of this obligation is such

that if the above-bounden A.... B.... do pay into court the said debt, in case a proper order shall be made for such repayment, within five days after notice of such order, then this obligation to be void, else to remain in full force.

(Close as in replevin bond.)

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149. GARNISHEE ORDER (ATTACHING DEBTS).

[*See Page 436, ante.*]

In the Supreme Court of Ontario.

The Master in Chambers (or as may be)

BETWEEN (*dated*).

A.... B...., Judgment Creditor.
and
C.... D...., Judgment Debtor.
and
E.... F...., Garnishee.

1. Upon the application of , *and upon reading the affidavit of* *filed, and upon hearing the solicitor* (or counsel) *for* *2. It is ordered that all debts owing or accruing due from the above-named garnishee to the above-named judgment debtor be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor on the* *day of* *19* *for the sum of $* , *on which judgment the said sum of $* , *remains due and unpaid, and any other judgments against the said judgment debtor entitled by law to share therein.*

3. And it is further ordered that the said garnishee attend before the Judge of the Division Court of the County of , *at his Chambers in the Court House in* *of* *in the County of* (or as the case may be) *on* *day the* *day of* *19, at* *o'clock in the* *noon, on an application by the said judgment creditor, that the said garnishee pay the said judgment creditor the debt due from him to the said judgment debtor, or so much thereof as may be sufficient to satisfy the judgment.*

---

150. FINAL GARNISHEE ORDER.

(*See p. 436, ante.*)

In the Supreme Court of Ontario.

The Master in Chambers (or as may be)

(*Date*)

Between A.... B...., *Judgment Creditor,*
and
C.... D...., *Judgment Debtor,*
and
E.... F...., *Garnishee.*

1. Upon the application of , *and upon reading the affidavit of* *filed, and the order herein dated the* *day of* ,

19 , whereby it was ordered that all debts owing and accruing due from the above-named garnishee to the above-named judgment debtor should be attached to answer a judgment recovered against the said judgment debtor by the above-named judgment creditor on the day of , 19 , for the sum of $, on which judgment the said sum of $....., remained due and unpaid, and upon hearing the solicitor (or counsel) for

2. It is ordered that the said garnishee do forthwith pay the debt due from the said judgment debtor into Court to the credit of this matter.

3. And it is further ordered that the costs of the judgment creditor of this applicotion be first paid from the said money and that the balance be then paid to the Sheriff of the County of to be dealt with under the provisions of the Creditors' Relief Act.

---

151. Bailiff's Return of Goods on Hand for Want of Buyers.

(See page 467, nate.)

By virtue of the within execution to me directed I have seized and offered for sale goods and chattels of the defendant within named, which goods and chattels still remain on hand for want of buyers, wherefore I cannot levy and pay over the moneys, as within mentioned.

Dated, etc.

Bailiff.

To the Clerk of the Court

---

152. Execution to Bailiff for Sale of Property Seized, but Unsold for Want of Buyers.

(See page 467.)

(Insert Title of Court and Style of Cause.)

[Seal.]

Whereas by an execution issued out of the said art, dated the day of , 19 , you were lately required to levy of the goods and chattels of the defendant (or plaintiff) [not exempt from execution], in the said county, the sum of , and your lawful fees, so that you might have that money within thirty days from the said date, and pay the same over to the clerk of this court for the plaintiff (or the defendant), and you, at a day now past lately returned thereon that by virtue thereof you had taken goods and chattels of the said defendant (or plaintiff) to the value of $, which said goods and chattels remained in your hands for the want of buyers. (Here state what the return was, if different in any respect from what is hereinbefore stated.)

Therefore, you are required to expose for sale and sell the said goods and chattels so taken by you and every part thereof for the best price that can be gotten for the same, to satisfy the said execution.

In case the said goods and chattels do not sell for a sufficient sum to so satisfy the said execution and your lawful fees, you are required to levy of the other goods and chattels of the defendant (not exempt from execution), in the said county, the residue of the said sum and your lawful fees; so that you may have the same within thirty days, etc.

(Conclude as in other executions.)

152 (1). SHERIFF'S RETURN OF GOODS ON HAND FOR WANT OF BUYERS, TO FULL AMOUNT.

By virtue of the within writ to me directed, I have seized and offered for sale goods and chattels of the within named defendant, which goods and chattels still remain on hand for want of buyers, whereupon I cannot levy and pay over the moneys as within commanded.

Dated, etc.

Sheriff of County of

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152 (2). SHERIFF'S RETURN OF GOODS (OR LANDS) ON HAND, FOR PART, FOR WANT OF BUYERS.

By virtue of the within writ to me directed I have seized and offered for sale goods and chattels (or lands and tenements) of the within named defendant to the value of $ part of the moneys within mentioned, which goods and chattels still remain on hand for want of buyers, wherefore I cannot levy and pay over the moneys as within commanded.

Dated, etc.

Sheriff County of

---

152 (3). WRIT OF VENDITIONI EXPONAS TO SHERIFF AFTER A RETURN OF GOODS (OR LANDS) ON HAND TO FULL AMOUNT, UNSOLD FOR WANT OF BUYERS.

No. *A.D. 19* .

[Seal.] (*Court and Cause.*)

Whereas by a writ of execution issued out of this court, you were lately commanded that of the goods and chattels, lands and tenements of the defendant in the Court to levy the sum of $ for debt (or damages) and $ for costs of suit; and on the day of you returned to this Court that by virtue of the said execution you had taken goods and chattels (or lands and tenements) of the said defendant to the value of the money and interest aforesaid, which said goods and chattels (or lands and tenements) remained in your hands unsold for want of buyers. You are therefore hereby commanded that you expose to sale and sell, or cause to be sold, the goods and chattels (or lands and tenements) of the said defendant, so by you taken as aforesaid, and every part thereof, for the best price that can be gotten for the same, and have the money arising from such sale immediately after the execution thereof, and pay the same over to the clerk of this Court for the plaintiff.

Given under the hand and seal of this Court this day of A.D. 19 .

To

Sheriff of the County of

Clerk.

Judgment .....$
Interest .....
Subsequent costs .....
This execution .....

.....,

Levy the sum of $. *and your lawful fees upon this precept.*

153. NOTICE OF APPLICATION, [SECTION 174], FOR JUDGE'S ORDER FOR CROSS JUDGMENTS TO BE SET OFF.

(Insert Title of Court and Style of Cause.)

Take notice that application will be made to the judge on the day of , 19 , at his chambers in , at the hour of o'clock a.m., for an order directing that the cross judgments which have been entered between the parties in these causes be set off, the one against the other, and that satisfaction of the judgments so set off be entered by the clerk in the procedure book, as directed by the 213th section of the Act.

Yours, etc.,
.....

Dated, etc.

---

154. JUDGE'S ORDER, UNDER SECTION 174.

(Insert Title of Court and Style of both Causes.)

Upon reading the notice served upon the defendant (or plaintiff) in this cause and the affidavit of service thereof, and upon the application of , the plaintiff (or defendant), in the first cause above-named, and the defendant (or plaintiff) in the second cause above-named (or as the case may be), and no cause appearing to the contrary, I do order that the cross-judgment between the parties in these causes be set off, the one against the other, and that , who has obtained judgment for the larger sum, shall have execution only for the balance over the smaller judgment, and that the clerk do make in the procedure book in both the said causes an entry of this order, and also enter a satisfaction on the judgment for the smaller sum; but if both sums are equal, that he do enter in the procedure book satisfaction of both judgments, and that execution thereon be stayed.

.....
Dated, etc. Judge.

---

155. ENTRY OF SATISFACTION OF SMALLER JUDGMENT, UNDER SECTION 174.

Satisfaction is entered under section 174 in this action, by setting off judgment between the same parties in suit No. , 19 , by judge's order.

---

156. ENTRY OF PARTIAL SATISFACTION ON LARGER JUDGMENT, UNDER SECTION 174.

Satisfaction is entered for $, part of the amount adjudged to the plaintiff (or defendant) by judge's order under section 213, by setting off the amount adjudged against him in favor of the plaintiff (or defendant) in suit between them numbered , 19 , and it is further ordered that the plaintiff (or defendant) do have execution only for $, the balance over the said judgment.

157. Entry in the Procedure Book under the Creditors' Relief Act, Where There is a Judgment: Section 178.

The plaintiff (or *defendant*), *as a creditor of the defendant* (or *plaintiff*), *having served upon the sheriff of the County of* , *a memorandum of the amount of this judgment under The Creditors' Relief Act, under which proceedings were taken against the defendant* (or *plaintiff*) *for the recovery thereof, and because the same was not paid in full* (where part of the judgment has been paid through those proceedings or otherwise, here state it thus), *but $* , *part thereof, having been paid, the said sheriff hath returned as follows* (here state the return), *and because he was unable to make the residue* (or the money thereon) *satisfaction is entered for the sum of $* , *part thereof* (if no part was recovered leave out the words "*satisfaction is entered for the sum of $* , *part thereof*"), *and judgment is entered for the plaintiff* (or *defendant*) *for the sum of $* , *balance of the debt* (or *damages*) *and $* *costs.*

---

158. Judgment under The Creditors' Relief Act.

Where the proceedings were not upon a judgment or execution, but upon a certificate of claim: Section 178.

Proceed, as in previous form, to the words "a memorandum," and thence as follows:—A certificate for a claim within the jurisdiction of this court, amounting to the sum of $ *debt* (or *damages*) *and $* , *under The Creditors' Relief Act, under which proceedings were taken for the recovery thereof against the defendant* (or *plaintiff*), *which not being paid in full, and the said sheriff, being unable to make the money thereon, returned the same under the provisions of the said Act, judgment is therefore entered for the plaintiff* (or *defendant*) *for $* *debt and $* *costs.* (If the sheriff has returned that he has made part, then the fact should be stated, and judgment should be entered for the residue only.)

---

159. Writ of Ven. Ex. for Part and Execution for Residue.

(*Court and Cause.*)

No. *A.D. 19* .

[*Seal.*]

Whereas by a writ of execution issued out of this court you were lately commanded that of the goods and chattels, lands and tenements of the defendant in the County of , *you should levy the sum of $* *for debt* (or *damages*), *and $* *cost of suit, and you on the* *day of* *19* , *returned to this Court that by the virtue of the said execution you had taken goods and chattels* (or *lands and tenements*) *of the said defendant to the value of* *Dollars, parcel of the said several sums of money and interest which goods and chattels* (or *lands and tenements*) *remained in your hands for want of buyers, and that the said* *had not any other or*

more goods and chattels in the said County whereof you could cause to be made the residue of the moneys and interest aforesaid or any part thereof; therefore, you are truly commanded that you expose to sale and sell or cause to be sold the said goods and chattels (or lands and tenements) of the said defendant so by you taken as aforesaid, for the best price that can be got for the same, and have the sum of parcel of the moneys and interest aforesaid arising from such sale, and any further or other moneys which you may receive by virtue of this execution within thirty days from the date hereof, and pay the same over to the clerk of the court for the plaintiff.

And we also command you, that of the goods and chattels of the said defendant in the County of , you do levy the residue of the moneys and interest aforesaid, and so much of such residue as you shall have made from such goods and chattels immediately after the execution hereof, and pay the same over to the clerk of this Court for the plaintiff.

Given, etc. (complete as in Form 152 (3)).

---

160. Renewal of Execution Against Lands.

[Section 182 (6)].

The clerk is to mark in the margin of the execution as follows: Renewed for three years on this day of A.D. 19 .

Clerk Division Court, County of .

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161. Affidavit for Leave to Proceed in the Division Court After Issue of Execution against Lands.

(Section 183.)

In the Division Court in the County of

Between A.... B...., Plaintiff,

and

C.... D...., Defendant.

I, A.... B...., of the (occupation) of in the County of make oath and say:

That I am the plaintiff herein (or that I am plaintiff's agent herein and have a personal knowledge of the facts hereinafter stated.)

2. That the judgment herein remains wholly unsatisfied (or as the fact may be).

3. That the execution against land has been returned unsatisfied (or that I believe the judgment debtor C.... D...., has not sufficient land in the County of to the Sheriff of which the execution against land, herein was directed, to satisfy the judgment herein (state reasons for belief).

Sworn, etc.

162. AFFIDAVIT OF PERSONAL SERVICE OF JUDGMENT SUMMONS.

In the Division Court in the County of

(Court and Cause.)

I *of the* *of* *in the County of* *(occupation)* *, make oath and say:*

1. That I did on *the* *day of* *, A.D. 19* *, personally serve the above-named defendant C.... D.... with a true copy of the within summons, by delivering to and leaving with him the said defendant C.... D....* *on the said day at the* *of* *in the County of* *the said true copy.*

2. That to effect such service I necessarily travelled *miles.*

Sworn, etc.

---

163. AFFIDAVIT FOR RENEWAL OF WARRANT TO COMMIT JUDGMENT DEBTOR.

(Rules 84, 88.)

(Court and Cause and formal parts as in forms ante.)

1. That I am the plaintiff herein (or I am the agent of the plaintiff herein), and have a personal knowledge of the facts hereinafter stated.

2. That the cause of the non-execution of the warrant to commit the above-named defendant issued against him herein is as follows: that I am informed to-lay by the bailiff that he has been and is, notwithstanding diligent enquiries by him, unable to find the said defendant, whose whereabouts is at the present time unknown (or as the case may be, giving the reasons).

Sworn, etc.

NOTE.—*The form of renewal is given in Rule 88 ante.*

---

164. BOND ON SUPERSEDEAS TO WARRANT OF ATTACHMENT.

[*Section 209*]

(Insert Title of Court and Style of Cause.)

Know all men by these presents, that we, C.... D..... of (insert place of residence and occupation), *the above defendant E.... F...., of, etc., and G.... H..... of, etc., are, and each of us is, jointly and severally held and firmly bound to A.... B.... the clerk of this court, in the sum of* *, to be paid to the said plaintiff, his certain attorney, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and each and every of us binds himself, his heirs, executors, and administrators firmly by these presents.*

Sealed with our respective seals, and dated the *day of* *, 19* .

Whereas the above-named plaintiff hath sued out a warrant of attachment against the goods and chattels of the defendant for the sum of , and under and by virtue of the said attachment certain goods and chattels of the defendant, to wit: (specify property seized), have been seized and attached; and the defendant desires that the said warrant be superseded, and the property, so attached, restored to him under the provisions of section 209 of The Division Courts Act.

Now the conditions of this obligation are such that if the said defendant, his heirs, executors or administrators do and shall in the event of the claim in the said cause being proved and judgment being recovered thereon as in other cases, where proceedings have been commenced against the person, pay the same, or pay the value of the said property, so taken and seized as aforesaid, to the plaintiff, his executors or administrators, or produce such authority whenever thereto required to satisfy such judgment, then this obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

C.... D.... [L.S.]
G.... H.... [L.S.]
E.... F.... [L.S.]

(Add affidavit of execution.)

---

164 (1). Approval of Bond for Restoration of Goods Seized under Attachment.

(*Section 209.*)

I, Judge of the County of (or *clerk of the Division Court in the County of*) *do hereby certify pursuant to section 209 (1) of the Division Courts Act, that I have examined the within bond and hereby approve of the same.*

Judge (or *Clerk*).

---

165. Order of Reference Containing Special Clauses.

(*Commence as in Form 65.*)

[Seal.]

1. The said arbitrator to have power, by writing, signed by him, from time to time, to enlarge the time for making his award.

2. That if either of the parties be dead before the making of the award that the same may be afterwards delivered to their respective personal representatives who shall require the same.

3. That the cost of the reference and award shall be at the discretion of the said arbitrator (or as the case may be).

4. That the arbitrator shall be at liberty to order and determine what he shall think fit to be done by either of the parties respecting the matters referred.

5. That the witnesses and parties shall be examined by the arbitrator on oath.

6. That the arbitrator shall be at liberty to proceed ex parte in case either party, after reasonable notice, shall, at any time, neglect or refuse to attend on the reference.

7. That the parties respectively shall produce before the arbitrator all books, deeds, papers, accounts, vouchers, writings, and documents within their possession or control, which the arbitrator may require and call for as in his judgment relating to the matter referred.

8. That neither party shall wilfully or wrongfully do, or cause to be done, any act to delay or prevent the arbitrator from making his award.

9. That neither of said parties shall bring or prosecute any action against the arbitrator concerning the matters referred.

10. That if either party shall, by affected delay or otherwise, wilfully prevent the arbitrator from proceeding in the reference, or from making his award, he shall pay such costs to the other as the arbitrator shall think reasonable.

11. The said parties jointly and severally agree with the said arbitrator, in consideration of his taking upon himself the burthen of the reference, to pay him his reasonable charges for the arbitration and award.

(Here add any other terms that the judge may prescribe or the parties may agree upon.)

Given under the seal of the court this day of 19 .

R. ROE,
Clerk.

---

166. ORDER UNDER SECTION 219.

(*See pages 561, et seq.*)

Between A.... B...., *Plaintiff,*

and

C.... D...., *Defendant.*

Upon the complaint made in writing to me the undersigned, Judge of the said court, by the above-named defendant C.... D.... (or as the case may be), against E.... F...., the bailiff of this court, that the said bailiff, acting now under color of process of this court, was guilty of extortion (or as the case may be, stating the ground of complaint with particulars), I did at a sitting of this court at on , after due notice to said E.... F...., enquire into the matter in a summary way, and after hearing the witnesses and the said defendant, and the said E.... F..... I do order that the said E.... F...., do forthwith repay to the said defendant the sum of $, which I find was unlawfully extorted (or as the case may be) by the said bailiff E.... F...., from the said defendant, together with $ damages, and $ costs, and in default of such repayment I do order that the said E.... F...., be committed to the common gaol of the County of for a period of three months unless the said sums respectively are sooner paid by him the said E.... F.....

Dated this day of A.D. 19 .

Judge.

166 (1). WARRANT OF COMMITMENT, UNDER SECTION 219.

In the Division Court in the County of .

To all or any of the constables or other peace officers in the said County of , and to the keeper of the common gaol of the said County of , at the of , in the said County of .

Between A.... B...., *Plaintiff.*
and
C.... D...., *Defendant.*

Whereas E.... F.... then the bailiff of this court, was by my order made herein dated the day of , A.D. 19 , ordered and adjudged to repay forthwith to the defendant C.... D.... the sum of $, unlawfully extorted from the said defendant by the said bailiff, under color of process of this court, together with $ damages and $ costs.

And whereas it was by the said order further adjudged that if the said several sums were not paid forthwith, the said E.... F.... should be imprisoned in the common gaol of the County of at the of , in the said County of , for the term of three months, unless the said several sums were sooner paid;

And whereas, the time in and by the said conviction appointed for the payment of the said several sums has elapsed, but the said E.... F.... has not paid the same, or any part thereof, but therein has made default;

These are, therefore, to command you, the said peace officers, or any one of you, to take the said E.... F.... and him safely to convey to the common gaol at the of , aforesaid and there to deliver him to the said keeper thereof, together with this precept;

And I do hereby command you, the said keeper of the said common gaol, there to imprison him for the term of three months, unless the said several sums are sooner paid, and for so doing this shall be your sufficient warrant.

Given under my hand and seal, this day of , in the year one thousand nine hundred and , at the of in the county aforesaid.

....., Judge.

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167. AFFIDAVIT TO OBTAIN AN ORDER TO BRING UP A PRISONER AS WITNESS.

[*See Notes to Section 114.*]

I, , of , the plaintiff (or *defendant*), *make oath and say:—That the above action is appointed to be tried at this court on the day of , A.D. 19 , and that E.... F...., now a prisoner confined in* (state the prison), *will be a material witness for me upon the said trial; and I further say that I am advised and verily believe that I cannot safely proceed to the trial of the said action without the testimony of the said E.... F.... and I do hereby make application for an order that the said E.... F.... be brought before this court to be examined as a witness on my behalf.*

168. ORDER TO BRING UP PRISONER AS WITNESS.

(*Formal Parts of Order as Usual.*)

It is ordered that the keeper of the common gaol at , do cause E.... F...., a prisoner in custody in the said gaol, to be brought before this court at the sittings thereof to be held at the in the of in the County of on the day of , A.D. 1915, at o'clock noon to give evidence on behalf of the in this cause. And that immediately after the said E.... F.... shall have so given his evidence, the said keeper do cause him to be safely conducted to the prison from which he shall have been brought.

And it is ordered that the said , do pay the expenses incidental to the above order, and the carrying out of the same.

———

Judge.

168 (1). WARRANT TO LEVY A FINE UPON A WITNESS IN COURT WHO REFUSES TO GIVE EVIDENCE.

Whereas H.... H.... being before this court at a sittings thereof, and called upon to give evidence in this cause, did wilfully refuse to be sworn and give evidence without alleging any just ground for such refusal (or after being sworn refused to give evidence (or to produce), as the case may be).

Whereupon it was adjudged and ordered by the court that the said H.... H.... should forthwith (or on the day of , A.D. 19 , as the case may be) pay to the clerk of this court a fine of $ for such neglect (or refusal). And whereas the said H.... H.... hath not made such payment: These are therefore (as before or as often before) to command you forthwith to make and levy by distress and sale of the goods and chattels of the said H.... H.... (not exempt from execution) the said fine and costs, amounting together to the sum of $, and your lawful fees; so that you may have the same within thirty days after the date hereof, and to pay the same over to the clerk of the court.

Given under the seal of the court this day of , 19

By order of the judge,

To V.... W....,
Bailiff of the said court..

X.... Y....
Clerk.

Fine .....$
Costs .....
Execution .....

———

Levy the sum of .....$

And you own lawful fees
(*See pp. 252, 485.*)

169. Warrant to Levy Fine upon Witness who Refused to be Sworn upon His Attendance upon Subpœna: Section 116.

(*Insert Title of Court and Style of Cause.*)

Whereas at a sitting of this court, holden on , at in the said County, H.... H...., of (Here describe the witness as in the subpœna), was duly summoned to appear as a witness in this action to give his evidence on the part of the plaintiff (or defendant) and at the time of his being so summoned payment (or a tender of payment) of his necessary and reasonable expenses for such attendance was duly made to him according to law, and having appeared did then and there wilfully refuse to be sworn and give his evidence in this action (or to produce, as the case may be.)

Whereupon it was adjudged, etc. (Proceed as in the two next preceding forms, after the word "*adjudged*" to the end.

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170. Warrant to Levy a Fine on a Witness for Disobedience of a Subpœna: Section 116.

(*Insert Title of Court and Style of Cause.*)

Whereas by a subpœna duly issued under the seal of this court in this cause (bearing date the day of 19), one H.... H...., of (here name and describe the person as set forth in the subpœna), was duly summoned to appear as witness to give his evidence in this action on the part of the plaintiff (or defendant) at a sitting of this court, held at in the said county, on the day of , A.D. 19 , (and to produce then and there, as the case may be). And whereas it has been duly shewn that payment (or tender of payment) of his reasonable expenses was duly made to the said H.... H.... at the time of such service. And whereas the said H.... H.... did not appear to give such evidence (or did not produce before the said, as the case may be), in obedience to the said subpœna, but wholly failed therein. And whereas the plaintiff (or the defendant) made application to this said court on the day of , A.D. 19 , that the said H...., H.... should be fined for such neglect and disobedience by this said court. And whereas notice of the said application was on the day of , A.D. 19 , duly served upon the said H.... H.... And afterwards on the day of , A.D. 19 (being the day named in such notice), the plaintiff (or defendant) and the said H.... H.... appeared in furtherance thereof, and no cause or excuse being made to appear to the satisfaction of the court for such non-attendance (or for not producing the said, as the case may be) and neglect (or the said H... H... made default and did not appear upon the said notice to shew cause to the said application or against his being fined for such neglect, and upon reading the affidavits and papers filed upon the said application shewing due service of the said notice) and no cause or excuse* (proceed from the asterisk* in the next preceding paragraph to the end of it.)

Whereupon it was adjudged (proceed as in the next preceding forms from the word "*adjudged*" to the end.)

171. SUMMONS AT INSTANCE OF CLERK FOR PAYMENT OF FEES UNDER SECTION 49 (2).

Insert title of Court and Style of Cause (if more causes than one, state the others).

[Seal.]

To the above-named plaintiff (or to X.... G....):—

The clerk of this court demands of you the sum of $ for the fees and costs of this suit, and you are hereby summoned to be and appear at the next sitting of this court to be holden at (as the case may be) in the said County of , on Monday, the day of , A.D. 19 , at the hour of 10 o'clock in the forenoon, and then and there to shew cause why you should not be ordered by the judge to pay the said fees and costs, a statement of which is hereunto annexed; and which, according to the provision of the 54th (58th) section of the Division Courts Act, were payable in the first instance by you, but which you did not pay.

In the event of your not so appearing and showing cause why you should not pay the same forthwith, or of your not paying the same, an order of the judge will be obtained and issued against you, under the 55th section of the Act, directing you to pay the same to the clerk, which will be followed and enforced by execution against your goods and chattels, or by such other ways and means as any debt or damages ordered by the court to be paid c . be recovered. If you pay the same before the sittings of the court, no further costs will be incurred than the costs of this summons and the bailiff's fees for service hereof and mileage.

(Conclude as in other summonses.)

---

172. ORDER ON PARTY TO PAY COSTS TO CLERK, UNDER SECTION 49.

(*Insert title of Court and Style of Cause, or Causes, if more than one.*)

Upon reading the summons herein granted on the day of , A.D. 19 , the affidavit filed, the affidavit of service thereof, and upon hearing the clerk of the said Division Court, and the said plaintiff (or as the case may be), I do order that the said do pay to the clerk of this court the sum of $ within days from this date as the fees which should have been paid by him to the clerk of the court on the proceedings herein, and which now remain unpaid, together with the costs of this proceeding, and in the event of the said sum not being so paid it is further ordered that execution do issue against the goods and chattels of the said , or that the same be made and levied by such ways and means as any debt or damages ordered to be paid by the court may or can be recovered by process of the said court, and that an entry of this order be made in the procedure book.

Dated at this day of , 19 .

.....
Judge.

173. EXECUTION ON ORDER FOR NON-PAYMENT OF FEES TO THE CLERK, UNDER SECTION 49 (2).

(Insert title of Court and Style of Cause as in Summons as in Form 56.)

Whereas the fees upon the proceedings in this cause were not paid in the first instance by the plaintiff (or by X. G., the party on whose behalf the said proceedings were had) before such proceedings were taken and instituted, as required by section 49 of The Division Courts Act; and the payment thereof has been ordered by the judge, of which the said plaintiff (or A. G.) has had due notice; the same having been duly demanded, and there being now due thereon the sum of $, which the said plaintiff (or X. G.) has neglected to pay;

You are therefore ordered and required to levy of the goods and chattels of the said plaintiff (or X. G.) (not exempt from execution) the sum of $, and your own fees, etc. (Conclude as in other executions against plaintiff for costs.)

....., Judge.

To Thomas Sturge, Bailiff.

....., Clerk.

(Memo. as in other executions.)

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174. ORDER TO SUSPEND ORDER, OR JUDGMENT, OR EXECUTION. SEC. 124.

(Insert title of Court and Style of Cause.)

It is ordered that the judgment (or *order*) [*or that the execution under the judgment* (or *order*)] *of this court in action, bearing date the day of , A.D. 19 , be suspended until the day of , A.D. 19 .*

Dated this day of , A.D. 19 . (See p. 291.)

..... Judge.

(See p. 291.)

---

175. ORDER POSTPONING EXECUTION OR JUDGMENT UNDER SECTION 124.

(Title of Court and Style of Cause.)

Whereas the plaintiff obtained a judgment against the defendant in this court on the day of , 19 , for the payment of $ debt (or *damages*) *and $ for costs, and the defendant was ordered to pay the same at a day now past (if by instalments, specify them), and it has been made to appear to the satisfaction of the judge by affidavit* (or *affirmation, or otherwise*) *that the defendant is unable from sickness* (or *other sufficient cause*) *to pay and discharge the debt* (or *damages*) *recovered against him* (or *any instalment thereof, if the same was ordered to be paid by instalments*), *so ordered to be paid, I do therefore order that the said judgment* (or *execution*, or *order*, as the case may be) *be stayed* (or *suspended*) *for* (here specify the time and terms upon which the order is granted.)

Dated this day of 19 , (See p. 291.)

..... Judge.

176. NOTICE OF INTENTION TO GIVE COPIES OF LETTERS, TELEGRAMS, AND OTHER WRITTEN INSTRUMENTS IN EVIDENCE.

NOTE.—*This notice must be served ten clear days before the trial: Ont. Ev. Act, R. S. O. 1914, c. 76, s. 49.*

(Court and Cause.)

Take notice that the in this cause intend at the trial hereof to give in evidence the copies of documents hereinafter mentioned as proof of the contents of the original documents of which they purport respectively to be copies, and that the same may be inspected by the solicitor or agents at the office of on day the day of , A.D. 19 , between the hours of 10 a.m. and 4 p.m.

This notice is given under section 49 of The Evidence Act, being chapter 76 of the Revised Statutes of Ontario, 1914.

Dated this day of , A.D. 19 .

To the above-named and to his Solicitor. } *Solicitor for the above-named.*

Description of Copies of Documents.	Date.

177. NOTICE TO PRODUCE.

(Court and Cause.)

Take notice that you are hereby required to produce and show to the court on the trial of this action all books, papers, letters, copies of letters, and other writings and documents in your custody, possession or power, containing any entry, memorandum, or minute relating to the matters in question in this action, and particularly (specify them).

Dated the day of , A.D. 19 .

(Signed)

Solicitor for the above-named.

To the above-named , and to his solicitor (or *agent*).

178. CLERK'S NOTICES TO THE PLAINTIFF.

No. , *A.D. 19* .
In the *Division Court, in the County of*

Between....., Plaintiff
and
....., Defendant.

(a) *Take notice that the defendant* has given a confession for the full amount of your claim.*

(b) **Disputes your claim (or does not dispute your claim.)*

(c) **Disputes the following items of your claim, viz.:* (here specify the items set forth in the defendant's notice to the clerk), *and admits the residue and you are required forthwith to say in writing if you are willing to take judgment for the part admitted.*

(d) **Will on the trial claim a set-off against your demand, and the particulars thereof are hereunto annexed.*

(e) **Will at the trial insist that your claim is barred by the Statute of Limitations* (or other statutory defence not herein specified.)

(f) **Will on the trial insist that he is discharged from payment of your claim by the provisions of the Insolvent Act.*

(g) **Will admit on the trial the 1st, 9th, 11th* (or other items of *your particulars of account to be correct.*

(h) **Will admit on the trial the signing* (or endorsement) *of the promissory note* (or *bill of exchange*) *sued upon* (or as the case may be), *and denies the residue of your claim.*

(i) **Has paid into court the sum of $* , *together with $* , *for costs of suit incurred up to the day of such payment in full satisfaction of your claim, which will be paid to you upon demand at my office; and all proceedings in the action will be stayed, unless within three days after you receive this notice you signify to me your intentions to proceed for the remainder of your demand; and in case you either accept or refuse the same in full, you must give a written notice to that effect to me within the said three days, otherwise you will be liable to pay to the defendant such subsequent costs as he may incur in this action.*

(j) **Has pleaded that he duly tendered to and offered to pay you before this action was brought, the sum of $* , *in full satisfaction of your claim, and has filed a plea of such tender in my office, and paid that sum into court, pursuant to the 111th section of The Division Courts Act, and that sum will be paid to you, less one dollar, in case you do not wish to further prosecute your suit, and all proceedings in the actions will be stayed, unless you signify to me within three days from the time you receive this notice your intention to proceed for your demand, notwithstanding such plea.*

(k) **Will on the trial insist that you are not a duly certified solicitor* (or not *a licensed veterinary, or auctioneer, etc.* (as the case may be.)

(l) **Has paid into court the full amount of your demand, together with your costs herein* (or *has paid into court $* , *part of your claim.*)

(m) **Has filed a statement confessing and admitting $* , *part of the amount claimed by you. If you consent to accept the amount so admitted, it will not be necessary for you to attend on the day of hearing. If, however, you do not consent to accept the sum so*

admitted in satisfaction of your claim, you must be prepared to prove the same at the sittings of the court to be holden on the day of , A.D. 19 .

(n) *Disputes your claim in part only, viz. (here specify the parts disputed as set forth in defendant's notice), and he admits the residue to be correct, you are therefore required to notify me to say in writing if you are willing to take judgment for the part undisputed; and if you fail to do so it will be assumed that you seek to recover your whole claim, in which case you must proceed to the trial of this cause at the next sittings of this court, to be held on the day of , 19 .

(o) *Q.... R.... and O.... K...., two of the defendants, have been served with the summonses in this cause, but have not given any notice disputing your claim that H.... J.... and L.... T...., the other of the defendants, have not been served with the summons, but have given a confession of the debt.

(p) *Has withdrawn his defence and consents that judgment be entered against him for the sum of $ and costs.

(q) *Take notice that the defendant intends at the hearing of this action to give in evidence and rely upon the following grounds of defence* (here state grounds of defence; see forms following which are suggested and may be varied to suit circumstances).

(r) *That the defendant was an infant, within the age of twenty-one years, when the supposed claim arose (or the supposed contract or agreement was made), and that he was born, as he believes, at , in the county of , on the day of , 19 .

(s) *That the defendant was discharged by composition, or scheme of arrangement with his creditors, on the day of , 19 .

(t) *That the defendant intends to set up a counterclaim against the plaintiff's demand, the particulars of which are annexed hereto (the clerk is to annex to this notice the particulars of set-off or counterclaim as furnished by defendant.

(u) *That the defendant intends to rely as a matter of equitable defence on the facts set forth in the statement hereunder written:

The facts constituting the equitable defence to this action are as follows:

—(Here set out the facts as concisely as possible, and number the paragraphs as in an affidavit.)

(v) *That the defendant has paid into court the full amount of your demands, together with your costs herein.

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170. CERTIFICATE UNDER CREDITORS RELIEF ACT.

(See Notes at p. 477.)

(Court and Cause.)

I, clerk of this court, do hereby certify that on the of 19 , the above named plaintiff duly obtained judgment in this Court against the above named defendant for the sum of $ and $ costs, in all $. That the said judgment still remains

unsatisfied and that the amount now due upon the said judgment is as follows:

Amount of judgment .....$.....
Subsequent costs .....$.....
Subsequent interest .....$.....

Total .....$.....

[SEAL.]

Given under my hand and seal of this court at this day of 19 .

Clerk of the Division Court, of the County of .

---

180. JUDGMENT WHERE SOME DEFENDANTS HAVE BEEN SERVED WITH SPECIAL SUMMONS, AND OTHERS HAVE CONFESSED.

The defendant, C.D., having been served with special summons, and particulars of claim, and not disputing $ part thereof, and the defendants E. F. and G. H. having confessed the same as due to the plaintiff, It is adjudged that the plaintiff recover $ for debt, and $ for costs.

---

181. JUDGMENT OF NON-SUIT OR DISMISSAL.

Judgment of non-suit, "or that the cause be dismissed" (if costs, etc., ordered add, "and the plaintiff pay $ for defendant's costs." or $ for defendant's trouble and attendance, and $ for his costs, to be paid in days).

---

182. JUDGMENT ON AWARD.

Judgment for the plaintiff (or defendant) for the sum of $ and $ costs (or for the sum of $ costs), pursuant to award, to be paid in days.

---

183. JUDGMENT FOR DEFENDANT.

Judgment for the defendant (or for the defendant for $ costs: or $ for his trouble and attendance, and also $ for his costs, to be paid forthwith).*

*Add, "on verdict by jury," if such be the fact:

184. JUDGMENT FOR DEFENDANT FOR BALANCE OF SET-OFF.

It appearing that the defendant's set-off exceeds the plaintiff's claim, it is adjudged that the plaintiff's action, proved it $, be discharged, and that the said set-off as to that amount be satisfied, and, further, that as to $, residue of such set-off, the defendant have judgment for the same, together with $ for his costs, to be paid in days.

(See Rule 127, pp. 112, 113, 115, 379.)

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185. JUDGMENT IN CASE OF COUNTERCLAIM.

It is adjudged that the plaintiff do recover against the defendant the sum of for debt (or damages), and $ for costs, amounting together to the sum of $, and that the defendant, on his counterclaim, do recover against the plaintiff the sum of $ for debt (or damages as the case may be), and $ for costs, amounting together to the sum of $, and that the said sum be set off one against the other, and that the do recover from the the sum of $ (being the difference between said sums), to be paid in days.

(See Rule 127, pp. 112, 113, 115.)

---

186. ENTRY IN THE PROCEDURE BOOK OF JUDGE'S ORDER FOR EXECUTOR OR ADMINISTRATOR TO REVIVE A JUDGMENT.

On the day of 19 , it was ordered by the judge that the plaintiff, as executor (or administrator), have execution against the defendant of a judgment of this court (or of the Division Court, etc.), whereby the said C. D., in his lifetime, on , recovered against the said defendant the sum of $, etc.

---

187. ENTRY OF ORDER IN PROCEDURE BOOK THAT JUDGMENT BE REVIVED AGAINST AN EXECUTOR OR ADMINISTRATOR.

On the day of , 19 , it was ordered by the judge that the plaintiff have execution against the defendant, as executor (or administrator of E. F., deceased, of a judgment of this court (or of the Division Court, etc.), whereby the plaintiff, on , recovered against the said E. F., in his lifetime, the sum of $, to be levied of the goods and chattels of the said deceased, in the hands of the said defendant to be administered.

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188. LANDLORD'S CLAIM FOR RENT UNDER SECTION 216.

(*See Notes at p. 552.*)

Whereas I have been informed that you have seized the goods of C. D., of , on the premises at , to satisfy a certain judgment of the Division Court in against the said C. D., at the

suit of A. B., I hereby give you notice that I am the landlord of the said premises, and that I claim $ for rent now in arrear, being for one (or as the case may be), and I require you to pay the same to me before you apply the proceeds of the sale of said goods or any part thereof to satisfy the said judgment.

Dated, etc.

N. F.,
Landlord of said Tenement.

To V. W.,
Bailiff of, etc.

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189. SUMMONS TO THE DEFENDANT UPON AN INFORMATION OR COMPLAINT FOR OBSTRUCTING BAILIFF IN EXECUTION OF DUTY.

(*Section 218.*)

CANADA,
PROVINCE OF ONTARIO
COUNTY OF .

To of the of in the County of .

Whereas, you have this day been charged before the undersigned, a Justice of the Peace, in and for the said County of....., for that you on the day of A.D. 19 , at the of in the County of did unlawfully interfere with G. H., a bailiff of the Division Court in the said County of while in the execution of his duty as such bailiff.

These are therefore to command you, in His Majesty's name, to be and appear before me on at o'clock in the noon, at or before such other justice or justices of the peace for the same county of as may then be there, to answer to the said charge, and to be further dealt with according to law. Herein fail not.

Given under my hand and seal, this day of in the year 19 , at in the county aforesaid.

.....[L.S.]

NOTE.—*The usual information should first be laid before the justice of the peace as required by the Criminal Code, which will apply to this proceeding.*

190. DECLARATION OF SERVICE OF NOTICE No. 192. SUPRA: R. S. O. 1914, c. 14, s. 15 (5).

PROVINCE OF ONTARIO,
COUNTY OF HURON.

I, E.F., of, etc. (residence and occupation), *do solemnly declare, that I did on the* day of 19 , *personally serve C.D. with true copies of the notice, and of the memorandum appended thereto, the originals of which notice and memorandum are hereto annexed marked Exhibit A, by delivering to and leaving with him the said C.D., personally, at* (place) *on* (date) *the said copies.*

And I make this solemn declaration conscientiously believing the same to be true, and knowing that it has the same force and effect as if made under oath, and in pursuance of the Canada Evidence Act.

Declared before me
at
on
A.D., 19 .

G.H.
A Commissioner, etc.

E.F.

---

191. DISPUTING NOTE BY DEBTOR TO BE FILED WITH THE PROVINCIAL TREASURER UNDER NOTICE No. 192.

To the Honorable the Provincial Treasurer of the Province of Ontario:

I dispute the claim made against me by A.B., of, etc., in respect of which he has given notice attaching my salary.

Dated, etc.

C.D.

NOTICES ATTACHING ONTARIO CIVIL SERVANT'S SALARY: R. S. O. 1914, c. 14, s. 15 (4).

192. WHEN CLAIM NOT A JUDGMENT.

To the Honorable the Provincial Treasurer of Ontario:

Pursuant to section 15 of the Ontario Public Service Act, I, the undersigned A.B., of (etc., residence and occupation), *give notice that a debt or money demand is due and owing to me from C.D., of* (etc., description and occupation), *a civil servant of the Crown, under the Provincial Government of Ontario, in the capacity* (state in what capacity the civil servant is acting) *upon* a promissory note made by the said C.D., dated* (give date) *payable to me months after date for the sum of $ with interest amounting in all to $* (or state what the debt is, with particulars, giving dates and items of account, etc.)

Dated, etc.

A.B.

(MEMORANDUM TO BE SERVED ON DEBTOR WITH COPY OF ABOVE NOTICE.)

To the above named C.D.

If you dispute the claim above referred to, you are required to file a disputing note with the Honorable the Treasurer of the Province of Ontario, within ten days from the date of the service hereof on you.

A.B.

---

193. NOTICE WHERE CLAIM IS A JUDGMENT: R. S. O. 1914, c. 14, s. 15 (3).

(Proceed as in No. 192, to asterisk) *upon a judgment recovered by me against the said C.D. in the* (state in what Court) *for the sum of $ on the day of 19 , for a debt due by him to me, upon which there is justly due and owing to me the sum of $ as stated herein.*

Dated, &c.,

Judgment	$.....
Subsequent costs	$.....
Subsequent interest	$.....
Total	$.....

A.B.

BOUNDARIES OF DIVISION COURTS

DIVISION COURTS, LIMITS OF THE RESPECTIVE DIVISIONS IN THE PROVINCE OF ONTARIO, AND JUDICIAL OFFICERS.

Algoma.

F. Stone, Judge, Sault Ste. Marie.
M. McFadden, J.J., Sault Ste. Marie.
F. J. S. Martin, Crown Attorney and Clerk P., Sault Ste. Marie.

1.—Bounded west by Thunder Bay District, 85th parallel of west longitude and each by Bar River, including all the islands in front.

2.—Bounded west by Bar River and east by the westerly boundary of the Townships of Thessalon, Kirkwood, Bridgeland, Houghton and Otter, and by said boundary line of the last five named townships produced northerly.

3.—Bounded west by the westerly boundary of the Townships of Thessalon, Kirkwood, Bridgeland, Houghton and Otter, and the boundary line of the last named five townships produced northerly to the northern boundary of the District. and on the east by a line produced northerly between the Townships of Bright and Thompson to the northern boundary of the District of Algoma.

6.—Consisting of St. Joseph's Island.

7.—All the Territory of the District of Algoma lying east of the eastern boundary of the Third Division including the Village of Cutler and Johns Island.

Brant.

A. D. Hardy, Judge, Brantford.
A. J. Wilkes, C.C.A. and C.P.. Brantford.

1.—T City of Brantford and that part of the Township of Brantford not included in the other divisions hereinafter described. The Townships of Onondaga and Tuscarora and that part of the Township of Brantford lying south of the main road from Brantford to Hamilton and east of Fairchild's Creek.

2.—The Town of Paris and that part of South Dumfries west of the line between lots 18 and 19, and that part of the first concession of the Township of Brantford lying west of a continuation of the last-mentioned line.

3.—The remainder of the Township of South Dumfries and of the first concession of the Township of Brantford.

4.—The ten northern concessions of the Township of Burford, and all that part of the 2nd, 3rd, 4th and 5th concessions of the Township of Brantford, west of the line between lots numbers 10 and 11, and that portion of the Kerr tract west of the continuation of the last-mentioned line.

5.—The Township of Oakland, the four southern concessions of the Township of Burford and lots numbers 1 to 5, inclusive, in the ranges east and west of the Mount Pleasant Road, in the Townships of Brantford, adjoining the Township of Oakland.

BRUCE.

A. B. Klien, Judge, Walkerton.
Thomas Dixon, C.C.A. and C.P., Walkerton.

1.—The Town of Walkerton and the Township of Carrick and the Township of Brant, south of the 12th concession, in the lots up to No. 26, and south of the 10th concession, in lots 26 to 34, inclusive.

2.—The Village of Teeswater, the Townships of Culross and Greenock south of the 12th concession.

3.—The Town of Kincardine, the Township of Kincardine, lying south of the 10th concession.

4.—The Village of Paisley, and that part of the Township of Brant lying north of 11th concession and west of lot 26. That part of Greenock lying north of concession 11; lots 26 to 35, inclusive, in the 8th, 9th, 10th, 11th, 12th, 13th and 14th concessions of the Township of Bruce; and Saugeen, east of a line between lots 28 and 29, and south of the proportion of the town line between Arran and Elderslie to the Saugeen River. All Elderslie lying west of the 25th side line and south of the 12th concession. And also that part lying north of concession 11 and west of lot 17.

5.—All of the Township of Amabel lying north of the 10th concession, Port Elgin and Southampton, and all Saugeen not in No. 4 Arran, west of the line between lots 10 and 11,

north of Arran Lake and its outlet, and Amabel, south of concession 11, and west of concession C, and concessions 8, 9 and 10.

6.—The Village of Tiverton and all the Township of Bruce, except that part included in No. 4, and all Kincardine north of the 9th concession.

7.—Tara and all Arran, not in No. 5, and all Elderslie, not in Nos. 4 and 12, and Amabel, south of the 8th concession and east of concession lettered C.

8.—The Town of Wiarton, the Township of Albemarle and that part of Amabel not in Nos. 5 and 7.

9.—The Township of Huron.

10.—The Townships of Eastnor, Lindsay, and St. Edmunds.

11.—Lucknow and the Township of Kinloss.

12.—Chesley and those parts of Brant and Elderslie not included in Nos. 1, 4 and 7.

Carleton.

D. B. McTavish, Judge, Ottawa.
R. D. Gunn, J.J., Ottawa.
J. A. Ritchie, C.C.A. and C.P., Ottawa.

1.—Comprising all the City of Ottawa and the Township of Gloucester, to lot 15, inclusive, Rideau Front, and concessions 1 and 6, inclusive, Ottawa Front and the islands in the Ottawa River opposite thereto.

2.—The Township of Gonlbourne, the 8th, 9th and 10th concessions of the Township of Marlborough, all the Township of Nepean south of the River Goodwood, and the 4th, 5th and 6th concessions thereof north of the same river to the boundary line between lots 20 and 21 in the last-mentioned concession.

3.—The Township of Huntley and the Township of March, except lots 1 to 5, inclusive, in concessions 1, 2, 3 and 4 thereof.

4.—The Townships of Fitzroy and Torbolton.

5.—The Township of North Gower, Long Island in the Rideau River, and 1st, 2nd, 3rd, 4th, 5th, 6th and 7th concessions of Marlborough.

6.—The Township of Osgoode, the 6th, 7th and 8th concessions Ottawa Front, and from lots 16 to 30, inclusive, of Rideau Front of the Township of Gloucester.

7.—The Township of Nepean, except the City of Ottawa, and part of the said Township lying south of the River Goodwood and concessions 4, 5 and 6, north of the River Goodwood to the boundary between lots 20 and 21 in the said last-mentioned concessions, and, including also lots 1 to 5, inclusive, in concessions 1, 2, 3 and 4, in the Township of March.

DUFFERIN.

W. G. Fisher, Judge, Orangeville.
J. L. Island, C.C.A. and C.P., Orangeville.

1.—The Town of Orangeville, the Township of East Garafraxa and all that portion of the Township of Amaranth lying south of the southern boundary of lot No. 26, in each concession in the Township of Amaranth.

2.—The Village of Shelburne, the Township of Melancthon, and all that portion of the Township of Amaranth lying north of the southern boundary of lot number 26, in each concession of the Township of Amaranth.

3.—The Township of Mulmur.

4.—The Township of Mono.

5.—The Township of East Luther.

ELGIN.

C. W. Colter, Judge, St. Thomas.
C. O. Z. Ermatinger, J.J., St. Thomas.
A. McCrimmon, C.C.A. and C.P., St. Thomas.

1.—The Townships of Bayham, Malahide and South Dorchester.

2.—The Townships of Southwold and Yarmouth (except the City of St. Thomas).

3.—The City of St. Thomas.

4.—The Townships of Aldborough and Dunwich.

ESSEX.

J. O. Dromgole, Judge, Sandwich.
G. Smith, J.J., Sandwich.
J. H. Rodd, C.C.A. and C.P., Windsor.

1.—Town of Sandwich and Township of West Sandwich.

2.—Town of Amherstburg and the Townships of Alden and Anderdon.

3.—The Village of Kingsville, and all that part of the Township of Gosfield not included in Division No. 8.

4.—The Township of Colchester South, and all Colchester North south of the 9th concession, exclusive of the said concession, and the lots on both sides of Maiden Street.

5.—Township of Mersea and Village of Leamington.

6.—The Township of Rochester, the Village of Belle River, the first concession of the Township of Maidstone, and all north of the Middle Road in the said Township of Maidstone.

7.—Town of Windsor, the Town of Walkerville, and all of Sandwich East north of the Talbot Street range.

8.—The Town of Essex, and all of the Township of Maidstone lying west of the first concession and south of the Middle Road: so much of Sandwich East as is south of Talbot Street, including the lots on both sides of said street to Nos. 306 and 307; all of Colchester north of the 9th concession, including said concession and lots on both sides of Maiden Street, and all that part of Gosfield lying north of concession 6, and extending as far east from the limits between Gosfield and Colchester as lot No. 12, including such lot in each concession north of concession 6, inclusive.

9.—The Townships of Tilbury West and Tilbury North.

10.—The Township of Pelee.

Frontenac.

H. R. Lavell, Judge, Kingston.
J. L. Whiting, C.C.A. and C.P., Kingston.

1.—City of Kingston. Township of Garden Island, Wolfe Island, Howe Island, and part of the Township of Pittsburg.

2.—Cataraqui, the Township of Kingston and the Village of Portsmouth.

3.—Loughboro', the Townships of Loughboro' and Bedford.

4.—Verona, Townships of Portland and Hinchinbrooke.

5.—Sudbury, the Township of Storrington and part of the Township of Pittsburg.

6.—The Townships of Olden, Oso, Barrie, Clarendon, Palmerston, Miller, Canonto and South Canonto.

7.—The Township of Kennebec.

GREY.

C. Q. Sutherland, Judge, Owen Sound.
C. H. Widdifield, J.J., Owen Sound.
T. H. Dyre, C.C.A. and C.P., Owen Sound.

1.—The Town of Owen Sound, the Village of Brooke and the Townships of Derby, Keppel, Sarawak and Sydenham.

2.—The Town of Durham, the Township of Egremont, and those portions of the Townships of Bentinck, Normanby and Glenelg as follows:—That part of the Township of Bentinck lying east of the line between lots 30 and 31 in the 1st, 2nd and 3rd concessions south of the Durham Road, and in concessions 1, 2 and 3 north of the Durham Road, and east of the line between lots 15 and 16 in concessions 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 thereof. That part of the Township of Normanby lying east of the line between lots 20 and 21, in the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th and 18th concessions and all of the Township of Glenelg, excepting that portion lying east of the line between lots 10 and 11 in the 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th concessions thereof.

3.—The Town of Meaford, the Township of St. Vincent, and that part of the Township of Euphrasia, lying west of the line between the 6th and 7th concessions and north of the line between lots 15 and 16.

4.—The Township of Collingwood and the east half of the Township of Euphrasia, excepting that part thereof lying between the 4th and 5th concessions and south of the lots between 12 and 13, and east half of the Township of Osprey.

5.—The Township of Proton, the west half of the Township of Osprey, and those parts of the Township of Artemesia consisting of the ranges of lots lying parallel to the Toronto and Sydenham Road, and south of the line between lots 130 and 131, and concessions 1, 2 and 3, south of the Durham Road, and 1, 2, 3, 4, 5 and 6 north of the said Durham Road, and those portions of concessions 7, 8 and 9 lying east of the ranges of lots parallel with the Toronto and Sydenham Road, and those portions of concessions 10, 11, 12, 13 and 14 lying east of the line between lots 30 and 31.

6.—The Township of Sullivan and the Township of Holland, excepting those portions of concessions 9, 10, 11 and 12 lying south of the line between lots 15 and 16, and those por-

tions of concessions 7 and 8 west of the ranges of lots lying parallel with the Toronto and Sydenham Road, and the ranges of lots lying parallel with the Toronto and Sydenham Road and south of the line between lots 50 and 51.

7.—All the lots from 1 to 30, inclusive, in the three concessions south and the three concessions north of the Durham Road in the said Township of Bentinck, and all the lots from 1 to 15, inclusive, in the 12th concession, from the 4th to the 15th concessions, inclusive, of the said Township of Bentinck, and all the lots from 1 to 20, inclusive, in all the concessions from 4 to 18, inclusive, in the Township of Normanby aforesaid.

8.—All the lots from 51 to 130, inclusive, in all the concessions parallel to and being northeast and southwest of the Toronto and Sydenham Road, in the Townships of Artemesia, Glenelg and Holland aforesaid; all lots to the westward of the dividing line between lots 30 and 31, in all the concessions from 10 to 14, inclusive, and all the lots from 1 to 5 in the 7th, 8th and 9th concessions, inclusive, which lie to the southwest of the third concession, southwest of the said Toronto and Sydenham Road, in the said Township of Artemesia; all the lots from 1 to 15, inclusive, in concessions 5 and 6, and all the lots from 1 to 15, inclusive, in the concessions from 7 to 12, inclusive, in the Township of Euphrasia; all lots south of the allowance for road between lots 15 and 16, in the 9th, 10th, 11th, and 12th concessions, and from lots 25 to 30, inclusive, on the 7th concession, and lots 28, 29 and 30 in the 8th concession of the said Township of Holland; and all the lots lying east of allowance for road between lots 10 and 11 in all the concessions from 7 to 15, inclusive, in the Township of Glenelg.

HALDIMAND.

G. B. Douglas, Judge, Cayuga.
Harrison Harrell, C.C.A. and C.P., Cayuga.

1.—Comprising the Township of Seneca except the first and second concessions, the Young Tract, and the property of the late Richard Martin and the late Robert Weir; all of the Township of Oneida, except the first range north of the Cayuga line, the Dennis Tract, and the lots southerly of the said tract, and the Village of Caledonia.

2.—Comprising the Township of North Cayuga, except that portion thereof lying northeast of the side between lots 12 and 13, and 1st and 2nd concessions of the Township of Seneca, except that portion thereof lying northeast of the side line between lots 12 and 13, the Young Tract, and the lands of the late Robert Weir and Richard Martin, Esquires, in the said Township of Seneca, the first range of Oneida north of the Cayuga line, also the Dennis Tract and river lots lying south, and the Townships of Rainham and South Cayuga.

3.—Comprising the Townships of Moulton, Sherbrooke and Dunn, and the Town of Dunnville.

4.—Comprising the Township of Walpole, and the Village of Hagersville.

5.—Comprising the Township of Canboro', that portion of North Cayuga lying east of the side line between lots 12 and 13, and those parts of the 1st and 2nd concessions of the Township of Seneca lying northeast of the side line between lots 13 and 13.

County of Haliburton.

(Annexed to Victoria for Judicial Purposes.)

J. E. Harding, Judge, Lindsay.
H. McMillan, J.J.
A. P. Devlin, C.P. and C.C.A., Lindsay.

1.—The Townships of Glamorgan and Snowden, except that portion of both included in the third division, and all of the Townships of Snowden, Lutterworth, Minden, Anson, Stanhope, Hindon.

2.—The Townships of Dysart, Guilford, Harburn, Dudley, Harcourt and Bruton, and that portion of Monmouth not included in the third division.

3.—All the rest of the territory comprising Township of Monmouth (except lots 1 and 19, inclusive) in 13th, 14th, 15th, 16th and 17th concessions; the south 12 concessions of the Township of Glamorgan, and from lot 21, inclusive, to the eastern boundary in the south six concessions of Snowden.

4.—The Townships of Shelbourne, McClintock, Livingstone, Lawrence, Nightingale, Havelock, Eyre and Clyde.

HALTON.

J. W. Elliott, Judge, Milton.
W. I. Dick, C.C.A. and C.P., Milton.

1.—All the territory comprised in the new survey of the Township of Trafalgar, and the first ten lots in concessions 1, 2, 3, 4, 5 and 6 in the Township of Esquesing, and the first five lots in concessions 7, 8, 9, 10 and 11 in the said township.

2.—That part of the Township of Trafalgar known as the Old Survey.

3.—All the rest of the territory comprised in concessions 8, 9, 10 and 11 in the Township of Esquesing not comprised in the first division.

4.—All the rest of the territory comprised in concessions 1, 2, 3, 4, 5 and 6, Township of Esquesing.

5.—The Township of Nassegaweya.

6.—The Township of Nelson.

HASTINGS.

G. E. Deroche, Judge, Belleville.
E. B. Fralick, J.J., Belleville.
William Carnew, C.C.A. and C.P., Belleville.

1.—To comprise the City of Belleville and the Township of Thurlow; also all that portion of the Township of Sidney lying south of the 8th concession and east of the line between lots 18 and 19.

2.—Comprising the Townships of Wollaston, Limerick and Cashel, and the six northerly concessions of the Townships of Tudor and Grimsthorpe, and all those parts of the Township of Lake, in all the concessions thereof lying north of lots 21 in said concessions, all in the County of Hastings.

3.—The Township of Tyendinaga, except that part called Deseronto.

4.—The Township of Hungerford.

5.- All that part of the Township of Sidney which lies to the north of the 8th concession, and to the east of lot No. 6, in each concession north of the 8th concession, and all that part of the Township of Rawdon which lies to the south of the 9th concession, and that part of the Township of Huntingdon south of the 5th concession: also Block A and lots 1, 2, 3, 4, 5 and 6, in the 8th and 9th concessions of the Township

of Sidney heretofore forming part of the 2nd division, together with all that portion of the Township of Sidney lying north of the 7th concession, and east of the line between lots 6 and 7.

6.—The Township and Village of Madoc, all that part of the Township of Huntingdon north of the 6th concession of said township, and all of the Townships of Tudor and Grimsthorpe, except the northerly six concessions of each of the said townships.

7.—The Village of Deseronto.

9.—The Town of Trenton, and all that part of the Township of Sidney which lies to the west of lot 7 in each of the concessions of the township, including Mill Island. Also, all of said Township of Sidney lying south of the 8th concession and west of the line between 18 and 19, and east of the line between lots 6 and 7.

10.—The Township of Marmora, that part of the Township of Lake lying south of lots 22 in all the concessions thereof, and all that part of the Township of Rawdon which lies north of the 8th concession thereof.

11.—The Townships of Herschell, Monteagle, Carlow, Bangor, Wicklow and McClure.

12.—The Townships of Faraday, Dungannon and Mayo, and the Village of Bancroft.

Huron.

B. L. Boyle, Judge, Goderich.
Philip Holt, J.J., Goderich.
Chas. Seager, C.C.A. and C.P., Goderich.

1.—Comprising the Town of Goderich, that part of the Township of Goderich to the north of the Cut Line and the Huron Road until the same meets the road allowance between the 13th and 14th concessions, then back along the Huron Road to its junction with the Cut Line, then west by the road allowance between concessions 11 and 12 to the River Maitland, then along the River Maitland to Goderich, together with the Township of Colborne.

2.—Comprising the Township of McKillop, the Town of Seaforth, and all that portion of the Township of Tuckersmith not included in the third division.

3.—Comprising all that portion of the Township of Hullett south of the blind line between the 7th and 8th concessions of the Township of Hullett, that part of the Township of Goderich not included in Nos. 1 and 7, 1st, 2nd, 3rd and 4th concessions, Township of Stanley 1st and 2nd concessions, Township of Tuckersmith, L.R.S., north of lot 15, and that portion west of side road between lots 25 and 26, H.R.S., and Town of Clinton.

4.—Comprising the Township of Grey, all of the Township of Morris east of side road between lots Nos. 10 and 11 (which is not included in No. 12), and the Village of Brussels.

5.—Comprising the Townships of Usborne and the Village of Exeter.

6.—Comprising the Townships of Ashfield and all West Wawanosh, except that portion east of Maitland River.

7.—Comprising the Township of Goderich, south of Cut Line and Huron Road until the same joins the road between the 12th and 14th concessions of the Township of Goderich; thence along the said concessions until the same joins the River Bayfield, all Stanley not included in No. 3 and the Village of Bayfield.

8.—Comprising the Village of Wingham, the Township of Turnbury, all that part of East Wawanosh not included in No. 12, and all of the Township of Morris not included in Nos. 4 and 12.

9.—Comprising the Township of Howick and the Village of Wroxeter.

10.—Comprising the Township of Hay.

11.—Comprising the Township of Stephen.

12.—Commencing at the northeast angle of the Township of Hullett, thence southerly along the easterly boundary of the said Township of Hullett to the blind line between the 7th and 8th concessions of said township, thence westerly along said line to the western boundary of the township, thence northerly along the westerly boundary of the township to the Maitland River at the southeastern corner of the Maitland Block, thence along the said river northerly till the western boundary of East Wawanosh is reached, thence northerly along said westerly boundary to the road running between the 6th and 7th concessions of said Township of East Wawanosh, thence easterly along said road to the easterly limit of said township, thence northerly along the gravel road to the road

running between the 5th and 6th concessions of the Township of Morris, thence easterly along said road to the line between lots 10 and 11, thence southerly along said line between the 6th and 7th concessions, thence easterly along said line to the line between lots 15 and 16, thence southerly to the boundary line between the Townships of Morris and Hullett, thence easterly to the place of beginning, including the Village of Blyth.

District of Kenora.

T. W. Chapple, Judge, Kenora.
J. F. MacGillivary, C. Atty. and C.P., Kenora.

1.—Comprising all the portion of the said District of Kenora lying west of the Seventh Meridian Line, including the Towns of Kenora and Keewatin.

2.—Comprising all that portion of the said District lying east of the eastern boundary of the Third Division, south of the northern boundaries of the Townships of Zealand and Hartman to the eastern boundary of the said District, including the Municipality of Ignace.

3.—Comprising all that portion of the said District lying between the Seventh Meridian Line and a line drawn parallel with the western boundary of lot 10 in the Township of Zealand, and extending northward to the northern boundary of the said District and southward to the southern boundary thereof, including the Town of Dryden.

4.—Comprising all that portion of the said Second Division, lying north of a line drawn eastward along the northern boundaries of the Townships of Zealand and Hartman, to the eastern boundary of the said District of Kenora.

Kent.

Archibald Bell, Judge, Chatham.
John L. Dowlin, J.J., Chatham.
H. D. Smith, C.C.A. and C.P., Chatham.

1.—The First Division to consist of the Town of Chatham and that part of the Townships of Dover East and West to the south of the 12th and 13th concession line of the Township of Dover East, and that part of the Township of Chatham south of the 12th and 13th concession line, and west of the side roads

between lots 12 and 13, from the first mentioned 12th and 13th concession line to the 5th and 6th concession line, and all south of the said 5th and 6th concession line of said township; that part of the Township of Harwich north of 5th and 6th concession line, by the easterly boundary; that part of the Township of Raleigh north of the 16th concession to the west side road between lots 12 and 13 north to the 6th and 7th concession line, and all of the said township north of the said last-mentioned line, and that part of the Township of Tilbury East north of the 4th concession.

2.—The Second Division to consist of that portion of Township of Howard south of the 2nd and 3rd concession line by the eastern boundary (known as the Botany Road), and that part of the Township of Orford south of the 10th and 11th concession line of said township.

3.—The Third Division to consist of all that part of the Gore of Camden lying west of the 10th and 11th concession line, and that part of the Township of Camden lying west of the side line between lots 6 and 1; the Village of Dresden, and that part of the Township of Chatham north of the 5th and 6th concession line and east of the side roads between lots 12 and 13.

4.—The Fourth Division to consist of that part of the Township of Harwich south of the 5th concession of the eastern boundary, and south of the 3rd concession by the western boundary, and that part of Raleigh south of the 15th concession and east of the side road between lots 12 and 13 and the road to the shore through lot 146 on the Talbot Road.

5.—The Fifth Division to consist of the Village of Wallaceburg, the Gore of Chatham and that part of the Township of Chatham northwest of the 12th and 13th concession line, and west of the said roads between lots 12 and 13, and that part of Dover lying north of the 12th and 13th concession side road.

6.—The Sixth Division to consist of that part of the Township of Howard north of the Botany Road aforesaid, and that part of the Township of Oxford north of the 10th and 11th concession line, the Township of Rone, the Township of Bothwell, the Village of Thamesville, and that part of the Gore of Camden east of the 10th and 11th concession line, and that

part of the Township of Camden east of the side line between lots 6 and 7.

7.—The Seventh Division to consist of that part of Tilbury East south of the 3rd concession, the Township of Romney, and that part of the Township of Raleigh south of the 6th and 7th concession line, and west of the side road between lots 12 and 13, in the said township, and the road through lot 147 on Talbot Road.

LAMBTON.

D. F. McWatt, Judge, Sarnia.
A. E. Taylor, J.J., Sarnia.
J. P. Bucke, C.C.A. and C.P., Sarnia.

1.—The external boundaries of the Township of Sarnia and the Town of Sarnia.

2.—The external boundaries of the Township of Warwick, including that portion of the Village of Arkona south of the township line.

3.—The external boundaries of the Townships of Euphemia and Dawn.

4.—The external boundaries of the Township of Sombra.

5.—The external boundaries of the Township of Plympton.

6.—The external boundaries of the Township of Bosanquet, including that portion of the Village of Arkona north of the township line.

7.—The external boundaries of the Township of Moore.

8.—The external boundaries of the Township of Enniskillen.

9.—The external boundaries of the Township of Brock.

LANARK.

J. H. Scott, Judge, Perth.
A. C. Shaw, C.C.A. and C.P., Perth.

1.—The Town of Perth, and the Townships of Drummond, Bathurst, South Sherbrooke, Burgess North, and that part of the Township of Elmsley North, north of the Rideau River, within the County of Lanark, and west of lot No. 12 in each concession. The sittings of said court to be held in the town of Perth.

2.—The Second Division to consist of the Village of Lanark, and the Townships of Lanark, Dalhousie, Darling, Lavant and North Sherbrooke. The sittings of said court to be held at the Village of Lanark.

3.—The Third Division to consist of the Town of Carleton Place and the Township of Beckwith, and the first six lots in the first seven concessions of Township of Ramsay. The sittings of said court to be held in the Town of Carleton Place.

4.—The Township of Montague, the Town of Smith's Falls, and that part of the Township of North Elmsley, from lot No. 1 to lot No. 12, in each concession, both inclusive, not within the limits of the Town of Smith's Falls. Sittings at Smith's Falls.

5.—The Township of Pakenham, the Town of Almonte, and the Township of Ramsay, with the exception of the first six lots in the first seven concessions of the said township. Sittings at Almonte.

Leeds and Grenville.

H. S. McDonald, Judge, Brockville.
E. J. Reynolds, J.J., Brockville.
M. M. Brown, C.C.A. and C.P., Brockville.

1.—To consist of the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th concessions and broken front of the Township of Elizabethtown, and the concession roads between them.

2.—To consist of the 1st, 2nd, 3rd, 4th and 5th concession, and broken front and that part of the 6th, 7th and 8th concessions from the town line of Edwardsburg to lot No. 18, inclusive, of the Township of Augusta, and the concession roads between them.

3.—To consist of the 1st, 2nd, 3rd, 4th and 5th concessions and broken front of the Townships of Leeds and Lansdowne, respectively, and the concession roads between them.

4.—To consist of the Township of South Gower, the Township of Oxford from the west side line of lots No. 11 in all the concessions of the eastern boundary of the township, and the gore of land between South Gower, Oxford and Edwardsburg.

5.—To consist of the Township of Wolford (except the 7th and 8th concessions and the allowances of roads within and between them); lots Nos. 1 to 10, inclusive, in the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th concessions of the Township of Oxford, and allowances of roads within and between them.

6.—To consist of the Townships of Bastard and Burgess, and those parts of the Townships of Leeds and Lansdowne, on the north side of the rear of the 5th concession in each respectively.

7.—To consist of the Townships of Kitley and Elmsley.

8.—To consist of the Townships of North Crosby and South Crosby.

9.—To consist of that part of the Townships of Escott and Yonge, in rear of the 4th concession of Yonge, and in rear of the 6th concession of Escott; that part of the Township of Elizabethtown, in rear of the 7th concession of and west of lot No. 18 in the 8th, 9th, 10th and 11th concessions, and the allowances for roads embraced therein.

10.—To consist of the Township of Edwardsburg.

11.—To consist of that part of the Township of Augusta in rear of the 5th concession and west of lot No. 18 in the 6th, 7th and 8th concessions; the whole of the 9th and 10th concessions of the Township of Augusta; the Gore between the Townships of Oxford, Wolford and Augusta; that part of the Township of Elizabethtown in rear of the 7th concession, and east of the commons, between lots No. 18 and 19 in the 8th, 9th and 10th concession; the 7th and 8th concessions of the Township of Wolford; lots No. 1 to 10, inclusive, in the 9th and 10th concessions of the Township of Oxford; and the allowance for roads embraced therein.

12.—To consist of the 1st, 2nd, 3rd and 4th concessions and broken front of the Township of Yonge; the 1st, 2nd, 3rd, 4th, 5th and 6th concessions and broken front of the Township of Escott, and the allowances for roads embraced therein.

The said 1st, 2nd and 12th divisions shall respectively embrace and comprehend within their lines those portions of the River St. Lawrence and islands therein, within the exterior lines of which such portions of said river and islands would lie and be, if such exterior side lines were produced and extended in that direction to the utmost limits of the Province.

Lennox and Addington.

Jas. H. Madden, Judge, Napanee.

H. M. Deroche, C.C.A. and C.P., Napanee.

1.—The Town of Napanee, Township of Richmond, all that part of North Fredericksburg and Adolphustown lying north

of Hay Bay, and all that part of North Fredericksburg lying north of Big Creek.

2.—Comprises 1st concession of Ernestown, the Village of Bath, the Township of Amherst Island, and the 2nd, 3rd and 4th concessions of the said Township of Ernestown, from the west limits thereof to the west limit of lot No. 21 in each concession.

3.—Township of South Fredericksburg and all that part of North Fredericksburg and Adolphustown not included in Division No. 1.

4.—1st, 2nd and 3rd concessions of the Township of Camden and the Village of Newburg.

5.—All that part of the Township of Camden not included in Division No. 4.

6.—All that portion of the Township of Ernestown not included in the limits of Division No. 2.

7.—Township of Sheffield.

8.—Townships of Kaladar, Anglesea and Effingham.

9.—Townships of Abinger, Ashby and Denbigh.

LINCOLN.

R. B. Carman, Judge, St. Catharines.
M. Brennan, C.C.A. and C.P., St. Catharines.

1.—The Town and Township of Niagara.

2.—The Township of Grantham (including the City of St. Catharines), the Villages of Merritton and Port Dalhousie and the Township of Louth.

3.—The Townships of Caistor and Gainsborough and the 9th concession of the Township of Grimsby, including the 1st and 2nd ranges as part of the said concession.

4.—The Village of Beamsville and the Township of Clinton.

5.—The Village of Grimsby, the Township of North Grimsby, and the Township of South Grimsby, except that portion included in the Third Division.

DISTRICT OF MANITOULIN.

C. E. Hewson, Judge, Gore Bay.
W. F. McRae, C.A. and C.P., Gore Bay.

1.—The Town of Gore Bay, the Townships of Gordon, Allan, Campbell, Mills, Burpee, Robinson, Dawson, The Islands,

Barrie, Clapperton and the Duck Islands, and that part of the Township of Billings lying west of the road allowance between lots 15 and 16 in the several concessions thereof, and so much of the Township of Carnarvon as lies west of Lake Mindemoya and north of the line between the 6th and 7th concessions thereof, and Cockburn Island.

2.—The Town of Little Current, the Township of Howland and those parts of the Townships of Sheguindah and Bidwell lying north of the line between the 6th and 7th concessions of Sheguindah and the 4th and 7th concessions of the Township of Bidwell, and the 6th and 7th concessions of the line between lots 17 and 18 in the Township of Billings, and the adjacent islands lying north and east of the said Townships, except the Clapperton Island.

3.—Manitowaning, the Townships of Assiginack, Tehkummah and Sandfield, and those parts of the Township of Sheguindah lying south of the line between the 4th and 5th concessions of the Township of Bidwell and the 6th and 7th concessions of the Township of Billings to the line between lots 17 and 18 of said township, and the Township of Carnarvon, except so much of the same as lies west of Mindemoya Lake, and all the part of Manitoulin lying east of the Township of Assiginack, Manitowaning and South Bays and the islands adjacent thereto.

MIDDLESEX.

Talbot Macbeth, Judge, London.
Edward Elliott, J.J., London.
J. B. McKillop, C.C.A. and C.P., London.

1.—That part of the City of London lying to the west of Maitland street with that portion of the Township of London lying south of the line between the 4th and 5th concessions and west of the said street, produced northerly on a line in the same direction to the line between the said 4th and 5th concessions, and with that portion of the Township of Westminster lying west of the main road leading south from Clarke's Bridge across the Thames, south to the line between the 1st and 2nd concessions, and westerly to the line between lots 42 and 43, and extending northerly to the River Thames, and also including the Village of London West.

2.—The Villages of Parkhill and Ailsa Craig, the Townships of East Williams and West Williams, and that portion

of the Township of Lobo lying north of the line between the 11th and 12th concessions, and east of the lines between lots Nos. 12 and 13.

3.—The Townships of McGillivray and Biddulph and the Village of Lucan.

4.—The Township of Delaware, with that portion of the Township of Westminster west of the line between lots 30 and 31 in the 2nd concession, then southerly on the line between lots 20 and 21 to the southerly limit of the township, including all west of said line, and also including all that portion of the front of said Township of Westminster lying west of the line between lots Nos. 12 and 13, not included in the first division, with that portion of the Township of Caradoc lying south of the line between the 5th and 6th concessions to the River Thames, and with that portion of the Township of Lobo lying south of the line between the 6th and 7th concessions, to the River Thames.

5.—The Township of Ekfrid and Mosa, including the Villages of Wardsville, Newbury and Glencoe.

6.—Townships of Adelaide and Metcalfe, the Town of Strathroy, with that portion of the Township of Caradoc lying north of the line between the 3rd and 4th concessions, with that portion of the Twnship of Lobo which lies north of the 6th concession and west of the line between lots 12 and 13 of the said township.

7.—The Township of North Dorchester, north and south of the River Thames, that portion of the Township of West Nissouri which lies south of the line between lots 14 and 15, and with that portion of the Township of Westminster lying south of the line between the 1st and 2nd concessions and east of the line between lots 30 and 31 in the 2nd concession and thence east of the line between lots 20 and 21, continued south to the southerly limit of the said Township of Westminster.

8.—All that portion of the Township of London which lies north of the line between the 4th and 5th concessions, that portion of the Township of Lobo which lies north of the line between the 6th and 7th concessions, and east of the line between lots 12 and 13 to the line between the 11th and 12th concessions and with all that portion of the Township of West Nissouri which lies north of the line between lots 14 and 15.

9.—All that part of the City of London lying east of Maitland Street; that part of the Township of London, lying north

of the line between the 4th and 5th concessions and east to the said street, produced northerly or in a line in the same direction to the line between the said 4th and 5th concessions and that part of the Township of Westminster lying north of the line between the 1st and 2nd concessions, and east of the main road leading south from Clarke's Bridge across the Thames.

District of Muskoka.

A. A. Mahaffy, Judge, Bracebridge.
Thomas Johnson, C.A. and C.P., Bracebridge.

1.—The Town of Bracebridge and the Townships of Macauley, McLean, Ridout, Monck and Cardwell, concessions 1, 2, 3, 4, 5, 6, 7, 8 and 9 in the Townships of Stephenson, Brunel and Franklin and that part of the Township of Watt situated east of lot 21, in the several concessions thereof, and concessions 7, 8, 9, 10, 11, 12 and 13 in the Townships of Muskoka and Draper.

2.—The Town of Gravenhurst, the Townships of Morrison, Ryde, Wood, Oakley and Baxter, and concessions 1, 2, 3, 4, 5 and 6 of the Townships of Muskoka and Draper.

3.—The Town of Huntsville, the Townships of Stisted, Chaffey and Sinclair, and concessions 10, 11, 12, 13 and 14 in the Townships of Stephenson, Brunel and Franklin.

4.—The Village of Port Carling and the Townships of Freeman, Gibson and Medora and that part of the Township of Watt situated on the west of lot 21 in the several concessions thereof.

District of Nipissino.

Jos. A. Valin, Judge, North Bay.
H. D. Leask, J.J., North Bay.
T. E. McKee, C.A. and C.P., North Bay.

1.—To be composed of all that part of the District which is situated west of the line between the Indian Reserve and the Township of Widdifield produced south to the boundary of the District, and north of the north-east angle of the Township of Gooderham, and south of the line marking the northern boundary of the said Township of Gooderham produced west to the boundary of the District.

2.—To be composed of so much of the District as lies east of the line commencing at the north-west angle of the Township of Poitras produced to the southeast angle of the Township of Freneh; the Townships of Olrig and Mattawan, and all that part of the District situated east of the line between the Townships of Bonfield and Calvin, produced to the southerly boundary of the District.

3.—To be composed of the Townships of Widdifield, Phelps, Ferris, Chisholm, Ballantyne, Wilkes, Biggar, Paxton, Butt, Devine, Hunter, McCraney, Finlayson, Peck, and all that part of the District situated west of a line drawn from the south-east angle of the Township of French, produced north to the Ottawa River, thence along the Ottawa River to the south-east angle of the Township of South Lorraine, thence west along the south boundary of South Lorraine to the east boundary of the Township of Cassels, thence north along the east boundary of the Township of Cassels, produced northerly to the northern boundary of the District, thence west along the northern boundary of the District to the western boundary thereof, thence southerly along the western boundary to the north-west angle of the Township of Pardee, thence east along the north boundary of the Township of Pardee, produced to the north-east angle of the Township of Gooderham; thence southerly along the east boundary of the Township of Gooderham, and the said boundary forwarded to the waters of Lake Nipissing.

5.—To be composed of the Townships of Bonfield and Boulter.

Norfolk.

A. T. Boles, Judge, Simcoe.
T. R. Slaght, C.C.A. and C.P., Simcoe.

1.—The Town of Simcoe, the Gore of the Township of Woodhouse and all that part of said Township lying west of the side line between lots 5 and 6, together with that part of the 4th, 5th and 6th concessions lying west of the said line between lots 12 and 13.

2.—The Township of Townsend and the Village of Waterford.

3.—The Township of Windham.

4.—The Township of Middleton and the Village of Delhi.

5.—The Township of Charlotteville.

6.—The Townships of North Walsingham, South Walsingham and the Village of Port Rowan.

7.—The Township of Houghton.

8.—The Village of Port Dover, and that part of the Township of Woodhouse not included in Division 1, viz.: all that part of the 1st, 2nd and 3rd concession lying east of the side line between lots 5 and 6, and that part of the 4th, 5th and 6th concessions lying east of the said line, between lots 12 and 13 in said township.

NORTHUMBERLAND AND DURHAM.

H. A. Ward, Judge, Cobourg.
G. M. Roger, J.J., Cobourg.
W. F. Kerr, C.C.A. and C.P., Cobourg.

1.—Townships of Cartwright and Darlington and the Town of Bowmanville.

2.—Township of Clarke and Village of Newcastle.

3.—Township of Hope and Town of Port Hope.

4.—Townships of Cavan, Manvers, South Monaghan and Village of Millbrook.

5.—Township of Hamilton and Town of Cobourg.

6.—Townships of Haldimand and Alnwick.

7.—Township of Cramahe and Village of Colborne.

8.—Township of Brighton and Village of Brighton.

9.—Township of Percy and Village of Hastings.

10.—Township of Murray.

11.—Township of Seymour and Village of Campbellford.

ONTARIO.

T. A. MacGillivray, Judge, Whithy.
D. J. McIntyre, J.J., Whitby.
J. E. Farewell, C.C.A. and C.P. Whitby.

1.—Including the Townships of Whitby and East Whitby and the Towns of Whitby and Oshawa.

2.—The Township of Pickering.

3.—The Townships of Reach and Scugog and the Village of Port Perry.

4.—The Townships of Uxbridge and Scott and the Town of Uxbridge.

5.—The Township of Brock and the Village of Cannington.

6.—The Township of Thorah and all that part of the Township of Mara lying south of the line between the 4th and 5th concessions.

7.—All that part of the Township of Mara lying north of the line between the 4th and 5th concessions thereof, and the Township of Rama.

Oxford.

J. G. Wallace, Judge, Woodstock.
R. N. Ball, C.A. and C.P., Woodstock.

1.—Comprising the City of Woodstock, the Township of East Oxford, and that part of the Township of East Zorra, lying south of the line between lots number twenty-five and twenty-six of the Township of Blandford, and that part of the Township of North Oxford lying east and north of the road between lots 16 and 17 to the boundary of the Township line between North and West Oxford, and that part of the Township of West Oxford lying east of the road between lots 6 and 7 to the boundary of the Township of East Oxford, and that part of the Township of Blandford lying south of the 10th concession.

2.—Comprises the Township of Blenheim.

3.—Comprises the Township of East Nissouri and West Zorra and the Village of Embro.

4.—Comprises the Townships of North Norwich and South Norwich and the Village of Norwich.

5.—Comprises the Town of Ingersoll and that part of the Township of North Oxford lying west and south of the road between lots No. 16 and 17 of the Township of West Oxford, and that part of the Township of West Oxford lying south of the road between lots 6 and 7 to the line between West Oxford and East Oxford, and those portions of the Township of Dereham being part of the 1st concession of the said Township of Dereham, west of the Middle Town Line.

6.—Comprises the Town of Tillsonburg and that part of the Township of Dereham not included in the Fifth Division.

7.—Comprising the Village of Tavistock and that part of the Township of East Zorra, north of the road between lots 25 and 26, and that part of the Township of Blandford lying north of the 10th concession of the said township.

District of Parry Sound.

F. R. Powell, Judge, Parry Sound.
W. L. Haight, C.A. and C.P., Parry Sound.

1.—The Town of Parry Sound and the Townships of Foley, McDougall, Cowper and Carling, and all that portion of the district lying to the west of the east boundary of Carling, produced to the French River.

2.—The Townships of McKellar, Ferguson, Hagerman, Croft, and all that portion of the district lying between the east boundary of Ferrie and the west boundary of Ferguson, produced to the French River.

3.—The Townships of Humphrey, Christie, Monteith and Conger.

4.—Townships of McMurrich, Perry, Armour, Proudfoot and Bethune.

5.—Townships of Spence, Chapman, Ryerson and Lount.

6.—That territory bounded on the west by the western boundaries of the Townships of Pringle and Patterson, and the western boundary of the Township of Patterson, produced to the French River and Lake Nipissing; on the east by the boundary of the District of Parry Sound, and on the south by the southern boundaries of the Townships of Himsworth, Gurd and Pringle.

7.—The Townships of Machar, Laurier, Strong and Joly.

Peel.

D. McGibbon, Judge, Brampton.
W. H. McFadden, C.C.A and C.P., Brampton.

1.—Township of Brampton, Township of Chinguacousy and northern division of the Township of Toronto Gore.

2.—Village of Streetsville, Township of Toronto and southern division of the Township of Toronto Gore.

3.—Township of Caledon.

4.—Village of Bolton, Township of Albion.

Perth.

J. A. Barron, Judge, Stratford.
G. G. McPherson, C.C.A. and C.P., Stratford.

1.—To consist of all that part of the Township of North Easthope west of the line between lots 25 and 26, and south

of the road between the 8th and 9th concessions, and all that part of the Township of South Easthope west of the side line between lots 25 and 26; all that part of the Townships of Downie and Gore north and east of the concession line between the 10th and 11th concessions and the Oxford Road; and all the Township of Ellice from the 1st to 13th concession, inclusive.

2.—To consist of all that part of the Township of Fullarton and included in Division No. 3, and the Townships of Hibbert and Logan.

3.—To consist of that portion of the Township of Downie west of the Oxford Road, and south of the concession line between the 10th and 11th concessions; the Township of Blanshard; all that part of the Township of Fullarton comprising the 13th and 14th concessions, and south of a road leading from Mitchell Road, between lots 24 and 25; east of lot 3 in the 10th concession; thence east along the line between the 10th and 11th concessions to the town line.

4.—To consist of that part of the Township of North Easthope east of the line between lots 25 and 26, and the north of the 8th concession, inclusive, with the 9th and 10 concessions; all that part of the Township of South Easthope not included in Division 1.

5.—To consist of the Township of Mornington, and all that part of the Township of Elma from lots 13 to 72, both numbers inclusive, of the 1st concession, and from lots 27 to 16, both numbers inclusive, in and from the 2nd to the 18th concessions, both concessions inclusive, of the said Township of Elma; and concessions 14, 15 and 16 of the Township of Ellice; and concessions 11, 12, 13 and 14 of the Township of North Easthope.

6.—To consist of the Township of Wallace and all that part of the Township of Elma from the 1st concession to the 18th concession, both concessions inclusive, and comprising lots Nos. 1 to 52, both inclusive, of the 1st concession, and lots Nos. 1 to 26 inclusive from the 2nd to the 18th concessions, both concessions inclusive.

PETERBOROUGH.

E. C. S. Huycke, Judge, Peterborough.
Geo. W. Hatton, C.C.A. and C.P., Peterborough.

1.—Shall comprise the City of Peterborough, the Townships of North Monaghan and Ennismore, all the Township of Smith

lying west of the 7th concession, all that part of the Township of Otonabee lying west of the 8th concession and north of lots Nos. 21 and all that part of the Township of Douro lying south of lots numbered 11.

Court to be held at the Court House in the City of Peterborough.

2.—Shall comprise the Village of Norwood, the Township of Asphodel, and all that part of the Township of Dummer lying east of the 5th concession and that part of the said Township of Dummer lying west of the 6th concession and south of lots numbered 11. Court to be held in the Town Hall in the Village of Norwood.

3.—Shall comprise that part of the Township of Smith lying north of the 6th concession, all that part of the Township of Douro lying north of lots numbered 10, that part of the Township of Dummer lying west of the 6th concession and north of lots numbered 10, the Township of Galway, the Township of Harvey and the Village of Lakefield. Court to be held in the Town Hall in the Village of Lakefield.

4.—Shall comprise the Townships of Anstruther, Burleigh, Cavendish and Chandos. Court to be held in the Town Hall at Apsley.

5.—Shall comprise the Townships of Belmont and Methuen and the Village of Havelock. Court to be held in the Town Hall in the Village of Havelock.

6.—Shall comprise the Township of Otonabee, except that part thereof lying west of the 8th concession and north of lots numbered 21. Court to be held in the Town Hall, at Keene, in said township.

PRESCOTT AND RUSSELL.

A. Johnston, J.J., L'Orignal.

J. Maxwell, C.C.A. and C.P., L'Orignal.

1.—Comprises the whole of the Township of Longueil, the municipality of the Village of L'Orignal, and the 1st concession of the Township of Caledonia.

2. Comprising all that part of the Township of West Hawkesbury, extending from front of 3rd concession to the rear of the said township.

3.—Comprises the whole of the Township of East Hawkesbury.

4.—Comprising the Township of North Plantagenet, and that part of the Township of South Plantagenet lying north of the Nation River.

5.—Comprising the whole of the Township of Cumberland.

6.—Comprising the whole of the Township of Russell.

7.—Comprising the two front concessions of the Township of West Hawkesbury, and the Municipality of Hawkesbury Village, within the same.

8.—Comprising the Township of Caledonia (excepting the 1st concession of the said township), and also that portion of the Township of South Plantagenet lying south and east of the Nation River.

9.—Comprising the whole of the Township of Alfred.

10.—Comprising the whole of the Township of Clarence.

11.—Comprising the whole of the Township of Cambridge.

PRINCE EDWARD.

D. Morrison, Judge, Picton.
R. H. Hubbs, C.C.A., and C.P., Picton.

1.—The Town of Picton, the 2nd and 3rd concessions of "Military Tract" from the west line of No. 13 eastward; Gore "G"; 1st and 2nd concessions north of the Carrying Place, 1st concession southeast of the Carrying Place, and 2nd concession north of Black River, including Gores "K" and "L" and McCan Gores, all in the Township of Hallowell; Block "I" in the concession north and east of East Lake, and Gore "B" in the Township of Athol, and 1st and 2nd concessions south of the Bay of Quinte, and Gore "A" in the Township of North Marysburg, and 1st concession southwest of Green Point to the end of Carman's Point in Sophiasburg.

2.—The Township of South Marysburg, and the Southern part of Athol, commencing at the outlet of East Lake, thence down to the head of the Lake, thence down to the base line between the 1st concession south and the 1st concession north of East Lake, till it strikes the township of Hallowell, thence down said township line till it strikes South Marysburg.

3.—The Township of Sophiasburg, together with Big Island, excepting the 1st concession southwest of Green Point to the end of Carman's Point.

4.—All that part of the Township of Ameliasburg lying east of the line between lots 86 and 87, in the 1st, 2nd, 3rd and 4th concessions of said township, including Huff's Island.

5.—That part of the Township of Hillier not included in the 7th division, also the first and 2nd concessions north of West Lake, and west of lot No. 7 in the said concession, and that part of Irwin Gore lying north and west of lot No. 7 in the 2nd concession and the west part of the 2nd concession produced west of lot No. 74 in that concession in the Township of Hallowell.

6.—Block (IV.) four, concession south side of West Lake, 1st concession "Military Tract," 2nd and 3rd concessions of said tract west of Lots No. 13, in those concessions, "Gore E," 1st and 2nd concessions north of West Lake, and east of lot No. 6 in those concessions; the Gerrow Gore and that part of Irwin Gore not included in Division No. 8, and all that part of the 2nd concession produced east of lot 75 in the Township of Hallowell.

7.—All that part of the Township of Ameliasburg lying west of the line between lots No. 86 and 87, in the 1st, 2nd, 3rd and 4th concessions of said township; all that part of the 4th and 5th concessions of the Township of Hillier west of the line between lots 86 and 87 and the 3rd concession west of the line between lots No. 22 and 23, with that part of the 2nd concession lying North of Pleasant Bay in the said Township of Hillier.

8.—All the point lying east of the west line of Marshland's Gore, the concession lying north of Smith's Bay and Waupoos Island in the Township of North Marysburg.

District of Rainy River.

C. R. Fitch, Judge, Fort Frances.
W. F. Langworthy, C.A., and C.P., Fort Frances.

1.—To comprise all that part of the said District lying east of the east boundaries of the Townships of Aylesworth, Lash, Carpenter, Kingsford and Fleming, and east of the east boundary of the said Township of Fleming produced north to the north boundary of the said District, to be styled "The First Division Court in the District of Rainy River."

2.—To comprise all that part of the said District lying west of Division No. 1 and east of the east boundaries of the Town-

ships of Morley, Morley Additional, Pattullo, Sifton and Dewart, and east of a line drawn north astronomically from the northeast angle of the said Township of Dewart to the north boundary of the said District, to be styled "The Second Division Court in the District of Rainy River."

3.—To comprise all that part of the said District lying west of Division No. 2, to be styled "The Third Division Court in the District of Rainy River."

RENFREW.

A. A. Fisher, J.J., Pembroke.
J. H. Burritt, C.C.A., and C.P., Pembroke.

1.—Comprising the Town of Pembroke, the Townships of Pembroke, Stafford, Alice, Petawawa, Buchan, Rolph, Wylie, McKay, Fraser, Herd, Clara and Maria, and all that part of the Township of Wilberforce from the 18th to the 25th concessions, both inclusive, and also those parts of the 14th, 15th, 16th and 17th concessions of the same Township of Wilberforce lying north of Snake River and east of Lake Dore.

2.—Comprising all that part of the Township of Westmeath lying east and north of the Muskrat Lake and River, and all those parts of the Township of Ross, from the 5th to the 9th concessions, both inclusive, east of Muskrat Lake, and from the 7th to the 13th (of the other) concessions, both inclusive, of the said Township of Ross.

3.—Comprising the Town of Renfrew and the Townships of Horton, Admaston, Bagot, Blythfield, Brougham, and Matawachan, in the said County of Renfrew.

4.—Comprising the Village of Arnprior and the Township of McNab.

5.—Comprising the Townships of Grattan, Sebastopol, South Algoma, North Algoma, and all that part of the Township of Wilberforce, from the 1st to the 17th concessions, both inclusive, excepting those parts of the 14th, 15th, 16th and 17th concessions of said Township of Wilberforce lying north of Snake River and east of Lake Dore.

6.—Comprising the Township of Bromley, and all that part of the Township of Westmeath west of Muskrat Lake, and all those parts of the Township of Ross, from the 1st to

the 14th concessions, both inclusive, of the said Township of Ross.

7.—Comprising the Townships of Brudenell, Radcliffe, Raglan, Lynedoch, Griffith, Hagarty, Sherwood, Jones, Richards and Burns.

SIMCOE.

G. N. Vance, Judge, Barrie.
E. A. Wismer, J.J., Barrie.
J. R. Cotter, C.C.A., and C.P., Barrie.

1.—Comprising the Town of Barrie, the Township of Vespra, except that portion lying west of the Nottawasaga River, and excepting also lots Nos. 38, 39, and 40, in the 1st and 2nd concessions, and lots Nos. 1, 2 and 3 in the 3rd, 4th, 5th, 6th and 7th concessions respectively. That portion of the Township of Oro lying south of lots Nos. 21 in the 1st and 2nd concessions (including the ranges), and south of lots Nos. 13 in the 3rd, 4th, 5th, 6th, 7th and 8th concessions respectively; that portion of the Township of Innisfil lying east of lots Nos. 5 in the 6th, 7th and 8th concessions, and that portion lying north of the 8th concession; that portion of the Township of Essa lying north of lots Nos. 19 in the 7th, 8th, 9th, 10th and 11th concessions.

2.—The Village of Bradford, the Township of West Gwillimbury, excepting thereout lots Nos. 1, 2, 3, 4 and 5 in the 14th and 15th concessions; the Township of Innisfil, excepting that portion lying north of the 5th concession, and excepting also lots Nos. 1, 2, 3, 4, and 5 in the 1st, 2nd, 3rd, 4th and 5th concessions thereof.

3.—The Township of Tecumseh, excepting concessions 12, 13, 14 and 15, the Township of Adjala, excepting that portion lying north of lot No. 25 in the 8th concession thereof.

4.—The Town of Collingwood, the Village of Stayner, that portion of the Township of Nottawasaga lying north of lot No. 18 in the 12th concession thereof; that portion of the Township of Sunnidale lying north of the 8th concession; that portion of the Township of Floss lying west of the Nottawasaga River; the islands in Lake Huron contiguous to the Township of Nottawasaga.

5.—The Township of Floss, except that portion lying west of the Nottawasaga River; the Township of Medonte, except

that portinn lying east of the 10th concession and north of lots Nos. 10 in the 9th and 10th concessions respectively; that portion of the Township of Oro lying north of the southern boundaries of lots Nos. 21 in the 1st and 2nd concessions, and north of the southern houndaries of lots Nos. 13 in the 3rd, 4th, 5th, 6th, 7th and 8th concessions respectively; lots 38, 39 and 40 in the 1st and 3rd concessinns, and lots 1, 2 and 3 in the 3rd, 4th, 5th, 6th and 7th concessions of the Township of Vespra.

6.—The Town of Orillia, the Township nf Orillia, southern division, the Township of Orillia, northern division, except that portion lying north of lots Nos. 15 in the first seven concessions thereof; that portion of the Township of Oro lying east of the 8th concession: that portion of the Township of Medonte, being composed of lots Nos. 1 to 6 (both inclusive) in the 11th, 12th, 13th, and 14th concessions; the islands in Lake Simcoe contiguous to the townships and portions of townships above described lying wholly or for the most part opposite thereto.

7.—The Township of Nottawasaga, except that portion lying north of lot No. 18 in the 12th concession thereof: the Township of Sunnidale, except that portion lying north of the 8th concession; that portion of the Township of Vespra lying west of the Nottawasaga River; that portion of the Township of Essa lying north of lots 19 in the 1st, 2nd, 3rd, 4th, 5th and 6th concessions: that portion of the Tnwnship of Tossorontio lying north of lots Nos. 20 in each of the seven concessions thereof.

8.—The Township of Essa, except that portion lying north of lnts Nos. 19 in each of the eleven concessions thereof: the Township nf Tosorontio, except that portion lying north of lots No. 20 in each of the seven concessions thereof: that portion of the Township of Innisfil, heing composed of lots Nos. 1, 2, 3, 4 and 5 in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th concessions; the 12th, 13th, 14th and 15th concessions of the Township of Tecumseh: lots Nos. 1, 2, 3, 4 and 5 in the 14th and 15th concessions of the Township of West Gwillimbury: that portion of the Township of Adjala lying north of lots Nos. 25 in the eight concessions thereof.

9.—The Town of Penetanguishene and the Village of Midland, the Township of Tiny: that portion of the Township of

Tay lying west of the 8th concession; the islands in Lake Huron contiguous to the Township of Tiny, and to that part of the Township of Tay, forming part of the 9th division, and lying wholly and for the most part opposite thereto.

10.—The Township of Matchedash, that portion of the Township of Orillia, northern division, lying north of lots Nos. 15, in the first seven concessions thereof; that portion of the Township of Medonte lying north of lots Nos. 6, in the 11th, 12th, 13th and 14th concessions, and that portion lying north of lots Nos. 10, in the 9th and 10th concessions thereof; the Township of Tay, except that portion lying west of the 8th concession; the island in Lake Huron, contiguous to that portion of the Township of Tay, forming part of the 10th division, and lying wholly or for the most part opposite thereto.

NOTE.—Each of the said several divisions shall include all allowances for roads embraced within its external limits, and shall also extend to the centre of every allowance for road lying external and adjacent to every such division, excepting always where any such last-mentioned allowance is hereinbefore declared to belong to or form part of any particular division.

STORMONT, DUNDAS AND GLENGARRY.

J. R. O'Reilly, Judge, Cornwall.
J. W. Liddell, J.J., Cornwall.
Jas. Dingwall, C.C.A., and C.P., Cornwall.

1.—Township of Charlottenburg, in the County of Glengarry.
2.—Township of Lochiel, in the County of Glengarry.
3.—Township of Cornwall, in the County of Stormont.
4.—Township of Osnabruck, in the County of Stormont.
5.—Township of Williamsburg, in the County of Dundas.
6.—Township of Matilda, in the County of Dundas.
7.—Township of Mountain, in the County of Dundas.
8.—Township of Finch, in the County of Stormont.
9.—Township of Lancaster, in the County of Glengarry.
10.—Township of Winchester, in the County of Dundas.
11.—Township of Roxborough, in the County of Stormont.
12.—Township of Kenyon, in the County of Glengarry.

SUDBURY.

J. J. Kehoe, Judge, Sudbury.
G. N. Miller, C.A., and C.P., Sudbury.

1.—To comprise so much of the District as lies east of a line commencing at the south-west angle of Township No. 82 produced north to the north-west angle of Township of Fairbank, thence east to the south-east angle of the Township of Rayside, thence north to the northern boundary of the District, thence east along the northern boundary of the District to the north-east angle of the Township of Ellis, thence south along the eastern boundary of the said township produced to the southern boundary of the District.

2.—So much of the District as lies north of a line produced westerly from the south-east angle of the Township of Bayside to the western boundary of the said District.

3.—So much of the District as lies west of a line produced north from the south-east angle of Township No. 82 to the north-west angle of the Township of Fairbank, thence west to the northern boundary of the said District.

4.—So much of the District as lies east of a line between the Townships of Allen and Bigwood, produced north to the northern boundary of the District.

DISTRICT OF TEMISKAMING.

H. Hartman, Judge, Haileybury.
F. L. Smiley, C.A. and C.P., Haileybury.

1.—To be composed of that portion of the District lying south of the northerly boundary of the Townships of Klock, Barr, Firstbrook, and Bucke, and east of the line between the Townships of Van Nostrand and Klock, produced southerly to the boundary of the District.

2.—To be composed of the Townships of Cane, Henwood, Kerns, Harley, Casey, Auld, Lundy, Hudson, Dymond, Harris, Hilliard and Brethour, and the Town of New Liskeard.

3.—To be composed of that part of the District that lies north of the northern boundary of the Townships of Cane, Henwood, Kerns, Hilliard and Brethour and east of the boundary line between the Townships of Tudhope and Bryce, produced northerly to the north-west angle of the Township of Bernhardt, thence east to the boundary of the District.

4.—To be composed of so much of the District as lies south of the southerly boundary of the Township of Langmuir produced easterly to the north-west angle of the Township of Bernhardt, and west of the line between the Townships of Maisonville and Bernhardt, produced southerly to the southern boundary of the District.

5.—So much of the District as lies west of a line produced north from the south-east angle of the Township of Geikie, to the boundary of said District.

6.—To be composed of that portion of the District lying north of the southerly boundary of the Township of Langmuir, produced easterly to the eastern boundary of the District.

THUNDER BAY DISTRICT.

H. H. O'Leary, Judge, Port Arthur.
Jno. McKay, J.J., Port Arthur.
W. F. Langworthy, C.A., and C.P., Port Arthur.

1.—All that part of the district lying west of the meridian of 87 degrees of west longitude, to the meridian of the most easterly part of Hunter's Island, excepting therefrom the Municipality of Neebing.

3.—Comprising the Municipality of Neebing.

VICTORIA.

J. E. Harding, Judge, Lindsay.
H. McMillan, J.J., Lindsay.
Thos. H. Stinson, C.C.A., and C.P., Lindsay.

1.—The first consists of the following townships and parts of townships, viz.: Of the 15th concession of the Township of Mariposa, and the Township of Eldon, except the ranges north and south of the Portage Road.

2.—All the Township of Fenelon, except that portion lying east of the Scugog River, and south of Sturgeon Lake, and the Township of Somerville.

3.—The Township of Verulam.

4.—The Township of Emily.

5.—The Town of Lindsay, Township of Ops, and that portion of the Township of Fenelon, lying east of the Scugog River, and south of Sturgeon Lake.

6.—The Township of Mariposa, except the 15th concession.

7.—The Townships of Cardeu and Dalton, Laxton, Digby and Longford, and the Township of Bexley, and that portion of the Township of Eldon north of Portage Road, and the range south of Portage Road.

WATERLOO.

C. R. Hanning, Judge, Berlin.
W. M. Reade, J.J., Berlin.
W. H. Bowlby, C.C.A. and C.P., Berlin.

1.—All that portion of the Township of Waterloo lying north of Blockline on the west side of the Grand River and that part of the upper block of said township lying north of said township lying on the east side of the Grand River north of lots Nos. 115, 109, 104, 86 and 95, to the Guelph Township line, including the Towns of Berlin and Waterloo.

2.—All that part of the Township of Waterloo lying south of the Blockline on the west side of the Grand River, and that part lying on the east side of the Grand River, south of the northern boundary of lots Nos. 115, 109, 104, 85 and 95, to the Guelph Township line, including the Villages of Preston and Hespeler.

3.—All that portion of the Township of North Dumfries lying east of lot No. 19 in the 7th concession, and running a course with the eastern boundary of the said lot in a northerly direction up to the 12th concession; thence along the eastern boundary of lot No. 23, in the said 12th concession, to the township line, including the Town of Galt.

4.—The Township of Wilmot, including the Village of New Hamburg.

5.—The Township of Wellesley.

6.—The Township of Woolwich.

7.—All that part of the Township of North Dumfries lying west of the eastern boundary of said lot No. 19, in the 7th concession; thence along the eastern limits of the said lot No. 19, the same course thereof, in a northerly direction to the 15th concession; thence along the westerly limit of lot No. 23, in the said 12th concession to the township line, including the Village of Ayr.

WELLAND.

L. B. C. Livingstone, Judge, Welland.
T. D. Cowper, C.C.A. and C.P., Welland.

1.—The Township of Crowland; that part of the Township of Thorold lying south of the lines between lots 178 and 195, running through to Pelham; that part of Pelham lying south of the 4th concession, and that part of Humberstone lying north of the concession line, between the 4th and 5th concessions, being the whole of the 15th concession and the Town of Welland.

2.—The Township of Wainfleet.

3.—The Township of Bertie, and those parts of the Township of Humberstone not included in Nos. 1 and 6, and the Village of Fort Erie.

4.—The Township of Willoughby, the Village of Chippawa, and that part of the Township of Stamford south of the line between lots 136 and 137; easterly from the westerly limit of the township to the southeast angle of lot No. 133; thence north on the line between lots Nos. 132 and 133, to the northern boundary of the township, including the towns of Clifton and Navy Island.

5.—Those parts of the Township of Stamford, Thorold and Pelham not included in any other division, and the Town of Thorold.

6.—All the Township of Humberstone lying south of the 5th concession, and west of the side lines between lots Nos. 9 and 10, in the several other concessions thereof, and the Village of Port Colborne.

WELLINGTON.

L. M. Hayes, Judge, Guelph.
A. Stirton, J.J., Guelph.
A. H. Macdonald, C.C.A. and C.P., Guelph.

1.—The Town and Township of Guelph.

2.—The Township of Puslinch.

3.—The Township of Eramosa.

4.—The Township of Nichol, excepting the 11th and 12th concessions; the Municipality of Fergus; the first eight concessions of the Township of Garafraxa; and lots 1 to 18, both inclusive, in concessions A and B of the Township of Peel, lots 13, 14, 15, 16, 17 and 18, in concessions 18 and 19, and lots 19, 20 and 21 in the 17th concession of the Township of Peel.

5.—The Township of Erin.

6.—The Township of Pilkington, and the 11th and 12th concessions of the Township of Nichol; the Municipality of the Village of Elora, and lots Nos. 19 and upwards belonging to the 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th concessions of Peel.

7.—Concessions 1 to 16, inclusive, of the Township of Maryboro' and concessions 1 to 16, inclusive, of the Township of Peel, except lots 19, 20, 21, 22 and 23 of those concessions in that township.

8.—That part of the Township of Arthur south and southeast of lot 15, on the west side of the Owen Sound Road, in the Township of Arthur; that part of the Township of Luther from 1 to 16, both inclusive; and lots 1 to 12, both inclusive, of the 17th and 18th concessions of the Township of Peel; lots 5 to 11, both inclusive, of the 19th concession of said Township of Peel; and lots 19 to 23, both inclusive, of concessions A and B of said Township of Peel.

9.—The territory formerly comprised in this division is now in the County of Dufferin.

10.—The Township of Minto.

11.—The Town of Mount Forest, and that part of the Township of Arthur north of lot 16, west of the Owen Sound Road; lot 17, on the Owen Sound Road, and lot 13, east of the Owen Sound Road.

WENTWORTH.

C. G. Snider, Judge, Hamilton.
J. F. Monck, J.J., Hamilton.
S. F. Washington, C.C.A. and C.P., Hamilton.

1.—All that part of the Township of Barton lying east of the lines between lots 14 and 15, and all that part of Hamilton City east of Hughson street.

2.—The whole of the Township of Flamboro' West, the Town of Dundas, and the east half of the Township of Ancaster.

3.—The whole of the Township of Flamboro' East.

4.—The whole of the Township of Beverly and the west half of the Township of Ancaster.

5.—The whole of the Township of Saltfleet.

7.—The whole of the Township of Glanford.

8.—The whole of tha Township of Binbrook.

9.—All that part of the Township of Barton lying west of the lines between lots 14 and 15, and that part of Hamilton City west of Hughson street.

YORK.

John Winchester, Judge, Toronto.
E. Coatsworth, J.J., Toronto.
F. M. Morson, J.J., Toronto.
J. H. Denton, J.J.
R. H. Greer, C.C.A., Toronto.
H. E. Irwin, C.P., Toronto.
Toronto City.—Crown Attorney, J. W. Seymour Corley.

1.—The City of Toronto east of Yonge street, at date 14th September, 1875 (*i.e.*, Bloor, Sherbourne and Howard streets on the north, the Don on the east, down to Queen street, and south of Queen street as far as Lee avenue).

2.—Concessions 5 to 11, inclusive, of the Township of Markham, and concessions 5 to 10, inclusive, of the Township of Whitchurch, from lots 1 to 10, inclusive, together with the Villages of Markham and Stouffville.

3.—Concessions 1 to 4 inclusive, of the Township of Markham, and concessions 1 to 4, inclusive, of the Township of Whitchurch, from lots 1 to 10, inclusive, and concessions 1 to 3, inclusive, of the Township of Vaughan.

4.—The Township of Whitchurch, from the line between lots 10 and 11 northward; and the Township of East Gwillimbury.

5.—The Townships of Georgina and North Gwillimbury.

6.—The Townships of King and the incorporated Village of Aurc

7.—Concessions 4 to 11, inclusive, of the Township of Vaughan.

8.—All that portion of the Township of York lying west of Yonge street, and the Township of Etobicoke.

9.—Township of Scarboro' and all that portion of the Township of York which lies east of Yonge street and the Village of Leslieville.

10.—The City of Toronto, west of Yonge street, at date of 10th September, 1875 (*i.e.*, Bloor street on the north and Dufferin street on the west).

INDEX.

ABANDONMENT
Failure to take out order deemed to be, 174.
Effect of, in appeal, 364.

ABANDONMENT OF EXCESS
Where defence or counterclaim involves matter beyond jurisdiction, 73, 103, 141, 585.
May be allowed at any time before judgment, 103, 585.
Prohibition if not abandoned, before judgment, 103.
Effect of, 103, 141.
In case of solicitor's bill, 103.
Judgment to be full discharge, 103, 141.
In proceedings against absconding debtors, 518, 525.

ABATEMENT
On death or insolvency, 482.

ABSENCE OF JUDGE
Procedure where Judge fails to reach court, 25.

ABSCONDING DEBTORS, 517. (See Provisions of Rules, 61-64.)
Jurisdiction in actions against, 517, 518.
Nature of proceedings, 518.
When attachment may issue, 517, 518.
Who is an absconding debtor, 518.
Affidavit for attachment, 520.
Attempt to remove property, 519.
Keeping concealed, 519.
By whom made, 520.
Must be filed, 517.
By whom proceedings may be taken, 517, 520.
Clerk's duty on issuing, 517, 521, 601.
Warrant of attachment, 521.
Issue of, 521.
Requisites of, 521.
Who may execute, 517, 521.
Seizure of goods, 521.
Return of warrants to the Clerk, 521.
Attachment maliciously issued, 522.
Execution by unauthorized person, 522.
When attachment superseded, 526.
The Absconding Debtors' Act, 526.
Other statutes, 527.
Right of Sheriff to goods seized, 526.
Proceedings on Sheriff intervening, 527.
Priorities, 527.
County Judge or Justice of the Peace may issue attachment, 522.
Procedure in such cases, 522, 523.
Bailiff or constable to seize and make inventory, 523.
When Bailiff entitled to deposit of fees before executing, 599.
Unless summons personally served trial not to take place within one month, 600.

ABSCONDING DEBTORS—*Continued.*
Appraisement of goods, 523, 524.
Fees of appraisers, 53, 523.
Oath of appraisers, 523, 524.
Form of Inventory, 523.
of Appraisement, 523, 524.
Court in which warrant should be made returnable, 524.
Proceedings may continue in court from which warrant issues, 524.
Action brought before attachment to be continued, 524.
Goods may be sold under execution in, 524.
Replevin not maintainable for goods attached, 525.
Perishable property may be sold, 532.
Proceeds of sale how disposed of, 531.
Goods which may be sold as, 533.
Appraisement of, 532.
Plaintiff's request necessary, 533.
Discretion of Bailiff as to sale, 533.
Security to be given by creditor, 532, 533, 534.
Application of proceeds, 532.
Cause of action not to be divided, 525.
Abandonment of excess, 525.
Plaintiff may recover up to full jurisdiction of Court, 518.
Defences may be entered by other creditors, 526, 601.
Several attachments, proceedings on, 526.
One execution to issue, 526, 601.
Distribution of moneys, rateably, 526.
Costs, 517.
Wages, priority of, 527.
Scheme of distribution, 526.
Form of, 526.
Notice where property insufficient to satisfy all attaching creditors, 527.
Form of notice, 528.
Creditors entitled to participate in, 526.
Custody of goods seized, 528.
Allowance to bailiff for, 528.
Restoration of goods, 528, 529.
Security to be given on, 528, 529.
Sale of goods under attachment, 524.
Judgment and execution, 524, 529.
Act respecting Absconding Debtors applicable, 526, 532.
Effect of attachment improperly issued, 531.
Costs not to be allowed, 531.
May be set aside, 532.
Garnishee proceedings—Effect of attachment on, 432.
Setting Aside Attachment—Defects in affidavit, 521.
Impropriety issued, 532.
Costs—Where attachment issued without cause, 531.
Where proceeds insufficient to satisfy all claims, 527.
When attachment superseded, &c.
Absconding Debtors' Act, 526, 532.
Assignments and Preferences Act, 527.
Creditors' Relief Act, 527.
The Wages Act, 527.

ABSENCE FROM ONTARIO, Statute of Limitations, 279.

ACCOMMODATION
For holding Court, 12, 13.
Expenses of, how payable, 12, 13.
ACCOUNT
Rendering of, unreplied to, effect of, 234.
Limitation of action for, 277.
Of fines to be kept by Clerk, 44, 45.
to be furnished to Clerk of the Peace, 45.
Of moneys received and paid out to be furnished to Judge, 45.
Action for, jurisdiction in, 97, 101.
Entry of, for suit (see Claims), 155, 181.
Copy of, to be served, 191.
ACCORD AND SATISFACTION
Cases as to, 480.
Party satisfying judgment entitled to entry of, 479.
ACQUIESCENCE
In jurisdiction, effect of, 8, 69.
Implication of agency by, 107.
ACKNOWLEDGMENT
To take action out of Statute of Limitations, 280.
ACTION
In what court to be entered, 155-169.
Commencement of, 155.
When barred by judgment (see Res Judicata), 5.
When judgment enforceable by, 9.
Causes of, not to be divided, 137-141.
For principal and interest, may be brought separately under written contracts, 149.
May be brought where defendant resides or carries on business, 155, 159-163.
May be brought in court nearest defendant's residence, 163.
May be brought in Division adjacent to defendant's residence, 164.
When defendant out of province, entry of, 165, 167.
Against Clerks and Bailiffs, entry of, 179, 180.
By assignee of chose in action, 189.
Against Judge, 181.
Against foreign corporation, firm or individual, 167, 168.
On securities for money seized under execution, 476.
Against Bailiff and sureties for negligence or false return, 562.
On bonds given under Division Court Act, 534.
Settlement of, right of Bailiff to fees on, 496.
before court, costs on, 449.
Costs on, when plaintiff does not appear, 445.
Limitation of (see Statute of Limitations), 271, 277.
Notice of (see Notice of Action), 567.
Where cause of action arose, 155, 156.
ACTION ON JUDGMENTS, 9, 276.
Not to be brought on judgment of Superior or County Courts, 9, 64, 92.
Nor on Division Court or Supreme or County Court judgments, 9.
On Foreign judgment, 7, 19.
ACTIONS AGAINST SURETIES, 29-35.
Entries in officer's books to be evidence in, 41, 42.
Limitation of, 34.

ACTIONS FOR RECOVERY OF LAND (see Title to Land)
Not maintainable in Division Courts, 64, 84-86.
When jurisdiction ousted, 64, 84, 86.
When jurisdiction not ousted, 84-86.
Procedure, 86.
Exemptions—Cases in which court has jurisdiction, 86, 87.

ACT FOR PROTECTION OF OFFICERS ACTING UNDER WARRANTS, 564.

ACT RESPECTING PUBLIC OFFICERS
Provisions of as to sureties (see Sureties), 28, 36, 90.

ADDING PARTIES, 217.
Witness admitting liability, 217.
Addition of defendant, primary debtor or garnishee, 217.
Rights of joint contractors to have co-debtor joined, 220.
On misjoinder or non-joinder of parties, 218, 219, 594.
Or substituting party as plaintiff, 217, 218, 221.
Cases in which order may be made, 222.
Consent of added plaintiff, 223.
Application to add or strike out a party, 223, 224, 594.
When too few persons joined, 218.
When party wrongly sues or is sued in representative character, 221, 224.
Amendment of name and description of plaintiff or defendant, 224.
Substituting party as defendant, 218.
On party appearing and admitting liability, 223.
Application for order to amend, 223.
Procedure, 217, 223, 606.
Entries in procedure book thereon, 606.
New style of cause, 607.
Altered title, 224.
On death, marriage or insolvency of parties, 224.
On change or transmission of interest or liability, 222.
When person brought in fails to appear, 223, 224.
Executors or administrators may be added, 224.
Costs where party improperly added, 594.

ADDRESSES
Of parties to be left with the Clerk on entry of claim or defence, 607.

ADJACENT DIVISION
Where a claim may be brought in, 155, 164, 585.

ADJOINING COUNTY
Judge may sue or be sued in, 181.
Clerk or Bailiff may sue or be sued in, 179, 180.

ADJOURNMENT OF COURT
Where Judge does not arrive in time, 25.

ADJOURNMENT OF TRIAL (see Trial), 257.
Cannot be granted if jurisdiction wanting, 65.
Powers of Judge as to, 257.
Grounds for, 257, 258.
In jury cases, 259.
May be granted to enable practice to be complied with, 257.
Costs of, 259.
When action pending in another court for same cause, 257, 598.

ADJUDICATION
On adverse claims in garnishment proceedings, 427-433.

ADMINISTRATORS (See Executors), 333.
ADMISSION (see Confession), 244, 444.
Of part of cinim, 225, 250.
Notice of, 250.
ADVERSE WITNESS, 295.
ADVERTISEMENT FOR CREDITORS
By executors and nduiniatrators, 335, 338.
ADVERTISEMENT OF SALE
Of goods under execution, 494.
Of iands under execution, 488.
AFFIDAVIT OF JUSTIFICATION
By sureties of Clerk and Bailiff, 20.
Form of. (See Forms.)
AFFIDAVITS
Requisites of, 171-174, 322, 596.
Not to be sworn before soiicitor or agent of parties, 173, 322, 598.
For prohibition, 78.
To chaag: piace of triai, 178.
For writ of replevin, 113, 114.
Of service.—To be prepared by cierk, 203.
To be filed on entering judgment, 233.
For aummary judgment, 235.
For commission to take evidence. (See Evidence), 304.
Of witnesses out of county receivabie aa evidence, 317.
On nppiication for new trial, 339.
For attaching order after judgment, 413.
On confession of deht, 444.
For judgment summons, 502.
Of disbursements (see Disbursementa), 300.
For leave to sue in adjacent diviaion, 164.
For order transferring suit, 169.
For substitutional service, 196.
For stay of execution, 346.
For attachment (See Absconding Debtor), 520.
Before whom to be aworn, 167, 322, 598.
Of service of defendant out of Ontario, 165, 167.
AFFIRMATIONS AND OATHS
To witnesses, 301.
AGENT
Cierks and Baiiiffs not to uct as, 57, 58.
Of foreign corporation, firm or individnal who deemed to be, 200.
Entering suit to be notified of payment of money, 46, 604.
Parties entering suit, or set-off, etc., to give name nnd addresa of agent, 607.
Signature of, nscertaining amount of ciaim, 107.
Authority of, how conferred, 108.
Cnrrying on businesa by, 163.
At trial, who may appear as, 260.
Judge may exciude, 260.
Autbority of, 260.
Right to recover fees, 261.
May be called as witneas, 260.
For service on corporation out of province in gnrniahment proceedings, 421.
Affidnvits not to be sworn before pnrty's agent, 173, 322.

AGENT FOR SERVICE
In appealable cases, appointment of, 357.

AGREEMENT
Not to appeal (see Appeal), 255, 348.
As to unauthorized place of trial invalid, 163, 164.

ALIAS OR PLURIES SUMMONS
Requisites of, 183.

ALIENS, 99. See Luczzake v. Spanish River Pulp and Paper Mills Co., 19 O. W. N. 136.

ALTERATIONS IN DIVISIONS
How made, 14, 15, 17.
Clerk of the Peace to keep record of, 17.

AMENDMENTS
Of error in judgment, 10, 323.
Cannot be made if there is no jurisdiction, 65.
Powers of Judge to permit, 224, 250, 572.
Of claim and particulars, 183, 224, 250.
Refusal of, 184.
If seal omitted from process, 3.
By adding or substituting parties, 217-224.
Application for order to, 223.
Procedure, 223.
On marriage, death or insolvency of parties, 224.
Notice to added or substituted party, 223, 224.
Parties added as defendant to be served with copy of order, 224.
(See Adding Parties).
General provisions as to, 224, 251.
Of defects in proceedings, 3, 183, 224, 572.
Of particulars in interpleader, 543.
To give jurisdiction as to amount, 73, 103.

APPEAL
Taking fresh evidence on appeal, 357.
From order transferring case to Supreme Court, 142, 348.
From order granting or refusing prohibition, 80.
Effect of dismissal of application for prohibition, 81.
Notes of evidence in cases subject to, 254.
May be dispensed with by Appellate Court, 255.
Agreement not to appeal, 255, 348.
In interpleader, 355.
Powers of Appellate Court on, 352, 353.
Reviewing evidence taken on commission, 357.
When and in what cases allowed, 347, 348, 349, 350, 351.
General principles of, 353.
Consent to, 355, 356.
In interpleader proceedings, 349, 355, 548.
Requisites of claim—money claimed, 355.
Proceeds or value of goods, 355, 356.
In garnishee proceedings, 349.
From order for immediate judgment, 349.
No appeal from Judge as *persona designata*, 349.
No appeal from Judge imposing fine, 349.
From arbitrator, 349.
Rules of Supreme Court as to, 361.
Staying proceedings, 357, 359.
In action by Mutual Insurance Companies, 348, 357.
Agent for service, 357.

APPEAL—*Continued.*
Notice of appeal, when to be given, 362.
Certified copies of proceedings to be furnished by Clerk, 357, 358.
Procedure on, 358.
Filing appeal case, 359.
Setting down, 359, 363.
Notice of, 359.
Judgment in, 359.
Enforcing judgment, 363, 600.
New trial after, 363, 600.
Costs, 363.
On abandonment of appeal, 364.
Cross appeal proceedings on, 356.
Appeal from order transferring cases under s. 69, 143.
Appeal from order transfering case under s. 71, 155.
Death of parties to appeal, 355.
APPEAL UNDER STATUTES, 365-382
Under Inspection and Sales Act, 379.
Act respecting Line Fences, 380.
Act respecting Deserted Wives, 381.
Under Schools Acts, 349.
From justices' convictions, etc., 365.
APPEALS TO DIVISION COURTS FROM JUSTICES' CONVICTIONS
The Criminal Code providing for, 365-370.
In what cases allowed, 365.
Who may appeal, 366.
To what division court, 366.
Scope of the Act, 366.
Waiver of right to appeal, 367.
by voluntary payment of fine, 367.
When no appeal lies, 367.
Death of parties, 367.
Procedure on appeal, 367.
Notice of appeal, 367, 368.
Recognizance, 367, 371.
Service of notice, 369.
Contents of notice, 370.
Respondent and Justice to be served, 369.
Two Justices, when both to be served, 369.
Sunday service void, 369.
For what sitting of court, 370.
Filing Notice of Appeal, 370.
Clerk's duty thereon, 605, 606.
Computation of time, 370.
Time for giving and filing notice cannot be extended, 371.
Transmission of papers to D. C. Clerk, 373.
Witnesses, procuring attendance of, 373.
The hearing and powers of court, 373-376.
Appeals to be entered at foot of docket, 606.
Proof of service of notice, 376.
No jury, 377.
Order on appeal, 377.
Costs, 378.
Abandonment of appeal, 378.
Duty of Division Court Clerk, 382.
Crown Attorney's fee on, 380.

APPEALS FROM JUSTICES' CONVICTIONS UNDER ONTARIO STATUTES, 379.
Under Municipal by-laws, 380.
The Ontario Public Health Act, 380.
The Master and Servants Act, 380.
The Act respecting Dogs and Sheep, 380.
The Act respecting Line Fences, 380.
The Deserted Wives Maintenance Act, 381.
The Ontario Liquor License Act, 381.

APPEARANCE IN COURT
Default of, by defendant (see Default), 233, 234.

APPLICATIONS
On proceedings to enforce payment of fees, 56.
For prohibition (see Prohibition), 78.
For certiorari (see Certiorari), 141-143.
To change place of trial, 169.
For renewal of summons, 195.
To set aside judgment, 230-232.
For summary judgment, 235-249.
For leave to dispute plaintiff's claim, 249.
To postpone trial, 257.
For commission to take evidence, 303.
For new trial, 339.
For inspection, preservation, etc., of property, 318.
For garnishee order, 413.
For judgment summons, 499.
For interpleader summons, 540.
How and when to be made, 540.
Clerk's duties as to, 541.

APPOINTMENT
Of depnty jndge, 23.
Of clerks and bailiffs, 25.
Of deputy clerks and bailiffs, 27.
Of inspector, 58.
Of appraisers, 523.
Of arbitrator, 436.

APPRAISEMENT
Of goods seized under attachment, 523, 524.
Memo. to be endorsed on inventory, 523.
Inventory of goods seized, 523.

APPRAISERS
Fees to be paid to, 53, 523, 618.
Duties of, 523.

ASSISTANTS
Clerks may appoint, 28.

ASCERTAINMENT OF AMOUNT
Jnrisdiction when amount ascertained by signature, 97, 107.
Cases thereon, 97, 107.

ASSAULT.
On bailiff, (see Bailiff), 558.

ARBITRATION
Reference to, 436.
Appointment of arbitrators, 437.
Revocation of reference, 438.
Award, 440, 441.

ARBITRATION—*Continued.*
Award, judgment on, 441.
Execution, 442.
Setting aside, 442.
Arbitrator may administer oaths, 443.
Summons to witness before arbitrator, 292.
ARBITRATOR (see Arbitration)
Appointment of, 436.
May administer oaths, 443.
Witness before, how summoned, 292.
Fees of, 441.
ARREST (See Judgment Debtor)
Duty of bailiff or constable on, 512-515.
Payment of debt on, 515.
Discharge from, 515.
Arrest of person disturbing Court, 555.
or resisting officer, 558.
ASSIGNMENT
Of replevin bond. (see Replevin), 121.
Of choses in action (see Choses in Action), 184-186, 189.
Notice of, 187.
Rights of assignee as against judgment or garnishing creditors, 433.
In insolvency; right of bailiff to fees on, 497.
ASSIGNMENT FOR BENEFIT OF CREDITORS
Effect of on garnishment proceedings, 433.
ATTACHMENT
Power of Division Courts as to, 132.
Will not lie against witness served substitutionally, 199, 293.
Against judge for disobeying certiorari, 23.
ATTACHMENT OF GOODS (see Absconding Debtors), 517.
ATTACHMENT OF DEBTS (see Garnishment of Debts), 396.
ATTEMPTS TO FIND PROPERTY
Bailiff's fees to be deposited by party insisting upon, 57.
AUTHORITY
Of Board of County Judges, 567.
AWARD (see Arbitration).
Judgment and execution on, 441, 442.
BAILIFF
Qualification of, 26.
Appointment and tenure of office, 25, 26.
Effect of refusal to perform duties, 27.
Suspension of by Judge, 27.
Dismissal of by Lieutenant Governor, 26.
Appointment of deputy, 27-28.
Leave of absence, 27.
To give security, 28.
Who may be sureties for, (see Security), 29.
Duties of, 50, 608.
Service and execution of process, 50-52, 610.
Books to be kept by, 59, 64, 608.
Annual return to inspector, 63.
Return of summons, 52, 610.
Duty when summons not served in time, 52, 610.
To produce certificate of filing covenant to inspector, 61.
Fees of, 53, 55, 554, 614.

BAILIFF—*Continued.*
Duties where actions by or against to be entered, 179, 180.
When Bailiff suspended, 202.
Appointment *pro tempore* in that case, 202.
Powers of such appointee, 202.
To produce books and papers to inspector, 60.
To inform inspector of appointment and sureties, 60.
To inform inspector of new sureties, 61.
Penalty against, for delaying proceedings, 51, 57.
Not to canvas voters at elections, 51.
Not entitled to mileage for service out of county, 50.
To report warrants in his hands at every court, 52.
Duties at court, 52, 608.
Functions of, during sittings, 52, 608.
To be paid by fees, 52.
Fees of, to be paid to Clerk on issue of execution, 56.
When party insists on attempt to find property, 57, 599.
Forfeiture of, for neglect to return process, 57.
To receive nothing except fees provided by tariff, 57, 608.
Duty of, on landlord's claim for rent, 549-555.
To enter from day to day all fees, etc., received, 64.
Suits by or against, where to be brought, 179.
When none; how process executed, 52, 202.
Not to receive money except under process, 610.
May take confession, 444.
Procedure by, on receiving execution, 466, 468, 478, 493-497.
To endorse date of seizure on execution, 493, 609.
On intervention by Sheriff under Creditor's Relief Act, 476, 477.
Rights to fees thereon, 477.
Not to purchase goods seized, 496.
Return of money realized by sale, 495-609.
Death of, while process unexecuted, 499.
Procedure by, on warrant of attachment, 523.
Seizure and appraisement under attachment, 523.
Allowance for keeping property, 528.
Return of appraisement to clerk, 524.
Liability of for damages arising out of execution of process, 546, 547.
Protection of Bailiff, Act for, 564-567.
Protection of, by Judge, 547.
Penalty against persons interfering with, 558, 559.
Misconduct of (see Misconduct), 560.
Negligence of (see Negligence), 562.
Making false return, 562.
Entitled to verdict on production of warrant, 564, 565.
Proof of warrant in action against Bailiff and Clerk, 566.
To be paid $2 for each court sittings in certain circumstances, 53.

BAILIFFS' RETURNS
To writ of replevin, 118.
Of execution, 63, 609.
Of warrant of attachment, 63, 521.
Of summons, 191.
Of fees, 63.

BALANCE OF UNSETTLED ACCOUNT
Jurisdiction in action for, 98, 103, 141.
Abandoning excess on, 103, 141.
Judgment in action for, 141.

BALANCE OF UNSETTLED ACCOUNT—*Continued.*
Judgment to be full discharge, 141.
Form of, 141.
BANK NOTES
Liable to seizure under execution, 456, 475.
BARRISTER
Appointment of to hold court, 23.
BARRISTERS AND SOLICITORS (See Solicitor)
Clerk not to practice as, 26.
What constitutes practising as, 26.
May appear as counsel, 260.
Authority of to bind client, 260.
BEQUEST
Validity of, not to be tried in Division Courts, 64, 88.
Transfer in actions on, to Supreme Court, 141.
BILLS OF EXCHANGE
Separate actions for principal and interest on, 140.
Seizure of, under execution, 456, 475.
BILL OF COSTS
To be made up by Clerk in detail, 44, 605.
BOARD AND LODGING
Garnishment of wages when debt contracted for, 408, 409.
No exemption when debtor has no family depending upon him, 410, 411.
BOARD OF COUNTY JUDGES
Authority to frame rules, 567.
Appointment of, 567.
Who may be appointed, 567.
Power to regulate Clerks and Bailiffs, 568.
To certify rules to Supreme Court, 569.
Expenses provided for, 570.
When meetings are to be held, 600.
BONDS (See Security)
Action on, 30, 33, 534.
Defences in, 32-34.
Set-off or counter-claim against, 535.
Stay of proceedings, 123.
Damages, 123.
Liability of sureties, 29-34.
Release of sureties, 32.
Seizure of, under execution, 456, 475.
On restoration of goods seized under attachment, 528.
Given under Act may be sued in the Division Court, 534.
To be delivered up to party entitled, 534.
See also Sureties.
In Replevin (See Replevin), 115.
Assignment of, 121.
Separate actions for principal and interest on, 140.
In garnishee proceedings under section 151, 431.
In attachment on sale of perishable goods, 533, 534.
BOOKS OF ACCOUNT
Production of (see Witnesses), 296.
On examination of defendants on motion for judgment, 247, 248.
May be received as evidence, 317.

BOOKS OF ACCOUNT—*Continued.*
Inspection of (see Inspection of Documents), 206-208.
Attachment for non-production of, 132.

BOOKS OF OFFICERS
Inspectors' Duties as to, 58, 59.
Sbowing fees and emoluments to be kept by Clerks, 64.
Certain books to be open to the pnblic snd accessible to Judge and inspector, 43.
Disposal of wben Clerk cbanged, 48.
Penalty for wrongfully bolding, 49.
Entries in and certified copies to be evidence, 41.
To be kept by Bailiff, 59, 64, 608.
Books to be kept by clerks, 41, 48, 59, 603.
Judgment Debtors' Book, 504, 603.

BOUNDARIES
Of Division Courts, 757.

BREACH OF CONTRACT
Actions on, 97, 101.

BREACH OF PROMISE OF MARRIAGE
Action for not permissible, 64, 90.

BREACH OF THE PEACE
Penalty for during court, 555.

BREACH OF TRUST
By trustee, limitation of action for, 274, 279.
Commitment for (see Judgment Debtor), 506.

BROTHER AND SISTER
Contracts for service between, 137.

CARRYING ON BUSINESS
Wbat consists of, 162, 201.

CASH BOOK
To be kept by Bailiff, 59, 608.
By clerk, 43, 603.
Entries to be made in, 43, 603.
To be open to tbe public, 43.

CAUSES OF ACTION
Excluded from Division Courts, 64.
Combining (see Combining Claims), 98, 108.
Equitable, powers of courts as to, 126-132.
Not to be divided (see Splitting Demands), 137-141.
Wbat included in, 156.
Wbere arising, 155-159.

CERTIFICATE
Of filing officers' security, 35.
Of claim to be filed nnder Creditors Relief Act, 477.

CERTIFIED COPIES
Wben receivable in evidence (see Evidence), 41.
Of proceedings to be furnisbed by Clerk on appeal, 357, 358.

CERTIORARI (see also Transfer to Supreme Court)
Responsibility of Judge as to, 23.
Transfer of claims to Supreme Court, 143-146.
Grounds for, 142-147.
Motion for, 145-147.
Proceedings after removal, 143.
Return to order, 146.

CHALLENGING JURORS
Right of (see Jurors), 388.
CHANGING PLACE OF TRIAL
When action entered in wrong court, 177.
Application for transfer, 177.
Order for, 178.
Effect of, 178.
Clerk's duties on, 178, 179.
Costs, 179.
Proceedings after transfer, 178, 179.
Notice respecting, to be endorsed on summons, 191.
In interpleader proceedings, 541.
When claim over $100, is made payable at particular place, 169.
Application for, 170.
Affidavit in support of, 171-174.
Notice to plaintiffs, 174.
Service of order, 175.
Clerk's duties as to, 174.
Order for, 174, 175.
CHANGE OF INTEREST
In subject of action—revival of judgment on, 224, 482.
CHANGE OF PARTIES (see Adding Parties)
On transmission of interest or liability, 224.
Chattel mortgages, seizure of under execution, 474, 475.
CHEQUES
Seizure of under execution, 456, 475.
CHIEF PLACE OF BUSINESS
Definition of, 201.
CHOSES IN ACTION
Assignment of (see Assignment of Chose in Action), 184-190.
Requisites of, 184, 186.
Effect of, 184.
Action by assignee, 189.
Equitable assignment of, 187.
Necessity for notice of assignment, 187.
When seized under execution how sued on, 475, 476.
CITIES
Number of divisions in, 11.
Time and place of holding court in, 12.
Treasurer of; duty as to jury fund, 395.
CITY OF TORONTO
Times of holding courts in, 12.
CIVIL SERVANTS' SALARIES
Garnishment of, 405.
CLAIMS (see Particulars of Claim), 181, 585.
Against officers of court and their sureties, 29-35.
Entered for suit to be numbered, 40, 181.
Solicitor or agent entering, rights of, 46, 604.
In replevin, 116.
Not to be divided, (see Splitting Demands), 137.
Court in which action for may be brought, 155, 164, 168, 179.
Entry of with clerk, 181.
Note to be filed before judgment, 181.
Lost note, security to be given, 184.
Requisite of, 181, 192, 628-632, 689.

CLAIMS—*Continued.*
Copy of, to be attached to summons, 190.
Amendment of, 183, 184.
Assignment of (see Chose in Action), 184.
Proof of in actions for less than $25, 317.
By and against executors, etc., 332.
In interpleader, 549.
By landlord for rent (see Interpleador), 550.
On entry of parties to leave addresses with Clerk, 357, 607.
Strictly for damages; what are, 397.
Sum included for interest, 192.
CLAIMS OF LANDLORDS AND OTHERS
(See Landlord), 535-550.
CLERK OF DIVISION COURT—Books to be kept by (see Books of Officers.)
Office of, where to be kept, 10.
in cities, 11.
Books to be kept by, 41, 48, 59, 603.
Duty of, if Judge does not open court, 25.
Qualification of, 26.
Appointment and tenure of office, 25.
Not to practice as barrister or solicitor, 26.
Suspension of by Judge, 27.
Dismissal of by Lieutenant-Governor, 26.
Effect of refusal to perform duties, 26, 27.
To give security (see Sureties), 28.
Who may be sureties, 29, 34.
Duties of, 39-50.
To issue all summonses, 39, 40.
To issue all warrants and executions, 41, 43.
To tax costs, 43.
May be granted leave of absence, 27.
Appointment of deputy, 27, 28.
Not to take money except in suits in his own court, 46.
When office vacant Clerk of the Peace to act as, 48.
To furnish Clerk of the Peace with account of fines, 44, 45.
To furnish judge with account of suitor's moneys, 45.
Returns to be made by, 47, 61-63.
Of suitor's moneys, 45.
Of unclaimed moneys, 47, 63.
Of jury trials, fund, 63.
In cities, 395.
Of commitments, 63, 517.
To lay the Bailiff's return before the Judge at every sitting, 63, 609, 610.
To forfeit fees if suits hindered by, 51.
Fees of, 52, 55, 62, 599, 611, 678.
To be paid by fees, 52.
Enforcing payment of, 56.
To be paid before proceedings taken, 56.
Not to receive other than fees provided by tariff, 57.
Returns.
Of fees, 63.
Of debtors committed, 63.
Of unclaimed moneys, 62.
Of fines, 63.
Of jury funds, 63.
As to sureties, 63.

CLERK OF DIVISION COURT—*Continued.*
To be paid $2 for sittings, 53.
Not to transmit money to home courts, etc., without order of party entitled, 47.
To answer promptly all enquiries, 604.
Fee on letters, 604.
Duties as to suitors moneys, 604.
Not to deal with suit after transcript, 497, 498.
Not to purchase or have any interest in suits, 57, 58.
Not to act as agent of parties, 58.
To produce books and papers for inspection, 60.
To inform inspector of appointment, 60.
To produce certificate of filing covenant, 61.
To inform inspector of new sureties, 61.
Income to be retained by, 62.
To enter from day to day all fees, etc., received, 64.
To forward summonses to other divisions for service, 43.
Notices to be given by (see Notices).
Duties as to trial lists, 254, 390.
On receipt of order changing place of trial, 177.
When jurisdiction disputed, 175.
On receiving money for any party, 45-48.
To pay unclaimed moneys to Clerk of the Peace, 47.
May take confession, 444.
Not to purchase goods seized in execution, 496.
Board of county Judges may regulate duties of, 568.
Misconduct, liability for (see Misconduct), 560.
Duty of on separation of counties, 18.
Fees in cases not exceeding $10, 53.
Clerks or bailiff, action by or against, where to be brought, 179.

CLERK OF MUNICIPALITY
To furnish copy of voters' list for jury, 387.
Penalty for neglect to do so, 389.
Proceeding to enforce penalty, 390.

CLERK'S OFFICE
Where to be situated, 10, 11.

CLERK OF THE PEACE
Duty of when D. C. Clerk's office vacant, 48.
Renewal of execution by, 488.
To record times and places of holding courts and of limits of divisions, 17.
And transmit copy of record to inspector, 17.
Officers' covenants to be filed with, 3-5.
To give certificate of filing, 35.
Duties of, as to establishment and alteration in divisions, 17.
To pay over unclaimed moneys to Prov. Treasurer, 47.

COMBINING CLAIMS (see Jurisdiction)
Causes of action may be combined, 98, 108.
Examples of such claims, 108.

COMMISSIONS DE BENE ESSE (see Examination)
Procedure on, 305.
(See Commission to Take Evidence).

COMMISSIONS TO TAKE EVIDENCE OF WITNESS OUT OF PROVINCE (See Evidence)
Application for, 303.
Affidavit for, 304.

COMMISSIONS TO TAKE EVIDENCE—*Continued.*
Order for, second commission, 307.
Concurrent commissions, 307.
Requisites of, 310.
Procedure on, 307, 308.
Objections to, 308, 309.
Costs of, 310, 316.
Commissioner may administer oaths, 308.
Rules of Supreme Court applicable to, 310, 314.
To take evidence where attendance of witnesses cannot be obtained, 310.
Costs of, 316.
Of witnesses in remote part of Ontario, 313.

COMMITMENT
For wrongfully holding books, etc., of court, 49.
Order for; not subject of prohibition, 75.
Of judgment debtor (see Judgment Debtor), 505.
For contempt of court (see Contempt of Court), 555-558.
Of officer for misconduct (see Misconduct), 560, 561.
Powers of courts as to (see Attachment), 132.

COMMODITIES
Where contracts payable in, 125.

COMPANY (see Corporations)
Service on; where head office out of province, 168.
Judgment and execution against shareholders of, 454.

COMPETENCY OF WITNESSES, 298.

CONDUCT MONEY
Of witnesses (see Witnesses), 293.

COMPULSION OF LEGAL PROCESS
Effect of payment by garnishee under (see Garnishment).

COMPUTATION OF TIME (see Time), 25, 38, 61, 171, 174, 176, 179.
As to Statutes of Limitations, 278.

CONCURRENT SUMMONS.
When issuable, 183, 586.

CONDITIONAL PROMISES
Effect of on Statute of Limitations, 282, 283.

CONFESSIONS OF DEBT
As to part and defence as to rest of claim, 229.
Clerks and Bailiffs may take, 444.
Judgment on, 445.
Affidavit required on, 444.
Costs were given shortly before court, 449.

CONSENT
To jurisdiction in personal actions, 97, 101.
Jurisdiction may be given by, 101.
To appeal, 348, 355.

CONSOLIDATED REVENUE FUND
Costs of seal to be paid from, 3.
Unclaimed moneys to form part of, 47.
Fees forfeited by Bailiff to form part of, 57.

CONSTABLE
To aid Bailiff in executing commitments, 515.
Powers and liability of, on attachments against absconding debtor, 521.

CONTEMPT OF COURT (see Insulting Judge), 555.
Penalty for, 555.
What is, 557.
Warrant of commitment for, 558.
CONTRACT
Jurisdiction in actions on, 97, 101.
Cases on ascertainment by signature, 104-108.
When payable otherwise than in money, 123, 126.
Relief against penalties and forfeitures in, 128.
CONTRACTS OUSTING JURISDICTION
By providing for mode of settling disputes, 68.
CONTESTED CASES (see Counsel Fees)
What are, 448.
When counsel fees allowed in, 448, 449
CONTINGENT INTERESTS
Sale of, under execution, against land, 461, 491
CONTRIBUTION
Right of sureties to, 33, 205.
CONVICTIONS, JUSTICES, APPEALS FROM (see Appeals)
COPIES
Of officers' bond to be received in evidence, 37.
Of entries in Clerk's book to be evidence, 37
CORPORATIONS
Where deemed to reside, 160.
Place of business of, 162, 201.
Not liable to judgment summons proceedings, 501.
Foreign corporations
Service on (see Foreign Corporations), 161, 200.
of garnishee summons (see Garnishment), 166, 421.
CORPOREAL HEREDITAMENTS
Action for not maintainable, 64, 87.
CO-SURETY
Right of to contribution, 33, 205.
COSTS
Taxation of, 43, 44, 448, 449, 605.
Revision of, 43, 44, 605.
Clerk to furnish statement of, when required, 44, 605.
Must be made out in detail and attached to summons, 43, 605.
In claims not exceeding $10, 53.
Of enforcing payment of fees, 56.
Of application for prohibition, 80.
Where action entered in wrong court, 170.
Of setting aside judgment by default, 232.
Of motion for judgment, 235.
Of examination on, 248.
Counsel fee on, 248.
Where plaintiff proceeds for balance on tender and payment into court, 268.
Of commission to take evidence, 310, 316.
Commissioner's lien for, 316.
Security for (see Security for Costs), 319.
On appeal (see Appeal) 363, 364.
Jury fees, 391, 396.
Of proceedings for garnishment of small debts in Supreme Court, 436.

COSTS—*Continued.*
Judge's authority as to, 445.
Where plaintiff fails to recover, 445.
Where no jurisdiction, 445, 447.
Of postage, etc., 448.
Counsel fees allowed as, 448, 449.
Where defendant confesses judgment or pays claim before court, 449.
Where plaintiff does not appear, 445.
Not recoverable in actions on judgments, 9.
On payment of execution before sale, 478.
Of proceedings on judgment summons, 500, 504, 509, 510.
Security for in interpleader, 543, 546.
Of interpleader proceedings, 543, 545.
Of service of defendant out of Ontario, 165.
See Witness fees.

COSTS IN THE CAUSE
What are, 202.
Jury fees to be, 391.
Postage to be, 448.

COUNSEL (see Agent), 260.
Judge may exclude, 260.
Authority of to bind client, 260.

COUNSEL FEES (see Costs)
On motion for judgment, 248.
In contested cases, 448, 449.
In what cases allowed, 448, 449.
To be taxed by Clerk, 449.

COUNTY COURT JUDGES (see Judge)
Appointment and qualification of, 20.

COUNTERCLAIM (See Provisions of Rule 29).
Power of court to grant relief on, 147-153, 272.
What may be set up by way of, 147-153.
Notice and particulars of, 153.
Involving matter beyond jurisdiction of court, 146-155, 273.
May be disposed of in separate action, 154.
Judgment on, 154.
When plaintiff fails to appear, 274.
Defence of—Notice to be given, 153.
Clerk's notice of to plaintiff, 273.
Adjournment when notice not given, 257.
Procedure—Where amount exceeds plaintiff's claim, 273, 274.
When plaintiff's action dismissed or discontinued, 274.
Effect of judgment where amount exceeds jurisdiction, 273.
Appeal on, 356.

COUNTY TOWN
Courts to be established in, 3.
Sittings to be held in court house, 14.

COUNTY TREASURER
To keep account of jury fund, 395.
Duty as to payment of jurors, 396.

COURT HOUSE
Holding Courts in, 14.
Sittings in county town to be held in, 14.
Remuneration for use of, how adjusted, 12, 13.

COURT ROOM
Municipality to furnish, 12.
Rent of, how payable, 12, 13.
COURTS
When established, 1.
Existing to be continued, 3.
Number in each county, 3.
Designation of, 3.
Seal of, 3.
Are courts of record, 4.
Time and place for holding, 10, 11, 12.
Municipality to furnish court room for, 12.
Rent of, how payable, 12, 13.
Sittings of in county town, 14.
Alteration in number and limits of, 14.
Establishment of, 3.
On separation of county, 17.
Who to preside at, 20, 23.
Adjournment of if Judge does not arrive in time, 25.
Jurisdiction of (see Jurisdiction), 64, 97.
Equitable jurisdiction, 126-132.
Not to grant injunctions, 126.
Power of as to defences equitable and legal, 125-132.
In which action to be entered (see Territorial Jurisdiction), 155, 156.
Powers of (see Powers), 125-132.
Limits of Division Courts in Ontario, 757.
COURTS OF RECORD
What are, 4.
Division Courts are, 4.
Effect of judgment of, 4, 5.
COVENANT
Breach of, action on, 97.
COVENANTS
Of Clerks and Bailiffs (see Sureties), 28-39.
Of Indemnity, limitation of actions on, 277.
CREDITORS
Entitled to participate in proceeds of goods attached, 526.
Notice by, to be filed in attachment proceedings, 527.
Sharing in benefits secured by interpleader, 477, 549.
CREDITORS' RELIEF ACT
Effect of in garnishment proceedings, 434.
When Sheriff may intervene, 434.
Rights of Bailiffs thereupon, 477.
Enforcement of claim by Sheriff in Division Court, 476.
Effect of on judgment and execution in Division Courts, 476.
Sheriff's return, 481.
Certificate of judgment to be served on Sheriff, 477.
What creditors share in benefits secured by interpleader, 477, 549.
Applies to money made on Division Court execution against land, 476.
Effect of in attachment proceedings, 527.
In Interpleader proceedings, 549.
CRIMINAL CONVERSATION
Action for, not maintainable in Division Courts, 64, 90.

CROSS-JUDGMENTS
May be set off, 478.
Not to prejudice solicitor's lien for costs, 478.
Entry of, how made, 478.

CROSS-APPEAL (see Appeal), 356.

CUSTODY
Of goods seized under attachment, 528.

CUSTOM
Questions as to, not to be tried in Division Courts, 64, 88.

DAMAGE BY FLOODING ACT
Actions under, 125.

DAMAGES
Actions for, 97-101.
In actions against officers and sureties (see Sureties), 28-39.
Action for, after probibition, 81.
Claims for, in personal actions, not to exceed $60, 97, 99.
In replevin (see Replavin), 119.
Claims for, what are, 97-101, 397.
Limitation of actions for (see Statute of Limitations), 276, 277.
Particulars of, in interpleader, 543.
Arising out of execution of process, 546.
Liability of Bailiff and creditor for, 547.
Adjudication on, in interpleader, 548.

DEATH
Of Judge; effect on proceedings, 23, 25.
Of surety; new covenant to be filed on, 37.
Effect of, on officer's security, 37.
Of Clerk; procedure on, 48.
Of party; action not to abate on, 10, 482.
Proceedings on, 482.
Revival of judgment on, 482.
Of Bailiff, while process unexecuted, 499.

DEBT COLLECTORS
Fraudulent use of forms by, 40.

DEBT
Action on, 97, 101.
Assignment of (see Choses in Action), 184-190.
Definition of, 225.
Not extinguished by imprisonment of debtor, 516.

DEBT ATTACHMENT BOOK
Not now required, 41.

DEBT OR MONEY DEMAND
Claims deemed to be, 225.

DECEASED PERSON'S ESTATE
Claims against, jurisdiction in, 99.

DECISION OF JUDGE (see Judgment)
When deemed to be a judgment, 18.
Power of Superior Courts to review, 22.
Should be stated publicly, with the reasons for it, 323.
When to be given, 323.
Cannot be altered at will, 323.
When final, 5-9.
To be according to equity and good conscience, 125.
In paying over money; liability of officer for, 45, 57.

DEFAULT (see Judgment).
Penalty on Bailiff's neglect to return process or execution, 57.
Judgment by; in replevin, 119.
When claim not disputed, 225.
On failure of defendant to appear in court, 233, 234.
DEFECTS
In affidavits of service, 230.
In proceedings, not to render officer liable, 563.
Not to render proceedings void (see Amendment), 571.
DEFENCES (see Counter-claim and Set-off).
Notice disputing claim must state in detail the grounds, Rule 30, otherwise judgment may be ordered, 592, 593.
In replevin, 113.
In action on bond, 122.
Legal or equitable may be set up, 129.
Involving matter beyond jurisdiction, 141, 146, 150.
Leave to enter, 230, 249.
Setting up on motion for judgment, 242.
As to part, 247.
May be allowed at any time before judgment, 248.
Notice of, by Clerk in such cases, 250.
Withdrawal of; procedure on, 250.
Where part only disputed, 225, 229.
Notice of, 229.
In garnishment, 428, 429.
By creditors in attachment, 526.
By Bailiff and creditor in interpleader, 548.
In actions against officers, 564.
Equitable defences, 129.
Time for entering, when defendant served out of Ontario, 165.
DEFENCE ON THE MERITS (see Motion for Judgment), 241, 242.
Statute of Limitations is a, 231.
Definition of Words, 1, 2, 17.
DELAY
In service of process, penalty for, 57.
Of suit by Clerk or Bailiff, 562.
DELEGATION OF AUTHORITY
By tribunal appointed by statute, 16.
Judicial functions, 22.
Power of legislation as to, 569.
DEMAND
Of payment from Clerk or Bailiff not necessary, 31, 563.
Demand of payment for Clerk, when necessary, 31.
Of perusal and copy of warrant, 564.
DEPUTY BAILIFF
Appointment and removal of, 27.
DEPUTY CLERK
Appointment and removal of, 27, 28.
DEPUTY JUDGE
May preside at Division Courts, 20.
Powers of, 20, 23-25.
Appointment of, 23-25.
Judge to notify Lieutenant-Governor of appointment, of deputy, 23-25.

DEPUTY JUDGE—*Continued.*
Duration of appointment, 24.
May practice profession, 24.
DETENTION AND PRESERVATION OF PROPERTY
May be ordered, 318, 595.
DETINUE
Jurisdiction in, 100.
Tender and payment into court in, 266.
Judgment in, 267.
DEVASTAVIT
Action for (see Executors and Administrators), 334, 336.
DEVISE
When disputed; action may be removed to Supreme Court, 141.
Jurisdiction ousted, 64, 88.
When deemed to be in dispute, 88.
DISABILITY
Effect of on Statute of Limitations, 279, 280.
Persons under, not prejudiced by disposal of unclaimed money, 48.
DISBURSEMENTS
Affidavit of, 300.
False affidavit of, 300.
DISCHARGE
By judgment in actions for balance of account, 141.
Of debt from attachment, 430.
Of debtor from custody, 515.
DISCRETIONARY POWERS
Exercise of by Judge, 11.
DISMISSAL
Of officers, 26.
Of servant; rights of employer as to, 134-136.
DISOBEDIENCE OF SUBPOENA
Penalty for, 302.
DISPUTING CLAIM
Notice of (see Notice Disputing Claim), 225, 249, 250.
DISPUTING JURISDICTION, 175.
DISQUALIFYING INTEREST
When officer of tribunal incapacitated by, 19, 22, 58.
When Judge incapacitated by, 22.
DISTANCE
How measured, 163, 421.
DISTRESS
Replevin of goods seized under (see Replevin), 114.
For rent on claim by landlord (see Landlord), 549.
DISTRIBUTION
Of proceeds of attachment against absconding debtor, 526.
DIVIDING CAUSES OF ACTION (see Splitting Demands), 137.
In attachment proceedings (see Absconding Debtors), 525.
DIVISION COURTS (see Courts)
Provisions as to establishment of, 3.
Alteration in number and limits of, 14.
On separation of county, 17.
May be held concurrently with General Sessions, 23.
Who to preside over, 20, 23.
Boundaries of, 757.

DOCUMENTS (see Production)
Production of on motion for judgment, 248.
On subpœna, 296-298.
Inspection of (see Inspection of Documents), 296-298, 598.
DUTIES OF OFFICERS (see Clerks and Bailiffs)
EJECTMENT
Action of, not maintainable in Division Courts, 84-86.
ELOIGNMENT (see Replevin)
Bailiff to make return of, 118.
Writ of Withernam to issue on, 118.
EMOLUMENTS OF CLERK
Disposition of (see Clerk), 62.
Return of to be made to Lieutenant-Governor, 47.
ENABLING WORDS.
Effect of, 234, 391.
ENQUIRIES
By parties to be answered by clerk, 604.
ENTIRETIES
When held by husband and wife not liable to execution, 491.
ENTRY OF CLAIM FOR SUIT (see Claim)
Court in which action to be brought (see Territorial Jurisdiction), 155, 164, 165, 169.
Where defendant a foreign corporation, 168.
When money exceeding $100 payable at a particular place, 169.
Changing place of trial in such case, 169.
Duty of clerk thereon, 169.
Application for, 169, 173, 174.
Requisites of affidavit therefor, 173.
Against Clerks and Bailiffs, 179, 180.
Parties to leave address of agent on, 357, 607.
ENTRIES
In procedure book as evidence, 41.
EQUITY AND GOOD CONSCIENCE
Judgment to be according to, 125.
EQUITABLE ASSIGNMENT
Of choses in action, effect of, 187.
EQUITABLE EXECUTION (see Receiver)
Division Courts cannot grant, 127.
Action for, not maintainable, 127.
EQUITABLE DEFENCES (see Equitable Jurisdiction)
Power of Division Courts as to, 126, 129.
EQUITABLE JURISDICTION
Power of Courts, 125-132.
No relief against third parties, 207.
Judgment to be according to equity and good conscience, 125.
Power of court to grant equitable relief, 126-132.
Rules of Supreme Court respecting, 126, 129.
Scope and effect of provisions as to, 126-132.
In defences, 129.
Relief against penalties and forfeitures, 126, 130.
Powers of court, as to attachment, 132.
Sequestration and attachment, 132.
Mandamus, 81.
Appointment of receivers, 126, 450.
Injunction, 126.

EQUITY OF REDEMPTION
Sales of under executions against lands, 456, 460, 474, 490.
Purchase by mortgagee, 461.
Sales under executions against goods, 474.

ERRONEOUS JUDGMENT
Judge not liable for, 21, 22.
Correcting, 10, 323.

ESTOPPEL
By matter of Record, 5.

EVIDENCE
Copies and extracts from public records, 17.
Certified copy of officers' covenant to be received as, 37.
Entries in officers' books, 37, 41.
Entries in procedure book, 41.
To be taken down in writing in appealable cases, 254.
Clerks' duties as to,, 357, 358.
Of witnesses out of province.
Commission to take, 303, 310.
When granted and when not, 304-306.
The Application for, 303.
When to be made, 304.
Terms, 304.
Notice of application, 304.
Affidavit for, 304.
for examination of party applying, 305
Order for, 307.
Second commission, 307.
Procedure, 307-309.
Production of documents, 307.
Notice of taking, 308.
Taking in shorthand, 308, 315.
Interpreter, 308, 315.
Compelling attendance of witness, 308.
Opening commission, 308.
Objections, 308, 309.
Costs, 310.
Con. Rules of Supreme Court apply, 310., 314.
Of sick, aged or infirm witness, or one about to leave Ontario, or whose attendance cannot be procured.
Order for, 310-313.
No commission to be issued, 313.
Procedure on, 310-314.
Con. Rules apply, 314.
Books of account and affidavits of witness residing out of county, when receivable as, 317.
Evidence Act.
Competency of witness, 298.

EXAMINATION
Of defendant on motion for judgment, 247.
De Bene Esse, application for, 305 (see Evidence).
Cases on, 303-307.
Procedure on, 307.
Commissioner to administer oaths, 308.
Rules of Supreme Court applicable, 310, 314.
Costs of, 310, 316.
By commission (see Evidence), 305.
Of judgment debtor (see Judgment Debtor), 490.

EXCESS (*see* Abandonment of Excess).
Abandonment of, 73, 101, 585.
Of amount of set-off or counterclaim in excess of plaintiff's claim, 271-274.
In attachment proceedings, 525.
Excluding witness from court, 290.
EXEMPTIONS (*see* Execution).
Goods, exemption from seizure under execution attachment and distress, 451, 470.
EXECUTION AGAINST GOODS
The Execution Act applies, 451.
Provisions of, set out, 451-464.
Word "Sheriff" therein includes "Bailiff," 451.
Exemptions, 451, 453, 470-472.
Against lands and goods, 453, 472.
What saleable under, against goods, 454-460, 472, 473.
What not saleable, 472.
Shares and dividends saleable, 454, 474.
Notice of seizure of, 454.
How seized, 454.
Service of notice, 454, 455.
Procedure for sale of, 455.
Patents of invention, 455, 473.
Notice and procedure, 456.
Goods of partners, 473.
Equitable rights in chattels, 456, 472.
Moneys and securities, 456-458, 474, 475.
Money secured by mortgage, 458-460.
Chattel mortgages, 475.
Procedure to realize securities, 475, 476.
Equity of redemption in land, 456.
Contingent interests in land, 461.
Property in possession of third parties, 457.
Church pews and sittings, 461.
Executions against executors, etc., 462.
Against municipal corporations, 462-464, 467.
Issuable on judgment within six years, 10.
Leave to issue necessary after six years, 10.
Not issuable on judgment after twenty years, 10.
Fees on; to be paid on issue of, 56.
When creditor insists on attempt to find property, 57, 599.
Enforcement of when there is no Bailiff, 52, 202.
In replevin (*see* Replevin), 119.
Against firm (*see* Partners), 212, 473.
On judgment by default on special summons, 225.
Issue of: To be issued by Clerk on judgment by default, 225, 464.
On summary judgment, 235, 464.
On judgment at trial, 339, 450.
Not to be postponed beyond fifty days, 346.
On set-off or counterclaim, 464.
Cross-judgments, 478.
When money not paid pursuant to order, 450.
Not to issue without order from creditor, 450, 464.
Effect of endorsement for more than amount due, 464.
When leave necessary, 464.
When issuable for part of claim without prejudicing right to remainder, 225, 229, 468.

EXECUTION AGAINST GOODS—*Continued.*
When to be dated, 482.
May be ordered in issue before regular day, 339, 483.
May be postponed, 346.
May be directed to any Bailiff in county, 450, 451.
Bailiff to endorse time of receipt of, 454, 466.
Enforcement of, seizure under, 464-467.
What constitutes seizure, 466.
Only binding from time of seizure, 454.
Must be executed within the county, 478.
Except in certain cases, 156.
Bailiff to endorse date of seizure on, 493.
Notice of sale, 493, 494.
Sale of goods under, 494, 495.
Must be executed by Bailiff personally, 52.
On death of Bailiff while proceedings pending, 52, 202.
Order in which warrants should be executed, 466.
Return of, 467.
To be returned within 30 days, 482, 496.
To Clerk of money realized, 495.
When return to be made, 482.
Of *nulla bona*, 467.
Of goods in hand for want of buyers, 467, 495.
Renewal of, not to be made without instructions from creditor, 482.
Cannot be made *nunc pro tunc*, 465.
Nor if expired, 465.
When and how renewable, 482, 483, 607.
By Clerk of the Peace, 488.
Rent, when landlord claims rent, Bailiff to destrain for it, 549.
Procedure thereon, 549-555.
Payment of before sale, 478.
To Clerk or Bailiff, 478.
Fees to be levied on, 479.
Goods to be released on, 479.
To plaintiff, effect of, 479.
On transcript (see Transcript of Judgment), 480.
Setting aside, by stranger, 467.
Grounds for, 467.
Abandonment and priority of, 468-470.
Exemptions, 451-470.
Of property of certain Indians, 471.
Against lands (see Execution against Lands), 453.
When Execution superseded, 476, 477.
Provision of The Creditors' Relief Act Affecting, 476.
The Assignment and Preferences Act, 477.
The Wages Act, 476.
On attachment (see Absconding Debtors), 524, 525.
Officers not to purchase goods seized, 496.
Procedure when landlord claims for rent, 476, 549.
Effect of assignment for benefit of creditors on, 496, 497.
Bailiff's lien for costs on settlement, etc., 496.

EXECUTION AGAINST LANDS
When issuable, 484, 485.
Force and effect of, 484.
Remedies available under, 487.
Equitable execution cannot be granted, 127.
Summary inquiries in aid of, 487.

EXECUTION AGAINST LANDS—*Continued.*
Rules of Supreme Court as to, 487.
When renewable, 487, 488.
Proof of title under Sheriff's conveyance, 488.
What may be sold under, 488.
Sale of lands under, 488.
Advertisement of sale, 488.
Sale of equity of redemption, 456, 460, 474, 490.
Purchase by mortgagee, 461.
Contingent interests, 491.
Sales of lands on execution against executors, 491, 492.
Rules of Supreme Court governing sales, 492.
Entireties—estate of husband and wife when held by, 491.
Proceedings in Division Courts after issue of, 492.
Affidavit to entitle plaintiff to take proceedings, 493.
Fees on execution, 485.
Creditors' Relief Act applicable to moneys realized under, 476.
The Assignments and Preferences Act, also applies, 477.
Death of Sheriff, 492, 499.

EXECUTORS AND ADMINISTRATORS
Actions against, 332.
Meaning of "Executor" and "Administrator," 332.
Limitation of actions against, 289-291.
Proceedings against, 332.
Particulars of claim in devastavit, 334, 338.
On deficiency of assets, 335.
Advertisements for creditors, 335, 338.
Foreign creditors, 336.
Notice of such defences must be given, 271, 274.
Judgment on devastavit, 336.
Judgment Quando Acciderint, 336.
Costs where defendant succeeds, 337.
Where plaintiff fails, 337, 338.
Scire Facias after judgment quando acciderint, 337.
Leave to issue execution on judgment of assets in future, 337.
Notice to creditors and distribution of assets, 335, 338.
Revivor of judgment against, 328, 482.
Executions against, 492.
Devastavit by, 334.

EXECUTOR DE SON TORT
Definition of, 333.
Liability of, 333, 334.
Exemptions from sale under execution, 451-470.

EXPERIMENTS
Authority to try may be given, 318, 319.

EXPRESS COMPANY
Service of process on, 200.

FALSE PRETENCES
Ground for committal of judgment debtor, 506.
Offence of, 506.

FALSE RETURN
Penalty against Bailiff for making, 562.
Right of action against Bailiff and sureties for, 562.

FEE BOOK
To be kept by Clerks, 64.
By Bailiffs, 64.

FEES AND EMOLUMENTS
Proportion of to be retained by Clerks, 62.

FEES
Of Bailiff, lien on goods seized in execution, 496.
Of Clerk of the Peace on filing officers' bond, 35, 36.
Clerks and Bailiffs to be paid by, 52.
Payable to appraisers, 59.
Table of to be hung up in Clerk's office, 53.
Tariff contains all charges which may be made, 57, 58.
None other to be taken by officers of court, 57, 599.
In cases not exceeding $10, 53-55.
To be paid in advance, 55, 56.
Bailiff not to withhold suitors' moneys for payment of, 47, 604.
Enforcing payment of when not paid in advance, 56.
Order and execution therefor, 56.
Of Bailiff to be paid before execution issues, 56.
Bailiff's right to when action settled or defendant assigns, 497.
When attempts to find property are insisted upon, 57, 599.
Forfeiture of, for neglect to return execution, 57.
Delay in service of summons, 51, 600.
Duty of inspector regarding, 59.
In replevin, how determined, 117.
Of Clerk on transfer of suit, 179.
Postages on papers to be costs in cause, 202.
To witnesses (see Witnesses), 299, 300, 302.
Of jurors, prepayment of, 383, 384.
For sustenance fund, 394, 395.
Return of, 395.
Payable to jurors called in court, 392, 396.
To Judge's jury, 391.
To jurors summoned, 396.
Of arbitrators (see Arbitration), 441.
To counsel, 448, 449, 599.
Cases in which counsel fees may be allowed, defined, 599.
"Contested" cases defined, 599.
Only barristers and solicitors entitled to, 599.
On payment of execution before sale, 478, 479.
On execution against lands, 485.
Of Bailiff when Sheriff intervenes, 477.
For keeping goods seized in attachment, 528.
When execution satisfied after seizure, 478, 479.
To be endorsed on warrant of committment, 515.
To be endorsed on executions, 609.
To be paid to judgment debtor residing over 3 miles from court, 592, 593.
Until paid, proceedings need not be taken, 56.
Tariff of, to Clerks, 53-55, 599, 611.
To Bailiffs, 53-55, 614.
To appraisers, 618.
To witnesses, 293, 617, 618.
Of Bailiff, on distress for rent claimed by landlord, 554.

FINES
Clerk to keep account of, 44, 45, 63.
Clerk to furnish verified account of to Clerk of the Peace, 45.
How enforced in Division Courts, 563, 559.
By Justices of the Peace, 558, 559.
How disposed of, 44, 63, 560.

FIRM (see Partners)
Proceedings against, 203-214.
Judgment and execution against, 212.
Liability of member of firm out of Ontario, 214.
Liability of person carrying on business in name of a firm, 215.
Application for name of person so carrying on business, 215.
Judgment summons against, 214.
Garnishee proceedings against, 214.
FLOODING LANDS
Actions for, 125.
When action for may be brought, 125.
FOREIGNER
Action against when to be brought, 165-167.
When head office is out of Ontario, 200-202.
Jurisdiction in actions against, 165, 167.
Notice instead of summons to be served out of Ontario, 167.
FOREIGN CORPORATIONS, FIRMS AND INDIVIDUALS
Where suit may be brought on action arising in different divisions, 168.
Jurisdiction in action against, 167, 421.
Service of attaching order on, 421.
Garnishee proceedings against, 169-421.
Service on in such cases, 169.
Who deemed to be agents for (see Agent), 421.
(See Corporations)
"FOREIGN COURT" AND "FOREIGN DIVISION."
Defined, 585.
Service of summons in, 43, 610.
Clerk and Bailiff not to receive money on process in, 46.
Clerk to give full statement of fees, 43, 605.
FOREIGN JUDGMENT
Action on, 7, 9.
Limitation of action on, 10.
FOREIGN PROCEDURE BOOK
Entries to be made in, 42, 43, 59.
Form of, 42, 59.
Forfeiture of fees by Bailiff, 57.
FORMAL DEFECTS
Not to be given effect to, 571, 572.
Power of Judge to amend (see Amendments), 217, 250.
FORFEITURES AND PENALTIES
Relief against, 120, 130.
FORMS
"Prescribed Form" interpreted, 2.
Authorized to be used in Division Courts, 595.
All forms to be on half sheet foolscap, 595.
FORMS AND PROCEEDINGS
Absconding debtor—
Affidavit for attachment against, 639.
of service of summons on, 641.
Warrant of attachment, 653.
Plan of distribution amongst creditors of, 637, 638.
Bond on sale of perishable property under, 682.
Added plaintiff, consent of, 709.
Affidavit of execution of consent, 709.

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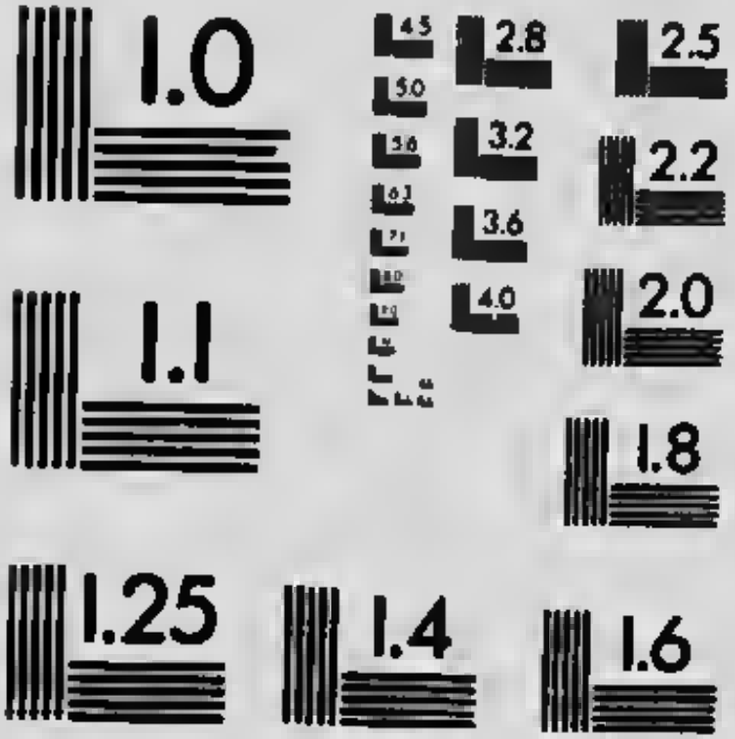

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FORMS AND PROCEEDINGS—*Continued.*
Admission—
Of claim or part of claim, 632.
Affidavits and oaths—(see Oaths)
Affirmations by Quakers, etc., and jurat thereto, 647.
For certiorari, 697.
For immediate judgment, 662.
For order to examine a sick, aged or infirm witness, 636.
For commission to examine witness out of Ontario, 667.
For leave to sue in adjoining division, 699.
For order for substitutional service, 702.
For attachment, 639.
For order for writ of replevin, 653.
For replevin without Judge's order, 654.
For judgment summons, 642.
For second judgment summons, 642.
For revival of judgment, 643.
by an executor, 644.
against executor, etc., 644.
For order to garnish debt, 660.
For prohibition, 695.
For judgment summons after being discharged once, 642.
Forms of oaths to witnesses, jury, etc. (see Oaths).
General form of heading and conclusion of, in garnishment, 635.
Of service of summons, 640.
Of service on absconding debtor at last place of abode or business, 641.
Of service on absconding debtor where no one found at such place of abode or business, 641.
Of service on absconding debtor at last place of trading or dealing, 641.
Of execution of confession, 641.
Of disbursements to several witnesses, 645.
Of justification by sureties to Clerk's or Bailiff's covenant, 628.
On motion for mandamus, 697.
On application to transfer action, 663.
To obtain a warrant to bring a prisoner required as a witness, 746.
Verifying claim of Woodman's Lien for Wages, 689.
For attachment under Woodman's Lien Act, 688.
For leave to proceed after transcript issued, 675.
execution against lands, 742.
For order to examine aged, etc., witness, 636.
For Commission to examine witness out of Ontario, 670.
Oath of witness, 646.
by uplifted hand, 646.
by Jew witness, 646.
by Quaker witness, 646, 647.
of interpreter, 646.
of jury called by parties, 646.
called by Judge, 646.
of witness before arbitrator, 647.
of stenographer, 648.
of appraisers, 692.
of judgment debtor, 646.

FORMS AND PROCEEDINGS—*Continued.*
Oath of officer in charge of jury, 647.
by illiterate or blind deponent, 647.
Affirmations instead of oaths, 646, 647.
Agreement—(see Consents and Agreements.)
Not to appeal, 715.
Appeals—
Consent to, 719.
Agreement not to, 715.
Request to Clerk on appeal to Supreme Court to transmit papers, 720.
Appointment of agent for service, 720.
Order staying proceedings on, 720.
Notice of appeal, 720.
Appeals to Division Courts from Justices' convictions.
Notice of appeal, 721.
Affidavit of service, 722.
Recognizance, 722.
Affidavits of execution and justification thereon, 723.
Affidavit to let in depositions as evidence on, 723.
Orders on appeal, 724, 725.
Warrant of distress for costs of, 725.
Constables return to warrant, 726.
Warrant of commitment thereon, 726.
Notice of abandonment of appeal, 727.
Fiat of Attorney-General under Liquor License Act, 727.
Notice of appeal thereon, 727.
Notice of appeal by licensee under Liquor License Act, 729.
Recognizance thereon, 729, 730.
Summons thereon, 730.
Application—by Bailiff for interpleader, 675.
For new trial, 703.
To set off cross-judgment, notice of, 740.
Appointment—Of agent for service on appeal, 720.
Appraisement—To be indorsed on inventory in attachment, 692.
Arbitration—Consent to, 681.
Appointment of third arbitrator, 681.
for meeting on reference, 682.
Award, 682.
Enlargement to be endorsed on appointment for meeting, 682.
Order of reference, 681.
containing special clauses, 744.
Assignment of replevin bond, 656.
Attachment of Debts—Judge's attaching order, 661.
Attachment of Goods (see Absconding Debtor)—
Against absconding or removing debtor, 653.
Under Woodman's Lien for Wages, 688.
Appraiser's oath, 692.
Inventory, 693.
Appraisement, 692.
Award (see Arbitration)
Bailiff's Forms, 656, 692, 694, 738.
Return to writ of replevin, 656.
Inventory of goods replevied, 657.
Bailiff's attachment forms, 692-694.
Return of goods on hand for want of buyers, 738.

FORMS AND PROCEEDINGS—*Continued.*
Notice of sale, 693.
Appraisement, appraisers' oath, etc., 692.
Bond—Assignment of, in replevin, 656.
For security for costs, 683.
In replevin, 655.
In garnishee proceedings by primary creditor, 736.
On seizure or sale of perishable property, 682.
On supersedeas to warrant of attachment, 743, 744.
On lost note, 700.
Of Clerk or Bailiff, 627.
To Bailiff on seizure of goods under execution, 691.
Books—Bailiff's book, 626.
Clerk's cash book, 621.
fee book, 622.
judgment debtors' book, 624.
order book, 624.
procedure book, 577, 624.
foreign procedure book, 578, 625.
Certificates and Orders—For discharge of party from custody, 717.
Of Clerk of proceedings to Appellate Court, 690.
Verifying entries in procedure book, 689.
Of judgment, under Creditors' Relief Act, 753.
Certiorari—Affidavit for, 697.
Notice of motion, 696.
Order for, 698.
Return by Judge to, 699.
Claim (see Particulars of Claim), 628.
Of lien under Woodman's Lien for Wages, 689.
Admission of, 632.
Of landlord for rent, 755.
In replevin, 654.
Clerk's Forms—
Notices (see Notices.)
Books (see Books.)
Returns (see Returns.)
Commitment—Warrant of, in default of appearance, 671.
after examination, 672.
for contempt in open court, 673.
Commission—(see Witnesses).
Affidavit for examination of witness out of Ontario, 667.
Order for, 667.
Return to, 670.
Form of commission, 668.
Instructions endorsed on, etc., 668.
Confession—Form of, 642.
Affidavit of execution, 641.
Judgment on, 661.
Admission of claim or part of claim, 632.
Consents and Agreements—
To judgment, 714.
To appeal, 719.
Not to appeal, 715.
Counterclaim—634.
Particulars of, 634.
Covenant, Clerk's and Bailiff's sureties, 627.

FORMS AND PROCEEDINGS—*Continued.*
Affidavit of execution of 627.
justification, by sureties, 628.
Creditors' Relief Act—Certificate of judgment under, 753.
Cross-Judgments—Entry of partial satisfaction on Judge's order setting-off, 740.
Judge's order to set-off, 740.
Notice of application to set-off, 740.
Defences—Clerk's notices of, 752.
Notices of, by defendants, 633.
Of set-off, 633.
Counterclaim, 634.
Notice of withdrawal of, 714.
Detinue—Particulars in, 631.
Judgment in, 715.
Execution, 716.
Demand—Of jury, 687.
Of statement of names, etc., of plaintiff's firm, 704.
Devastavit—Suggestion of, in action against executors, 334.
Discharge of judgment debtor, certificate for, 717.
Judge's order for, 717.
Distribution—Plan of, 637, 638.
Executions—Under various judgments, 754, 755.
Against goods of defendant or plaintiff, 581, 664.
lands of defendant, 582, 664.
Where one of several parties has died after judgment, 664.
Against a firm, 706.
In garnishee cases, 732-734, 735, 736.
Against married women, 709.
non-payment of Clerk's fees, 750.
property seized, but unsold for want of bu[illegible] 738, 739.
In action of detinue, 716.
replevin, 665, 666.
Renewal of execution against lands, 742.
of execution against goods, 607.
Warrant to levy fine on witness refusing to give evidence, 747.
on witness refusing to be sworn, 748.
for disobedience to subpœna, 748.
Against lands, 582, 664.
Against garnishee where he defends unsuccessfully, 732.
Venditioni Exponas—
To Sheriff, 730.
To Bailiff, 738.
For part and fi. fa. for residue, 741.
Fees—Tariff of, 611-619.
Fines—Order for imposition of, for contempt, 673.
Warrant to levy against witness refusing to give evidence, 747.
refusing to be sworn, 748.
for disobedience to subpœna, 748.
Firm- [illegible]aml of names of members of, 704.
Affidavit for order for, 705.
Order, 705.
Statement of names of, 706.
Application for execution against person liable as partner, 707.
Affidavit therefor, 707.
Order thereon, 708.

FORMS AND PROCEEDINGS—*Continued.*
Notice to person claimed to be liable as member of, 708.
Foreign Defendant, out of jurisdiction, notice for service on, 700.
Flooding Land, damage by—
Particulars of claim for, 632.
Summons to witness, 652.
Notice of judgment for, 652.
Garnishment—
Summons before judgment, 578.
after judgment, 650.
Affidavit for attaching order, 660.
Attaching order, 661.
Warning to garnishee, 661.
Notice where claim is for board or lodging, 733.
Judgment against garnishee, 731.
Execution against garnishee, 731.
Judgment in favor of garnishee, 732.
Execution against garnishee, where he defends, 732.
Execution against primary debtor and garnishee, 733, 734.
Judgment on contestation between primary debtor and garnishee, 734.
Judgment for primary debtor, garnishee or third party claimant, 735.
Summons where third party claims the money, 735.
Execution against primary creditor for costs, where claimant succeeds, 735.
Execution against claimant where he fails, 736.
Bond under section 161, 736.
Garnishee order on garnishment of small debts on Supreme or County Court judgments, 737.
Garnishment of civil servants' salaries, Forms Nos. 190, 191, 192, 193.
Headings and Conclusion— In affidavits, 635.
Of notices, admissions, orders, etc., 687.
Immediate Judgment—
Affidavit for, 662.
Notice of motion, 711.
Order for, 710.
Judgment thereon, 711.
Order for examination of defendant on application for, 711.
leave to defend unconditionally, 712.
to defend conditionally, 712.
judgment for part, 713.
leave to defend on payment into court, 713.
to set aside immediate judgment and for leave to defend, 713.
Infirm Witness, Examination of (see Witness).
Interpleader—
Application of Bailiff for, 675.
Interpleader summons, 675.
Claim in, 676.
Perishable goods, order for sale of, 677.
Affidavit for such order, 677.
Claim of damages by claimant, 677.
by creditor, 678.
Adjudications in interpleader, 678-680.
Inventory—Of goods replevied, 657.

FORMS AND PROCEEDINGS—*Continued.*
Inventory—
Of goods seized under attachment, 693.
Judgment Summons—To defendant after judgment, 650.
default, 650.
Affidavit for, 642.
for second summons, 642.
Second summons, 642.
Warrant to commit, 671, 672.
Affidavit of service of judgment summons, 743.
Judgment—Against defendant on default of appearance at trial, 710.
on default of notice disputing claim, 710.
defendant on confession after action, 661.
executor or administrator on devastavit, 717.
who admits his representative character and demand, but pleads plene administravit and does not prove it, 718.
where plene administravit alleged and proved, 718.
where demand proved and defendant does not prove administration, 718.
in ordinary cases, 718.
where demand denied, 718.
where representative character denied or release pleaded, 719.
where assets wasted, 717.
Against firm, 706, 707.
garnishee on judgment already entered, 731.
married women, 709.
primary debtor and garnishee, 733.
In favor of garnishee, 732.
Where primary debtor fails and proceedings are continued between debtor and garnishee, 734.
For primary debtor, garnishee or claimant, 735.
On set-off in favor of primary debtor, 735.
Cross-judgment, notice of application to set-off, 740.
Entry of in procedure book (under Creditors' Relief Act) when there is a judgment, 753.
that judgment be revived against executor, etc., 755.
of partial satisfaction where cross-judgment set-off, 740.
For defendant, 754.
on set-off when part satisfied, 755.
for balance of set-off, 740, 755.
Immediate, order for, 710.
In case of counterclaim, 755.
In detinue, 715.
In replevin, 658, 659.
In interpleader, 678, 679, 680.
Non-suit or dismissal, 754.
On motion for speedy judgment, 711.
On award, 754.
Orders for imposition of fines, 673.
Order to suspend order, judgment, or execution, 750.
postponing execution (under section 124), 750.

FORMS AND PROCEEDINGS—*Continued.*
Judgment—
Revived, execution for executor, etc., 755.
execution against executor, etc., 755.
Transcript of to another court, 674.
of affidavit for leave to proceed after, 675.
Judgment Debtor, Examination of (see Judgment summons, 650.
Under Creditors' Relief Act, 741.
When some defendants served and others confessed, 754.
Judgments in replevin, 658, 659.
Jurat—See Affidavits and Oaths, 647.
Jurors—
Summons for, 651.
Panlist of, 691.
Jury—Demand of, 687.
Justices' Convictions, Appeal from—(See Appeals), 724.
Landlord—Claim of, for rent, 755.
Lien—Under Woodmen's Lien for Wages Act, 688.
Line Fences—Forms on appeal under Act respecting (see Appeals).
Mandamus—
Affidavit for, 697.
Notice of motion, 696.
Married Woman—
Judgment and execution against, 709.
Master and Servant—(See Appeals).
Minutes of Judgment (see Judgment)—
Names and Residences of Plaintiff—Demand of, 704.
Declaration in reply, 706.
Notice of application for order for, 705.
Order for, 705.
Next Friend—Undertaking, to be responsible for costs, 685.
Affidavit of execution of, 686.
New Trial—Application for, 703.
Negotiable Instrument—Bond on suit for, when lost, 700.
Non-suit—Judgment of, 754.
Notices—By Clerk, general, 752.
of payment in, of money, 46.
of new trial, 686.
of trial by jury, 686.
of acceptance of money paid into court, 680.
of proceedings being transferred, 687.
to plaintiff of various defences, 752.
to either party generally, 752.
to parties added as defendants, 716.
of preparation of plan of distribution among execution creditors, 637, 638.
By parties, disputing jurisdiction, 633.
in counterclaim, 634.
of demand of jury, 687.
of set-off, 633.
of defence (see Defences), 633.
of counterclaim, 634.
of withdrawal of defence, 714.
of intention to give copies of documents in evidence (under Evidence Act), 751.
of motion for mandamus, certiorari, or prohibition, 696.

FORMS AND PROCEEDINGS—*Continued.*
Notices by parties—
of payment into court in replevin, 658.
of motion to transfer action, 663.
notice instead of writ, on foreign defendant out of jurisdiction, 700.
admitting part of plaintiff's claim, 632, 714.
disputing claim, 632.
of statutory defences, 633.
of defence by executor or administrator, 633.
of judgment under Act Respecting Damages to Land by Flooding, 652.
on replevin summons, 655.
on garnishee summons, 660, 661.
of application for commission to examine witnesses, 670.
of opening commission, 671.
of claim by landlord for rent, 755.
of claim of damages in interpleader, 678.
demand of security for costs, 684.
of motion for security for costs, 684.
requiring trial by jury, 687.
heading and conclusion of notices, 687.
of claim against person alleged to be liable as a member of a firm, 704.
of application for names of members of firm, 704, 705.
refusing to accept money paid into court, 716.
of appeal from justice's conviction, 721.
of abandonment of appeal, 727.
of appeal, 720.
of motion for immediate judgment, 711.
of application for examination of witness de *bene esse*, 670.
of refusal to accept money paid into court, 716.
of application for order for names, etc., of plaintiff's firm, 705.
to produce at trial, 751.
Heading and conclusion of, 687.
Bailiff's notice of sale, 693.
of payment of rent to landlord, 693.
Notices and Warnings—On summonses, 649.
Oaths—Of appraiser in attachment proceedings, 692.
Various forms of, 646-648.
Orders (see Summonses)—
For immediate judgment, 710.
statement of names, etc., of plaintiff's firm, 705.
renewal of summons, 586, 701; affidavit therefor, 701.
security for costs, 685.
substitutional service, 703.
examination of defendant and production of books, etc., 711.
leave to defend unconditionally, 712.
judgment for part of claim, 713.
leave to defend on payment into court, 713.
commission for examination of witness out of jurisdiction, 667.
examination for sick, aged, or infirm witness, 636.

FORMS AND PROCEEDINGS—*Continued.*

Orders for—
certiorari, 698.
prohibition, 696.
discharge of prisoner from custody, 717.
Judge's attaching order in garnishee proceedings, 681.
Of reference to arbitration, 681.
containing special clauses, 744.
On party to pay Clerk's costs, 749.
Postponing execution or judgment, 750.
Staying proceedings, with a view to appeal, 720.
Against Bailiff on charge of extortion, 745.
of commitment thereon, 746.
To bring up prisoner as a witness, 747.
set-off cross judgments, 740.
Transferring cause when entered in wrong court, 682.
On appeal, 724, 725.

Particulars—
Of claim against Clerk or Bailiff and sureties, 632.
against executor, etc., 620.
for damages for flooding land, 632.
in replevin, 654.
of damages in interpleader, 677, 678.
in interpleader, 676.
in detinue, 631.
in contract, 628, 630.
in action of tort, 631.
on a warranty of horse, 629.
promissory note, 629, 630.
bills of exchange, 630.
bond, 630.
covenant, 629, 630.
of dsmages by creditor, 654.
Of defence (see Defences), 632.
Of set-off (see Set-off), 633.
Of counterclaim (see Counterclaim), 634.

Partners—(See Firm).

Pay List—Of jurors, 691.

Payment into Court—Refusal to accept money paid in, 716.
Notice by Clerk to plaintiff of plea of and of tender, 753.

Perishable Property—Bond on sale of, in attachment, 682.

Plea—Of tender, 715.
Of payment into court, 715.

Plan of Distribution—Notice of preparation of, among execution creditors, 637, 638.

Prohibition—
Affidavit for, 695.
Notice of motion, 696.
Order for, 696.

Replevin—Summons in, 654.
Affidavit for Judge's order for, 653.
Affidavit for, without order, 654.
Claim in, 654.
Replevin bond, 655.
Assignment of bond, 656.
Bailiff's return to writ, 656.
Inventory, 657.
Notice of payment into court in, 658.
Judgments in, 658, 659.

FORMS AND PROCEEDINGS—*Continued.*
Replevin—
Writ in reprisal (replus in withernam), 657.
Return—Bailiff's, to writ of replevin, &c.
to execution (see Execut. ns), 693, 694.
Judge's, to certiorari, 600.
Return of goods on hand for want of buyers, 738, 739.
Execution thereon, ven. ex., 738, 739.
Revival of Judgment—
Affidavit for, 643.
By executor or administrator, 644.
Against executor or administrator, 644.
Set-off—Notice of, 633.
Special summons, 648.
Substitutional Service—Order for, 703.
Affidavit therefor, 702.
Suggestion—Of devastavit in action against executor, 334.
Summonses—For interfering with or assault on Bailiff in discharge of duty, 648, 756.
General form of, 648.
For damage to land by flooding, 652.
Renewal of, 586.
In action against foreign defendant abroad, notice instead of summons, 700.
In suit by clerk for fees, 749.
replevin, 654.
interpleader, 675.
Order for renewal of, 701.
Affidavit for, 701.
Memo. on, in wages cases, 733.
Notices and warnings on, 649.
Notice endorsed on, to change place of trial, 649.
Special, 648.
To executor, etc., when allegation that assets have come to his hands since judgment, 719.
defendant after judgment, 659.
default, 650.
jurors, 651.
witnesses, 652.
garnishee and primary debtor after judgment, 659.
before judgment, 660.
Warning on summons to primary debtor, 579.
Security for Costs—
Demand of, 684.
Notice of motion for, 684.
Affidavit for, 685.
Order for, 685.
Bond for, 683.
Stenographer's oath, 648.
Tariff of Fees—53-55, 611-619.
Of Bailiff, 614, 619.
Clerk, ,611.
witnesses and appraisers, 617.
fees in suits under $10, 618.
Tender—Plea of, 715.
Tort—Particulars of claim in actions of, 631.

FORMS AND PROCEEDINGS—*Continued.*
Transcript of Judgment—674.
Affidavit for leave to proceed after, 675.
Unclaimed Money in Court—Form of verified list of, 690.
Undertaking—By next friend, to be responsible for in action by minor, 685.
Venditioni Exponas—
Writ of to Bailiff, 738, 741.
Sheriff, 739.
Warrants—
Of commitment on judgment summons on default of appearance, 671.
after examination, 672.
for contempt in open court, 673.
Renewal of, 697.
Of attachment under Woodman's Lien for Wages Act, 688.
Withdrawal of Defence—Notice of, 714.
Withernam—Order in (see Replevin), 657.
Woodman's Lien for Wages Act—
Attachment under, 688.
affidavit for, 688.
Claim of lien, 689.
affidavit on, 689.
Writ—of replevin, 654.
FRANCHISE
Actions for, not maintainable in D. C., 84, 88.
Definition of, 88.
FRAUDULENT CONCEALMENT
Limitation of action for, 277.
FRAUD—Setting aside judgment obtained by, 342.
By debt collectors; penalty for using misleading forms, 40.
FRAUD OR BREACH OF TRUST
Committal for (see Judgment Debtor), 506.
FREEHOLDERS
Definition of, 34.
FRIENDLY SOCIETIES
When jurisdiction in action against ousted, 69.
GAMBLING DEBT
Action for, prohibited in Division Courts, 93.
What constitutes, 93-95.
GAOLER
Duty of on commitment of judgment debtor, 515.
GARNISHMENT OF DEBTS—See provisions of Rules 26-28.
Rights of creditor as to, 396.
Requisites of claim, 396-398.
Debts attachable, 399-402.
Claims not attachable, 402-412.
Rights of other parties, 406, 407.
by assignment,, 406.
solicitor's lien for costs, 407.
where garnishee non-resident in Ontario, 414.
Exemption of Wages, 408-412, 424.
Where debt contracted for board and lodging, 408-412, 424.
Where money necessary for support of debtor's family, 410, 411.
Where debtor unmarried or having no family dependent on him, 411.
Memorandum on summons in wages cases, 412, 424.

GARNISHMENT OF DEBTS—*Continued.*
Facts to be set forth in particulars, 412.
Warnings to be endorsed on summons, 409, 412.
Where Claim is a Judgment—
Issue of attaching order, 413.
Affidavit therefor, 413.
Service of order, 414.
Effect of, 415.
Rights of creditor as against assignee, 415.
Securities for the debt not bound, 417.
Service to bind all debts, 414-416.
Mode of service, 414.
Warning to be endorsed on order, 415.
Garnishee may pay into court in his own discharge, 416.
Payment otherwise than into court void, 417, 418.
Liability to pay the same again, 418, 419.
Summons to garnishee 419.
Court out of which summons to issue, 419.
When returnable, 419.
Service to be made on garnishee and primary debtor, 420.
Mode of service, 420.
where garnishee is a corporation whose head office is not in the province, 421.
The Creditors' Relief Act, 416.
Garnishing corporations, or firm, 214.
Defences by garnishee and primary debtor, 421.
Judgment at hearing, 422.
Effect of judgment, 422.
Judgment may be for debt or when it becomes due, 423, 425.
Proof of debt by garnishee requisite, 422.
Form of judgment prescribed, 423.
Where claim is not a Judgment, 423.
Court out of which summons to issue, 423.
Where garnishee not in the province, 424.
Particulars of claim required, 423.
Memorandum to be annexed, 424.
Transfer of proceedings when entered in wrong court, 426.
Service of summons, 424.
Judgment against primary debtor and garnishee, 424.
Proof of debt required, 424, 425.
Married woman liable to judgment, 426.
Summary judgment applicable, 426.
General Provisions—
Garnishee to give notice disputing liability, etc., 427.
In default, Judge may give judgment, 427.
All parties interested may show cause, 427.
Parties intervening, 428, 432.
Controversy between primary debtor and garnishee, 427, 429.
What defences may be set up, 428.
Causes why debt should not be paid over, 428.
Notice of defence by garnishee, 427.
Stotutory defences, set-off, etc., 427, 429.
Notice of defence, 427, 429.
Judgment against primary debtor and garnishee, 422, 425.
Service of summons to bind debt in all cases, 430, 414.
Payment into court, effect of, 414, 416, 418.
Payment otherwise than to creditor or into court void, 417, 418.

GARNISHMENT OF DEBTS—*Continued.*
Effect of payment by garnishee under order, 430, 431.
Costs of proceedings, 427, 429, 430.
Execution against garnisbee not to issue until debt due, 423, 425.
Application to discharge debt from attachment, 430, 431.
Order discharging debt, 430, 431.
Security by primary creditor may be ordered, 431.
Requisites of bond, 432.
Action upon bond, 432.
Adjudication on Conflicting Claims, 427, 428, 433.
Who may be claimant, 432.
On assignment of debt, 433.
On assignment for benefit of creditors, 433.
On attachment against absconding debtor, 433, 434.
On Mechanic's Lien, 433.
On operation of Creditor's Relief Act, 434.
Interpleader on conflicting claims, 435.
Proceedings against partners, 214.
When Sheriff may intervene, 433, 434.
Adjudication on claims, 432.
Right to jury, 384, 432, 435.
Quære whether Judge may defer judgment in trustee cases, 324.
Debt Attachment Book—None now required, 436.
Judgment Summons—Examination of garnishee on, 501.
GARNISHMENT OF SMALL DEBTS
In Supreme Court—Proceedings in Division Courts thereon, 436.
GARNISHMENT OF CIVIL SERVANTS' SALARIES, 405.
GENERAL RULES AND ORDERS
Power of Board of County Judges as to, 567-570.
GOODS
Judgment on contract for, payment in, 125.
Liable to seizure under execution, 472.
Penalty for interfering with when under seizure, 559.
GUARANTEE COMPANY
May be surety for officers, 39.
HEARING (see Trial)
Judge may adjourn, 257-259.
Postponement of in cases tried by jury, 259.
Who may appear as agent at, 260.
HOLIDAYS
What are, 25.
Judgment entered on, effect of, 25, 230, 323.
What proceedings may be taken on, 25, 230, 323.
Home Court and *Home Division*—
Defined, 585.
HOSTILE WITNESS
Definition of, 295.
HUSBAND AND WIFE (see Married Women)
Estate of, when held by entireties, not exigible under execution, 491.
ILLEGAL PROMISSORY NOTES
Action for not maintainable in D. C., 97.
ILLEGAL SEIZURE
Action for, 470.

IMMEDIATE JUDGMENT
May be ordered, 235.
Individual carrying on business in a firm name, 215, 216.
INFANCY AND LUNACY
As affecting defence of Statute of Limitations, 279.
INFANT
May sue for wages, 132.
In other cases must procure the attendance of a next friend, 132, 133, 595.
Undertaking by next friend, 133, 594.
Has 6 years after majority to bring suit, 133.
Not liable for devastavit as executor, 133.
Doctrine of contributory negligence not applicable to, 133.
Cannot be a common informer, 133.
Liability of parent for maintenance of, 133.
Ratification of contracts made by, 291.
Liability for fraudulent representation of age, 133.
INJUNCTION
When to be granted instead of prohibition, 71.
Division Courts no power to grant, 126.
Effect of provisions respecting, 126.
INSPECTION
Of Documents—Proceedings to obtain, 296-298, 598.
Of Property—Judge may order, 318, 319, 394, 595.
Procedure on, 318.
Of subject matter of action may be ordered by Judge, 318.
by jury, 394.
INSPECTOR OF DIVISION COURTS
May grant leave of absence to officers of courts, 27.
Appointment, duties, and investigations by, 58-61.
Enquiry into officer's conduct, 59, 60.
INSOLVENCY
Definition of, 37.
Procedure when officer's sureties become insolvent, 37.
Action not to abate on, 10, 482.
Proceedings on, 482.
Insolvent's estate, jurisdiction as to claims against, 98.
INSTALMENTS
Judgment may be ordered to be paid by, 338, 339, 346.
How payable when no time for payment fixed by order, 339.
INSTRUMENTS IN WRITING
Separate actions may be brought for principal and interest on, 140.
Insulting Judge in court, etc., 555.
INTEREST (see Disqualifying Interest)
Deprives Bailiff of right to interplead, 19, 22, 58, 538.
On judgments, 9.
May be sued for separately from principal under written contracts, 140.
Where a sum included for, does not oust the jurisdiction, 97, 107.
Allowance or disallowance of, 324.
at what rate, 324.
Special statutes governing, 324-332.
The Judicature Act, 324.
The Bills of Exchange Act, 327.
The Interest Act, 328.
The Money Lenders Act, 331.

INTEREST—*Continued.*
The Bank Act, 331.
Post diem interest, 331.
pnwnbrokers, 332.
chartered banks, 331, 332.
on nrrears on mortgages, 329, 331.
loan and other corporations, 331.
compound interest, 332.

INTERPLEADER—See provisions of Rules 8-12.
Agreement not to appeal in, 356.
Appeal in, 355, 548.
Jury in—right to demand, 383, 545.
C. editors entitled to share in benefits secured by, 549.
Claims of landlords nnd others, how adjusted, 540, 549.
Definition of landlord, 535.
agent, 535.
joint-tenancy, 535.
coparcenary, 535.
tenant in common, 535, 536.
Principles of, 537.
One application only when several creditors, 537.
Rights of parties to defence and as to costs, 545, 548.
Abandonment, 539, 551.
Goods must be taken in execution, 540.
On claim by landlord for rent (see Landlord), 540.
Application for summons, 536, 540.
requisites of, 540.
Issue of summons, 541.
Court from which summons may issue, 541.
Issue to be tried, 541.
Change of place of trial in, 541.
Stay of proceedings, 542.
Service of summons, 542.
Particulars of claim, 542.
of damage claimed, 543.
Deposit for costs, 543.
Security for costs in, 546.
Perishable Property—Order for sale of, 543.
liability for sale, 543.
advertisement of sale, 544.
Claimant may regain possession, 544.
prevent sale by making a deposit, 544.
Judge must adjudicate on the claim, 545.
Costs of the proceeding, 545.
Damages, etc., arising out of the execution of process, 546.
Liability of Bailiff, 547.
New trial, application for, 545, 547.
Summons may issue in name of creditors as plaintiffs, 548.
Contest by subsequent execution creditors of right of prior creditor, 548.
Judgment need not be proved, 548.
Amount of damages claimed do not affect Judge's power to adjudicate, 546.
Defences by Bailiff and creditor, 548.
Payment into court, 549.
If damages not adjudicated upon, claimant barred from recovery, 597.

INTERPLEADER—*Continued.*
Interpleader on conflicting claims in garnishee proceedings, 435.
The Creditor's Relief Act, application of, 549.
Con. Rules of Supreme Court, application of, 549.
INTERPRETATION, 1, 2, 17.
INTESTACY
Limitation of actions for distributive shares on, 275.
IRREGULARITY
Not a ground for prohibition, 572.
IRREGULAR JUDGMENT
Setting aside, 233.
Not a mere non-compliance with rules, 230, 572.
JOINDER OF CLAIMS
(See Combining Claims), 98-108.
JOINT-DEBTORS (see Partners).
Judgment against one, effect of, 7.
Proceedings against, 203.
One or more may be sued, 203.
Effect of judgment in such case, 203, 205.
Debtor sued may set up any defence, 204.
Rights to contribution, 203, 205.
Property of liable to seizure, 207-214.
JOINT STOCK COMPANIES
Judgment and execution against shareholders, 454.
JUDGE
To decide according to equity and good conscience, 125.
Discretion of, how to be exercised, 11.
Not to practise as counsel, etc., 23.
Senior and junior may preside in County Courts, General Sessions and Division Courts at the same time, 23.
To preside over Division Courts, 20.
Deputy, appointment and powers of, 20, 21, 23, 24.
Liability of, 21.
May act in other counties than his own 20.
Jurisdiction extends to territory added to his county, 20.
Adjournment of court on non-arrival of, 25.
May suspend Clerk or Bailiff, 27.
Leave of absence to Clerk or Baillff, 27.
Responsibility of as to officers' duties and security, 27, 28.
Disqualified by interest in subject of litigation, 74.
Actions against, may be brought in adjoining county, 181.
To try causes in a summary way, 323.
Powers of, at trial, 323, 338.
May order times and proportions of payment, 338, 346.
Powers of, in jury cases, 259.
Junior Judge, 20.
Effect of death of, 23, 25.
JUDGE'S JURY
May be called to try disputed facts, 391.
Fees payable to, 391.
JUDGE'S NOTES
Of evidence (see Appeal), 254.
JUDGMENT
Defined, 450, 451.
May be entered on a holiday, except Sunday (see holidays), 323.

JUDGMENT—*Continued.*
Effect of (see Res Judicata), 5-9.
When interest allowed on, 9.
Action on, 9, 276.
Foreign, action on, 7, 10.
Revival of (see Revival of Judgment), 10, 482.
Finality of, 5-9.
Amendment of, 10, 323.
Execution, when issuable on (see Execution), 450.
When decision of Judge becomes a, 18.
Correcting error in, 10.
Entry of, on holiday, 25, 230.
In replevin, 119.
May be in payment for money, though contract payable in goods, 125.
To be according to equity and good conscience, 125.
In action for balance of account to be full discharge of debt, 103, 141.
Against one or more joint-debtors, effect of, 7.
firm (see Partners), 212-214.
By default on specially endorsed summons, 225.
On counterclaim when plaintiff does not appear, 274.
On default of defendant appearing at trial, 256.
But not when given for unliquidated damages, 256.
Against executors and administrators, 332, 338.
To be entered in procedure book, 605.
Setting aside—When defendant may be let in to defend, 230, 249.
Not to be set aside for matters of form, 571.
Application to set aside, 230.
costs of, 232.
On defective affidavit of service, 230.
By default, 225.
When judgment for too much, 232.
Practice as to, 233.
Motion for (see Motion for Judgment), 235.
counsel fees allowed on, 248.
Against defendant at trial in default of appearance, 233, 234.
To be final and conclusive, 125, 256.
May be postponed, 257-259.
Against executors and administrators (see Executors), 332-338.
May direct times and proportions of payment, 338, 339.
May be payable by instalments, 338, 346.
when such judgment payable, 346.
In appeal, 363.
enforcement of, 363.
On questions of fact submitted to jury, 391.
In Garnishment Proceedings (see Garnishee).
Against married woman, 229, 241, 338.
On Award of Arbitrator, 441.
Entry thereof by Clerk, 441.
Execution thereon, 442.
Entry of satisfaction on, 478, 479, 480.
Irregularly signed, not a mere non-compliance with rules, 230, 572.
When execution may issue on, 450, 464.
Effect of, when obtained by covin, 342.
On counterclaim when amount beyond jurisdiction, 273.
Cross-judgment may be set-off, 478.

JUDGMENT—*Continued.*
When Judge may give judgment at trial without proof, 256.
On Sheriff's certificata of amount uncollected under Creditors' Relief Act, 481.
Entry of sama in Procedura Book, 482.
JUDGMENT BY DEFAULT
On Specially Endorsed Summons, 225.
Requisites of clnim and servlce, 225-228.
Notice disputing clnlm, 229.
To he entered within onc month, 229.
Notice to be given to defendant, 229.
Where part only is in dispute, 225.
Against married woman, 229.
Forms of, 709.
Summons nnd affidavit of service to be filed, 230.
On defendant's failure to appear In court, 233-234.
Effect of, 235.
Proof required, 234.
JUDGMENT DEBTOR
Examination of, 499.
garnishee, 501.
partners, 501.
corporations, 501.
Affidavit required for summons, 499, 502.
Nature nnd effect of process against, 500.
Who liable to examiaation, 500, 501.
Who not liable, married woman, 500.
Corporations, 501.
Members of firm, 214.
Where examination to be held, 502, 504, 499.
Scope of examiantion—Touching estate and effects, 502.
Disposal of property, 502.
Circumstances under whleb debt was contracted, 503.
As to wbat debts nre owing to hlm, 502.
Service of summons, 503, 505.
Payment of expenses and mileage, 503, 593.
Evldence of other witnesses, 504.
Second examination, 504, 505.
grounds for, 504, 505.
Judgment debtor's list, 504, 607.
Judgment debtor's book, 59, 603.
Commitment of—Grounds for, 505, 511.
For nou-attendance, 505, 506.
Must be wilful, 509.
Refusal to answer proper questions, 505, 506.
Fraud or breach of trust, 506.
Gift, delivery or transfer of property, 507.
Means nnd ability to pay, 507.
Non-payment pursuant to order, 508.
Grouads for when principal and interest sued for sepnrately, 510.
In Supreme Court, 510-512.
What is wilful non-attendance, 509.
Order for party to he committed, 508.
Order and warrant—Requisites of, 508, 509, 512, 594.
To whom warrant to be directed, 512-513.

JUDGMENT DEBTOR—*Continued.*
Arrest of debtor, 512, 513.
Life of warrant, 512, 594, 607.
Renewal of, 512, 514, 594, 607.
Only one renewal, 594.
Warrant to be delivered to gaoler, 515.
Constables to aid in execution of warrant, 515.
Term of imprisonment, how computed, 515.
Discharge of debtor, 515, 610.
on payment on arrest, 515, 516, 610.
payment while in custody, 515, 516.
on order of Judge, 515.
Judge may rescind order to commit, 516.
Imprisonment does not extinguish the judgment, 516.
Annual return of commitments to be made by Clerk, 517.
Costs of examination, 504.
Debtor summoned without sufficient grounds may be compensated, 509, 510.

JUDGMENT DEBTORS' BOOK
To be kept by Clerk, 59, 603.

JUDGMENT SUMMONS
See Judgment Debtors, 499.

JUDICIAL FUNCTIONS
Cannot be delegated, 22.

JUDICIAL OFFICERS
Liability of, 21, 22.

JUNIOR COUNTY
Separation of from senior county, 17.
Establishment of courts in, 17.

JUNIOR JUDGE
To preside over Division Courts, 20.
Appointment of not to prevent senior Judge from acting, 20.

JURISDICTION
Abandoning excess, 103.
Of Judge extends to territory added to his county, 20.
Acquiescence in, what is, 22, 164.
Cases in which Division Courts have none, 64.
Scope and extent of in Division Courts, 64, 65.
Absence of, deprives Judge of all powers, 65.
except as to costs, 65.
In cases of claims against estates of deceased persons, 99.
Remedy where unauthorized exercise of attempted (see Prohibition), 65.
Remedy where right of parties denied (see Mandamus), 81.
Title to land—jurisdiction ousted by, 64, 84.
When ousted, 84.
When not ousted, 85.
Procedure, 86.
Exceptions, 87.
Ousted by title to corporeal or incorporeal hereditaments, 87.
When toll custom or franchise in question, 88.
When validity of devise disputed, 88.
Actions for malicious prosecution, 88.
libel, slander and criminal conversation, 89.
seduction, breach of promise of marriage, 90.
Actions against justices of the peace, 90-92.

JURISDICTION—*Continued.*
Contracts Ousting Jurisdiction, invalid if objection taken, 164.
By agreement to settle disputes in a particular way, 68.
Under the rules of Friendly Societies, 68.
Other cases where jurisdiction ousted, 92.
Cases to which it is extended, 97.
Personal actions, 97, 99.
By consent, 97, 101.
Actions on contract, 101.
Where amount ascertained by signature of defendant, 97, 104.
In actions against absconding debtors, 98.
In combined claims for different causes, 98, 108.
In replevin, 99, 108.
In detinue, 100.
Where defendant not in the province, 165.
Equitable relief may be granted, 126-132.
Attachment and sequestration, 132.
Transfer to Supreme Court, where defence involves matter beyond jurisdiction, 141.
Extent of power to grant equitable relief, 126-132.
Does not extend to injunctions, 126.
In separate actions for principal and interest under written contracts, 97, 104.
In actions for balance of unsettled account, 97, 101.
In actions against persons out of the province, 165.
In actions against foreign corporations, firms and individuals, 200.
In actions against foreign partnerships, 168.
Notice disputing, 164, 229.
In attachment proceedings (see Absconding Debtors), 517.
Costs may be ordered though no jurisdiction, 445.
Under School Acts, 123.
Under Damage by Flooding Act, 125.

JURORS (see Jury)
Who may be, 385, 387.
How selected, 385, 386, 387.
How summoned, 385, 386, 387.
Copy of voters' lists to be furnished by Clerk of the municipality, 387.
Penalty on default of municipal Clerk, 389, 390.
If municipality a party to action, jurors to be selected elsewhere, 386.
Number to be summoned, 387.
Service of summons, 387, 388.
Challenging, 388.
Penalty for disobeying summons, 389.
Fees of, 391, 396.

JURY (see Jurors)
In replevin (see Replevin), 383.
Misconduct of, ground for new trial, 344.
The right of challenge, 388.
Cases for, to be set down separately on list, 390.
Five jurors to be sworn, 390.
Judge may call tales, 391.
Fees payable to in such cases, 391, 392.
May be ordered by Judge to try disputed facts, 391.
Cases in which jury may be demanded, 383-384.
Powers of Judge in cases tried by, 259.

JURY—*Continued.*
Effect of withdrawal of juror, 341, 394.
Judge may order inspection of property by, 394.
In garnishment proceedings, 384, 432.
In interpleader proceedings, 383.
Demand of, 383.
Notice for imperative, 384.
Prepayment of fees of, 384.
Must be summoned when demanded, 385.
Order in which cases to be tried by, 390.
In cases transferred from one division to another, 383.
List of cases to be tried by, 390.
Disagreement of, procedure in, 392.
Power of Judge—may non-suit, dismiss action and submit questions to, 393, 394.
on granting new trial, 346.
On adjudication of adverse claims in garnishment, 435.
Fees payable to, 396.
Return by Clerk of cases tried by, 395.
County treasurer to repay Clerk the fees of, 396.

JURY FUND
Fees payable for, 63, 394.
Return of by Clerks, 63.

JUSTICES OF THE PEACE
When actions against not maintainable in Division Courts, 64, 90-92.
Notice of objection requisite, 90.
Appeals from convictions by (see Appeals), 365-370.

LAND
Actions for recovery of not maintainable in Division Courts, 64, 84.
Transfer to Supreme Court when title in question, 141.
Equitable execution against, cannot be granted, 127.
Execution against (see Execution Against Land), 484.
Actions for flooding, 125.

LANDLORD (see Interpleader)
Definition of, 535.
Who deemed "agent" of, 535.
Claims of, to goods seized in execution, how adjusted, 536, 549.
Judge to adjudicate on claims of, 536.
Provisions as to rents due to, 549.
Claim for rent by, 550.
What goods subject to, 550.
How affected by abandonment of seizure by Bailiff, 551.
Seizure must be made, 552.
Notice of claim by landlord, 552.
Time for giving notice, 553.
Must state terms of holding, 553.
Extent of lien for rent, 553.
How Bailiff to proceed, 553-555.
Distress, for rent, by Bailiff, 554.
Fees of Bailiff on, 554.
Where replevin is made of goods distrained, 555.
Claim of, to be paid first, 555.

LANDLORD'S WARRANT
May be executed by Bailiff, 58.

LEGISLATURE
Delegation of authority by (see Delegation of Authority), 569.
Power of, over Division and other courts, 20-21.

LEAVE
To bring action in division adjacent to defendant's residence, 163, 585.
Affidavit for, 585.
LEAVE OF ABSENCE
May be granted to Clerks and Bailiffs, 27.
LEAVE TO DEFEND
Application for, 240.
Unconditionally (see Motion for Judgment), 242.
Conditionally, 248.
May be given at any time before judgment, 240.
Notice of, by Clerk, 250.
LEAVE TO ISSUE EXECUTION
When and in what cases necessary, 10, 482.
Proceedings thereon, 482.
LEGACIES
Limitation of actions for, 277
LIABILITY OF JUDGE (see Judge), 21-23.
LIBEL
Action for, not maintainable in Division Courts, 64, 89.
LIEN
Of Bailiff for fees on execution, 406, 407.
Of landlord for rent, 540-549.
LIEUTENANT-GOVERNOR
May regulate holding of courts in certain cases, 18.
LIMITATION OF ACTIONS (see Statute of Limitations), 271.
Against officers, 276.
LIMITATION OF PROCEEDINGS ON JUDGMENTS, 10.
LIMITS OF DIVISIONS (see Courts)
Number and designation of, 3.
Alteration in, how made, 14-15.
Provision on separation of counties, 17, 18, 19.
LISTS OF CASES FOR TRIAL
To be prepared by Clerk (see Trial Lists), 254, 390.
LOAN COMPANIES
When jurisdiction ousted in actions against, 60.
LOST NOTE
Practice in action on, 184.
LUNACY
A disability under Statute of Limitations, 279.
LUNATIC
Service of process on, 199.
MALICIOUS PROSECUTION
Action for not maintainable in D. C., 64, 88.
Definition of, 88.
MALPRACTICE
Limitation of actions for, 276.
MANDAMUS
Powers of Division Courts to grant, 81.
When order for writ be granted, 81.
Application for, 83.
MARRIAGE
Breach of promise of, no action in D. C. for, 64, 90.

MARRIED WOMEN
Judgment by default against, 229.
Particulars of claim in action against, 229.
Summary judgment against, 241.
Examination of on judgment summons, 500.

MASTER AND SERVANT
Right of servant to recover wages, 134.
Rights of as to employment and dismissal, 134.
Terms of hiring and dissolution of contract, 134.
Contracts between parent and child, 137.
brother and sister, 137.
Services rendered in expectation of marriage, 137.
Proceedings on appeal under the Act respecting, 389.
Dismissals of servant, 134.
Illness no ground for, 136.
What are grounds for, 134-136.

MATTERS OF FORM
Proceedings not to be set aside for, 571.

MEASURING OR SURVEYING PROPERTY IN DISPUTE
Judge may order, 595.

MECHANIC'S LIEN
Effect of in garnishment proceedings, 433.

MILE
Includes fraction of a mile, 585.

MILEAGE
Payment of to judgment debtor, 503.
How computed, 203.
Affidavit of to be made, 203.

MINOR (see Infant)
May sue for wages, 132.

MISCONDUCT
Of officers—Penalty for, 560, 606.
what is, 560.
Commitment for, 561.
Liability of sureties for, 31.

MISJOINDER AND NONJOINDER
Of parties (see Adding Parties), 217, 219.
Misleading forms, use of for collection of debts, 40.

MISREPRESENTATION
Limitation of actions for, 277.

MISTAKE
By Clerk, effect of, 3.
Judge not liable for, 21.

MONEYS IN COURT (See Suitors' Moneys)
Penalty for person wrongfully holding, 49.
Clerk not to receive except in suits, in his own court, 46, 606.

MOTION FOR JUDGMENT
Cases in which order for speedy judgment may be made, 235, 236.
Affidavit in support of motion, 237.
Application for, 239.
Notice of motion, 238, 239.
Service of, 239, 240.
Order for.
against married woman, 241.
may be set aside, 249.

MOTION FOR JUDGMENT—*Continued.*
Setting up defence, 236, 241, 242.
as to part, 236, 247.
Leave to defend conditionally, 248.
unconditionally, 245.
Money may be brought into court, 247.
Examination of defendant on, 247.
Production of documents, 248.
Costs, and counsel fees, 248, 449.
Only for plain and simple cases, 245.
MORTGAGE (see Equity of Redemption)
Separate actions may be brought for principal and interest on, 140.
Limitation of actions upon, 275.
Seizure of (see Execution), 458, 475.
Registration of Notice of seizure, 458, 460, 475.
MORTGAGED LANDS
Sales of under execution, 474.
MORTGAGEE
Purchase by at sale of land under execution, 461.
MUNICIPALITY
To furnish accommodation for court room, 12, 13, 14.
MUNICIPAL CORPORATIONS
Limitation of actions against, 276.
MUTUAL INSURANCE COMPANIES
Appeal in actions by, 348, 357.
NEAREST DIVISION
To defendant's residence, 163.
When action may be brought in, 163.
NEGLIGENCE
Of Bailiff, penalty for, 51, 57, 562.
NEXT FRIEND.
In action by infant, attendance of must be procured, 132, 133.
NEW COUNTIES, 17-19.
NEW TRIAL
Stay of proceedings on, 602.
Application for, 339-340, 601-603.
proceedings on, 339.
Grounds for granting, 341-344.
Power of Judge on, 345.
Proceedings on and subsequent to application, 345, 601.
Order may be conditional, 346.
Clerk to forward notes of evidence to Judge on application, 340, 602.
Appeal lies from order granting or refusing, 350.
After appeal, 363, 600.
In interpleader, 545, 547.
Filing application is stay of proceedings, 340, 345, 602.
NON-ATTENDANCE
Commitment for on judgment summons, 505.
Non-joinder of parties, 217-223.
NON-PERFORMANCE OF DUTIES
By officers—liability of sureties for, 30, 31.
NON-SUIT
Effect of, 252, 254.
Judge may order, 251, 252.
in jury cases, 346.
Plaintiff cannot insist on, 341.

NOTES OF EVIDENCE
In appealable cases (see Appeal), 254.
Certified copies to be furnished by Clerk on appeal, 357, 358.

NOTICES (see Forms)
Requisites of, 181, 250, 606.
Must be sent by post prepaid and registered, 606.
To be endorsed on summonses, 191, 400-412.
To be in writing, 181.
By Clerk, when deferred judgment given, 324.
Of withdrawal of defence to be given by Clerk to plaintiff, 250.
Of tender and payment into court, 261.
By plaintiff of intention to proceed on plea of tender, 261, 267.
Of intention to proceed on payment into court, 261, 267.
By Clerk of defence of tender and payment into court, 261.
Of statutory defence, how served, 271.
Of admission of part of set-off or counterclaim, 273.
Of admission of debt by garnishee, 427.
By Clerk of decision on postponed judgment, 323.
To creditors by executors, 335.
For jury, 383.
Disputing jurisdiction, etc., voids consent to jurisdiction, 164, 165.
By creditors of claims against absconding debtor, 526.
Of landlord's claim for rent, 549.
By Clerk of payment of money, 45.
Of sale of goods under execution, 493.
Of sale of lands under execution, 488.
Notices of Defence—Disputing jurisdiction, 175.
Disputing claim, 225, 249, 250.
Notice to creditors by executor, 335.
In garnishment, 427.
Of statutory defences, set-off, etc., how given, 271.
Entry of may be allowed at any time before judgment, 249.
Notice to be given to Clerk in such cases, 249.
Requisites of, 250.

NOTICE DISPUTING JURISDICTION
Requisites, and service of, 175.

NOTICE OF ACTION.
Not now necessary, 567.

NOTICE OF ADMISSION
Of part of claim or defence, 229.

NOTICE OF APPEAL
When to be given, 362.
From Justices' convictions, 367.

NULLA BONA
Return of, 467.

OATHS AND AFFIRMATIONS

OBSTRUCTING OFFICERS, 559.

OFFENCES AND PENALTIES (see Penalties), 555.

OFFICERS OF COURT (see Clerks and Bailiffs)
Actions by and against, 179, 180, 564.
Limitation of actions against, 34, 276, 564.
Protection of (see Protection), 276, 564.
Offences against, 555-559.

OFFICE
Of Clerk, where to be kept, 10, 11.

ORDER FOR SALE
Of perishable goods (see Perishable Goods), 123, 532, 543.
ORDERS OF COURT
For entry of satisfaction on judgment, 478, 479.
To enforce payment of fees, 50.
For renewal of summons, 196.
Setting aside judgment, 230, 233.
Postponing trial, 257.
For inspection, preservation or detention of property, 296, 318.
For commission to take evidence, 307.
For committment, 505.
Must be entered in Procedure Book, 41.
Ouster of jurisdiction by contract, 68.
PAPERS
Of office, disposal of on separation of county or transfer of proceedings, 18, 48.
To be held by Clerk of the Peace on death or removal of Clerk, 48.
Penalty for wrongfully withholding, 49.
Sent by mail must be registered, 202, 600, 606.
PARENT AND CHILD
Contract between, 137.
No liability of mother to maintain children, 133.
PARTICULARS OF CLAIM
Requisites of, 181.
Entry of with Clerk, 181.
To be numbered as received, 181.
Amendment of, 183.
Plaintiff to furnish, 181.
To be annexed to summons and served, 190.
In actions for devastavit, 334, 336.
In replevin, 116.
In garnishment of wages, 412.
In interpleader proceedings, 542, 586.
To be embodied in application for interpleader, 542, 582.
PARTIES (see Adding Parties), 217-223.
To actions against sureties, 32.
Mis-joinder and non-joinder of, 218, 219.
To garnishment proceedings, 428.
To action by assignee of a debt, 189.
Alien plaintiff, 99.
PART OF CLAIM
Admission of, 229.
Judgment for, 229.
Execution for; may issue without prejudice to rights as to remainder, 229.
PARTNERS
Proceedings by or against, 203-214.
One or more persons jointly liable may be sued, 203.
Non-joinder will not prevent person sued from setting up any defence, 204.
Effect of judgment in such case, 204.
Right of partner sued to contribution, 203.
Bailiff may seize property of firm on certificate of Judge that the debt was a strictly partnership transaction, 207, 473.
Liability of partnership property to execution, 207, 473.

PARTNERS—*Continued.*
May sue or be sued in firm name, 207, 208, 209.
Effect of suing in firm name, 208-214.
Judgment and execution against firm, 212, 214, 473.
Actions against foreign firms, 165-167.
Application to have party adjudged a partner, 212.
Who may be deemed to be partners, 212, 213.
Judgment summons against, 214.
Limitation of action for breach of trust by, 287.
Garnishment proceedings against, 214.
Rules of Supreme Court as to service of, 217.
Service of summons on firm, 208, 210, 211.
Demand of names of members of firm, 208, 212.
Sale of goods of, 473.

PATENT
Validity of cannot be tried in Division Courts, 64, 88.

PAYMENT
Of money under compulsion of legal process not recoverable, 8.
Otherwise than in money: judgment on contract for, 125.
Before court: what costs allowed on, 449.
Of execution before sale, 478.
to plaintiff, effect of, 479.

PAYMENT INTO COURT
In replevin, 119.
In detinue, 266, 595.
On motion for summary judgment, 236, 247.
With plea of tender (see Tender), 261.
In satisfaction of plaintiff's claim, 268.
Clerk to give notice of, 268.
Plaintiff to give notice of intention to proceed or proceedings will be stayed, 268.
Clerk to give notice to defendant thereof, 606.
If notice not given in time, trial may be adjourned, 257.
Costs if no further sum recovered, 268.
Stay of proceedings may be removed, 271.
In garnishment proceedings, 414, 417, 418, 425, 430.
By Bailiff or creditor when damages claimed in interpleader, 549.

PARTY
Defined, 584.

PENALTIES
For Bailiff's neglect, 57.
For wrongfully holding books, etc., of Division Courts, 49.
For breaches of the peace during court, 555.
For disobedience to summons by juror, 389.
Against Clerk of municipality for failure to furnish voters' lists, 389.
For misconduct, extortion or misconduct on the part of officers, 560.
For contempt of court, 555.
For interfering with Bailiff, 559.
with goods under seizure, 559.
Limitation of actions for, 560.
How enforced 559.
For witness disobeying subpœna, 302.

PENALTIES AND FORFEITURES
Relief against, 126, 130.

PERSON
Defined, 584.

PERSONAL ACTIONS
Jurisdiction in (see Jurisdiction), 97, 99.

PERSONA DESIGNATA, 349.

PERISHABLE GOODS
Sale of, 532.
Bond on, 533.
Order for sale of, 533.
Liability for sale, 533.
Advertisement of sale, 533.
Query as to right to sell perishable goods replevied, 123.

PLACE OF TRIAL (see Territorial Jurisdiction)
No stipulation for, other than provided by D. C. Act valid, if jurisdiction objected to, 164.
May be in division where money payable, subject to change, 169.
Application to change, 169.

PLACE OF BUSINESS
Defined, 162, 201, 202.

POSTAGE
On papers to be costs in the cause, 202.
To be forwarded by Clerk when papers sent to the Judge, 202, 600, 606.

POSTPONEMENT (see Adjournment)
Of Trial—Powers of Judge as to, 257.
In garnishment proceedings, 435.
Of Execution—Grounds for, 346.
Of Judgment—Decision may be given when convenient, 323, 324.
But quære as to garnishee cases, 324.

POWERS OF COURTS (see Jurisdiction)
Discretionary or enabling (see Discretion), 11.
As to equitable relief (see Equitable Jurisdiction), 126-130.

PRACTICE AS SOLICITOR
Deputy Judge may, 24.

PRESERVATION OF PROPERTY
Order for may be made for, 318, 595, 596.

PRINCIPAL AND INTEREST
Separate actions may be brought for, 140.
Commitment of judgment debtor in such actions, 510.

PRIORITY OF EXECUTION (see Execution), 466.

PRIVILEGE
From arrest: of witness, 295.

PRIVILEGED COMMUNICATIONS (see Production of Documents), 296-298.

PROCEDURE BOOK (see Books).
To be signed by Clerk on each page, 41.
Entries to be made therein, 41.
in to be received as evidence, 41.
Form of, 42
Foreign—Form of, 42, 59.

PROCEDURE—155.
How far principles of in Supreme Court applicable, 129.

PROCEEDINGS
Defined, 55.
On separation of junior from senior county, 17.
At trial (see Trial), 251-256.
Not to be set aside for matters of form, 571.

PROCESS
Defined, 3, 585.
Requisites of, 3.
Service of (see Service), 50-52.
Execution of, when Bailiff suspended, 202.
Setting aside, 571.
Process and procedure, 155.

PROCESS BOOK
Bailiff to keep, 59, 608.
Entries to be made therein, 608.

PRODUCTION (see Documents)
Of books and papers on subpœna, 296-298.

PROHIBITION
When granted, 65-77.
Where the defect complained of is apparent, 67.
Where not apparent, 67.
Where territorial jurisdiction disputed, 68.
Application for, 68, 78.
Material in support of, 78.
Notice of motion, 79.
Practice as to, 79.
Waiver of, 69.
Injunction instead of, 71.
Where objection extends only to a particular issue, 72.
Where there is a denial or perversion of right, 72.
Amendment to give jurisdiction, 73.
Where Judge interested, 74.
Cases where refused, 75.
Where jurisdiction depends on contested facts, 76.
Stay of proceedings in inferior court, 79.
Restitution, 79.
Declaration in prohibition, 80.
Appeal from decision of court as to, 80.
Costs of the proceeding, 80.
Effect of dismissal of application, 81.
Damages, 81.
Irregularity not ground for, 572.
Where title to land in question (see Title to Land), 64, 84-86.
Motion to transfer case not necessary before, 68.

PROMISSORY NOTES
For gambling debts or liquors drunk in tavern or ale house not to be sued in D. C., 93, 95.
Illegal, meaning of, 97.
Must be filed, 181.
When lost, practice as to, 184.
Seizure of under execution, 456, 475.

PROOF OF TITLE
Under Sheriff's conveyance of land, 488.

PROTECTION OF OFFICERS
Acting under warrants, 564.
Bailiff entitled to verdict on production of warrant, 565.

PROTECTION OF OFFICERS—*Continued.*
Where Clerk and Bailiff both sued and Bailiff proves warrant, 565.
Defect in proceedings not to render officer liable, 563, 564.
Special damage must be proved, 564.
Limitation of actions against officers, 276.
Notice of action not now required, 567.
PUBLIC OFFICERS.
Act respecting applicable to officer's covenant, 28.
Provisions of the Act, 28.
Returns to be made by to Government, 47, 48.
Limitation of action against sureties of, 34.
QUESTIONS OF FACT
Power of Appellate Court to review, 352, 353.
May be submitted to jury, 391.
Judgment thereon, 391.
RAILWAY COMPANIES
Service of process on, 201.
Limitation of actions against, 277.
RATIFICATION
Of contracts made by infants, 291.
RECEIVERS (see Equitable Execution)
Division Courts cannot appoint, 126, 450.
RELEASE
Of sureties (see Sureties), 32.
Of goods on payment of execution, 478.
RELIEF (see Equitable Jurisdiction), 126.
Against penalties, etc., 126.
RENDERING ACCOUNT
When unreplied to, no evidence of debt, 234.
RENEWAL
Of officers' covenant, when by bond of guarantee company, 36.
Of summons (see Summons), 195.
Of execution (see Execution), 482.
Of execution against lands, 484, 487.
RENT
Limitations of actions for, 274.
Claims by landlord for on seizure under execution, 549.
Landlord's lien for, 549-555.
How Bailiff to proceed on claim, 549-555.
REPLEVIN (see provisions of Rules 13-25)
Jurisdiction of Division Courts in, 99, 108.
Where action will lie, 99, 108, 110.
When goods repleviable, 109, 110.
When goods not repleviable, 113.
When plaintiff estopped by acquiescence, 113.
Demand, when necessary, 113.
Application for writ, 113.
When writ may issue without order, 114.
Of property distrained, 114, 555.
Affidavit for, requisites of, 113, 114.
Summons in, 115.
Court in which action may be brought, 115.
Security required, 115.
Executing the writ, 116.
Particulars of claim required, 116.

REPLEVIN—*Continued.*
Service of writ, 117.
Setting aside writ, 117.
Return of writ, 118.
Proceedings when goods eloigned, 118.
Writ in replevisal (Withernam), 118.
Parties to the action, 118.
Judgment by default, 119.
Payment into court, 119.
Right to jury, 119, 383.
Damages, 119.
Judgment and execution, 119.
Replevin Bond—Requisites of, 120.
Assignment of, 121.
Action on Bond, 121-123.
Defences in, 122.
Stay of proceedings, 123.
Damages, 119, 123.
Liability of sureties, 123.
Release of sureties, 123.
By tenant of goods seized under execution, 555.
Of goods taken in attachment, 111, 555.
Of goods distrained for rent, 114.
Sale of perishable goods, 123.
Of animals—damage feasant, 114.

RESCUE
Of property seized under execution, penalty for, 559.

RESIDENCE
What deemed to be, 34, 159.

RESISTING OFFICERS
Penalty for, 558.

RES JUDICATA
Effect of judgment, 5.

RESTORATION
Of goods seized under attachment, 528-530.
Security to be given on, 528-530.

RETIRED JUDGE
May be appointed to Board of County Judges, 567.
May hold courts on order of Gov.-Gen., 21.

RETURNS
Of moneys unclaimed, 47, 63.
Of fees and emoluments by public officers, 62.
To be made annually by Clerks and Bailiffs, 61, 62, 63, 64.
To writ of replevin, 118.
To order for certiorari, 146.
Of summons, time for, 191.
By Sheriff under Creditor's Relief Act, 481.
(See Clerks' and Bailiffs' Returns).
By Bailiffs in cities and towns, 609.
Clerk to certify same, 610.

RETURN DAY
Of summons, 191.

REVIEW
Of Judge's decision, on appeal (see Appeal), 352, 353.

REVISION
Of taxation of costs (see Costs), 43, 44.

REVIVAL OF JUDGMENTS
When application must be made, 10, 464, 482, 498.
Application for, 482.
When execution may issue without reviving, 482.
REVOCATION
Of references to arbitration, 438.
RIGHT OF SURVIVORSHIP
On death of one or more of several parties, 224.
RULES OF SUPREME COURT (see Supreme Court)
RULES OF DIVISION COURTS, 583-619.
Non-compliance with not to render proceedings void, 571.
Authority of Board of County Judges as to, 567.
Force and effect of, 569.
SALE OF GOODS (see Execution)
By Bailiff under execution, 464-467, 493-495.
Effect of when made after expiration of execution, 465.
After removal of Bailiff from office, 490.
Notice of sale and procedure thereon, 494.
Procedure when sale not made, 495.
Bailiff or other officer not to purchase goods, 496.
Where property perishable, 123, 532.
SALE OF LANDS
Under execution (see Execution against Lands), 484-496.
SATISFACTION (see Accord and Satisfaction)
Entry of on cross-judgments, 478.
on payment of judgment, 479.
SCHEME OF DISTRIBUTION
On several attachments against an absconding debtor, 526.
SCHOOL ACTS, JURISDICTION UNDER, 99, 123.
SEAL
Each court to have, 3.
How obtained, 3.
Process to be under, 3.
SECURITY
Of Officers—Judges' duties and responsibility as to, 28, 35.
Security required, 28.
Affidavit of justification by sureties, 29.
Clerk to report as to at every court, 29.
Procedure on death, removal or insolvency of security, 34, 37.
Who may be sureties, 34, 35, 39.
Liability of sureties, 29-34.
Proceedings against sureties, 36, 37.
Rights of sureties to contribution, 33.
Rights of sureties against officer, 34.
Form and effect of the covenant, 30.
Limitation of actions against sureties, 34.
Procedure when surety withdraws, 38.
Time for filing covenant, 35.
Covenant must be approved by Judge, 28, 35.
And filed with the Clerk of the Peace, 35, 36.
When covenant requires renewal, 36.
Covenant to be available to suitors, 36.
And may be sued in any court having jurisdiction, 36.
Certified copy of covenant to be received as evidence, 37.
Entries in officers' books to be evidence against sureties, 37.

SECURITY—*Continued.*
On death insolvency or removal of surety, new bond to be filed, 37.
Judge to be kept informed as to, 38.
Duty of Inspector as to, 59.
Clerks and Bailiffs to furnish Inspector with names of sureties, 60.
And to inform him when sureties changed, 61.
The certificate of filing covenant to be produced to inspector when required, 61.
Guarantee companies, 39.
Security for Costs—May be ordered in Division Courts, 319.
Cases in which order may be granted, 320-322.
Procedure, 321.
Form of security, 322, 683.
In Garnishment and Interpleader Cases, 321.
In Replevin—(See Replevin), 115.
In Attachment—By debtor to obtain restoration of goods seized, 528.
On appeal (see Appeal).
On sale of perishable property, 533.

SECURITIES FOR MONEY
Seizure of under execution, 456.
Bailiff to hold for benefit of plaintiff, 456, 475.
May be sued in name of Bailiff, 451, 456, 475, 476.
Beneficial plaintiff must secure costs, 457.
Disposal of moneys realized, 457.
Bond may be required, 457.

SEDUCTION
Action for not maintainable in D. C., 64, 90.

SEIZURE OF GOODS
Under execution (see Execution), 466.
In replevin (see Replevin), 116.
Abandonment of seizure, 468.

SENIOR COUNTY
Procedure on separation from, 18.

SEPARATION OF COUNTY
Establishment of courts on, 17.
Clerk to deliver up papers on, 18.

SEQUESTRATION
Power of Division Courts to order, 132.
Servant and master, rights and remedies of, 134-137.

SERVICE
Requisites of, 191-195, 257.
to obtain judgment by default, 228, 230.
On a lunatic, 199.
Of subpœna (see Subpœna), 199, 293, 299.
Of summons where claim does not exceed $15, 191.
Out of jurisdiction, 165, 167, 200.
Of application for new trial, 339.
Of order on added defendant, 223, 224.
Of notice of motion for summary judgment, 711.
Of Summons—(See Summons). Bailiff responsible for, 50, 52.
In foreign divisions, 43.
On foreign corporations, firms or individuals, 167, 200.
In interpleader, 542.
On non-residents, 165-167.

SERVICE—*Continued.*
Where garnishee is not in the province, 166.
Where defendant out of Ontario, 163-167, 200.
How to be made, 163, 191-195.
What is personal service, 192.
To be at least ten days before return day, 191.
In other divisions, 43.
Of summons in replevin, 117.
Where defendant is out of the province, 165-167, 200.
Proof of at trial, 233.
Costs of service on defendant out of Ontario, 165, 167.

SET-OFF
Involving matter beyond jurisdiction, 140, 150, 155.
General principles of, 147, 149.
Distinguished from counterclaim, 149, 272.
Notice of, how given, 271.
Adjournment of suit if notice not given, 257.
Judgment where amount exceeds plaintiff's claim, 271, 273.
Costs, 274.
Proceedings on discontinuance or dismissal of plaintiff's action, 274.
When amount exceeds claim found due to plaintiff, 271, 273.
Judgment for the excess, 271.
Removal of case to Supreme Court, 146, 150, 155.
Cross-judgments may be set off, 478.

SETTING ASIDE PROCEEDINGS
In replevin, 117.
Judgment: on defective affidavit of service, 230.
Judgment by default, 230, 233.
Not for matters of form, 571.
Grounds for, 230-232.
Application for, 230-233.
Affidavit for, 231.
Cost of setting aside judgment, 232.
Service of order, 233.
Practice as to, 233.
Award of arbitrators, 442.
Proceedings not to be set aside for matters of form, 571.
Executions (see Execution), 407.
Attachment, 532.

SEVERAL ATTACHMENTS (see Absconding Debtors), 526.

SHAREHOLDERS
Of joint stock companies, executions against, 454.

SHERIFF
Includes bailiff in provisions of Execution Act, 451.
Intervention by in garnishment proceeding, 433.
Right to intervene and take goods seized by Bailiff under execution, 476.
Bailiff's fees in such cases, 477.
Procedure on failure to make money on Division Court judgments or certificates filed, 477, 481.
Right of to recover money attached in Division Courts, 433.

SIGNATURE
Jurisdiction where amount ascertained by, 97, 104.
What is a, 107.
Sufficiency of on ascertainment of amount, 107, 108.

SITTINGS OF COURTS (see Courts)
Times and places of holding, 10, 11.
in Toronto, 12.
Provisions as to accommodation for, 12-14.

SLANDER
Action for not maintainable in Division Courts, 64, 89.

SOLICITOR
Clerk not to practice as, 26.
What constitutes practicing as a, 26.
Right as to suitor's money in claim entered by solicitor, 40, 604.
Right to appear in court for parties, 260.
Scope of authority, 260.
May be called as a witness though counsel in same case, 260.
May be precluded from appearing at trial, 260.
Rights as to recovery of fees, 261.
Lien for costs, 478.
Not to be prejudiced by set-off, 478.
Affidavit not to be sworn before party's solicitor, 322.

SOLICITOR AND CLIENT
What are privileged communications between, 296-298.

SPECIALTY DEBTS
Limitations of actions on, 274.

SPEEDY JUDGMENT
(See Motion for Judgment), 235.

SPLITTING DEMANDS (see Causes of Action)
The division of causes of action prohibited, 137.
What constitutes dividing a cause of action, 137-141.
What is not dividing a cause of action, 137-141.
Instalments of principal and interest on mortgage may be sued separately, 140.
Not allowed in actions against absconding debtors, 525.

SPIRITUOUS OR MALT LIQUORS
Actions for prohibited in Division Courts, 95.
Definition of, 95.
Cases illustrating, 95.

STATUTES
Relating to appeals from Division Courts (see Appeals), 365-382.
to Division Courts (see Appeals), 365-382.

STATUTORY DEFENCES
Notices required as to, 271, 272, 273.

STATUTE OF LIMITATIONS
Effect of renewal of summons, 195, 586.
Notice of defence of, to be given, 271, 274.
Adjournment if not given, 257.
Plea of, a defence on the merits, 231.
Limitation of Actions for Rent and Specialty Debts, 274.
Limitation of actions on mortgages and other causes of action, 275, 278.
Effect of special statutes, 278.
Limitation of action for account and for not accounting, 277.
Computation of time, 278.
When statute begins to run, 279.
Disabilities, effect of, 279.
When revived by Payment or Acknowledgment, 280.

STATUTE OF LIMITATIONS—*Continued.*
When revived by Payment or Acknowledgment—
As to specialty debts, 280.
simple contract debts, 281.
Causes of action to which acknowledgment extends, 281.
Sufficient Acknowledgment, 282.
Conditional promises, 282, 283.
New time of payment, 284.
Requisites of—To whom, and by whom made, 284.
Signature, 285.
When to be made, 285.
Evidence of, 285.
Insufficient Acknowledgments, 286.
Joint Contractors—Acknowledgment by one not to bind others, 287.
Judgment against one, effect of, 7.
Endorsements of payments, 287.
Action against Clerk or sureties, 34.
Acknowledgment by Part Payment, 287-289.
Actions against Executors, Trustees, etc., 289, 290.
Ratification of Contracts by Infants, 291.
Actions against public officers, 276.
STATUTORY PROVISIONS
As to place of trial, 163.
STATION AGENT
Of railway, service on, 162, 163.
STAYING PROCEEDINGS
Pending application for prohibition, 79.
In action on replevin bond, 123.
On tender and payment into court, 261.
Judge may remove stay, 267.
On order for security for costs, 270, 271, 319.
On appeal, 357.
On issue of interpleader, 542.
STEALING GOODS SEIZED UNDER EXECUTION, ETC., 559.
STRIKING OUT PARTIES
(See Adding Parties), 217, 223.
SUBJECT MATTER OF ACTION
Tender of in detinue, 266.
Order may be made for inspection, preservation and detention of, 318.
Experiments may be ordered as to, 318.
Judge may inspect or order jury to inspect, 318, 394.
SUBPŒNA
Who may serve, 209.
Substitutional service of, 199, 203.
Issue and service of, 202, 209.
Production of books and documents under, 296.
Setting aside, 298.
Payment of witness fees, 293, 299, 300.
Penalty for disobeying, 294, 302.
On appeals under statutes, 373.
Fees to witnesses, 299, 300, 302.
Supreme Court Rules, 203.
SUBSTITUTIONAL SERVICE
Where defendant out of province, 168.
Powers of Judge to order, 196.
Cases illustrating, 198.

SUBSTITUTIONAL SERVICE—*Continued.*
Affidavit for, 196.
Order thereon, 199.
Setting aside order, 199.
Witness so served not liable to attachment, 199, 293.
On party out of jurisdiction, 165-168.
SUBSTITUTING PARTIES
(See Adding Parties), 217-222.
SUITORS' MONEYS (see Rules 66, 67, 69, 70, 71, 81, 89).
Liability of officers and sureties for default in paying over, 29-34, 44.
Clerk to keep account of, 43, 604.
Notice of payment to be given to party entitled, 45, 604.
How and when payable, 44, 46, 608.
Rights of solicitor or agent entering claim, 46, 604.
Demand of payment, when necessary, 46.
Clerk not to receive except in suits in his own court, 46.
Verified account of, to be furnished to Judge when required, 45.
Disposal of, when unclaimed for six years, 47, 63.
Not to be withheld for payment of fees in other cases, 47.
SUITS (see Actions)
SUMMARY JUDGMENT
(See motion for judgment), 235-249.
SUM IN DISPUTE
Determining right to appeal, 347, 350.
SUMMONS
Clerk to issue, 39, 43.
Action to be commenced by, 181.
Requisites of, 182.
Procedure on issue of, 182.
Service of—Bailiff to serve, 50, 52, 190.
In foreign divisions, 43.
To be at least 10 days before returnable, 191.
When defendant out of county, 191.
Mode of service, 167, 191, 192.
out of jurisdiction, 165, 167.
On lunatic, 199.
Affidavit of service must be made, 203.
Return of—To be made promptly after service, 50.
Procedure when not served in time, 52.
When returnable, 225.
Penalty for neglect to return, 57.
Notices to be endorsed on, 191.
Particulars of claim to be attached, 181, 190.
"*Alias* or *plures*" requisites of, 183.
"Concurrent," when to be issued, 183, 586.
When and how renewable, 195, 586.
Grounds for renewal, 195.
Order for, 196.
Effect of renewal on Statutes of Limitation, 196, 586.
Summons and affidavit of service must be filed, 230.
In Various Proceedings—To Clerk of municipality (see Jurors), 389.
To garnishee after judgment, 501.
Judgment debtor, 499.
In interpleader, 541.
Amendment of, 183.

SUMMONS—*Continued.*
Service where claim does not exceed $15, 191.
Substitutional service, 196.
On defendant's agent, 200.
SUNDAY
No judicial proceedings can be taken on, 25, 323.
SUPREME COURT
Transfer of actions to (see Certiorari), 141-146.
Procedure in, 145-147.
Removal to, where defence exceeds jurisdiction, 141-146.
Proceedings in, after removal of cause by certiorari, 143.
Rules of, respecting equitable relief, 126-129.
commissions to take evidence, 310-314.
appeals, 361.
equitable execution against interest in land, 127.
sales of land under execution, 488.
commitment of judgment debtors, 511.
Garnishment of small debts in, 436.
Principles of practice applicable to Division Courts, 570.
SUPREME COURT RULES
Supreme Court action, judgment on, 64, 92.
SURVIVAL
Of action in case of death, etc., of party, 224.
SURVIVORSHIP
Right of, on death, 224.
SURETIES (see Security)
Of Officers of Court—Liability of, 28-34, 203.
Release of, 32.
Judgment against Bailiff releases sureties, 7.
Right to contribution, 33.
Proceedings on withdrawal of, 38.
Names and addresses to be sent to Inspector, 60.
Reports on, to the Judge, 605.
Limitation of actions against, 34.
In replevin (see Replevin), 120-123.
SUSPENSION OF CLERK OR BAILIFF BY JUDGE, 27.
TABLE OF FEES
To be hung in Clerk's office, 53.
TARIFF OF FEES (see Fees)
To Clerks, 53, 611.
Bailiffs, 54, 55, 614.
witnesses and appraisers, 53, 617, 618.
In suits not exceeding $10, 53-55.
TAVERNS AND ALE HOUSES
Defined, 96.
Actions for liquors drunk in not maintainable in D. C., 95.
TAXATION OF COSTS (see Costs)
Clerk's duties as to, 43, 44, 605.
Procedure on, 43, 605.
Clerk to furnish itemized statement of, 605.
TEACHERS' SALARIES
Actions for enforcement of, 123.
Appeals in, 124.

TELEGRAPH COMPANY
Service of process on, 200.
TENDER
Plea of, with payment into court, 261.
Time for filing, 261.
By whom made, 262.
To whom made, 262.
Mode of making, 263.
production of money, 264.
requiring change, 264.
demand of receipt, 265.
under protest, 265.
Demand of payment prior or subsequent to, 266.
Payment out of court, 266.
Clerk's notice, 267.
Proceedings if plaintiff accepts, 261.
Stay of proceedings unless plaintiff gives notice of intention to proceed, 261, 267.
Judge may remove stay, 267.
Costs when plaintiff proceeds for balance, 268.
In actions of detinue, 266.
Of subject matter of action, 267.
TERRITORIAL JURISDICTION
Objections to—Must be taken in Division Court, 170.
Notice disputing jurisdiction, 164, 175, 176.
Service of notice, 175.
Courts in which Actions may be entered, 155, 156, 168, 169.
In replevin, 110.
Where cause of action arose, 156.
Where defendant resides or carries on business, 159, 162.
Court nearest to defendant's residence, 163.
In division adjacent to defendant's residence, 164.
Applications for leave in such cases, 164.
When defendant is out of Ontario, 165.
In garnishment proceedings when defendant is out of province, 421.
Where defendant is a foreign corporation, 167, 168, 421.
Where claim over $100 and is payable at a particular place, 169.
Change of place of trial in such cases, 169.
In actions by or against Clerks and Bailiffs, 179, 180.
In actions against Judge, 181.
Garnishee summons after judgment, 419.
Judgment summonses, 499.
Proceedings against absconding debtors, 517.
Interpleader proceedings, 536, 541.
Consent to jurisdiction invalid if jurisdiction disputed, 163, 164.
Theft of goods under seizure, 559.
THIRD PARTIES
No relief against, 207.
TIME
Computation of, 25, 38, 61, 171, 174, 176, 179.
As to Statute of Limitations, 278.
TITLE
Proof of under conveyance of lands from Sheriff, 488.
TITLE TO LAND (see Prohibition)
When in question jurisdiction ousted, 64, 84-86.
Cases in which jurisdiction ousted, 84-86.
jurisdiction not ousted, 84-86.

TITLE TO LAND—*Continued.*
Procedure when objection raised, 86.
Exceptions—Cases in which jurisdiction not ousted though title in question, 86, 87.
Transfer to Supreme Court when title comes in question, 141.
TOLL
Actions respecting not maintainable in Division Courts, 64, 88.
Transfer to Supreme Court in, 141.
TORT
Jurisdiction in actions for (see Personal Actions), 97, 99.
TORONTO
Sittings of courts in, 12.
Transmission of right by death, etc., 224.
TRANSFER OF ACTIONS (see Changing Place of Trial)
When Entered in Wrong Court, 177.
Duty of Clerk thereon, 177, 178.
Application to transfer not necessary before applying for prohibition, 68.
To Supreme Court—Where defence involves matter beyond jurisdiction, 146.
Grounds for, 146, 155.
Procedure, 155.
Where title to land, etc., in question, 141.
(See Certiorari), 143.
TRANSCRIPT OF JUDGMENT
Clerk to issue when required, 497.
Application for, 498.
Requisites of, 497.
When to issue, 497, 498.
Entry of in Procedure Book, 497, 498, 606.
Proceedings after issue, 497.
Money made on, how payable, 47.
Execution in home court not necessary before issue, 498.
TREASURER OF COUNTY (see County Treasurer)
TRIAL (see Hearing), 125, 251.
Judgment without proof on defendant not appearing at trial, 256.
Consent as against statutory provisions as to place of trial invalid, 163, 164.
Transfer of action under, section 77, 169.
Procedure—Judge may summarily dispose of cause or non-suit the plaintiff, 251-254, 256.
Powers of Judge on, 251, 256, 323.
Judge may inspect or order jury to inspect subject matter, 318, 394.
Order in which cases are to be tried, 254.
When evidence to be taken down in writing, 255.
Effect of non-suit, 254.
When defendant fails to appear, 256.
Who may appear at, 260.
Counsel fees, 448, 449.
In Jury Cases (see Jury), 393, 394.
Postponement of—Judge may adjourn, 254, 257, 259.
Grounds for, 257.
Costs of, 259.
In jury cases, 259.
For purpose of giving notices, etc., 257.

TRIAL—*Continued.*
In Attachment—When process served personally, 524, 530.
When not served personally, 530.
Changing place of, 169, 171.
TRIAL LISTS
Form and requisites of, 254, 390.
Order in which cases are to be entered on, 254, 390.
TRUSTEES (see Executors, etc.)
Limitation of actions against, 289.
UNCLAIMED MONEYS
Clerk to make out list of annually, 47.
List to be posted up in Clerk's office, 48.
To be transmitted to Clerk of the Peace, 47.
UNSETTLED ACCOUNT
Action for balance of, 97, 101.
WAGES
Right of minor to sue for (see Infant), 132.
Of minor belongs to himself, 133.
Right of servant to receive (see Master and Servant), 134.
Garnishment of (see Garnishment), 408-412, 424.
Priority of claim for on attachment proceedings, 527.
WAIVER
By omission of defendant to take advantage of defences open to him, 8.
When right to prohibition ousted by, 69.
Waiver of section 94, as to place of trial, of no effect, 164, 165.
WARRANTS
Requisites of, 43.
And writs of execution to be issued by Clerk, 43.
Must be executed by Bailiff, 43, 50.
Of commitment on judgment summons (see Judgment Debtor), 505-511.
Of attachment (see Absconding Debtor), 521.
Of commitment for contempt of court, 558.
Of commitment of officer for misconduct, 561.
Provision for protection of persons acting under, 564.
WEARING APPAREL
Definition of, 470.
Exemption of from seizure under execution, 451, 470.
WILL
Action on devise, etc., under, not maintainable in D. C., 64, 88.
transfer of to Supreme Court, 141.
WITHDRAWAL
Of juror, effect of, 341.
Of notice of defence, procedure on, 250.
Of surety, procedure on, 38.
WITNESSES AND EVIDENCE (see Evidence)
Subpœna and service of (see Subpœna), 199, 292, 293.
Power of courts over witnesses resident out of county, 292, 302.
Privilege of witness from arrest, 295.
Fees of witness out of county, 302.
Competency of (see Evidence Act), 298.
Witnesses in actions for flooding lands, how summoned, 299.
Excluding witness, 299.
Witness fees, payment of (see disbursements), 293, 301, 302.

WITNESSES AND EVIDENCE—*Continued.*
Fees of, what allowed (see Tariff), 299, 300, 302.
Witness in gaol, how attendance procured, 295.
Procedure when witness adverse, 295.
Penalty for disobeying subpœna, 294, 301, 302.
Persons in court may be compelled to testify, 292, 301.
Oaths and affirmations to witnesses, 301.
Substituted service on witness, effect of, 199.
Production of books and documents, 296.
Documents privileged, 296.
not privileged, 298.
Inspection of books and documents, 296.
Setting aside subpœna, 298.
Service of subpœna, 293, 199, 299.
Affidavit of disbursements, 300.
False affidavit of disbursements, 300.
Subpœna on appeals, 373.
Commission to take evidence (see Commission), 303.
Examination of witness whose attendance cannot be procured, 310.
in remote part of province, 313.
Books of account and affidavits as evidence, 317.
Examination of witnesses on application to commit judgment debtor, 499.
Agent or solicitor for parties may testify, 260.
Adverse, 295.

WITNESS FEES
Payment of, 293, 302.
Affidavit of disbursements, 300.
False affidavit of disbursements, 300.
Tariff of, 446, 447.
Party entitled to fees as witness, 446.

WOODMAN'S LIEN FOR WAGES
Proceedings on (see Forms), 155, 164.