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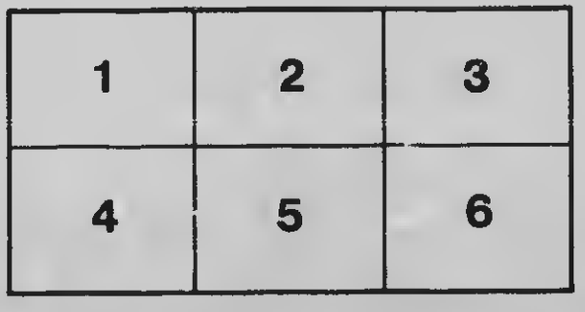

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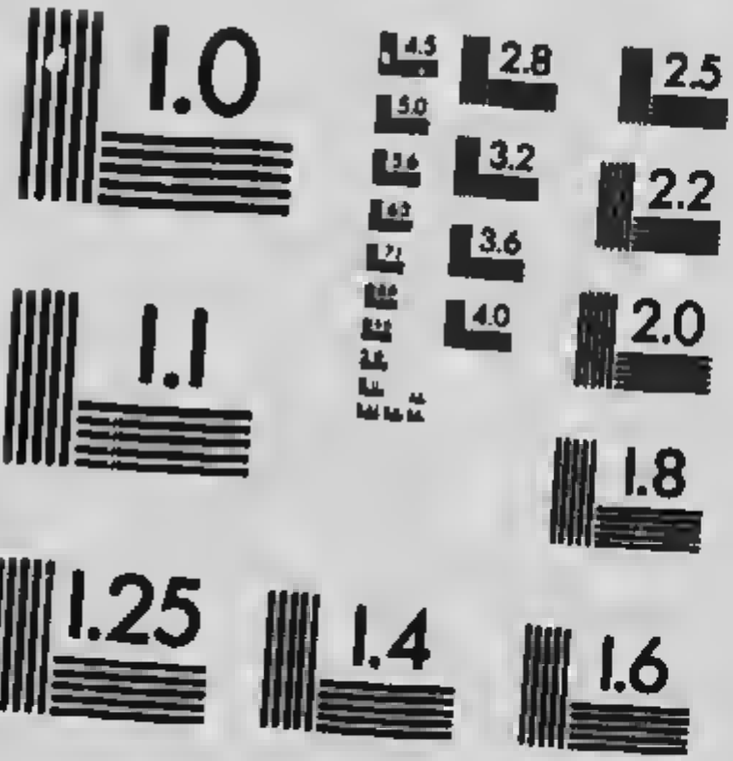

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A MANUAL

OF

COUNTY COURT PRACTICE

IN ONTARIO

COMPRISING THE STATUTES AND RULES RELATING TO THE POWERS AND DUTIES OF COUNTY AND DISTRICT COURT JUDGES, AND THE JURISDICTION, PROCEDURE AND PRACTICE OF THE

COUNTY AND DISTRICT COURTS OF ONTARIO

AND IN APPEALS THEREFROM TO THE

SUPREME COURT OF ONTARIO

WITH CANADIAN, ENGLISH AND AMERICAN DECISIONS, AND THE COUNTY COURT AND GENERAL SESSIONS TARIFFS, AND A NUMBER OF SPECIAL FORMS

BY

M. J. GORMAN, K.C., LL.B.

OF OSGOODE HALL, BARRISTER-AT-LAW

THIRD EDITION

TORONTO:
THE CARSWELL COMPANY, LIMITED
1914

LONDON:
SWEET & MAXWELL, LIMITED
1914

PREFACE TO THE THIRD EDITION.

The necessity for a new edition of this book within five years after the last edition was issued, has been caused principally hy the many changes in the Rules and the sections of the Judicature Act which apply particularly to county courts, as well as hy amendments to the County Courts Act itself. These changes have rendered many parts of the former edition, not only useless, hnt misleading. For instance, section 21 of the Act of 1910, and all Rules and sections of the Judicature Act providing for trials of supreme court actions in county courts, and of county court actions in the supreme court, were swept away in the last revision. This necessitated the omission of pages 61 to 66, and rendered several of the former forms ohsolete.

By section 48 of the "County Courts Act," as it was drafted hy the revisers in 1910, and as it was read a first and second time during the session of that year, sections 9, 10 and 11 of "The Unorganized Territory Act," which gave certain additional jnrisdiction to district courts, were to he repealed, hnt on the third reading, this repeal was struck out. Snbsequently, however, this repeal was effected hy section 46 of the "Statute Amendment Act" of the same session, thns making the jurisdiction of the county and district courts exactly similar, as was intended hy the revisers. It was only after the issue of the second edition that this latter legislation came to the knowledge of the author, and this has necessitated the cancelling of pages 98 to 102 of that edition.

The amendments made hy 2 Geo. V. c. 17, s. 11 (4) to section 40 of the County Courts Act of 1910, on the lines suggested by the author's notes at page 140 of the second edition, necessitated the remodelling of pages 139 to 146 of that edition, and the omission of some of the decisions and references therein contained. The repeal

of all the Rules specially applicable to county court appeals has necessitated the complete rewriting of the part of the work dealing therewith, and the omission of several sections, rules and decisions formerly applicable thereto. Finally the adoption of new tariffs of costs, disbursements and sheriff's fees necessitated the substitution of these tariffs for those in force when the second edition was issued.

If one may be allowed another w rd upon the important qnestion of costs, in addition to what is said at pages 173 and 174 of this work, it would be to point out that many proceedings in the county court are left entirely nnprovided for by the solicitors' tariff. At least some clerks have ruled that they cannot allow fees in such cases by analogy to the former tariff, and the result is that no fees at all are taxed by these clerks for such work. On the other hand, the fees of clerks have been so enormously increased by the new tariff that several clerks are paying 90 per cent. of their incomes for the last two or three months of the year, to the Provincial Treasurer, under the section of the statute to be found at pages 49 and 50 of this work.

One may be permitted to express regret that the work of revising the Judicature and County Courts Acts and the Rules, was not performed by the same Commissioner. While considerable improvement as regards county courts has been made, principally by the elimination of synonymous rules or sections of statutes, several duplicate provisions yet remain. It seems to the author that it would have been better if all the rules specially applicable to county courts had been omitted from the revision, and embodied in the County Courts Act, as was suggested in the second edition.

Although 130 new cases have been added in this edition, the size of the book has not been increased.

M. J. GORMAN.

Ottawa, December, 1914.

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ADDENDUM.

Add to notes to section 30 of the County Courts Act, at page 130:

In Curlette v. Vermilyea, 1 O.W.N. 693, the plaintiff sued the executor for a specific chattel bequeathed to her by the testatrix, but which she alleged the executor refused to deliver. An action was brought in the county court of York for the recovery of the article and a motion was made before the master in chambers to transfer the action to the county court of Hastings, in which county the will had been proved. The master held that this action came within the provisions of the County Courts Act above referred to, and made an order transferring it to the county court of Hastings.

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THE COUNTY JUDGES ACT

R.S.O. 1914, CHAPTER 58.

An Act respecting County and District Judges and Local Courts.

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

Short Title.

1. This Act may be cited as *The County Judges Act* 9 Edw. VII. c. 29, s. 1.

This Act was formerly called the Local Courts Act, and did not apply to judges of district courts, except in so far as the provisions of R.S.O. 1897, c. 109, known as the Unorganized Territory Act, made it specially applicable. Certain sections of the latter Act applied to district courts, which had a jurisdiction distinct from, and in several matters, in excess of the ordinary jurisdiction of the county courts. Those sections were repealed by 10 Ed. VII. c. 26, s. 46, and c. 30, s. 48, and this Act now applies generally to county and district courts.

Appointment of Judges.

Sections 96 and 97 of the B. N. A. Act are as follows:—

96 The Governor-General shall appoint the judges of the superior, district and county courts in each

province, except those of the courts of probate in Nova Scotia and New Brunswick.

97. Until the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and the procedure of the courts in those provinces, are made uniform, the judges of the courts of those provinces appointed by the Governor-General shall be selected from the respective Bars of those provinces.

The wording of section 96 is not free from ambiguity, as regards judges of surrogate courts in Ontario. See Reg. v. Bush, 15 O.R. 229, and Clement's Canadian Constitution, 2nd edition, pp. 290 *et seq.* See also, as to appointment of surrogate court judges, notes to s. 14, *infra.*

During Good Behaviour.

2. The judges of the several county and district courts now holding office, as well as the judges hereafter to be appointed, shall hold their offices during good behaviour, but shall be subject to be removed by the Lieutenant-Governor for inability, incapacity or misbehaviour, established to the satisfaction of the Lieutenant-Governor in Council. 9 Edw. VII. c. 29, s. 2.

Provincial Legislation ultra vires.

A court of impeachment for the trial of charges against county court judges for inability or misbehaviour in office was established by 20 V. c. 58, which was afterwards consolidated by C.S.U.C., c. 14. C.S.U.C., c. 15, s. 2 gave the Governor power to appoint county court and junior county court judges, and s. 3 declared that these judges "shall hold their office during good behaviour, but shall be subject to removal by the Governor for inability in case such inability or misbehaviour be

established to the satisfaction of the court of impeachment for the trial of charges preferred against judges of the county courts." The Legislature of Ontario by 32 V. c. 22, ss. 2 and 3, assumed to repeal these sections and to declare that county court judges "shall hold their office during pleasure, subject to he removed by the Lieutenant-Governor for inability, incapacity or misbehaviour established to the satisfaction of the Lieutenant-Governor in Council." By 32 V. c. 26, the Legislature also assumed to repeal C.S.U.C., c. 14, and thereby to abolish the court of impeachment. By 33 V. c. 12, the words "good behaviour" were substituted for the word "pleasure" in chapter 22 of the statutes of the previous session, above referred to. These enactments were consolidated by R.S.O. 1877, c. 42, s. 2, and continued in R.S.O. 1887, c. 46,. s. 2, R.S.O. 1897, c. 54, s. 2, 9 Ed. VII., c. 29, s. 2, and in the above section.

The constitutionality of this enactment came before the Queen's Bench Division in 1882, in *Re* Squier, 46 U.C.R. 474. Certain charges having been preferred against Judge Squier, a Commission was issued under the Great Seal of Canada, reciting the provisions of the Imperial Act, 22 Geo. III., c. 75, and directing the Commissioner to examine into the charges and report thereon. A motion was made for prohibition, and it was held that the Commission could not be supported at common law, because it created a court for hearing and inquiring into offences without determining them. It was also held that this inquiry into the conduct of a county court judge was regulated by C.S.U.C., c. 14, ss. 1 and 4, and that the tenure of office of a county court judge was still regulated by C.S.U.C., c. 15, s. 3, and that the attempt of the Legislature to repeal these sections, and to abolish the court of impeachment, was *ultra vires*. It is difficult to understand why, in view of the above decision, this section is still retained.

Federal Legislation.

The same year, the Parliament of Canada, by 45 V c. 12, abolished the court of impeachment above mentioned and provided a new mode of procedure for the removal of county court judges. These provisions were afterwards consolidated by R.S.C. 1886, c. 138, s. 2, and are now embodied in the following section of R.S.C. 1906, c. 138:—

Tenure of Office.

28. Every judge of a county court in any of the provinces of Canada shall, subject to the provisions of this Act, hold office during good behaviour and his residence within the county or union of counties for which the court is established.

Removal for Misbehaviour.

2. A judge of a county court may be removed from office by the Governor in Council for misbehaviour, or for incapacity or inability to perform his duties properly, on account of old age, ill-health or any other cause; if,—

(*a*) the circumstances respecting the misbehaviour, incapacity or inability are first inquired into; and,

(*b*) such judge is given reasonable notice of the time and place appointed for the inquiry and is afforded an opportunity, by himself or his counsel, of being heard thereat, and of cross-examining the witnesses and adducing evidence on his own behalf.

3. If any such judge is removed from office for any of such reasons, the Order in Council providing for such removal, and all reports, evidence and correspondence relating thereto, shall be laid before Parliament within the first fifteen days of the next ensuing session.

Commission of Inquiry.

4. The Governor-General in Council may, for the purpose of making inquiry into the circumstances respecting the misbehaviour, inability or incapacity of such judge, issue a commission to one or more judges of the Supreme Court of Canada or any one or more judges of any superior court in any province of Canada, empowering him or them to make such inquiry and to report, and may, by such commission, confer upon the person or persons appointed, full power to summon before him or them any person or witnesses, and to require them to give evidence on oath, orally or in writing or on solemn affirmation, if they are persons entitled to affirm in civil matters, and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which they are appointed to inquire.

Power of Commissioners.

5. The commissioner or commissioners shall have the same power to enforce the attendance of such person or witness, and to compel him to give evidence, as is vested in any superior court of the province in which the inquiry is being conducted. R.S., c. 138, s. 2.

It is declared by section 34 (4) of the Dominion Interpretation Act, that " 'county court' in its application to the Province of Ontario, includes 'district court.' "

See also *Re* Squier, *supra,* as to other methods of procedure for the removal of county court judges.

Salaries of Judges.

The following provision is made by R.S.C. 1906, c. 138, s. 5, as amended by 8-9 Edw. VII. c. 31, s. 1, and 3-4 Geo. V., c. 28, s. 5, for the salaries of county and district judges in this province:—

16. The salaries of the judges of the county and district courts shall be as follows:—

The judge of the county court of the County of York, $3,500 per annum;

Seventy-three other judges and junior judges of county courts and district courts, each $3,000 per annum.

It will he seen that the former illogical limitation of salaries for the first three years, to $2,500 per annum, has at last heen abolished.

Travelling Allowances.

The travelling expenses of such judges are provided for as follows:—

18. There shall he paid for travelling allowances to each judge . . of a . . county court . . , in addition to his moving or transportation expenses, the sum of six dollars for each day, including necessary days of travel going and returning, during which he is attending as such judge in court or chambers at any place other than that at which he is hy law ohliged to reside: Provided that,—

(*a*) No judge shall receive any travelling allowance for attending in court or chambers at the place where he resides; and,

* * * * * * * *

(*c*) no judge of a county court shall receiye any travelling allowance for courts or chambers held at the county town of the county, or union of counties, within which he resides.

(*d*) No travelling allowances shall he granted to a judge of a county court in respect of any attendance at a place not within the county or district for which the judge is appointed, unless it appear to the satisfaction of the Minister of

Justice that the attendance was duly authorized and necessary. 3-4 Geo. V. c. 28, s. 7.

* * * * * * * *

4. Each judge of a district court in Ontario shall receive a travelling allowance of five hundred dollars per annum.

5. Every application for payment of any such allowances shall be accompanied by a certificate of the judge applying for it of the number of days for which he is entitled to claim such allowance.

The above s. 18 was varied by s. 8 of 3-4 Geo. V. c. 28, as follows:

8. Whenever a judge is entitled to the travelling allowance of six dollars per day for attending in court or chambers under the provisions of section 18 of the principal Act, he shall be entitled to a further sum of four dollars for each day he has so attended, if such attendance has been in any place which is a city.

Annuities of Judges.

The same statute makes provision for the retirement and pension of county court judges, and also for the method of payment of salary and pension, as follows:—

24. If any judge of a county court becomes afflicted with some permanent infirmity disabling him from the due execution of his office, and resigns his office, or if a judge of a county court, not having attained the age of seventy-five years, resigns his office after having continued therein for a period of at least twenty-five years, His Majesty may, by letters patent under the Great Seal of Canada, grant him a pension equal to two-thirds of the annual salary of which he was in receipt at the time of his resignation, to commence immediately after his resignation and to continue thenceforth during his natural life: Provided that if such judge has only continued in office

as such judge for a period of less than five years, the pension which may be so granted to him shall not, unless the judge has attained the age of seventy-five years, exceed one-third of the annual salary of which he was in receipt at the time of his resignation.

2. If any person, receiving a pension under this section, becomes entitled to any salary in respect of any public office under the Government of Canada, such salary shall be reduced by the amount of such pension. R.S., c. 138, s. 15; 2 Edw. VII. c. 16, s. 2; 3 Edw. VII. c. 29, s. 2.

Retirement of Judges.

25. Every judge of a county court who has attained the age of seventy-five years shall be compulsorily retired, and any judge who has continued in office for a period of thirty years or upwards may resign his office; and to any judge who is so retired, or who so resigns, His Majesty may grant an annuity equal to the salary of the office held by him at the time of his retirement or resignation.

2. The annuity in either of the cases mentioned in this section shall commence immediately after the judge's retirement or resignation, and continue henceforth during his natural life.

Salaries and Annuities—How Paid.

27. The salaries and retiring allowances or annuities of the judges shall be payable out of any moneys forming part of the Consolidated Revenue Fund of Canada.

2. For any period less than a year, the salaries and retiring allowances or annuities shall be paid *pro rata*.

3. The salaries and retiring allowances or annuities shall be payable by monthly instalments and shall be free and clear of all taxes and deductions whatsoever imposed under any Act of the Parliament of Canada.

4. The first payment of salary of any judge shall be made *pro rata* on the first day of the month which occurs next after his appointment.

5. If any judge resigns his office or dies he or his executor or administrator shall be entitled to receive such proportionate part of the salary aforesaid as has accrued during the time that he has executed such office since the last payment. R.S., c. 138, s. 16; 4-5 Edw. VII. c. 47, ss. 1 and 2.

Qualification of Judges.

3. The person to be appointed to be the judge or junior judge of a county or district court shall be a barrister of at least seven years' standing at the Bar of Ontario. 9 Edw. VII. c. 29, s. 3.

This section has undergone several variations. In the Revised Statute of 1887, the term was five years. By 58 V. c. 13, s. 27, this was changed to ten years. Then by 63 V. c. 11, s. 6, the following proviso was added:—

"Provided that any person who has been a practising solicitor for five years before becoming a barrister may be appointed if of seven years' standing at the Bar of Ontario, and any person who has been a practising solicitor for ten years before becoming a barrister may be appointed if of five years' standing at the Bar of Ontario. Provided further that where in any county it is expedient by reason of the common use of two or more languages by the inhabitants thereof to appoint a judge who is conversant with more than one language, a barrister who is so conversant may be appointed if of seven years' standing at the Bar of Ontario."

This proviso has disappeared in the revision, except that the term of seven years is now made generally applicable throughout the province, and is similar to the qualification in England.

Validity Questioned.

In the second edition of Clement's Canadian Constitution, at page 302, the following comments are made on the above legislation:—

"The question has been much canvassed as to the validity of provincial Acts prescribing the qualifications to be possessed by the judges mentioned in section 96, their place of residence, etc. Dominion Ministers of Justice have refused to be bound by such legislation, but there is no judicial decision on the point."

In November, 1905, the Dominion Government disallowed an Act of the British Columbia Legislature, which provided that judges appointed to the Bench of British Columbia must have resided in the province for a certain number of years. This was regarded as a usurpation of Federal power.

Style of Judges.

4. Unless otherwise expressed in the commission, where more than one judge of a county or district court is appointed for a county or district, the judge whose commission has priority of date shall be styled "The judge of the county *or* district court of " (as the case may be), and the other judge of the same court shall be styled "The junior judge of the county *or* district court of " (as the case may be). 9 Edw. VII. c. 29, s. 4.

Appointment of Junior Judges.

5.—(1) A junior judge may be appointed for a county or district the population of which exceeds 80,000.

(2) The recital in any commission heretofore or hereafter issued for the appointment of a junior judge that the population of the county or district for which he is appointed exceeds 80,000 shall be conclusive and shall not be open to question in any proceeding whatever.

(3) A junior judge may be appointed for a county in which a city is situate and for which county a junior judge was appointed prior to the 13th day of April, 1897, and for any of the Counties of Grey, Lincoln, Renfrew, Leeds and Grenville, Stormont, Dundas and Glengarry, Prescott and Russell, Northumberland and Durham, Ontario, Bruce, Simcoe, Huron, Lambton and Victoria, including Haliburton, and for the Provisional Judicial Districts of Algoma, Nipissing and Thunder Bay. 9 Edw. VII. c. 29, s. 5; 2 Geo. V. c. 19.

Jurisdiction of Junior Judges.

6. Where any power or authority is, by this Act or otherwise, conferred upon or may be exercised by the judge of a county or district court, whether with reference to the holding of any of the courts of the county or district which he may hold, or to the business of any of such courts, or to any other matter or thing over which he has jurisdiction, the like power and authority shall be possessed and may be exercised by a junior judge, subject to the general regulation and supervision of the judge. 9 Edw. VII. c. 29, s. 6.

Appointments in York.

7. A second junior judge and a third junior judge may be appointed for the County of York, who shall be called respectively the second junior judge and the third junior judge of the county court of the County of York. 9 Edw. VII. c. 29, s. 7.

The arrangement of these sections is not happy, as section 6 should follow section 7, while the latter should have been made sub-section 4 of section 5.

In Elora Agricultural Insurance Co. v. Potter, 7 P.R. 12, it was held, where a reference was directed to "the judge of the County of Wellington," that the senior judge was the person referred to, and an appointment given by the junior judge to proceed with the reference was set aside.

In Biggar's Municipal Manual, p. 235, it is stated that the words "senior or officiating judge" in section 259 of the Municipal Act do not include a junior judge. In Reg. *ex rel.* McDonald v. Anderson, 8 P.R. 241, an application was made to set aside a writ of *quo warranto*, which had been issued on the fiat of the junior judge of the County of Wellington. The application was dismissed, but the question of the right of a junior judge to act does not appear to have been raised.

A junior judge of a county court is "a judge of a county court" within the meaning of the Extradition Act. *Re* Parker, 19 O.R. 512; *Re* Garbutt, 21 O.R. 179 and 465. See also R.S.C. 1906, c. 138, s. 2 (*a*), and Speers v. Speers, 28 O. R. 188, *infra*, note to section 14.

Judge to Reside within County.

8. Every judge and junior judge of a county or district court shall reside within the county or district

for which he is appointed, unless otherwise provided by Order in Council. 9 Edw. VII. c. 29, s. 8; 1 Geo. V. c. 17, s. 54.

The words "unless otherwise provided by order in council," were added in 1911, and they presumably mean action by the Lieutenant-Governor in Council. The constitutionality of this amendment came up incidentally in the House of Commons on May 16th, 1914, on the discussion of a Bill introduced by the Minister of Justice, to amend the Judges' Act. A member referred to the fact that the county court judge of his county resided in an adjoining county under the alleged authority of such an order in council, and the Minister promised to look into the fact. The Bill was afterwards withdrawn, and apparently this question was allowed to drop.

Section 28 of R.S.C. 138, *supra*, makes the tenure of office of a county judge conditional on residence within his county, and as this condition is embodied in the patents issued to county judges, it is apparent, according to *Re* Squier, *supra*, at page 491, that proceedings might be taken by *scire facias* to remove a judge who disregarded it.

Judge not to Practise.

9. A judge or junior judge shall not, directly or indirectly, practise as counsel or solicitor or act as a notary public or conveyancer under the penalty of forfeiture of office and the further penalty of $400. 9 Edw. VII. c. 29, s. 9.

In an action brought for the penalty under this section, the declaration alleged that defendant, being a judge, did in certain proceedings in the surrogate court prepare certain papers and documents to be used in said court, to wit, the petition of one G., etc. Defendant

pleaded that he did not practice in the profession of the law as an attorney for said G., or as such attorney prepare any papers or documents to be used in said surrogate court. The evidence shewed that defendant prepared gratuitously for G., who was a widow in poor circumstances, the petition, bond and affidavits to enable her to obtain administration to her late husband:—Held, that the plea was proved, and a verdict was, therefore, entered for defendant on the leave reserved. *Per* Draper, C.J., of Appeal, and Morrison, J., the evidence did not bring defendant within the spirit of the Act, or the mischief against which it was directed, which was the doing of acts prohibited for profit. Allen *q.t.* v. Jarvis, 32 U.C.R. 56.

See section 12, *infra*, as to deputy judges being allowed to practice.

Judge not to Engage in Business.

R.S.C., c. 138, contains the following additional prohibition against county judges engaging in any other business:—

33. No judge of . . any . . county court in Canada shall, either directly, or indirectly as director or manager of any corporation, company or firm, or in any other manner whatever, for himself or others, engage in any occupation or business other than his judicial duties; but every such judge shall devote himself exclusively to such judicial duties. 4-5 Edw. VII. c. 31, s. 7; c. 47, s. 3.

This does not, however, prevent a county judge from acting as arbitrator, though it was at first supposed it did, as does the English County Courts Act.

The opinion of the Department of Justice as to the meaning of this legislation may be gleaned from the following letter, addressed by the Deputy Minister to Mr. Martin Malone, of Hamilton, on February 2nd, 1914, with reference to a charge made by him against Judge Monck,

of an infraction of this section, by acting as a Director of the Hamilton Jockey Club, at a salary of $1,000 a year:—

"I have received a reply from the judge, and he admits that he is and has been for many years a Director of the Hamilton Jockey Club. The Judge states that he never looked upon the Jockey Club as an ordinary trading or business corporation, and therefore considers that in retaining his Directorship he was not carrying on business within the meaning of section 33 of the Judges' Act; that the club is a social and sporting club, having, of course, as all clubs have, a business side, but that it is not organized for the purpose of conducting business as an ordinary corporation does in the business world. The judge states that he did some years ago receive a honorarium for his services, but that he did not receive a salary of $1,000 a year, and that the by-law by which it was proposed to authorize the salary was not confirmed and never became effective, he having refused to accept any salary. The judge considers, therefore, that he is strictly conforming with the spirit and letter of section 33."

"I am to state that in these circumstances the Minister of Justice does not consider that any further action devolves on him. If you think that the judge's directorship constitutes a breach of the statute it is doubtless open to you to proceed to have your views adjudged by ordinary methods, but the Minister of Justice does not think that the case is sufficiently made out to justify executive action."

Deputy Judges.

10.—(1) A barrister of at least three years' standing at the Bar of Ontario may be appointed to be deputy judge for any county or district.

(2) The appointment may be made notwithstanding that the office of judge is vacant by death, or

resignation, or that the judge is ill or absent at the time of the appointment. 9 Edw. VII. c. 29, s. 10.

This section is not to be confounded with section 4 of the County Courts Act, *infra*, which was passed in 1894, and which provides that, "In case of the illness or absence of the judge, the court may be presided over by a judge of any other county or district court or by one of His Majesty's counsel, upon the request in writing of the judge or of the Attorney-General for Ontario." A deputy judge must be appointed, like any other judge, by the Governor-General in Council. See *Re* Greenwood v. Buster, 1 O.W.R. 225. In that case a judgment of nonsuit had been pronounced in 1893 by one Richard T. Walkem, Q.C., sitting as county judge, at the request of the judge who was ill, but without the authoriy of a Commission as deputy judge or otherwise. The plaintiff moved before the judge to set aside the nonsuit, but the motion was dismissed with costs. Several years afterwards upon proceedings being taken to enforce the judgment for costs, the plaintiff moved for prohibition. It was argued for the defendant that the plaintiff was estopped from taking advantage of the irregularity, and the cases of Mayor of London v. Cox, L.R. 2 H.L. 239; Archibald v. Bushey, 7 P.R. 304; Robinson v. Cornwall, *ib.* 297, were cited, also Shortt on Mandamus and Prohibition, p. 455. It was held by Meredith, J., that there was a total want of jurisdiction, and consent could not confer jurisdiction, and that the delay could make no difference. Reference was made to Deadman v. Agriculture & Arts Association, 6 P.R. 176, and prohibition was granted, but without costs. In a similar unreported case of *Re* Innis v. Gates, Rose, J., had previously granted prohibition under the same circumstances.

The law is different under the present English County Courts Act, which is more like section 4 of our County Courts Act, *infra*, and section 20 of our Division Courts

Act; see Rex v. Lloyd, 75 L.T.Q.B. 126 and 406, and notes to next section.

If the above quoted section 4 of the County Courts Act had been passed before the appointment of Mr. Walkem above mentioned, such appointment would have been valid under it, as it was apparently enacted to cover cases of that kind.

Tenure of Office and Powers.

11. A deputy judge shall hold office during pleasure, and in case of the death, illness or absence of the judge, shall have authority to perform in the place of the judge, in the county or district for which he is appointed, all the duties of and incident to the office of the judge, and all acts required or allowed to be done by the judge under this or any other Act, unless therein otherwise expressly provided. 9 Edw. VII. c. 29, s. 11.

In Regina v. Fee, 3 O.R. 107, where the defendant was convicted of perjury committed at a division court held by a deputy judge under a Commission issued by the Governor-General in Council during the absence of the county judge on leave, it was held that it was not necessary for the Crown to prove the Order in Council granting the leave of absence, for its existence would be presumed, as well as the fact that the Commission was not effete by lapse of time, in accordance with the general presumption of law that a person acting in a public capacity was duly appointed and authorised to act. It was also held that the Commission was validly issued, and that it was not essential to enable the deputy judge to act, that the county judge should be absent from the county. See also McKenzie v. Dancey, 12 A.R. 317.

In *Re* Prince Edward Prov. Election, 9 O.L.R. 463, it was held that a deputy county court judge, in the

case of illness of the county judge, has jurisdiction to hold a recount of ballots in an election for the Provincial Legislature.

In Keyes v. McKeon, 23 O.L.R. 529, it was decided that a deputy judge, appointed by the Governor in Council, under the provisions of section 10, had the same jurisdiction as a local judge of the high court, under section 185, (now section 114) of the Judicature Act, as is possessed by a county court judge. An order made by a deputy judge, as a local judge of the high court, for inspection by the plaintiff and his solicitors and certain named witnesses, of a building, the construction of which was in question in the action, was held in the circumstances of the case, to have been properly made upon short notice, and for the next day after the order; and to be in other respects a proper order under Con. Rule 1096, (now 370).

In Hoey v. Macfarlane, 4 C.B.N.S. 718, it was held that a deputy judge had no authority to deliver judgment after the expiration of the period for which he was appointed, or after the death of the judge who appointed him. Section 21 of the English County Courts Act of 1888, however, now provides that the appointment of a deputy judge shall not be vacated by the death or resignation of the judge, but the acts of the deputy judge after such death or resignation, shall be as valid as if the judge had not died or resigned. Section 18 of the same Act provides for the appointment being made by the judge himself, but the name of the deputy judge must be forthwith communicated to the Lord Chancellor. See also Rex v. Lloyd, 75 L.J.K.B. 126 and 406.

Deputy Judge may Practise.

12. Nothing herein contained shall prevent a deputy judge from practising the profession of the law. 9 Edw. VII. c. 29, s. 12.

In Reid v. Drake, 4 P.R. 141, where a deputy judge had declined on the ground, amongst others, that he was the partner of the plaintiff's attorney, to entertain an application by the defendant for his discharge from arrest under a capias, it was held that the deputy judge should have granted the application.

Oath of Office.

13. Every judge, junior judge and deputy judge, before entering upon the duties of his office, shall take and subscribe the following oath before some person appointed by the Lieutenant-Governor to administer the same, that is to say:

"I, , do swear that I will (*in the case of a deputy judge add the words* as occasion may require,) truly and faithfully, according to my skill and knowledge, execute the several duties, powers and trusts of judge of the county *or* district court of the county *or* district of , (*as the case may be*): So help me God."

9 Edw. VII. c. 29, s. 13.

Judges May Act Together or Separately.

14.—(1) 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 such 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.

(2) The county court of the county of York, the court of general sessions of the peace, and the division courts of the said county, or any of such courts, may sit at the same time, and the business thereof may be proceeded with simultaneously. 9 Edw. VII. c. 29, s. 14.

Section 20 of The County Judges Act, *infra*, provides that "the judges of any county or district court may sit separately and concurrently for the despatch of the business of a sitting." There does not seem to be any good reason why these two sections should not have been consolidated.

To be a Justice of the Peace.

Section 13 of the former Act, which provided that county court judges should be *ex-officio* justices of the peace, has been omitted from this Act, but section 3 of the Justices of the Peace Act provides that county and district court judges shall be justices of the peace for every county, district and part of Ontario. See Rex v. Sault Ste. Marie, 1 O.W.N. 1144.

Additional Powers.

Section 114 of the Judicature Act confers the following additional powers on county court judges:—

114. Except in the County of York, every judge of a county court shall be a judge of the high court division for the purposes of his jurisdiction in actions in the supreme court; and in the exercise of such jurisdiction may be styled a local judge of the supreme court, and shall, in all causes and actions in the supreme court, have, subject to the Rules, power and authority to do and perform all such acts and transact all such business in respect to matters and causes in or before the high court

division as he is or may be by statute or the Rules empowered to do and perform. 3-4 Geo. V. c. 19, s. 116.

The following are the Rules of Court which govern the proceedings before county court judges under the above section, and appeals therein:—

Same Power as Master in Chambers.

209. A local judge and a local master who does not practice as a barrister or solicitor or take out certificate entitling him to practice shall in all causes and matters in his county and in interpleader proceedings where the goods in respect of which interpleader is sought are situate in his county, have concurrent jurisdiction with, and the same power and authority, as the master in chambers at Toronto. C.R. 45.

Certain Powers of Judge of High Court.

210.—(1) A local judge shall, in actions brought and proceedings taken in his county, possess the like powers as a judge sitting in court or chambers with regard to:—

(*a*) Motions for judgment in undefended actions;

(*b*) Motions to appoint receivers after judgment by way of equitable execution;

(*c*) Applications for leave to serve short notice of a motion to be made before a Judge sitting in court or chambers.

And where the solicitors for all parties reside in his county or agree that the same shall be heard before him any motion or application except

i. Applications for taxed or increased costs under Rule 654.

ii. Motions for injunction, save as provided in Rule 211.

iii. Motions to strike out a jury notice save for irregularity.

(2) Where an infant or lunatic or person of unsound mind is concerned the powers conferred by this Rule shall not be exercised without the consent of the Official Guardian, or of the committee or guardian of or the person authorized to act on behalf of the lunatic or person of unsound mind.

May Grant Interlocutory Injunction.

211.—(1) A local judge may in cases of emergency grant an *ex-parte* injunction in any action brought in his county upon proof to his satisfaction that the delay required for an application to a judge is likely to involve a failure of justice, but such injunction shall not be for a longer period than eight days.

See, as to restricted limits within which this power should be exercised; Capital Mfg. Co. v. Buffalo Sp. Co. 3 O.W.N. 553, and Baldwin v. Chaplin, 4 O.W.N., 1574.

When to Hear Motion to Continue.

(2) If all parties interested consent, the local judge may hear any motion to continue, vary or dissolve the injunction. C.R. 46, *amended.*

May Order Partition or Administration.

212. Motions for partition or administration may be made before a judge in chambers or the local judge of the county where the land (or if more than one parcel, any parcel) is situate or the testator or intestate died. C.R. 956.

Appeal to Judge in Chambers.

505.—(1) A person affected by an order of the master in chambers, a local judge or a local master, or other

officer in chambers, or of a master under the authority of Rule 433, may appeal therefrom to a judge in chambers.

(2) The appeal shall be by motion, on notice served within four days and returnable within ten days after the decision complained of.

(3) The appeal shall not be a stay of proceedings unless ordered by a judge or by the officer whose decision is complained of.

(4) Where the judgment, order or decision is made or given in vacation, a person affected thereby may, if the matter is urgent, appeal therefrom during vacation to the vacation judge, or may appeal after vacation in the same manner and within the same time as if the judgment, order or decision had been made on the first day after vacation.

(5) Appeals in chambers shall be argued by counsel. C.R. 767 and 768.

Appeal to Judge in Court.

506. Any person affected by a judgment or order of a local judge in court, may appeal therefrom to a judge in court, and such appeal shall be brought within the time and upon the like notice and proceedings as in cases of appeals from orders and decisions of local judges in chambers. C.R. 48.

In Chisholm v. Herkimer, 19 O.L.R. 600, one of the local judges at London assumed to make an order under Rule 75 which provides that "Where there are numerous parties having the same interest, one or more may sue or be sued, or may be authorized by the court to defend on behalf of or for the benefit of all." Upon this order a judgment by default was entered against several defendants, some of whom were not formally parties to the action. The latter subsequently filed a petition to set aside the judgment, and it was held by Riddell, J., that

the local judge was not "the court" under Rule 75, and had no power to make an order thereunder. See also Cochrane Mfg. Co. v. Lemon, 11 P.R. 351, and Waterhouse v. McVeigh, 12 P.R. 676.

Ex parte Orders.

In addition to the above Rules as to appeals, the following Rule applies specially to *ex parte* orders:—

217. A party affected by an *ex parte* order, or any party who has failed to appear on an application through accident or mistake, or insufficient notice of the application, may move to rescind or vary the order before the judge or officer who made the same, or any judge or officer having jurisdiction, within four days from the time when the order comes to his notice. C.R. 358.

It was held in Williams v. Harrison, 6 O.L.R. 685, that the Master in Chambers had jurisdiction, under this Rule, to rescind an *ex parte* order made by a local judge.

Jurisdiction of Master in Chambers.

The jurisdiction of the Master in Chambers, conferred on county judges by Rule 209, is as follows, under Rule 208:—

208. The Master in Chambers is empowered and required to dispose of all applications properly made in chambers save in respect to the following matters:

1. Matters relating to criminal proceedings, or the liberty of the subject;
2. Appeals and applications in the nature of appeals;
3. Extending the time for appealing to a divisional court of the appellate division;
4. Applications for arrest;
5. Proceedings as to lunatics;

6. Originating notices other than applications for administration, partition or interpleader.
7. Applications as to the custody, maintenance or guardianship of infants, or the sale, lease, mortgage of or dealing with infants' estates or settled estates.
8. Opposed applications for judgment for partition or administration.
9. Applications for prohibition or mandamus.
10. The payment of money out of court, or dispensing with payment of money into court, in administration and partition matters.
11. Allowing taxed costs in lieu of commission under the provisions of Rule 653.
12. Striking out a jury notice except for irregularity.
13. Any matter which is expressly required to be done by a judge.
14. The removal of causes from inferior courts.
15. The making of orders for references under The Arbitration Act.
16. Staying proceedings after verdict, or judgment at a trial. C.R. 42, *amended.*

When Judge to be Local Master.

The following sections of The Judicature Act provide for the county judge becoming local master, either permanently or temporarily:—

88. Where a vacancy occurs in the office of local master, the judge of the county court of the county shall be the local master until and unless another person is appointed local master, and if there are two judges, both of them shall be local masters until and unless one of them or some other person is appointed sole local master. 3-4 Geo. V. c. 19, s. 88.

89. In case of the illness or absence of a local master or upon his request in writing, filed with the local registrar, a judge, or deputy judge of the county court of the county, after approval by the Lieutenant-Governor in Council, may act as such local master and while so acting shall have all the powers and may perform all the duties of such local master. 3-4 Geo. V. c. 19, s. 89.

When to be Surrogate Judge.

The following are the provisions of the Surrogate Courts Act respecting the judges of that court:—

6.—(1) The judge of the surrogate court shall be appointed by the Lieutenant-Governor in Council, and shall hold office during good behaviour and residence in the county for which he is appointed, and shall be subject to be removed by the Lieutenant-Governor in Council for inability, incapacity or misbehaviour established to his satisfaction.

(2) Every appointment of a surrogate court judge heretofore made by the Lieutenant-Governor in Council is hereby declared to be as valid as if this section had been enacted at the time of his appointment. 10 Edw. VII. c. 31, s. 6.

7. The judge of a county court appointed before the 7th day of April, 1896, or where there are more judges than one, the senior judge appointed before that day shall continue to be *ex-officio* judge of the surrogate court for the county. 10 Edw. VII. c. 31, s. 7.

8.—(1) In case of the illness or absence, or at the request in writing, of the judge of the surrogate court of any county or district any judge who has authority to preside over the county or district court of the county or district, or in the case of a county or district for which there is only one judge, any barrister of 10 years' standing, on the request in writing of the judge of the surrogate court or of the Attorney-General of

Ontario, may act as judge of the surrogate court. 1 Geo. V. c. 18, s. 1.

(2) In case of a vacancy in the office of judge of the surrogate court a judge of the county or district court of the county or district may act as judge of the surrogate court, or if there be no such judge of the county or district court, or none present in the county or district, or able to act, any judge of any other county or district court may so act, upon the written request of the Attorney-General of Ontario.

(3) A judge of the county or district court, while so acting, shall have all the powers and privileges and may perform all the duties of the judge of the surrogate court.

(4) Except in the case of a vacancy, where a judge so acts he shall not be entitled to the fees, unless with the consent of the judge of the surrogate court.

(5) Where a judge of a county court, who is also judge of the surrogate court, vacates his county court judgeship, unless the Lieutenant-Governor in Council otherwise directs, he shall thereby vacate his judgship of the surrogate court. 10 Edw. VII. c. 31, s. 8.

In Speers v. Speers, 28 O.R. 188, it was held that a junior judge who had tried an issue in the surrogate court while the office of senior judge was vacant, had the right to deliver judgment in such case after a new senior judge had been appointed.

To Hold Division Courts.

Section 19 of the Division Courts Act imposes the following additional duties on judges of the county courts:—

19.—(1) The courts shall be presided over by the judge or the junior judge or by the deputy judge.

(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.

(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.

Powers Under Other Statutes and Rules.

By R.S.O. 1914, c. 82, s. 4, a judge of the county court may order a writ of attachment to issue in a supreme court case against the property of an absconding debtor. It was held in Disher v. Disher, 12 P.R. 518, that the county court judge has no power to set aside an order made by himself under this section. By R.S.O. 1914, c. 83, s. 3, a judge of a county court may make an order in the nature of a *ca. re.* in a supreme court action, as well as in his own court; and by s. 25 (2), he may set aside such order or order the defendant to be discharged out of custody. It was held in Elliot v. McCuaig, 13 P.R. 416, that a divisional court had power under this rule, (1) to set aside or vary an order for arrest made by a county court judge in a county court action, and (2) to reverse an order dismissing an application for discharge. (The head note as to the latter is defective). This decision was followed by the divisional court in McVean v. Ridler, 17 P.R. 353, on an appeal from an order discharging the defendant; and a subsequent application to the court of appeal for leave to appeal to that court was dismissed, the court holding that no appeal lay either with or without leave. In Bank of Montreal v. Partridge, 3 O.W.N. 149, Middleton, J., did not follow the first part of the above decision in Elliot v. McCunig. By section 28 of the last mentioned Act a *ca. sa.* can be issued in the supreme court only on an order of a judge of that court where the defendant has not been previously arrested, or has been discharged. It was held in Waterhouse v. McVeigh, 12 P.R. 676, following Cochrane Mfg. Co. v.

Lemon, 12 P.R. 351, that a county court judge has not this power as a local judge of the high court. It was also held that a judge of the high court sitting in "single court" has power to set aside such an order. See also Chisholm v. Herkimer, 14 O.L.R. 600, where it was held that a local judge is not "the court" under Rule 75, (former Rule 200), and has no power to make an order thereunder. As to the power to impose additional duties on judges, see Lefroy on Legislative power in Canada, 510, *In re* Vancini, 34 S.C.R. at page 626, and Geller v. Loughrin, 24 O.L.R. 18.

May Act Outside His County.

15.—(1) It shall be competent for any judge of a county or district court to hold any of the courts in any county or district or to perform any other duty as a judge of a county or district court in any such county or district upon being required so to do by an order of the Governor-General in Council, made at the request of the Lieutenant-Governor.

May Act at Request of Other Judge.

(2) The judge of any county or district court may, without any such order, perform any judicial duty in any county or district on being requested so to do by the judge of the county or district court to whom the duty for any reason belongs.

Retired Judge May Act.

(3) Any retired judge of a county or district court may hold any court or perform any other duty of a judge of a county or district court in any county

or district on being authorized so to do by an order of the Governor-General in Council, made at the request of the Lieutenant-Governor.

Powers of Judge so Acting.

(4) The judge so required, requested or authorized as aforesaid shall, while acting, be deemed to be a judge of the county or district 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.

(5) In this section "judge" shall include a junior judge. 9 Edw. VII. c. 29, s. 15.

Powers under "The Judges Act."

The following further provisions are contained in R.S.C. 1906, c. 138:—

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. 54-55 V. c. 28, s. 1.

31. It shall be competent to 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 any 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.

2. The judge of any county court may, without any such order, 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.

3. The judge so required or requested as aforesaid shall, while acting in pursuance of such requisition or request, he 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. 54-55 V. c. 28, s. 2.

32. Any retired county court judge of a province may hold any court or perform any other duty of a county court judge in any county or district of the province on heing authorized so to do by an order of the Governor in Conncil, made at the request of the Lieutenant-Governor of such province; and such retired judge while acting in pursuance of such order shall be deemed to he a judge of the county or district in which he acts in pursnance of the order, and shall have all the powers of such judge 54-55 V. c. 28, s. 3.

Quaere as to whether these sections authorize such judge or retired judge to sit in any other place than in the county in which he is so authorized to act. See cases cited *infra,* also section 16, *infra.*

Powers of Legislatures.

By sub-section 14, of section 92, of the B. N. A. Act, the legislatures of each province may exclusively make laws in relation to the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, hoth of civil and criminal jurisdiction, and including procedure in civil matters in those courts. By section 14 of chapter 25 of the Consolidated Statutes of British Columbia, a county court judge is authorized to act as such in certain cases in a district other than that for which he is appointed. The constitutionality of the latter Act came before the supreme court in 1892, in *Re* County Courts of British Col-

umhia, 21 S.C.R. 446, when it was held, over-ruling Piel Ke-ark-an v. Reginam, 2 B.C.R. 53, that the power given hy the B. N. A. Act included the power to define the jurisdiction of such courts territorially as well as in other respects, and also to define the jurisdiction of the judges who constitute such courts. It was also held that the Act was *intra vires* of the legislature under the ahove section of the B. N. A. Act. It was further held that the expression " any judge of the county court " in the Dominion statute respecting speedy trials, meant any judge having, hy force of the provincial law regulating the constitution and organization of county courts, jurisdiction in the particular locality in which he might hold " speedy trials," hut the statute would not authorize a county court judge to hold a " speedy trial " beyond the limits of his territorial jurisdiction, without authority from the provincial legislature so to do. See now section 823 of the Criminal Code. See also R. v. Brown, 13 Can. Crim. Cases, 133, in notes to c. 61, *infra.*

In *Re* McDonald and Town of Listowel, 6 O.L.R. 556, it was held upon a petition under section 110 of the Ontario Registry Act for an order amending a plan, presented to the judge of the county court of the county in which the land lay, and adjudicated upon at his request by the judge of another county, that the judge of such other county had jurisdiction, as to hear such a petition is one of the judicial duties to he performed hy the judge of a county court in any case where application is made to him instead of to a judge of the high court, and that sub-section 2 of the ahove section 15 applied.

It was held in Nova Scotia, under a statute similar to our County Judges' Act, that a county judge sitting in Cape Breton County, had no jurisdiction to try a municipal election petition to set aside the election of a councillor for Richmond County. Catherine v. Morrison, 21 N.S.R. 291.

Similarly, in New Brunswick, where the county judge of St. John was called in by the county judge of Albert to try a case under the County Court Act, and, while sitting in chambers in St. John, issued a summons for a new trial, but afterwards discharged it on the ground that he had no power to act in St. John, it was held that the first summons was a nullity, and that he had power to issue a new summons in Albert. Steeves v. Lucas, 15 N.B.R. 70.

It has been held in Nova Scotia that the territorial jurisdiction of county court judges does not depend upon their commission, which are only descriptive of the tribunal over which such judges are appointed to preside, but upon the enactments of the provincial legislature, which may define, enlarge, and extend the districts within which the judges sit, as it sees fit. Crowe v. McCurdy, 18 N.S.R. 301.

In a more recent case in New Brunswick, it was held (per Weldon, Fisher and Wetmore, JJ., Allen, C.J., and Duff, J., dissenting), that section 1 of the Act 39 V. c. 5, intituled "An Act to establish Parish Courts," which section provides that the commissioners shall he appointed by the Lieutenant-Governor in Council, is not *ultra vires* of the local legislature. Ganong v. Bayley, 17 N.B.R. 324.

See also Clement's Canadian Constitution, 2nd ed., p. 309, *Re* Wilson v. McGuire, 2 O.R. 113, and Gibson v. McDonald, 7 O.R. 401, *infra,* notes to section 19.

Judge may be Authorized to Sit Outside County.

16. The Lieutenant-Governor in Council may empower a judge or junior judge of a county or district court to transact, at such place out of his county or district, to be named in the order in council, as

may be deemed proper, all such business depending in his Court as may be transacted in chambers where the solicitors for all parties reside in the place so named, or with the consent of the solicitors for all parties. 9 Edw. VII. c. 29, s. 6.

This may possibly be of some convenience where a judge is temporarily resident out of his jurisdiction for some necessary or reasonable purpose, and urgent matters arise during his stay in another place. Although it was enacted before the amendment to section 8 *supra*, it would also apply to a judge permanently resident outside his county under the authority of an order in council pursuant to the present section 8.

Allowances to Judges of District Courts.

17. In lieu of the fees otherwise payable to him under The Surrogate Courts Act and for services performed under The Mechanics and Wage Earners Lien Act, The Woodman's Lien for Wages Act and The Rivers and Streams Act there shall be paid to every judge and junior judge of a district court the sum of $500 per annum, and the fees heretofore payable in money under any of the said Acts shall be payable in stamps, and shall form part of the Consolidated Revenue Fund. 10 Edw. VII. c. 26, s. 13.

Appointment of Stenographers.

18.—(1) A shorthand writer may be appointed by the Lieutenant-Governor in Council for the local courts of each county and provisional judicial district.

Subject to Direction of Judge.

(2) The shorthand writer so appointed shall be subject to the direction of the judge or, in his absence, of the junior judge or judges, and shall be entitled to such remuneration by salary or by fees, or partly by salary and partly by fees, as the Lieutenant-Governor in Council may direct.

When Paid by Salary Only.

(3) If such shorthand writer is paid by salary only the fees payable in respect of his duties shall be applied in reduction of his salary, and the balance, if any, shall be paid by the county quarterly on the first days of January, April, July and October of every year.

Regulation of Fees and Duties.

(4) The fees and all matters relating to the duties of the shorthand writer shall be determined and regulated by the judge of the county or district court, subject to the approval of the Lieutenant-Governor in Council.

Separated Cities and Towns to Contribute.

(5) Every city and separated town shall pay the county a proper proportion of the remuneration which, in case of disagreement, shall be determined by arbitration according to the provisions of *The Municipal Act*, and subject thereto, and unless and until the same is otherwise determined, the city or

town shall pay to the county one-half of such remuneration. 9 Edw. VII. c. 29, s. 17.

The following are the fees fixed by Order in Council of 30th June, 1896, with reference to shorthand writers in local courts:—

(1) For single copies five cents per folio.

(2) For copies required for the judges under rules made or to be made in that behalf, and to be furnished at the expense of the parties, and for one copy for the party desiring to move thereon, six cents per folio of one copy for all the copies required of any one transcription of shorthand notes, not exceeding five altogether.

(3) For any additional copies made for the parties one and one-half cent per folio for each copy.

Interpreters.

19. If the Council of any county, by resolution, requests the appointment of an official interpreter to act at the Courts held in that county an appointment may be made in the same manner, and subject to the same terms and conditions, as provided with respect to shorthand writers by the next preceding section which shall apply as nearly as may be to official interpreters. 9 Edw. VII. c. 29, s. 18.

Note.—By 9 Edw. VII. c. 29, s. 19 (1), chapter 54 of R.S.O. 1897, and all amendments thereto are repealed, but by sub-section 2 it is provided that notwithstanding the repeal of sections 19 to 28 of the said Act any district or group formed under the provisions of the said section 19 and then existing should continue to exist, and that the provisions of the said

sections should continue to apply to such district or group.

Sections 19 and 20 of the former Act, referred to in above note were as follows:—

County Court Districts.

19. (1) Any part or parts of the province may, for the purposes of this Act, be divided into districts, or groups of counties, by proclamation of the Lieutenant-Governor, at such time or times as he may deem expedient; and such division shall take effect, and the districts thereby formed be erected and established, on such day after the first publication of the proclamation in the *Ontario Gazette* as the proclamation may name.

(2) The districts so erected may, from time to time be dissolved, re-established, altered or re-arranged by the Lieutenant-Governor by like proclamation; and the time when the dissolution, alteration or re-arrangement is to take effect may be named, proclaimed and published in the *Ontario Gazette* in like manner. R.S.O. 1887, c. 46, s. 17.

20. After the erection of a district for the purposes of this Act, the several county courts, courts of general sessions, division courts, courts of appeal under the Assessment Act, courts for the revision of voters' lists and all other courts which a county judge may hold in each county, shall be held by the judges (including therein the junior judges) in the district, in rotation, as far as may in each district be just, convenient and practicable, in view of the respective ages, length of service, and strength of the several judges and the special duties assigned to junior judges, as well as in view of the other offices (if any) held by any of the judges, and all other circumstances. R.S.O. 1887, c. 46, s. 18.

Several groups of counties were established under these sections. An order having been made by the judge

of the county court of the County of Lambton, sitting in a division court in the County of Middlesex, for the committal of a defendant, a motion for prohibition was made on the ground that that enactment was *ultra vires*:—Held Armour, J., dissenting, that the provincial legislature has complete jurisdiction over the division courts, including the appointment of officers to preside over them; that the learned judge acted in the Middlesex division court as one of the persons designated by the legislature to preside over it, and having regard to the enactment in question, solely in its hearing on division courts, it was not *ultra vires*. *In re* Wilson v. McGuire, 2 O.R. 118.

In a subsequent case an application was made for a prohibition to restrain proceedings to enforce an order of the sessions of the County of Renfrew, which were presided over by the county judge of Lanark under the provisions of these sections, quashing a conviction with costs:—Held, per Armour and O'Connor, JJ., that the county judge of the County of Lanark had no power to preside at the sessions in the County of Renfrew, the above sections authorizing him to do so being *ultra vires*. Wilson, C.J., upon this point gave no positive opinion, but inclined to the opposite view. Gibson v. McDonald, 7 O.R. 401.

In consequence of the latter decision, the judges in "grouped" counties have ceased to hold county courts in other than their own counties, and the writer is not aware of any group to which the above saving clause is of any practical application.

While the "grouping clauses" were being acted upon, the judge of a grouped county and the senior and junior judges of the adjoining grouped county, assumed to sit in term under these provisions, and to reverse a decision of the junior judge at the trial, but it was held that the judgment of a court so constituted was invalid, and that the verdict at the trial was not affected thereby.

Ferguson v. McMartin, 11 A.R. 731. See also Borthwick v. Young, 13 A.R. 671.

For a criticism of the *ratio decidendi* of the above case of Gibson v. McDonald, see Judge Constantineau's recent work on "The de facto doctrine," sections 425, 426 and 427. See also as to *de facto* judges, *Ex parte*, Thomas Curry, 1 Can. Crim. Cases, 532.

THE COUNTY COURTS ACT

CHAPTER 59.

An Act respecting the County Courts and District Courts.

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

Short Title.

1. This Act may be cited as *The County Courts Act*. 10 Edw. VII. c. 30, s. 1.

A Court in Each County.

2. There shall be in and for every county and district a court of record, to be styled in counties, the county court of the county (*or* united counties) of (*naming the county or united counties*) and in districts the district court of the district of (*naming the district*). 10 Edw. VII. c. 30, s. 2.

These courts were originally established in Upper Canada, under the name of "district courts," and the various statutes from Geo. III. to 4 & 5 V. were consolidated by 8 V. c. 13. They have since undergone numerous changes, both in jurisdiction and procedure, and they occupy an intermediate position between the high court

and the division courts. They were given a limited equity jurisdiction by 16 V. c. 119, which was subsequently taken away by the Law Reform Act, 32 V. c. 6, s. 4, but was restored and increased by the County Courts Act, 1896, 59 V. c. 19.

So far as the writer's knowledge goes, the Province of Ontario is the only place in the British Empire having three distinct civil courts or original jurisdiction, presided over by judges, and general in their character. The English county courts possess substantially the combined jurisdiction of our county and division courts, and the pleading, procedure and practice are somewhat similar to those of our division courts, with a sliding scale of court and solicitors' costs, according to the amount of the claim. The county and district courts in the other provinces of Canada have largely followed the English model.

Judges to Preside over Courts.

3. Subject to the provisions of The County Judges Act, the court shall be presided over by the judge or junior judge or by the acting or the deputy judge. 10 Edw. VII. c. 30, s. 3.

See notes to section 14 of the County Judges Act, *ante*, as to the duties and powers of county and district judges.

Signatures of Judges.

R.S.O. c. 76, s. 30, provides as follows:—

30. (1) All courts, judges, justices, masters, clerks of courts, commissioners, and other officers acting judicially, shall take judicial notice of the signature of any of the judges of any court in Canada, in Ontario, and in every

other province and territory in Canada, where such signature is appended or attached to any decree, order, certificate, affidavit, or judicial or official document. R.S.O. 1897, c. 73, s. 30, part.

In Timmins v. Wright, 45 U.C.R. 246, it was held, that a county judge's order to arrest was well proved, under R.S.O. 1877, c. 62, s. 28, by the production of a copy certified as such, under the hand of the clerk of the court; but that the affidavit on which the capias issued, filed in that court, was not duly proved by the production of a copy of the affidavit similarly certified, and with a seal attached, apparently that of the court, but not referred to or described in the certificate.

Illness or Absence.

4. In case of the illness or absence of such judges the court may be presided over by a judge of any other county or district court, or by one of His Majesty's Counsel learned in the law, upon the request in writing of the judge or of the Attorney-General for Ontario. 10 Edw. VII. c. 30, s. 4.

See notes to section 10 of the County Judges Act, *ante*.

While a deputy judge, under that section, must be appointed by the Governor-General in Council, the judge himself may, under this section, and for either of the reasons therein mentioned, appoint one of the persons named therein as a temporary substitute, for the purpose of holding a particular sitting of the court, but not to perform any other duties.

This section, which was first enacted by 57 V. c. 20, s. 9, (1894), was apparently passed to cover cases like Greenwood v. Buster, 1 O.W.R. 225, *ante*. The appointment of R. T. Walkem, Q.C., referred to in that case, would have been good under this section, if it had then been in force.

In re Leiber v. Ward, 43 U.C.R. 375, it was held that a junior judge had power, under a similar provision in the Division Courts Act, to appoint a substitute.

In re Gough, 21 C.L.T. 92, an application was made to the Supreme Court of Nova Scotia for a writ of prohibition to prevent a county judge, who had acted in an adjoining county at the request of the county judge of that county, from giving judgment after the death of the latter, in an application heard by him during the other judge's lifetime, but the application was refused.

In McInally v. Blackledge, 80 L.J.K.B. 882, where the registrar sat as deputy, at the request of the county judge, and with the consent of the parties, it was held that no appeal lay from his decision.

See Keyes v. McKeon, 23 O.L.R. 529, *supra*, notes to section 11 of chapter 58.

Seal.

5. Every such court shall be provided with a suitable seal to be approved by the Lieutenant-Governor in Council. 10 Edw. VII. c. 30, s. 5.

Appointment of Clerks.

6. There shall be a clerk of every such court, who shall be appointed by the Lieutenant-Governor in Council, and shall hold office during pleasure. 10 Edw. VII. c. 30, s. 6.

Sections 90, 92 and 93 of the Judicature Act provide as follows:—

90. Where a judge of the county court is the local master, the clerk of that court shall be the deputy registrar unless another person is appointed to that office. 3-4 Geo. V. c. 19, s. 90.

92. Unless another person is appointed, the clerk of the district court shall *ex officio* he local registrar for his district. 3-4 Geo. V. c. 19, s. 92.

93. Except in the County of York, and unless another person is appointed, the clerk of the county court shall *ex officio* he deputy clerk of the Crown and Pleas for his county, unless the offices of deputy clerk and depnty registrar are consolidated under section 91. 3-4 Geo. V. c. 19, s. 93.

The following Con. Rules apply specifically to Connty Court Clerks:—

764. All writs in the county courts sball be issued by the clerk and shall be under the seal of the court, and shall he tested in the name of the judge thereof; or in the case of the death of such judge, then in the name of the junior or acting judge for the time being. C.R. 1212.

768. (2) The clerk of a county court shall, subject to the direction of the judge of that court in actions in the county court discharge all the duties and have all the power of the registrar, judgment clerk, clerk of the weekly court and clerk in chambers in supreme court actions. *New.*

Security by Clerks.

7. The clerk shall give security for the due performance of the duties of his office in such sum and in such manner and form as the Lieutenant-Governor in Council may direct. 10 Edw. VII. c. 30, s. 7.

The following provisions as to giving security are contained in the Public Officers Act, R.S.O. cap. 15:—

8.—(1) Security by or on behalf of every person appointed to any office or employment, or commission in the public service of Ontario, or to any office or employment of public trust, or wherein he is concerned in the

collection, receipt, disbursement or expenditure of any public money under the Government of Ontario, and who by reason thereof is required to give security, shall be furnished within one month after notice of his appointment, if he is then in Ontario, or within three months, if he is then absent from Ontario (unless he sooner arrives in Ontario, and then within one month after such arrival), in such sum and in such manner as may be approved of by the Lieutenant-Governor in Council or by the principal officer or person in the office or department to which he is appointed, for the due performance of the trust reposed in him and for his duly accounting for all public moneys entrusted to him or placed under his control.

(2) Where a deputy is appointed by any person holding an office, any security required by law and hereafter given on behalf of such person, shall extend to and include the acts and omissions of the deputy, whether appointed before or subsequent to the giving of the security.

(3) The liability of the sureties, and of the officer appointing the deputy, shall be the same as regards the performance of the duties of the office by the deputy, as in regard to the performance thereof by the person holding the office; and such liability shall extend to and cover all acts and omissions of the deputy while he continues to perform the duties of the office, and whether before or after the death or resignation of the person appointing him, subject to the same rights of withdrawal by the sureties from liability, as may exist in regard to the security given by public officers.

(4) The Lieutenant-Governor in Council may, notwithstanding the provisions of this section, require new security to be furnished by any deputy on the death or resignation of the person holding the office wherein he is deputy, and such security shall be for the like amount, and subject to the same conditions as that required by law for the due performance of the duties of the officer whom the deputy represents. 9 Edw. VII. c. 5, s. 8.

9. The Lieutenant-Governor in Council may prescribe the form of the security required to be furnished under any Statute by a public officer or by any class of public officers, and may authorize the Treasurer of Ontario to enter into agreements in His Majesty's name with any corporntion authorized to carry on the business of fidelity insurance in Ontario for the furnishing of security for any public officer, or for public officers generally, or for any class or classes of public officers. 9 Edw. VII. c. 5, s. 9.

Place of Office.

8.—(1) The clerk shall keep his office in the court house, or, if there is no room available therein, at such place in the county or district town as the judge may direct.

Section 377 of the Municipal Act is as follows:

377. (1) The county council shall have the care of the court house and of all offices, rooms and grounds connected therewith, whether the court house is a separate building or is connected with the gaol, and the appointment of the caretakers thereof, and shall, from time to time, provide all necessary and proper accommodation, fuel, light, stationery, and furniture for the provincial courts of justice, other than the division courts, and for the library of the Law Association of the county, such last mentioned accommodation to be provided in the court house, and proper offices, together with fuel, light, stationery, and furniture, and, when certified by the Attorney-General to be necessary, with typewriting machines, for all officers connected with such provincial courts, other than the Crown Attorney of the City of Toronto. (*As to Division Courts, see 10 Edw. VII. c. 32, s.* 13.)

(2) The council of the corporation of the City of Toronto shall provide proper offices, with fuel, light,

stationery, and furniture for the Crown Attorney of the City. 3 Edw. VII. c. 19, s. 506, *redrafted.*

(3) A corporation shall not be liable to pay for furniture, unless it has been ordered by the council or by some person authorized by it so to do. 3 Edw. VII. c. 19, s. 513, *amended.*

In an action brought under this section before the word "stationery" had been inserted therein, it was held that "furniture" must include everything necessary for the furnishing of the offices referred to in the enactment, for the purpose of transacting such business as might properly be done in such offices; and the word therefore included stationery and printed forms in use in the courts.

It was held also, upon the facts of this case, that a local officer of the courts, who ordered supplies of stationery and forms from the plaintiffs for his office, was duly authorized by the defendants' council to do so. Newsome *et al* v. County of Oxford, 28 O.R. 442.

Pursuant to this decision, the Statute Commissioners inserted the word "stationery," where it now appears as above, in the subsequent revisions of the statutes.

It was subsequently held in the case of Mitchell v. Pembroke, 31 O.R. 348, that a municipal corporation is liable to the police magistrate for a claim for stationery although extending beyond a year.

In re Local Offices of the High Court, 12 O.L.R. 16, it was held by Boyd, C., that the office of local master is an office within the meaning of the above section, but that the words "stationery and furniture" do not extend to law books and text books.

In Essex County.

(2) The clerk of the county court of the County of Essex may keep an office in some convenient place in the City of Windsor, subject to such arrangements

as the county council of the County of Essex may assent to, and subject also to the approval of the Lieutenant-Governor in Council. 10 Edw. VII. c. 30, s. 8.

In the case of Rodd v. County of Essex, 19 O.L.R. 659, it was held by the court of appeal, reversing Falconbridge, C. J., that the defendants were not liable for any portion of office rent for the clerk of the peace, at Windsor, as there was no provision in his case similar to that contained in the above proviso for keeping an office in any place but the county town. This decision was affirmed by the Supreme Court, 44 S.C.R. 137. Subsequently the following section was enacted by 1 George V. c. 17, but for some reason this section has not been consolidated in the revision of 1914:—

53. The Corporation of the County of Essex and the Corporation of the City of Windsor may enter into an agreement for providing and maintaining suitable accommodation in the City of Windsor for offices for the Crown Attorney, Local Master and Local Registrar of the High Court, and chambers and offices for the county judges and for other officers connected with the administration of justice in the county, and either of such corporations may acquire by purchase, lease or otherwise in the City of Windsor the necessary land or land and buildings for such offices, and may erect buildings and furnish and maintain the same for all or any of such purposes, and may pass by-laws for borrowing money by the issue of debentures, payable within 30 years from the date of the issue thereof, to pay the cost of such land and buildings, without obtaining the assent of the ratepayers.

Office Hours.

9. Except on holidays, and subject to rules of court as to office hours during vacations, the office

of the clerk shall be kept open from 10 o'clock in the forenoon until 4 o'clock in the afternoon, except on Saturday, when the office shall be kept open until 1 o'clock in the afternoon. 10 Edw. VII. c. 30, s. 9.

The former Rule 1220, which provided for office hours in vacation, was omitted in the recent revision, but on November 8th, 1913, sub-section (1) was added to Rule 177, as follows:—

"Office hours during vacation shall be from 10 a.m. to 12 noon."

In *Re* MacKay v. Goodson, 27 U.C.R. 263, it was held that a clerk of the county court being also *ex-officio* deputy clerk of the Crown and clerk of assize, is privileged from arrest only when engaged in his official duties, or while going to or returning from his office.

Account of Fines.

10. The clerk shall whenever required so to do by the Crown Attorney, and at least once in every three months, deliver to him, verified by the affidavit of the clerk, a full account in writing of all fines levied by order of the court. 10 Edw. VII. c. 30, s. 10.

Fees of Clerks.

R.S.O. 1914, c. 17, provides for the emoluments of county court clerks as follows:—

4.—(1) Every Local Registrar of the High Court, Deputy Clerk of the Crown, Clerk of the County Court and Registrar of the Surrogate Court shall be entitled to retain to his own use in each year his net income up to $2,500.

(2) Of the net income of each year over $2,500 he shall pay to the Treasurer of Ontario the following percentages:—

(*a*) On the excess over $2,500, up to $3,000, ten per cent. thereof;

(*b*) On the excess over $3,000, up to $3,500, twenty per cent. thereof;

(*c*) On the excess over $3,500, up to $5,000, fifty per cent. thereof;

(*d*) On the excess over $5,000, ninety per cent. thereof. 10 Edw. VII. c. 5, s. 4.

Return of Fees.

R.S.O. 1914, c. 15, contains the following provisions:—

15. Every clerk of a county court, every registrar of a surrogate court, and 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, and shall on or before the 15th day of January in each year make up a statement under oath of such fees, charges and emoluments to and including the 31st day of December of the previous year and return the same to the provincial secretary.

16. Every public officer who is by this or any other Act required to make a return of the fees and emoluments of his office to any department of the Government, or to any officer, shall include in his return the following particulars:

(*a*) The aggregate amount of all fees and emoluments earned by him during the preceding year by virtue of his office;

(*b*) The aggregate amount of all fees and emoluments actually received by him during the preceding year by virtue of his office;

(*c*) The actual amount of the disbursements during the same period in connection with his office, and such other particulars as the Lieutenant-Governor in Council may prescribe.

R.S.O. c. 17, contains the following additional provisions, applicable to county court clerks:—

8. On or before the 15th day of January in each year every officer affected by this Act shall transmit to the Provincial Treasurer a return under oath of all his fees and emoluments, including his salary, if any, whether received in cash or not, and also the disbursements incident to the business of the office or offices held by him, up to and including the 31st day of December of the next preceding year; and shall with such return transmit such portion of the fees and emoluments received by him during the next preceding year as he is required under this Act to pay to the Treasurer. R.S.O. 1897, c. 18, s. 5.

9. The moneys referred to in the next preceding section when received shall form part of the Consolidated Revenue Fund. R.S.O. 1897, c. 18, s. 6.

10.—(1) The Lieutenant-Governor in Council may make rules and regulations for the management of the offices of such officers, and may, thereby, confer on the inspectors thereof such powers as may be deemed necessary for carrying out the provisions of this and all other Acts relating to the duties of such officers.

(2) Such rules and regulations shall be laid before the Assembly within the first ten days of the Session next after the making thereof. R.S.O. 1897, c. 18, s. 8.

11. The disbursements of such officers shall be subject to the revision of the inspectors, and for the purposes of

such revision an inspector shall have power to take evidence and examine witnesses under oath. R.S.O. 1897, c. 18, s. 9.

Duties Under Bills of Sale Act.

The Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, c. 135, imposes the following additional duties on clerks of county courts:—

18.—(1) Except in the case of the Provisional County of Halihurton the instruments mentioned in the preceding sections shall he registered in the office of the clerk of the county or district conrt of the county or district in which the property mortgaged or sold is at the timo of the execntion thereof.

(2) Where the property is situate in the Provisional Connty of Halihurton the instrument shall he registered in the office of the clerk of the first division court of the provisional connty.

(3) In the case of a county the instrument shall he registered within five days from the execntion thereof.

(4) In the case of the Provisional Connty of Haliburton and of a district the instrument shall he rogistered within ten days from the execntion thereof.

(5) The clerk shall file the instrument and endorse thereon the time of receiving it. 10 Edw. VII. c. 65, s. 18.

20. The clerk shall number every instrument or copy filed in his office, and shall enter in alphahetical order in a book to he provided hy him the names of all the parties thereto, with the number indorsed thereon opposite to each name, and such entry shall he repeated alphahetically under the name of every party thereto. 10 Edw. VII. c. 65.

32.—(1) Every officer with whom instruments are reqnired to he registered nnder the provisions of this Act shall, on or before the 15th day of Jannary in each

year, transmit to the Minister of Agriculture a return which shall set out:

(*a*) the number of undischarged mortgages on record in his office on the 1st day of January in the year next preceding that in which the return is made;

(*b*) the number of mortgages and renewals, the number of discbarges, and the nnmber of assignments for the benefit of creditors registered during tbe year following the said 1st day of January; and

(*c*) the number of undischarged mortgages on record in his office on tbe 31st day of December in said year.

(2) The return shall not include instruments which have lapsed by reason of non-renewal.

(3) The occnpations or callings of the mortgagors or assignors as stated in the instrnments shall be classified and the return shall show the aggregate sums purporting to be secured by the mortgages in each class.

(4) The retnrn shall, wbere practicable, distingnish mortgages to secnre endorsations or fnture advances from mortgages to secnre existing debts or present advances. 10 Edw. VII. c. 65, s. 32.

Taxation of Costs.

11. The clerk shall tax costs, subject to an appeal to the judge. 10 Edw. VII. c. 30, s. 11.

There is no prohibition against a clerk of a county court sning or being sued in his own court, as there is in the case of jndges by s. 31, *infra*, and as in the case of division conrt clerks by R.S.O. c. 63, s. 80. It was held in Tolputt v. Mole, 80 L.J.K.B. 232, that where the

registrar of an English county court was unsuccessfully sued in his own court, he was entitled to tax his own costs.

Scale of Costs.

The scale of costs taxable is provided for by the following Rules:—

649. Where an action of the proper competence of a county court is brought in the supreme court, or an action of the proper competence of a division court is brought in the supreme court, or in a county court, and the judge makes no order to the contrary the plaintiff shall recover only county court costs, or division court costs, as the case may be, and the defendant shall be entitled to tax his costs of suit as between solicitor and client; and so much thereof as exceeds the taxable costs of defence which would have been incurred in the county court or division court, shall, on entering judgment, be set off and allowed by the Taxing Officer against the plaintiff's county court or division court costs to be taxed, or against the costs to be taxed and the amount of the verdict if it be necessary; and if the amount of costs so set off exceeds the amount of the plaintiff's verdict and taxed costs, the defendant shall be entitled to execution for the excess against the plaintiff. C.R. 1132.

650. Where judgment is entered for default and the action is within the jurisdiction of an inferior court, the taxation shall be on the scale of fees in such court. C.R. 1133.

651. The Taxing Officer may make all inquiries necessary to determine whether an action is within the competence of an inferior court. See C.R. 1133.

The case of McIlhargey v. Queen, 2 O.W.N. 364, is an illustration of the limitations of the above rules. In an action brought in the county court, the Taxing Officer allowed the plaintiff only division court costs. On

appeal to the county judge, the plaintiff was held entitled to costs on the county court scale. On a further appeal by the defendant to a divisional court, the decision of the county judge was reversed and the ruling of the Taxing Officer was restored. Upon the taxation of the costs of the latter appeal by the Taxing Officer at Toronto, he allowed the costs on the county court scale, without a right of set-off, holding that these rules did not apply to the costs of an appeal. An appeal from this taxation was dismissed by Riddell, J., 2 O.W.N. 781, and an application for leave to appeal to a divisional court was dismissed by Middleton, J., 2 O.W.N. 916. See also Wallace v. Employers, 3 O.W.N. 1179, for a discussion as to the jurisdiction of the trial judge to amend his endorsement on the record as to the scale of costs, after the judgment had been reduced on appeal to an amount within the jurisdiction of an inferior court.

In *Re* Hicks v. Mills, 18 C.L.T. 223, it was held that the costs of an application to the Master in Chambers to change the place of trial in a county court action, should be taxed on the county court scale, but the costs of an appeal from the Master's order to a judge in chambers, and of a further appeal to a divisional court, should be taxed on the high court scale.

Rule 314 provides for the taxation of plaintiff's costs where he takes out of court, in satisfaction of his claim, a sum of money less than he had sued for. It has been held, after some conflict of opinion, that these costs are taxable on the scale of the court in which the action was brought, notwithstanding that the amount so accepted would be recoverable in an inferior court. Stephens v. Toronto Ry. Co., 13 O.L.R. 363; Frost v. Leslie, 27 O.L.R. 450.

Set also Ross v. Townsend, 1 O.W.N. 157; Osterhout v Fox, 14 O.L.R. 599; Johnston v. Birkett, 21 O.L.R. 319; Noble v. Gunn, 1 O.W.N. 884; Moffat v. Link, 2 O.W.N. 56; Striker v. Rosebush, 2 O.W.N. 160; Gordon v. Gowling, 5 O.W.N. 269.

Appeal from Taxation.

In an unreported decision of MacMahon, J., on March 8th, 1894, in the case of Waterloo Mfg. Co. v. Hoare, it was held, on an attempted appeal by the defendants from the taxation of their costs by the clerk of the county court of Watorloo (in which court the action was brought, though it had been tried in the high court), that he had no authority to make an order at all. On the 16th of the same month, an application was made in the same case to the court of appeal for leave to appeal from a ruling or decision of the judge of the county court upon a question arising on the taxation of the costs, but the motion was dismissed.

In a subsequent unreported decision of a divisional court, in the case of Routledge v. Graham, on September 14th, 1897, an attempt was also made to appeal from an order of the junior judge of the County of Middlesex, made upon an appeal from the clerk's taxation of the costs, but it was held that no appeal lay.

In Kreutziger v. Brox, 32 O.R. 418, an appeal as to the scale of costs in a county court action was entertained by the divisional court, and the decision of the court below was reversed. See also Babcock v. Standish, 19 P. R. 195. This decision was not followed in McCormick Harvester Machine Co. v. Warnica, 3 O.L.R. 427, but in neither of these cases was the question apparently raised as to the right of appeal. In Leonard v. Burrows, 7 O.L.R. 316, however, the point was squarely raised, and it was held that an order made by a judge of the county court in a county court action, dismissing an appeal from a ruling as to the scale of costs upon taxation of the plaintiff's costs of the action awarded by the judgment, is in its nature interlocutory and not final within the meaning of sub-section 2, of section 40, *infra*. In consequence of this decision, the present sub-section 1 (*d*) of section 40, *infra*, was passed in 1904, expressly providing for an appeal in a case of this kind.

The following Rules prescribe the procedure preliminary to, and on an appeal from taxation:

681.—(1) A party dissatisfied with the allowance or disallowance by the Taxing Officer of the whole or any part of any item may, at any time before the certificate is signed, deliver to the other party interested therein, and to the Taxing Officer, objections in writing to such allowance or disallowance, specifying concisely the item objected to, and may thereupon apply to the Taxing Officer to review the taxation in respect of the same.

(2) The Taxing Officer shall, upon request, hold the taxation open for a reasonable time in order to allow such objections to be delivered. C.R. 1182

682. The Taxing Officer shall then reconsider and review his taxation upon such objections, and he may receive further evidence in respect thereof, and, if required, he shall state either in his certificate of taxation or by reference to such objections, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto. C.R. 1183.

509. In other cases a party dissatisfied with the decision of a taxing officer upon any question of principle or as to any item respecting which objections have been duly filed, may appeal from the certificate of a taxing officer to a judge in chambers; the practice upon the appeal shall be the same as upon an appeal from the Master in Chambers. C.R. 774, 775, and 776. *Amended.*

Taxation in other Cases.

By section 16 (5) of the Costs of Distress Act, 9 Edw. VII. c. 46, the clerk of the county court is empowered to revise the taxation by the clerk of the division court, of the costs of a distress, where the portion in dispute amounts to $10 or upwards.

By section 32 of the Act respecting Mortgages of Real Estate, R.S.O. 1897, c. 121, power is given to the clerk of

the county court to tax the costs of exercising the power of sale in a mortgage.

By section 460 of the Consolidated Mnnicipal Act, 1903, the costs of arbitrators under that Act may be taxed by the clerk of the county court, subject to a revision by one of the taxing officers at Toronto.

By section 106 of the Mnnicipal Drainage Act, R.S.O. 1897, c. 226, the referee may direct the taxation of the costs by the clerk of the county court with whom the papers are filed.

It would seem that there is no appeal from the taxation by the clerk in cases of this kind, since he does not act as an officer of the court, but as a person designated by statute, except where the statnte itself provides for an appeal. See Mahon v. Nicholls, 31 U.C.C.P. 22, and cases cited at page 28. This question was raised in a drainage case in Fewster v. Township of Raleigh, 15 C.L.T. 137, bnt was not decided. See, however, Crooks v. Township of Ellice, 16 P. R. 553.

Mandamus to Clerk.

The clerk may be compelled by mandamus to perform the several duties of his office nnder this and other sections, as well as under the general practice of the courts. *Re* Linden v. Bnchanan, 29 U.C.R. 1; *Re* Oliver v. Fryer, 7 P.R. 325; *Re* Great Western Advtg. Co. v. Rainer, 9 P.R. 494.

Not to Draw Documents.

12. The clerk shall not, for fee or reward, draw or advise upon a chattel mortgage or other paper or document connected with the duties of his office, and for which a fee is not expressly allowed by the tariff. 10 Edw. VII. c. 30, s. 11.

This section was passed for the purpose of placing county court clerks in the same position as registrars of deeds are under the Registry Act with regard to documents filed in their offices.

Not to Practice Law.

Section 30 of the Solicitors' Act provides as follows:

30.—(1) A solicitor shall not practise in any court in Ontario either in his own name or by his partner, deputy or agent, or in the name of any other person, or otherwise directly or indirectly, while he holds or conducts any office of the supreme court or either division thereof, or of a county or district court, a surrogate court or a division court to which he is appointed by the Crown; but nothing herein contained shall extend to a local master or deputy registrar of the supreme court who is not a deputy clerk of the Crown and pleas, or to the official guardian, or to an official referee, a drainage referee or an official arbitrator.

(2) Every person who contravenes the provision of this section shall incur a penalty of $2,000. 2 Geo. V. c. 28, s. 30.

Clerk Pro tem.

13. In the event of the death, resignation or removal from office of the clerk, the clerk of the peace shall, *ex officio,* be the clerk until another person is appointed and assumes the duties of the office, and every clerk of the peace while clerk of the court, shall, except in the County of York, be also *ex-officio* deputy clerk of the Crown and registrar of the surrogate court, if the clerk held that office; and in case the clerk was local registrar, the clerk of the peace, while he holds the office of clerk of the court, shall be *ex officio* local registrar. 10 Edw. VII. c. 30, s. 13.

May Appoint Deputy.

The following provision is made by 4 Geo. V. c. 21, s. 15, for the appointment of a deputy clerk:

15.—(1) The Judicature Act is amended by adding thereto the following section as section 77 (*a*):—

77.—(*a*) With the approval of the Lieutenant-Governor in Council every local registrar, deputy registrar, deputy clerk of the Crown and county court clerk may, by writing under his hand and seal of office, appoint a deputy who may perform all the duties required to be performed by the officer making the appointment.

(2) The section so added shall be deemed to have been in force on and from the 16th day of April, 1912.

Special Examiners.

14. The special examiners of the supreme court shall be officers of the county and district courts, and shall possess the like powers in county and district court cases as those possessed by them in cases in the supreme court. 10 Edw. VII. c. 30, s. 14.

Rules 345 and 580 provide respectively for examinations for discovery and of judgment debtors without order, "before the proper officer in the county in which he resides." Section 2 (*s*) of The Judicature Act contains the following definition of a "proper officer":—

(*s*) "Proper officer" where that expression is used with respect to a duty to be discharged under this Act or the Rules and that duty has been heretofore discharged by a particular officer, shall mean that officer, and where that expression is used in respect to a new duty under this Act or the Rules shall mean the officer to whom the duty is assigned by this Act or by the Rules

or if it is not assigned to any officer shall mean such officer as shall from time to time be directed to discharge the duty, if it relates to the Appellate Division by the Chief Justice of Ontario, or if it relates to the High Court Division by the President of that Division;

As the above duties have "been heretofore discharged" by the clerks in county court cases, they will still have concurrent jurisdiction therein with special examiners under the above section.

Where Sittings to be Held Semi-annually.

15.—(1) Except in the Counties of Carleton, Middlesex, Wentworth and York, and subject to the provisions of The County Judges Act, sittings of the county courts for the trial of issues of fact and assessments of damages, with or without a jury, shall be held semi-annually, to commence on the second Tuesday in June and December.

(2) In the Counties of Carleton and Middlesex, two such sittings shall be held in each year, to commence on the first Tuesday in June and December.

Where to be Held Quarterly.

(3) In the County of York and the County of Wentworth, four such sittings shall be held in each year, to commence on the first Tuesday in December and March, and on the second Tuesday in May and September.

Other Regular Sittings.

(4) Except in the County of York and in the county of Wentworth, there shall be sittings of every

county court on the first Tuesday in April and October in each year for the trial of issues of fact and assessments of damages without a jury. 10 Edw. VII. c. 30, s. 15; 1 Geo. V. c. 17, s. 20.

Sub-section (2) was passed in consequence of representations made by the county court judges that the sittings held at Ottawa, London and Hamilton, on the second Tuesdays, frequently clashed with the non-jury sittings of the high court at these places.

Under what were known as the "grouping clauses" of the former Local Courts Act, repealed by section 19 (2) of the County Judges Act, 1910, the county courts with jury and sessions in some counties were held on the first Mondays in June and December, while in others they were held on the first Tuesdays of these months. Even since the decision in Gibson v. McDonald, 7 O.R. 401, holding these clauses to be *ultra vires* of the legislature, these sittings have continued to be held on the same dates, but it is presumed that they will now conform to the above section.

The provisions of section 14 of the former Act, as to the quarterly sittings of the county court in term, have been omitted from the present Act, in consequence of the repealing of the former section 51, which required appeals in certain cases to be made to the county court in term. See notes to section 39, *infra*.

See section 4 of The General Sessions Act, *infra* for the dates of the sittings of the latter courts.

District Courts.

16. Sittings of the district courts for the trial of issues of fact and assessments of damages, with or without a jury, shall be held at,

(*a*) Bracebridge, on the fourth Tuesday of June and November;

(*b*) Fort Frances, on the first Tuesday of April and October;

(*c*) Gore Bay, on the last Tuesday of May and the third Tuesday of October;

(*d*) Kenora, on the first Tuesday of June and the second Tuesday of November;

(*e*) North Bay, on the second Tuesday of June and the fourth Tuesday of November;

(*f*) Parry Sound, on the first Tuesday of June and December;

(*g*) Port Arthur, on the first Tuesday of May and the second Tuesday of November;

(*h*) Sault Ste. Marie, on the second Tuesday of May and November; and at

(*i*) Sudbury, on the first Tuesday of June and on the fourth Tuesday of November. 10 Edw. VII. c. 30, s. 16; 2 Geo. V. c. 17, s. 11 (1, 2).

(*j*) Haileybury, on the first Tuesday of June and December (as amended by 4 Geo. V. c. 21, s. 16).

It will be noticed that, while s.-s. 4 of s. 15, *supra*, provides for separate regular sittings of county courts without jury, there is no similar provision for district courts. By s. 19, *infra*, however, additional sittings of either courts may be held.

By s. 6 of The General Sessions Act, *infra*, the sessions in districts are to be held on the same dates as those above mentioned in s. 16.

Hour of Opening.

17. The sittings of the county courts, provided for by sub-sections 1 and 2 of section 15 and the sittings of the district courts, provided for by section 16, shall not open earlier than one o'clock in the afternoon of the first day of the sittings. 10 Edw. VII. c. 30, s. 17.

This section does not apply to sittings under s.-s. 3 and 4, nor to additional sittiags without jury provided for by s. 19, *infra*.

Additional Fee to Clerk.

18. The clerk shall be entitled to be paid by the county the sum of $4 for each day's attendance at all sittings of the county court, both non-jury and jury. 1 Geo. V. c. 17, s. 21.

Under the former tariff, clerks were entitled to a fee of 50 cents on every jndgment, and to an additional fee of $1 oa every jury sworn. As no corresponding provision was made in the new tariff, the above fee was apparently provided to replace same.

Additional Sittings.

19. Besides the regular sittings, additional sittings for trials without a jury may be held at such time as the judge may direct or appoint; and such sittings shall be held as often as may be requisite for the due despatch of business. 10 Edw. VII. c. 30, s. 18.

See Ferguson v. Anderson, 4 O.W.N. 830.

The following rule contnins substantially the samo provisions ns the above sectiou:

765. The judges of the county courts shall have power to sit and act at nny time for the transaction of any part of the business of such courts, or for the discharge of any duty including the trial of non-jury actions. C.R. 1214.

Concurrent Sittings.

20. The judges of any county or district court may sit separately and concurrently for the despatch of the business of a sittings. 10 Edw. VII. c. 30, s. 19.

See s. 14 of The County Judges Act, *supra*, which provides thnt the judges may sit together in county court or generni sessions, or may sit sepnrately and hold both courts simultaneously. There does not seem to be nny good reason why theso two sections should not havo been consolidated.

Adjournment for Absence.

21.—(1) Where the judge who is to hold the sittings is unable to hold the same at the time appointed the sheriff, or in his absence the deputy sheriff, shall adjourn the court by proclamation to an hour on the following day to be named by him, and so from day to day until the judge is nble to hold the court, or until he receives other directions from the judge or from the provincial secretary.

(2) The sheriff shall forthwith notify the Provincial Secretary of the adjournment. 10 Edw. VII. c. 30, s. 20.

JURISDICTION.

Only that Expressly Conferred.

The county court beiag aa inferior coart of record, it can have ao jurisdictioa that has not beea expressly coaferred upon it. Powley v. Wbitehead, 16 U.C.R. 589; Portman v. Patterson, 21 U.C.R. 231; Wetherall v. Garlow, 21 U.C.R. 1; Fair v. McCrow, 21 U.C.R. 599. If thero is no jurisdictioa, all the proceedings are *coram non judice*. *Re* Cosmopolitaa Life Association, 15 P.R. 185. It bas heen held to be incumbent on the plaintiff to shew nffirmatively by his pleadiag that the action is one within the jurisdiction of the couaty court. Mayor of London v. Cox, L.R. 2 H.L. 239; Morris v. Forster, 25 N.B.R. 1; but see Jordoa v. Marr, 4 U.C.R. 53; Davidson v. B. & N. H. Ry. Co., 5 A.R. 315; Cheesewright v. Thorn, 38 L.J. Ch. 1869; Dualap v. Babang, 27 N.B.R. 549.

Prohibition.

Heretofore prohibitioa was the principal remedy resorted to against tho assumption by the court, of jurisdiction which it did not possess, but aow s. 26, *infra*, provides that "prohibition shall not lie in respect of an action or coanter-claim which may be trnnsferred under the provisions of this Act into the high court, or iato another county or district court."

It was held in Godson v. City of Toronto, 16 A.R. 452, 18 S.C.R. 36, that n county court judge was not actiag judicially in holding an iaquiry under the Municipal Act; that he was in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on nny persou, and he was not, therefore, subject to control hy a writ of prohibitior from a superior court.

In *re* Alexander Boyes, 13 O.R. 3, it was doubted whether the court had power to interfere by prohibition,

with the county judge as an election officer, except where express statutory power to do so was given.

In McLeod v. Noble, 28 O.R. 528, 24 A.R. 459, it was held that a judge of the high court had no jurisdiction to restrain by injunction, a county court judge from holding a recount of the ballots cast at an election for the House of Commons. See also Crossinan v. Williams, 4 O.W.R. 14, and notes to s. 27, *infra*.

For form of order for prohibition, see form No. 15.

Mandamus.

A judge of a county court may be compelled by an order in the nature of a mandamus (see Rule 622), to exercise the jurisdiction conferred on him under this Act. The following principles, deducible from the authorities, are laid down in the English Annual County Courts Practice, 1910, pp. 100, *et seq.*

1. The writ is a high prerogative writ, and is not granted of right, *ex debito justitiae*.

2. Two circumstances must concur to justify the grant of the order, viz., a special legal right to the performance of the act required to be done, and the absence of an effectual remedy.

3. Though the writ lie where that has not been done which a statute orders to be done, it will not be granted for the purpose of undoing what has been done; so it will not lie where an inferior court has decided in a particular case unjustly or improperly.

4. A mandamus is never granted unless there has been a distinct demand for the performance of that which it is the object of the mandamus to enforce, and a direct refusal, either in terms or by circumstances which shew an intention to withhold from doing the act required.

5. The remedy by mandamus cannot be extended to cases to which it does not by law extend, though the parties waive the objection.

In Forde v. Crabb, 8 U.C.R. 274, a mandamus was refused to compel a judge to approve of the security tendered after the time which he had given for such tender had expired.

In *re* Burns v. Butterfield, 12 U.C.R. 14, it was held that a mandamus would lie to a judge of a county court commanding him to hear and determine a matter, but not to correct his judgment when given.

In *re* Woods v. Rennet, 12 U.C.R. 167, it was held that a mandamus would not lie to the judge of a county court to reverse his decision on a point of practice.

In *re* Judge of the County Court of Elgin, 10 U.C.R. 588, a mandamus was refused to compel the judge to act further in a garnishee application, which was opposed by one H. as assignee of the judgment debtor, from whose answer it appeared that the judge was interested in the claim with H., who was his brother-in-law.

In Williamson v. Bryan, 12 U.C.C.P. 275, a mandamus was refused to compel a county judge to decide a case after he had endorsed upon a rule nisi before him, a memorandum that a rule absolute was refused, upon which decision a judgment had been entered.

In *re* Judge of County Court of Elgin & Macartney, 13 U.C.C.P. 73, a mandamus was refused to compel the judge to grant a summons for rescinding an order made by him staying proceedings in a cause until a trustee should give proper indemnity against the costs of an action.

In Hebling v. Duggan, 1 C.L.T. 108, where, upon the mere statement of counsel for defendant that the title to land was in dispute, the judge refused to proceed, it was held, following the decision in Page v. Sloan (not reported), that a writ of mandamus should go to the judge to proceed with the case.

In Coolican v. Hunter, 7 P.R. 237, it was held that mandamus does not lie to command a judge of a county

court to alter his adjudication upon matters within his jurisdiction.

In *re* Dean v. Chamberlain, 8 P.R. 303, it was held that where a county court judge improperly refuses to hear the argument of a rule nisi, mandamus is the proper remedy.

In *re* White v. Galbraith, 12 P.R. 513, it was held that a judge could not be compelled by mandamus to exercise his discretion to permit an amendment.

See also *re* Ratcliffe v. Crescent Mill and Timber Co., 1 O.L.R. 331, and cases therein referred to; *re* Strathroy Local Option By-law, 1 O.W.N. 465; also notes to s. 42, *infra*.

In Rex v. Mellor, 83 L.J.K.B. 996, an application was made for an order to compel the judge of a county court to try an action which had been transferred to his court, but which he contended should have been remitted to another county court. It was held that the judge had no jurisdiction to enquire into what circumstances were taken into account when the order was made, and that his duty was to obey the order, and try the action in due course in its proper turn, as if it had been an action originally commenced in his court. If he was of opinion that the order was invalid for want of jurisdiction, it was his duty to give a judgment on the points, with reasons stating fully the grounds upon which he had come to that conclusion. He should then have adjourned the hearing to enable either party to raise the question of jurisdiction in the high court, if desired. Churchward v. Coleman, 36 L.J.Q.B. 57, followed.

In *re* McLeod v. Amiro, 27 O.L.R. 232, it was held that although the high court may, by mandamus, command an inferior court to hear a case within its jurisdiction, yet however wrong the decision may be, mandamus does not lie to compel a reconsideration. If the inferior court determines a case on a preliminary point, without going

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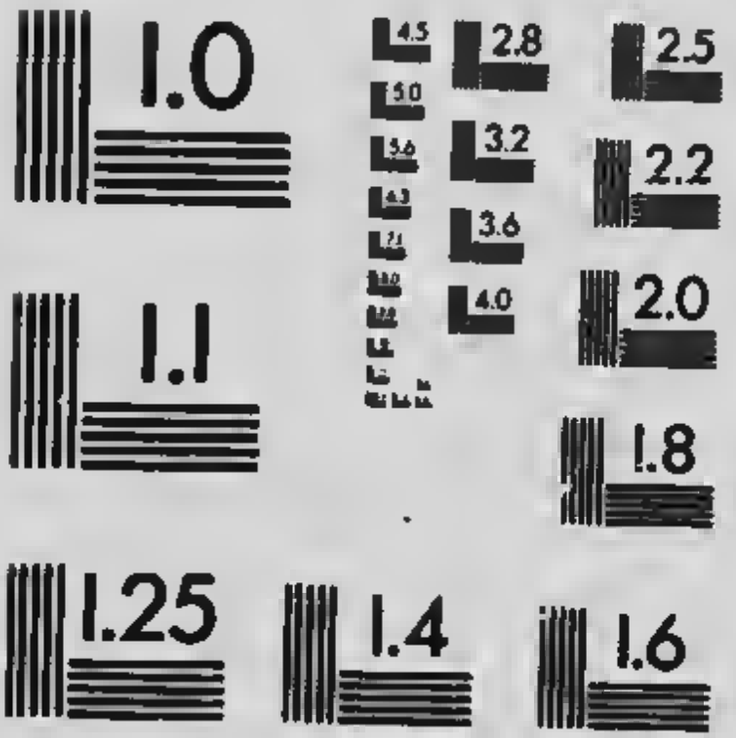

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into the merits, it is no real decision on the case, and mandamus will lie, but it must be clear that the point is preliminary in reality, and not on the merits.

For form of order of mandamus, see form No. 16.

Former Jurisdiction.

Prior to the Law Reform Act, 1909, the County Courts Act contained the following ss. 22, 23, and 27, which were then repealed, but no section similar to the old section 22 has been re-enacted, while the present s. 22, *infra*, replaces the former ss. 23 and 27:—

22. Except in the cases of actions in which, by s. 27 of this Act, or by any other Act, jurisdiction is conferred upon county courts or a judge thereof, the said courts shall not have cognizance of any action:—

1. In which the title to land of a greater value than $200 is brought in question; or

2. In which the validity of any devise, bequest or limitation exceeding $200 under any will or settlement is disputed, nor where the assets of the estate or fund out of which the amount in question is payable exceeds $1,000; or

3. For libel and slander; or

4. For criminal conversation or seduction; or

5. Against a justice of the peace for anything done by him in the execution of his office, if he objects thereto. 59 V. c. 19, s. 1.

23. Subject to the exceptions contained in the last preceding section, the county courts shall have jurisdiction;

1. In all personal actions where the debt or damages claimed do not exceed the sum of $200;

2. In all causes and actions relating to debt, covenant and contract, to $600, where the amount is liquidated or ascertained [as being due] by the act of the parties or by the signature of the defendant;

3. To any amount on bail-bonds given to a sheriff in any case in a county court, whatever may be the penalty;

4. On recognizances of bail, taken in a county court, whatever may be the amount recovered or for which the bail therein may be liable;

5. In actions of replevin where the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of $200, as provided in the Replevin Act;

6. In interpleader matters, as provided by the rules respecting interpleader. R.S.O. 1887, c. 47, s. 19; 59 V. c. 19, s. 2.

7. In any cause or action relating to debt, covenant and contract where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant, when the plaintiff and defendant, before the issue of the writ, agree by memorandum in writing signed by them and filed upon the application for the writ, that the court shall have power to try the action;

8. In actions for the recovery of or for trespass or injury to land where the value of the land does not exceed $200;

9. In actions by persons entitled to and seeking an account of the dealings and transactions of a partnership, the joint stock or capital not having been over $1,000, whether such account is sought by claim or counter-claim;

10. In actions by a legatee under the will of any deceased person, such legatee seeking payment or delivery of his legacy not exceeding $200 in amount or value out of such deceased person's estate not exceeding $1,000;

11. In actions by a legal or equitable mortgagee whose mortgage has been created by some instrument in writing, or a judgment creditor, or a person entitled to a lien or security for a debt, seeking foreclosure or sale, or

otherwise, to enforce his security, where the sum claimed as due does not exceed $200;

12. In actions by a person entitled to redeem any legal or equitable mortgage or any charge or lien, and seeking to redeem the same, where the sum actually remaining due does not exceed $200;

13. In actions by any person seeking equitable relief in respect of any matter whatsoever, where the subject-matter involved does not exceed $200;

14. In any action or contestation to establish the right of a creditor to rank upon an insolvent estate where the amount of such claim does not exceed $400. 59 V. c. 19, s. 3.

27.—(1) The several county courts shall have jurisdiction in actions for the recovery of corporeal hereditaments (where the yearly value of the premises, or the rent payable in respect thereof, does not exceed $200), in the following cases, namely:—

(*a*) Where the term and interest of the tenant of such corporeal hereditament has expired, or has been determined by the landlord or the tenant, by a legal notice;

(*b*) Where the rent of such corporeal hereditament is sixty days in arrear, and the landlord has the right by law to re-enter for non-payment thereof;

and in respect to such actions the said courts shall have and exercise the same powers as belong to and may be exercised by the high court, in and respect to actions for the recovery of land.

(2) The term "landlord," as used in this section shall be understood to mean the person entitled to the immediate reversion of the land; or if the property be holden in joint tenancy, coparcenary or tenancy in common, shall be understood to mean any one of the persons

entitled to such reversion. R.S.O. 1887, c. 47, s. 20 (1) (3).

Division Court Jurisdiction.

The following are the provisions of the Division Courts Act, as to the jurisdiction of that court:—

61. The court shall not have jurisdiction in any of the following cases:—

(*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. R.S.O. 1897, c. 60, s. 71;

(*e*) An action upon a judgment of order of the high court or a county court where execution may issue upon or in respect thereof. 61 V. c. 15, s. 9.

62. (1) Save as otherwise provided by this Act, the court shall have jurisdiction in:—

(*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

(1) 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

(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.

(*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.

(2) Claims combining—

(*a*) Causes of action in respect of which the jurisdiction is by the foregoing sub-section of this section limited to $60, hereinafter referred to as class (*a*);

(*b*) Causes of action in respect of which the jurisdiction is by the said sub-section limited to $100, hereinafter referred to as class (*b*);

(*c*) Causes of action in respect of which the jurisdiction is by the said sub-section 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 $100, 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.

(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 $60, as provided in the Replevin Act. R.S.O. 1897, c. 60, s. 72.

(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.

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 high court. R.S.O. 1897, c. 60, s. 75.

(2) Nothing in this section shall confer jurisdiction to grant an injunction or to appoint a receiver. 61 V. c. 15, s. 1.

67. (1) A cause of action shall not be divided into two or more actions for the purpose of bringing tbo same within the jurisdiction of the court.

(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, be may, notwithstanding anything in this section contained, but subject to the other provisions of this Act, sue separately for every sum so due. R.S.O. 1897, c. 60, s. 79.

The limitation in clause (*c*) of section 62 (1), as to unsettled accounts, does not apply to actions under clause (*d*) of the same sub-section. Tbe curious anomaly existed under the former Act, that, while in an action on an unliquidated claim, no matter how small the balance sued for might be, the division court had no jurisdiction, if the trial necessitated an investigation of accounts exceeding $400 (now $600), whereas if the claim was liquidated, then, no matter how large tbe original amount might have been, an action might be maintained on it in the division court, so long as tbe balance sued for did not amount to over $200. See Bank of Ottawa v. McLaughlin, 8 A.R. 543. It is by no means clear that clause (*d*) and its sub-divisions continue tbis state of the law. Probably it was the intention of the revisers to do so by subdivision (ii), but the entire change in construction and phraseology renders it doubtful whether that object was accomplished. See notes to section 40, *infra*.

See Kennedy v. MacDonnell, 1 O.L.R. 250; Barnett v. Montgomery, 5 O.W.N. 884, as to section 61 (a) *supra*.

See McIlhargey v. Queen, 2 O.W.N. 364, 781 and 916; Renaud v. Thibert, 27 O.L.R. 57, as to ascertainment by signature under sectiou 62 (d) *supra*. See also an article in 32 C. L. T. 891.

As will be seen by Con. Rule 649 in notes to section 11, *supra*, it is at his peril as to costs that a plaintiff brings an action in any court other than the lowest one

having jurisdiction. See Ross v. Townsend, 1 O.W.N. 457.

There are no provisions in the County Courts Act, similar to the above section 67; but where the plaintiff's claim arises out of one entire transaction, the amount of which is beyond the jurisdiction of the county court, he can, (subject to s.-s. 2 of s. 22, *infra*), proceed in the latter court only by abandoning the excess, either in the writ, or afterwards under section 27, *infra*. In either case he forfeits such excess, and cannot recover it in another action.

Present Jurisdiction.

22.—(1) The county and district courts shall have jurisdiction in:—

Actions on Contracts.

(*a*) Actions arising out of contract, expressed or implied, where the sum claimed does not exceed $800;

This clause of sub-section 1, which formed part of section 21 of the Law Reform Act, 1909, has not only greatly increased the jurisdiction of these courts, but has also effected a very desirable simplification of the law, by doing away with the old distinction between "liquidated" and "unliquidated" claims arising out of contract. See an article by the writer in volume 22, Canadian Law Times (1902), p. 419, for a discussion of the numerous conflicting decisions, not only of single judges and divisional courts, but of the court of appeal, as to what constituted "liquidation." An attempt was made, by 4 Edw. VII. c. 10, s. 10, to remedy this state of affairs by inserting the words "as being due," after the word

"ascertained," as shewn above, but it was not very successful, so this simple and clear-cut provision was adopted. In consequence, the great wealth of legal decisions under the former statute, with all their distinctions and conflicts, have become obsolete.

The scope of the clause has also been considerably widened by the inclusion in it of actions arising out of "implied" contracts, but it is sometimes difficult to determine whether a particular case falls within that class, or whether it is really an action of tort. It has been held in England that an action is "founded on contract" when it does not arise out of a breach of a general duty, and when there would be no liability but for a contract. Legge v. Tucker, 26 L.J.Ex. 71. Similarly, when it is directly and not remotely founded on such contract. Pontifex v. Midland Ry., 47 L.J.Q.B. 28. An action against a carrier for negligent loss of goods is "founded on contract." Fleming v. Manchester S. & L. Ry., 4 Q.B.D. 81, disapproving Tattan v. G. W. Ry., 29 L.J.Q.B. 184. See, however, Turner v. Stallibrass, 67 L.J.Q.B. 52, and Sachs v. Henderson, 71 L.J.K.B. 392. But an action against a carrier for delivery of goods to an insolvent consignee after the notice of a stoppage in transitu, is founded on tort and not on contract, because the stoppage puts an end to the original contract for carrying. Pontifex v. Midland Ry., *supra*. So also an action for personal injuries to a passenger occasioned by negligence. Taylor v. Manchester S. & L. Ry., 64 L.J.Q.B. 6. But negligent loss by a cabman of his fare's luggage gives rise to an action 'founded on contract." Baylis v. Lintott, 42 L.J.C.P. 119. So also an action for negligent treatment by a livery-stable keeper of his customer's horse. Leggo v. Tucker, *supra*.

Where an auctioneer wrongfully resold goods purchased by the plaintiff at an auction, it was held that an action against the auctioneer was founded on tort. Coben v. Foster, 61 L.J.Q.B. 643. So also an action for

the recovery of a picture wrongfully detained. Bryant v. Herbert, 47 L.J.C.P. 670. In De la Boro v. Pearson, 77 L.J.K.B. 380, the plaintiff wrote the defendant requesting him to advise as to the investment of a sum of money, and to name a good stock-broker. The defendant handed the plaintiff's letter to a broker, who wrote to the plaintiff offering to invest the amount for him, and the plaintiff sent the broker a cheque requesting him to purchase certain stocks. The broker misappropriated the cheque, and the plaintiff sued the defendant for damages. It was held that there was a contract, and that the defendant had committed a breach of it, which breach was the cause of the damage, notwithstanding the intervening wrongful act of the broker. But in a more recent case, in which the plaintiff alleged that he employed the defendant, a dentist, for reward to extract a tooth by his painless process, and that the tooth was so unskillfully extracted, that portions of it were left in the plaintiff's jaw, it was held to be an action of tort. Edwards v. Mallon, 77 L.J.K.B. 608.

In Johnson v. Kenyon, 13 P.R. 24, the plaintiff held the defendant's note for $300, and gave it back to the defendant to hold until the latter should be free from a certain liability as surety. After he became freed he refused to give up the note, and destroyed it, and this action was brought for such refusal. It was held to be an action arising out of contract. This decision was subsequently distinguished in Plummer v. Coldwell, 15 P.R. 144. The latter action was brought to restrain the defendants by injunction from negotiating a promisso[illegible] note for $230, and to compel them to deliver it up to the plaintiffs. It was determined that the note was wrongfully held by the defendants, who had obtained it under the pretense of discounting it, and it was held that the action sounded in tort and not in contract. See also Bank of Upper Canada v. Widmer, 2 O.S. 256, and notes to following sub-section.

In O'Brien v. Irving, 7 P.R. 308, the plaintiff sued for $90, for the value of his horse employed by the defendant, the injury complained of being that the defendant allowed the horse to be worked after he took sick, by which death was occasioned. It was held that this was an action for breach of contract, in not taking proper care of the horse, and that it was within the jurisdiction of the division court.

In Wallace v. Employers' Liability Ass. Co., 3 O.W.N. 1179, where the amount of the judgment was reduced on appeal to $650, it was held that the action was still not within the competence of a county court, as it was not merely for a money recovery, but for a declaration that the injuries which the plaintiff received resulted in temporary total disability, and that the action was therefore in form as well as in substance, an action dealing with the instalments yet to accrue.

In Burke v. Shaver, 29 O.L.R. 365, which was an action brought in a county court against a solicitor for not following certain instructions, a judgment was given for $92.84. It was held that the action was for the direct breach of a positive contract to do a specific act, and not for breach of a general duty, and that, therefore, the action was within the jurisdiction of the division court. See also Laidlaw v. O'Connor, 23 O.R. 696.

As to waiver of a tort, and suing in contract for the same cause of action, see Rodgers v. Maw, 15 M. & W. p. 448; Brower v. Sparrow, 7 B. & C. 310; Smith v. Baker, L.R. 8 C.P. 350.

The following summary of American cases is taken from the University of Pennsylvania Law Review, vol. 61, p. 266 (February, 1913):

CONTRACT OR TORT—QUASI CONTRACT—In Stanton v. Phila. & Reading Ry. Co., 236 Pa. 419 (1912), it was held that assumpsit was the proper action where there was an allegation of a breach of an agreement on the part of the

carrier to use reasonable care to preserve the plaintiff's shipment, although the breach was due to negligence; that the doctrine of waiver of tort was not involved.

It is a general principle that where a breach of a contract, express or implied, amounts to a tort a party may sue for breach of the contract or sue for the tort. *Ex contractu* actions: Reilly v. White, 234 Pa. 115 (1912); Carland v. Western Union Teleg. Co., 118 Mich. 369 (1898). *Ex delicto* actions: Eckert v. Penna. R. R., 211 Pa. 267 (1905); Stoek v. Boston, 149 Mass. 410 (1889). Where there is no legal duty except that arising from a contract, there can not be an election between an action on contract and one in tort, for there is no tort; in such case there can be no action except upon the contract. Parill v. Cleveland etc. R. Co., 23 Ind. App. 638, 648 (1899). Galveston Ry. Co. v. Hennegan, 33 Tex. Civ. App. 314 (1903), held that, for failure of employer to furnish medical attendance to employee as he had agreed, the action must be *ex contractu* for there was no legal duty extrinsic to the contract; the court also pointed out that if the medical treatment had been undertaken the law would impose a duty to use reasonable care, for breach of which an action *ex delicto* could be maintained.

Where a tort is committed which results in a profit or advantage to the tort feasor, the plaintiff may waive the tort and sue in assumpsit on the fiction of an implied promise. Lamine v. Dorrell, 2 Ld. Ray. 1216 (1705); Norden v. Jones, 33 Wis. 600 (1873); Braithwaite v. Akin, 3 N. D. 365 (1893); Terry v Munger, 121 N.Y. 161 (1890). A minority of the jurisdictions hold that the tort cannot be waived where the goods converted are merely retained or consumed and not reduced to cash. Bethlehem v. Perseverance Fire Co., 81 Pa. 445 (1876); Woodruff v. Zahan, 133 Ga. 24 (1909); Tuttle v. Campbell, 74 Mich. 652 (1889).

Where one person commits a tort against another without any intention of benefiting his own estate and his own estate is not thereby benefited, the law will not imply or presume a contract on the part of such wrong-doer to pay resulting damages. Webster v. Drinkwater, 5 Me. 319 (1828); Tightmeyer v. Mongold, 20 Kan. 90 (1878); Patterson v. Prior, 18 Ind. 440 (1862); Ingersoll v. Moss, 44 Ill. App. 72 (1891).

Abandonment of Excess, Payment or Set-off.

Apart from the provisions of section 27, *infra*, the plaintiff has the right, before action, to abandon any portion of his claim in excess of the jurisdiction of the county court, so as to bring his action in that court. *Re* MacKenzie and Ryan, 6 P.R. 323. He is also entitled to reduce a claim originally beyond the jurisdiction of the court to an amount within the jurisdiction by crediting a payment received thereon. Brown v. McAdam, 4 P.R. 54. The same rule applies where the defendant has a set-off which, before action, was agreed on by the parties as a payment on account. Fleming v. Livingstone, 6 P.R. 63; Bennett v. White, 13 P.R. 149. Where the plaintiff affirmed and the defendant denied that there had been an agreement to treat the set-off as a payment on account, and the trial judge found as a fact that there was such an agreement, it was held that the court had jurisdiction. *Re* Jenkins v. Miller, 10 P.R. 95. In the absence of such agreement, the plaintiff cannot, by giving the defendant credit for his set-off and thereby reducing his claim to an amount within the jurisdiction of the court, give the court jurisdiction. Sherwood v. Cline, 17 O.R. 30; Furnival v. Saunders, 26 U.C.R. 119; Osterhout v. Fox, 14 O.L.R. 599; Finn v. Gosnel, 14 O.W.R. 830. As to the difference between a set-off and a counterclaim, and the effect on the question of costs, see Cutler v. Morse, 12 P.R. 594; Sanderson v. Ashfield, 13 P.R. 230; Girardot v.

Welton, 19 P.R. 162 and 201, Caldwell v. Hughes, 4 O.W.N. 1192; Everley v. Dunkley, 5 O. W. N. 65.

Joining Causes of Action.

The following Rules govern the joining of several causes of action:—

69. A plaintiff may unite, in the same action, several causes of action. C.R. 232.

70. A claim by or against husband and wife may be joined with a claim by or against either of them separately. C.R. 234.

71. A claim by or against an executor or administrator may be joined with a claim by or against him personally, provided the last mentioned claim is alleged to have arisen with reference to the estate represented by him in the action. C.R. 235.

72. A claim by plaintiffs jointly may be joined with a claim by them or any of them separately against the same defendant. C.R. 236.

73. If several causes of action joined in the same action are such as cannot be conveniently disposed of in one action, the court may order any of them to be excluded, or may direct the issues respecting the separate causes of action to be tried separately. C.R. 237.

Section 72 of the Division Courts Act, *supra*, provides that claims founded on contract and on tort may be combined and tried in one action in that court, under certain circumstances. There is not, and never has been any similar legislation with regard to county courts, but the above rules are apparently applicable under rule 768, *infra*.

The cases of Jordan v. Marr, 4 U.C.R. 53; Vogt v. Boyle, 8 P.R. 249; McLaughlin v. Shaefer, 13 A.R. 253, and Thomson v. Eede, 22 A.R. 105, are no longer applicable, since the abolition of the difference between liquidated and unliquidated claims. In any event, these cases

applied only to actions on contracts, and did not deal with the joining therewith of claims for torts, or any of the other classes of actions in which the county courts had, or now have jurisdiction.

It follows that a claim under any of the sub-sections of this section in which the jurisdiction is limited to $500, may be joined with a claim under the above sub-section, at least where the amount of the combined claims does not exceed $500, and where such joinder would be permitted in the high court under the above rules.

A judgment of a division court cannot be enforced by action in a higher court, because the obligation to pay thereby created is not an absolute obligation, but is subject to the discretion vested in the judge to defer payment in certain circumstances; and the fact that a division court is now a court of record makes no difference in that respect. Crowe v. Graham, 22 O. L. R. 145. See now, s.-s. (e) of s. 61 of the Division Courts Act quoted *supra*.

As to effect of jurisdiction being exceeded by addition of interest, see Malcolm v. Leys, 15 P.R. 75; Sproule v. Wilson, do., 349, and Trimble v. Miller, 23 O.R. 500.

See also notes to sub-section (2) *infra*, as to effect of not disputing jurisdiction.

Personal Actions.

(*b*) Personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed $500;

The meaning of the words "personal actions" is not very clear, especially in view of the present more comprehensive nature of the preceding clause of this sub-section. Apparently, personal actions include actions of contract as well as of tort, though it may be doubted

whether these words are now intended to include anything but the latter. Under the previous corresponding section, the words " debt or damages " were used, but it will be noticed that in the above sub-section " sum " has been substituted. Under the former Act, unliquidated claims arising out of contract, were held to be included in the term " personal actions." Now, however, actions on such claims may be brought under clause (a), *supra*.

In Whidden v. Jackson, 18 A.R. 439, Burton, J.A., defined a personal action as an action " for debt or other chattels or damages to them, or injury to his person." See also *Re* McGugan v. McGugan, 21 O.R. 289, where " personal actions " were held to mean common law actions. In Stroud's Judicial Dictionary a personal action is defined as " such as one man brings against another on any contract, for money, goods, or on account of an offence or trespass, and which claims a debt, goods, chattels or damages." Wharton's Law Lexicon defines a personal action as " one brought for specific recovery of goods and chattels, or for damages or other redress for breach of contract or other injury of whatever description, the specific recovery of lands, tenements and hereditaments only excepted." It adds, however, that " the term is often used in a narrower sense to express an injury to a person as for slander, injury by accident, as distinguished from injury to property." See also 3 Blackstone's Commentaries, p. 117.

The exception in the above sub-section, as to criminal conversation and libel, was rendered necessary by the repeal of section 22 of the former Act, which contained a specific list of matters not within the jurisdiction of the county courts. Actions for slander and seduction, which were formerly expressly excepted from the jurisdiction of these courts, may now be brought therein, but actions for criminal conversation and libel are still excepted, no matter how small the amount of damages claimed.

The following are instances of claims held to be recoverable in county courts as personal actions:—

Money claimed by a curate for the purposes of a Sunday School and claimed by its manager: Christie v. Sanberg, W.N. (1880) 159; paving rates assessed under an Act of Parliament: Baddly v. Denton, 4 Ex. 508; freight due under a charter-party: Regina v. Southend, 13 Q.B.D. 142; damages for collision between barges: Acovell v. Bevan, 19 Q.B.D. 428; an action against a bailiff who has distrained for poor rates to recover as much of his charge as was unreasonable: Regina v. Philbrick, 74 L.J.K.B. 464; an action of detinue: Taylor v. Addyman, 13 C.B. 309; an action to recover the value of a non-negotiable note: Clegg v. Barretta, 56 L.T. 775; an action by a partner against his co-partner for a purely money demand which is part of the partnership assets: Allen v. Fairfax Cheese Co., 21 O. R. 598, distinguishing *Re* McGugan v. McGngan, 21 O.R. 289, and Whidden v. Jackson, 18 A.R. 439; an action by a legatee against the devisee of lands charged with the payment of a legacy: Grey v. Richmond, 22 O.R. 256; an action by a mortgagor against a mortgagee to recover, as money received, the surplus derived from the sale under power of sale of the mortgaged lands: Reddick v. Traders Bank of Canada, 22 O.R. 449; an action for trespass to land: Seabrook v. Young, 14 A.R. 97; but see Neely v. Parry Sound R. I. Co., 8 O.L.R., at p. 129; an action to recover a penalty under a statute: Chaput v. Robert, 14 A.R. 354; an action for malicious prosecution: Blair v. Asselstine, 15 P.R. 211.

Trespass to Land.

(*c*) Actions for trespass or injury to land where the sum claimed does not exceed $500, unless the title to the land is in question, and in that case also where the value of the land

does not exceed $500, and the sum claimed does not exceed that amount;

This clause takes the place of the latter part of sub-section 8 of section 23 of the former Act, while the following clause includes the first part of the old sub-section 8 as well as the former section 27. This clause, as it now stands, covers two distinct classes of cases, namely:—

(1) Actions up to $500, no matter what may be the value of the land with respect to which the injury was committed, so long as the title to the land itself is not in question, and

(2) Actions in which the title to land is in question, and in which neither the damages claimed nor the value of the land exceeds $500.

In the first class of cases such actions were previously considered within the jurisdiction of the county courts as "personal actions," even before these courts were given power to try any actions in which the title to land came in question. See Seabrook v. Young, 14 A.R. 97, and cases therein referred to. In that case, which was an action for trespass to land, Osler, J.A., in delivering the judgment of the court of appeal, said: "It was strenuously argued that an action of this nature could not be brought in the county court under any circumstances, a contention in which I do not agree. It depends upon whether the title is brought in question by the pleadings or upon the evidence, and it need not necessarily be brought in question or denied in such an action as this any more than in an action for use and occupation." See also Fitchett v. Mellow, 18 P.R. 161.

In the case, however, of Ross v. Vokes, 14 O.W.R. 1142, this view was apparently not adopted. The action was brought in the high court before the recent amendments to the County Courts Act came into force, to recover $200 damages to plaintiff's land by the obstruction

of his access thereto, and for a mandatory order requiring the defendant to remove the obstructions. No statement of defence was delivered, nor apparently was any question raised as to the plaintiff's title. On motion for judgment the plaintiff was granted the relief asked, with the costs of the action. The taxing officer taxed these costs on the county court scale, but on appeal to Meredith, C.J., this ruling was reversed on the ground that the value of the plaintiff's land exceeded $200. The learned judge, after quoting the sub-section referring to personal actions, denied its applicability to a case of this kind, and held that the generality of its provisions was controlled by paragraph 8, which he interpreted as meaning that the county court was to have jurisdiction in actions for damages for trespass or injury to land only where the value of the land did not exceed $200. No reference appears to have been made to Seabrook v. Young, *supra.*

An action for trespass to land is not a "personal action" within the meaning of The Division Courts Act. Neely v. Parry Sound, 8 O.L.R. 128; Bishop v. Mullen, 16 O.W.R. 863; but see Burns v. Hewitt, 1 O.W.R. 757, *contra.* See also an article by the author in 30 C.L.T. 862, reviewing these judgments and giving reasons for preferring the last mentioned decision.

In Dobner v. Hodgins, 14 O.W.R. 265, which was an action on a note for $500, a collateral question was raised as to the ownership of "a certain interest in certain lands in the State of Wisconsin," as to the value of which no evidence was given. A taxing officer allowed only county court costs, and an appeal from the taxation was dismissed. An application for leave to appeal to a divisional court was also dismissed, (p. 593), when it was stated that the statute applied "only where the title to land in Ontario was brought in question."

In the second class of cases it is important to ascertain the exact meaning of the words "the value of the

land." In Brown v. Cocking, 37 L.J.Q.B. 250, it was held that where a judge had decided that the annual value of the land did not exceed 20 pounds, and there was evidence to support his decision, the court could not grant a prohibition; but in the subsequent case of Elston v. Rose, 38 L.J.Q.B. 6, it was held that, the county court judge having taken an erroneous test of value, the court could grant prohibition. It was also held in the latter case that the value intended was the marketable value, for which the rent paid by the tenant to the immediate landlord is, in the absence of exceptional circumstances, a fair criterion, and that the judge erred by deducting the ground rent in arriving at the annual value of the premises.

In Stolworthy v. Powell, 55 L.J.Q.B. 288, the plaintiff was the lessee of certain property at an annual rental of 56 pounds, including a party wall, which separated his house from that of the defendant, who denied the plaintiff's title to the wall and committed trespass upon it. It was held that, inasmuch as the only portion of the premises the title to which was in dispute, was under the annual rental of 20 pounds, the county court had jurisdiction to try the action.

In Bassano v. Bradley, 65 L.J.Q.B. 479, it was held that a county court had jurisdiction, within section 60 of the County Courts Act, 1888, to try an action for recovery of arrears of rent charge of 10 pounds a year issuing out of land, the value whereof exceeded 50 pounds a year, inasmuch as in such action the title to the rent charge was in question, and not the title to the land out of which issued, and, therefore, the value of the hereditaments in dispute did not exceed the sum of 50 pounds a year. The Lord Chief Justice, in delivering judgment, said that he should desire very seriously to consider the decision in the case of Stolworthy v. Powell, above referred to, before assenting to it, and that he did not take it into account in arriving at his decision, which he rested

on the ground that the defendants had not satisfied him that the county court had no jurisdiction in this matter.

In Angel v. Jay, 80 L.J.K.B. 458, it was held that the words "value of the property" in the corresponding section of the English County Courts Act, mean the value of the freehold of the land, the lease of which has been granted, and not the value of the leasehold interest which is the subject matter of the transaction to be dealt with by the County Court, and, therefore, that the Court had no jurisdiction to rescind the lease.

In Millar v. Smith, 6 O.W.R. 784, which was brought in the high court, for trespass to land, and cutting down a few trees, it was held by Boyd, C., that, as the whole land was worth over $200, and as the evidence was very loose as to the extent of the land trespassed upon, although he gave judgment for only $25 damages, he could not say, on the state of the pleadings, that the action could have been brought in the county court. See also Neely v. Parry Sound River Improvement Co., 8 O.L.R. 128; Whitesell v. Reece, 9 O. L. R. 182; Moffatt v. Carmichael, 14 O.L.R. 595.

In a later case of Fortier v. Chenier, 12 O.W.R. 5, the facts were as follows: The plaintiff's land, as described in the statement of claim, was a parcel of about four acres, and the value of it was found by the county judge to be over $200, but the actual trespass was to only a small portion of it, upon which the defendant had entered and cut down and removed some trees. The divisional court held that the plaintiff was entitled to succeed, as against the objections to the jurisdiction, on the ground that the land, the title to which was called in question, was not of greater value than $200. See also Walters v. Wylie, 3 O.W.N. 177 and 567

In Kennedy v. MacDonell, 1 O.L.R. 250, it was held that rent, payable under a lease of land, is an incorporeal hereditament, and where the right or title to it comes in

question, a division court has no jurisdiction in an action to recover it.

In *Re* Barnett v. Montgomery, 5 O.W.N. 884, on an application for prohibition to the division Court in an action for a return of $100 deposit on an abandoned purchase of land, Britton, J., in refusing the application, quoted the language of Armour, C.J., in *Re* Crawford v. Seney, 17 O.R. 74:—"In prohibition we have to be satisfied that the title really comes in question before we can prohibit."

Decisions under Former Statutes.

The following cases were decided under statutes which excluded from the jurisdiction all actions in which the title to land was brought in question, irrespective of the value of the land or the amount claimed. They will be helpful in arriving at the meaning of the words "unless the title to the land is in question," contained in the above clause.

The defendants by an agreement under seal with one S. acquired a right of user in certain land for the purpose of pasturing their cattle. There was no demise, or right of distress, or anything in the agreement to make the defendants tenants of S. There was, however, a covenant that S. would not allow his own animals, or those of others to enter upon the land in question. The question whether S. gave the defendants such an interest in the land as entitled them to impound cattle was held not to be a question of title in the sense that it would oust the jurisdiction of the county court. Graham v. Spettigue et al., 12 A.R. 261. But see Chew v. Holroyd, 8 Ex. 249, and Armstrong v. McGourty, 22 N.B.R. 29.

In trespass, for entering plaintiff's close and taking his goods defendant pleaded not guilty, that the goods were not the plaintiff's, and justification under a *fi. fa.* Title to land was not brought in question:—Held, that the

plaintiff on a verdict for $175 was clearly not entitled to full costs without a certificate. Stewart v. Jarvis, 27 U.C.R. 467.

In roplevin, defendants avowed under a distress for rent, to which the plaintiff pleaded that he did not hold the land as tenant, etc., as in the avowry alleged:—Held, that the title upon this plea did not necessarily come in question, and that the record therefore did not shew a cause of action beyond the jurisdiction. O'Brien v. Welsh et al., 28 U. C. R. 394.

Where in matters of tort relating to personal chattels, title to land is brought in question, though incidentally, the court has no jurisdiction. Trainor v. Holcombe, 7 U.C.R. 548.

Declaration for converting the plaintiff's dwelling house, with the doors and windows, etc. Plea, that the goods were not the plaintiff's. At the trial in the county court, it appeared that the plaintiff claimed as assignee of a mortgage of the land on which the house stood, and that the dispute was, whether the house was part of the freehold. A verdict having been rendered for the plaintiff, it was afterwards set aside, on the ground that the title to land came in question, and that the case should have been stopped upon the plaintiffs' evidence:—Held, that this was right, and the judgment below was affirmed. Portman v. Patterson, 21 U.C.R. 237.

Title to land does not, on mere suggestion, necessarily come in question under a plea of not guilty by statute. The general rule is that it must be pleaded. In this case, which was an appeal from the county court:—Held, that though defendant might have shewn upon the plea of not guilty, that for want of title the plaintiff could not maintain the action for injury to his premises, yet that in the absence of such proof, or a *bonâ fide* tender thereof, the mere suggestion of it did not preclude the county court from trying the real cause of action, which was within its

jurisdiction. Ball v. The Grand Trunk Railway Company, 16 U.C.C.P. 252.

A county court judge at a trial of a case, upon the application of plaintiff's counsel, struck out a count of the declaration and all pleadings relating thereto, because the pleadings thereunder ousted his jurisdiction, by bringing title to land in question:—Held, that he had the power to do so. Fitzsimmons v. McIntyre, 5 P. R. 119.

Declaration, that one A. devised the north half of lot 15 to his son W., in fee, and the south half to his wife J., for life, and after her death to W. in fee; and the plaintiffs claimed from defendant a portion of the first year's rent, which they alleged they were entitled to, and which the defendant had paid to J. after notice. Equitable plea, that W. in his will devised all his lands to the plaintiff in trust for the sole benefit of J. during her life, under which she claimed and received from them the rent:—Held, that upon these pleadings the title to land was brought in question, and the jurisdiction ousted. Fair et al v. McCrow, 31 U.C.R. 599.

The plaintiff sued for damages sustained by the defendant cutting timber on his own land, after having sold such timber standing to the plaintiff's assignor. It was determined by the court that the timber sold was an interest in land:—Held, that the title to land was brought in question in the action, and therefore, although the plaintiff recovered only $135, a county court would have no jurisdiction, and the costs should be on the scale of the high court. McNeill v. Haines, 13 P.R. 115. But see Muskoka Mill & Lumber Co. v. McDermott, 21 A.R., at p. 137, and Bailey v. Bleeker, 5 C.L.J. 99.

The plaintiff by his statement of claim alleged that he was and had been for more than six years the owner of certain land, which was unoccupied, and claimed damages for timber cut by the defendant on such land. The defendant by his statement of defence disputed the plain-

tiff's claim and set up certain facts by way of confession and avoidance. The action was brought in the high court, but the plaintiff recovered only $120 damages:—Held, that under the pleadings plaintiff was obliged to prove his title to the land, and therefore the county court would have had no jurisdiction, and the costs should be on the scale of the high court. Danaher v. Little, 13 P.R. 361.

The statement of claim alleged that the defendant was a monthly tenant of the plaintiff's land, and that the plaintiff on a certain day terminated the tenancy by notice, and claimed damages for injuries to the demised premises. The statement of defence denied the allegation that the defendant was the tenant of the plaintiff:—Held, that the title was put in issue by such denial, and as the county court would therefore have had no jurisdiction, the costs should be on the scale of the high court, although the plaintiff recovered only $7[illegible], held, also, that the question whether the title was in issue must be determined according to the pleadings, and not according to what took place on the trial or reference. Worman v. Brady, 12 P.R. 618.

Where, in an action by a monthly tenant against his landlord and other persons for wrongful entry upon the demised premises, the landlord denied the plaintiff's tenancy:—Held, that the title to the land was brought in question, and the costs of the plaintiff were properly taxed on the high court scale, although the damages recovered were only $104. Worman v. Brady, 12 P.R. 618, and Danaher v. Little, 13 P.R. 361, *supra*, followed; Tomkins v. Jones, 22 Q.B.D. 599, specially referred to. Flett v. Way, 14 P.R. 312.

The plaintiff agreed to sell to the defendant a parcel of land for $1,750, of which $10 was paid on the execution of the written agreement. The agreement contained no provision as to possession, but the defendant went

into possessioa as tbo purebaso.. Tho plaintiff was ua-able to mako titlo aad tho defeadaat coatiaued in possos-sion for a coasiderable time. Tho plaintiff brought a division court aetion for uso and occupation. The de-fendant set up that tho contract had not been rescinded whea ho gavo up possessioa and that ho aover beeame tenaat to the plaiatiff aor liable to pay rent:—Held, that the plaintiff was bound to provo a coatraet, express or implied, to pay compeasation for tho use aad occupatioa, aud in order to do so it might have been necessary to show whea the contract of sale went off; but that was aot a bringiag of tho titlo iato question so as to oast the juris-dictioa of tho division court. That in prohibitiou the court must be satisfied that the title really comes in ques-tion; it is not eaough that some question is raised by tho defendant's notiee. Purser v. Bradburae, 7 P.R. 18, distinguished. Order of Street, J., graatiag prohibition reversed. *Re* Crawford . Seaey, 17 O. R. 74.

In an aetion ia tbe commoa pleas divisioa, for tres-pass to laads aad removal of fixtures, the plaintiff re-eovered a verdiet of $50. The taxiag offieer taxed divi-sion court costs to the plaintiff, and full costs to the de-feadant. Tbe pleadiags admitted aa eatry under au agreement as to placiag fixtures, and their removal and appropriation, but put in issue their wroagful removal:—Held, tbat the taxing officer was right, the title to cor-poreal hereditameats not being in question:—Held, also, that tbough the defendant had failed to prove his defence, he was entitled to set off his costs. Richardsoa v. Jenkia, 10 P.R. 292.

S. being indebted to the plaintiffs, entered iato an agreemeat to mortgage to them, amongst other lands, certain lands known as the Dominion Hotel property A mortgage was on the same day executed, but by mistake the Dominion Hotel property was omitted therefrom, and a lot formerly owaed by S., adjacent thereto, inserted. The defendant bad been the tenant of S., and after tbe

mortgagc, attorned and paid some rent to the plaintiffs, helieving them to have a title to the lands. In an action for arrears of rent:—Held, that after such attornment and payment of rent, the defendant could not he heard to deny the plaintiff's title, and they being the equitahle owners of the land, were entitled to recover:—Held, also, that the title not heing open to question by the defendant, the county court had jurisdiction. Bank of Montreal v. Gilchrist, 6 A.R. 659.

Where, in an action of trespass for pulling down fences and for mesne profits, the plaintiff alleged his title at the time from which he claimed to recover mense profits; and the defendant, in his statement of defence denied that he committed any of the wrongs in the plaintiff's statement of claim mentioned, and denied that he was liahle in damages or otherwise on the alleged causes of action:—Held, that on these pleadings the title to land was expressly hrought in question, and the jurisdiction of the county court ousted. Campbell v. Davidson, 19 U.C.R. 222; Seahrook v. Young, 14 A.R. 97.

In an action hrought in the high court by a landlord against a tenant for damages for breach of the latter's covenants in a farm lease, the statement of claim alleged that the plaintiff hy deed let to the defendant the land described for a term of years, and that the defendant therehy convenanted as set forth, and assigned as breaches of the covenants that the defendant did not cultivate the farm in a good, hushand-like, and proper manner. By the statement of defence the defendant denied all the allegations of the statement of claim, and further alleged that the defendant had used the premises in a tenant-like and proper manner, "according to the custom of the country where the same was situate." The plaintiff recovered a verdict of $100, the action heing tried with a jury. The title to the land was not brought into question at the trial, hut it was contended that it came into question on the pleadings:—Held, not so; for

the defendant was, on the face of the record, estopped from pleading *non demisit* and his denial could only be read as a traverse of the actual execution of the lease. Purser v. Bradburne, 7 P.R. 18, commented on:—Held, also, that the "custom" pleaded was not the "custom" meant by section 60, sub-section 4, of the Division Courts Act, R.S.O. 1887, c. 51, which refers to some legal custom by which the right or title to property is acquired, or in which it depends. Legh v. Hewitt, 4 East 154, followed. Held, therefore, that the action was within the competence of the division court, and and that the costs should follow the event in accordance with Rules 1170, 1172. Talbot v. Poole, 15 P.R. 99.

In settlement of an action on a promissory note for $383, given for the price of liquors sold to him by plaintiff, a liquor dealer, defendant, a tavern keeper, agreed in writing to give, and gave security upon certain terms, by a conveyance of land, and a new note for the amount sued for, which was subsequently divided into three notes of $125 each:—Held, that the title of land did not come in question. *Re* McGolrick v. Ryall, 26 O.R. 435.

The plaintiff by mistake built a line fence on the defendant's land. The defendant afterwards used the rails to build his part of the line fence on the correct line. In an action for the value of the rails taken by the defendant it was held that they were not an interest in land. *Re* Bradshaw v. Duffy, 4 P.R. 50.

In an action in a superior court for breach of covenant for quiet enjoyment in a lease, the defeudant pleaded *non demisit*. The plaintiff obtained a verdict for one shilling, but a certificate for costs was refused:—Held, that the plea of *non demisit* raised a question of title, and that the plaintiff was entitled to full costs. Purser v. Bradburne, 7 P.R. 18.

In an action to recover the rent and taxes of certain land, certain facts as to the terms and conditions of the

tenancy were disputed, but the defendant did not dispute the plaintiff's title. On the plaintiff obtaining a judgment for the amount claimed, the defendant applied for a prohibition on the ground that the title to land was called in question bnt it was refused. *Re* English v. Mulholland, 2 C.L.T. 89.

The bare assertion of the defendant that the title to land comes in question is not sufficient to oust the jurisdiction. The judge has authority to inquire into so much of the case as is necessary to satisfy himself on the point, and if there are disputed facts, or a question as to the proper inference from undisputed facts, that is enough to raise the question of title. If the facts can lead to only one conclusion and that against the defendant, then there is no such *bonâ fide* dispute as to title as will oust the jurisdiction of the court. Moberly v. Collingwood, 25 O.R. 625.

Quære, as to whether the title to land comes in question in an action by a licensee of timber limits against a trespasser who denies plaintiff's title. Muskoka Mill & Lumber Co. v. McDermott, 21 A. R. 129.

Easements.

(*d*) Actions for the obstruction of or interference with a right of way or other easement where the sum claimed does not exceed $500, unless the title to the right or easement is in question, and in that case also where the value of the land over which the right or easement is claimed does not exceed that amount;

As to the meaning of the words "the value of the land," see the following cases in notes to the preceding clause: Brown v. Cocking, 37 L.J.Q.B. 250; Elston v. Rose, 38 L.J.Q.B. 6; Stolworthy v. Powell, 55 L.J.Q.B.

228; Bassano v. Bradley, 65 L.J.Q.B. 479; Fortier v. Chenier, 12 O.W.R. 5, and Ross v. Vokes, 14 O.W.R. 1142.

The corresponding section of the English County Courts Act provides that the court shall have jurisdiction "in case of an easement or license where neither the value nor the rent payable for the lands, tenements or hereditaments in respect of which the easement or license is claimed, or on, through, over or under which such easement or license is claimed, shall exceed the sum of 100 pounds by the year."

In Holworth v. Sutcliffe, 64 L.J.Q.B. 729, the plaintiff brought an action in the high court for interference by the defendant with a pipe which conveyed water to his premises across the defendant's lands, and alleged that the value of his premises exceeded the statutory jurisdiction of the county court. The defendant paid a sum of money into court, which was taken out by the plaintiff in satisfaction. On the appeal from the taxation of the plaintiff's costs, it was held that the county court would have had no jurisdiction to try the action, if it had been brought in that court.

See also Chew v. Holroyd, 8 Ex. 249.

In Sloane v. Davis, 7 N. B. R. 593, a disputed claim of an easement of right of way over land, the title to which was not in question, was held to be not within the jurisdiction of the county court.

Recovery of Property.

(*e*) 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;

As shewn by the notes to the preceding clause (*c*), the former sub-section 8 has been divided, and the portion of it conferring jurisdiction in actions of ejectment

has been transferred to this clause. The special jurisdiction conferred on county courts by the former section 27, in actions between landlord and tenant, has been abolished, and all such actions will now come within this clause.

By sub-section 2 of section 30, *infra*, actions for the recovery of real property must be brought and tried in the court of the county or district in which the land sought to be recovered is situate. An action could not, therefore, be brought in the county court for land in two different counties. See McCrea v. Easton, 19 C.L.J. 331.

Section 8 of the Replevin Act, 9 Edw. VII. c. 38, was repealed by section 8 of the Statute Law Amendment Act, 1910, and the following section (now s. 8 of R.S.O. 1914, c. 69) substituted therefor:—

8. The county and district courts shall have jurisdiction in replevin as is provided in the County Courts Act. 10 Edw. VII. c. 26, s. 8.

As regards action of detinue, they have been held in England to be included in "personal actions," and the court, therefore, would have jurisdiction under clause (*b*), *supra*. Leaser v. Rhys, 10 C.B.N.S. 369.

As to interpleader, see notes to section 28, *infra*.

Mortgages and Liens.

(*f*) Actions for the enforcement by foreclosure or sale or for the redemption of mortgages, charges or liens, with or without a claim for delivery of possession or payment or both, where the sum claimed to be due does not exceed $500. 10 Edw. VII. c. 30, s. 22 (1), *part*; 1 Geo. V. c. 17, s. 48.

This clause combines the provisions of sub-sections 11 and 12 of the former section 23.

Under the former equity jurisdiction of the county court, it was held in Connell v. Curran, 1 Ch. Ch. 11, that where a plaintiff filed a hill in the court of chancery to foreclose a mortgage for a sum within the jurisdiction of the county court, no costs should be allowed him, and the fact that the defendant was resident in a county other than where the land was situate would not vary this rule.

In Seath v. McIlroy, 2 Ch. Ch. 93, it was held that where the plaintiff's claim on the premises, together with the amount of a snhsequent mortgage exceeded $200, it was beyond the jurisdiction of the county court.

In Hyman v. Roc[illegible] 11 Gr. 262, it was held that where a bill was filed to foreclose in respect of a demand not exceeding $200, the plaintiff was entitled to his full costs where it appeared that there was an incumhrance heyond that sum.

In Ramsay v. Luck, 3 O.W.N. 1053, which was an action in the high court to foreclose a mortgage for $300, as well as for other relief, and which action was dismissed as against certain defendants, the judge disposed of their costs as follows: "At the trial, counsel for these defendants offered, in case I should he of opinion, under the circumstances, that they might well be content with costs on the county court scale only, not to press for costs on the high court scale, which ordinarily they would he entitled to claim. I think, having regard to the facts, it will he appropriate to give them costs throughout as against the plaintiff on the county court scale; and I order and direct accordingly."

The provision in former Rule 1167 as to revision of costs having heen omitted in Rnle 678, there will no longer he any difference in this respect hetween mortgage actions in the supreme and county courts.

As to references, see section 36. *infra*.

Partnership.

(*g*) Partnership actions where the joint stock or capital of the partnership does not exceed in amount or value $2,000;

In Rae v. Trim, 8 P.R. 405, which was decided under the former equity jurisdiction of the county courts, it was held that the fact of title to land coming in question did not oust the jurisdiction of the court. See now, however, clauses (*c*) and (*e*), *supra*.

In Blaney v. McGrath, 9 P. R. 417, the plaintiff and defendant had entered into partnership to manufactnre certain goods for the price of $2,000. The contract was not fulfilled, and the plaintiff hrought an action for an account of the partnership dealings. The report found that the plaintiff had contributed to the capital $87.39 and the defendant $233.89, aud that there was due from the defendant to the plaintiff $43.74. The plaintiff's costs were taxed upon the lower scale, hut this ruling was reversed on appeal.

In Allan v. The Fairfax Cheese Co., 21 O.R. 598, which was decided after the former equity jurisdiction of the county courts had heen repealed, and hefcre the present jurisdiction had been restored, it was held that a county court had jurisdiction where the amount of the claim did not exceed the ordinary jurisdiction of the court, to entertain an action hy a partner against his co-partners for a purely money demand, which formed part of the partnership assets, although it might involve the taking of the partnership accounts.

Under section 58 of the English County Courts Act, the jurisdiction in partnership matters is limited to the recovery of a demand not exceeding the sum of 100 ponnds, which is the whole or part of the unliquidated balance of the partnership account, hut hy suh-section 7 of section 67, they also have jurisdiction over actions for

the dissolution or winding up of any partnership in which the whole property, stock and credits of such partnership do not exceed in value 500 pounds.

Legacies.

(*h*) Actions by legatees under a will for the recovery or delivery of money or property bequeathed to them where the legacy does not exceed in value or amount $500, and the estate of the testator does not exceed in value $2,000;

In Rustin v. Bradley, 28 O.R. 119, it was held that this clause was not applicable to an action brougth by the legatee against the devisee of land, to recover a legacy charged on the land, as the plaintiff was not seeking payment of a legacy by the legal representative of the testator or out of the testator's estate in his hands, but to enforce payment out of the land of a charge created thereon, which case was not intended to be covered and was not covered by the words of this sub-section. See Goldsmith v. Goldsmith, 17 Gr., at page 218, and notes to sub-section (*h*), *infra*.

Section 58 of the English County Courts Act gives that court jurisdiction not exceeding 100 pounds, for the amount or part of the amount of a distributive share under an intestacy or of any legacy under a will. It has been held, that this section does not give power to county courts to entertain a question of pure trust, *i.e.*, to exercise the same jurisdiction as the court of equity. The extent to which the county courts might go was stated by Parke, B., in Pears v. Wilson, 6 Ex. 833, as follows: "The question is, whether, instead of a legacy to the plaintiff, it is a legacy to the executors in trust, and whether it is a legacy within the meaning of the Act.

We have had an opportunity of consulting my Lord Cranworth about it, and he agrees with us in thinking that this falls under the description of a legacy; every legacy is, in truth, a trust in the executor to pay it to the legatee in a certain sense. In this case, there was no intervention of the trustee required for the execution of the trust, it is simply a direction to hold in trust for another; . . . and we think that the county court has jurisdiction."

In Hewston v. Phillips, 11 Ex. 699, where a testator bequeathed to the defendant all his effects on trust, *inter alia*, to pay the plaintiff 100 pounds when he should attain 21 years, and to pay interest in the meantime, with powers of maintenance, which were duly exercised, it was held, in an action by the plaintiff on attaining his majority, that the court had no jurisdiction, Alderson, B., observing that it was the case of a real trustee and not of an executor with the bare duty to pay over the money.

See also, Curlette v. Vermilyea, 1 O.W.N. 693.

Equitable Claims.

(*i*) All other actions for equitable relief where the subject matter involved does not exceed in value or amount $500; and

In Bradley v. Barber, 30 O.R. 433, it was held that, when a cause of action is within the jurisdiction of a county court, an injunction may, in a proper case, be granted to restrain an apprehended wrong, and a declaration of right may be made in a case whether substantive relief is sought or not, in as full and ample a manner as in a case in the high court.

In *re* Thompson v. Stone, 4 O.L.R. 333, where the plaintiff having recovered a judgment of $92.05 and costs against the defendant in the division court, brought an action in the county court to set aside, as fraudulent as against him, a chattel mortgage for $520 made by the

defendant, it was held, on motion for prohibition, that the subject-matter involved was the amount due on the judgment, it not being alleged or proved that there were any debts of the defendant other than that due to the plaintiff, and the county court, therefore, had jurisdiction. This judgment was affirmed by the divisional court, 4 O.L.R. 585.

In Halliday v. Rutherford, 2 O.W.R. 269, in an action brought to set aside an alleged fraudulent conveyance of certain land by the defendant, a *lis pendens* was registered, and by a consent order was vacated on payment of $300 into court, with a provision that creditors should file their claims. The plaintiff's claim being $96.20, and the total claims filed amounting to $184.47, the master ruled that the plaintiff was entitled to costs on the county court scale, which ruling was upheld on appeal.

In Rustin v. Bradley, 28 O.R. 119, it was held that a county court had jurisdiction under this clause in an action brought by a legatee against the devisee of land to recover a legacy of $5 charged upon the land, as involving equitable relief in respect of a matter within the jurisdiction of the county court. It was also held that the county court of York had power to order a sale of the land which was situate in the County of Peel.

In Angel v. Jay, 80 L.J.K.B. 458, it was held that the words "value of the property" in the corresponding section of the English County Courts Act, mean the value of the freehold of the land, the lease of which has been granted, and not the value of the leasehold interest which is the subject-matter of the transaction to be dealt with by the county court, and, therefore, that the court had no jurisdiction to rescind the lease.

In Wallace v. Employers' Liability Ass. Co., 3 O.W.N. 1179, where the amount of the judgment was reduced on appeal to $650, it was held that the action was still not within the competence of a county court, as it was not

merely for a money recovery, but for a declaration that the injuries which the plaintiff received resulted in temporary total disability, and that the action was therefore in form as well as in substance, an action dealing with the instalments yet to accrue.

Insolvent Estates.

(*j*) Actions and contestations for the determination of the right of creditors to rank upon insolvent estates where the claim of the creditor does not exceed $500. 10 Edw. VII. c. 30, s. 22 (1), *part*.

Before the passing of this clause, it was held that the county court had no jurisdiction to entertain an action for a declaration of right to rank on an insolvent estate. Whiddon v. Jackson, 18 A.R. 439.

Dispute of Jurisdiction.

(2) Where a defendant intends to dispute the jurisdiction of the court on the ground that the action, though otherwise within the proper competence of the court, is not within it because of the amount claimed or of the value of the property in question or of the amount or value of the subject matter involved or, in the cases mentioned in clauses (*g*) and (*h*) of sub-section 1, because the joint stock or capital of the partnership exceeds in amount or value $2,000, or the estate of the testator exceeds in value $2,000, he shall in his appearance or in his statement of defence state that he disputes the jurisdiction of the court and the ground upon which he relies for disputing it; and, in default of his so doing,

unless otherwise ordered by the court or a judge, the question of jurisdiction shall not afterwards be raised or the jurisdiction be brought in question. 10 Edw. VII. c. 30, s. 22 (2); 3-4 Geo. V. c. 18, s. 15 (1).

The latter portion of this sub-section has a far reaching effect, as will be seen by the case of Pearce v. City of Toronto, 25 O. W. R. 321. That action was brought in the county court of York for $2,000 damages for injuries sustained by a fall on a sidewalk. The defendants did not dispute the jurisdiction of the court, but the trial judge awarded the plaintiff only $500 damages, intimating that he did not consider he had jurisdiction to give any more. On appeal to a divisional court, the amount was increased to $750, the Chief Justice stating that the effect of the county judge's decision, if right, would be to wipe out the provisions of the above sub-section.

In a subsequent case of Makepeace v. King, reported in the "Toronto Globe," of March 20th, 1914, in which a judgment had been given in the county court of York, in favour of an architect for $900, for drawing plans for a building, the amount was reduced on appeal to $600. Apparently no notice disputing the jurisdiction had been given, and the reduction by the court of appeal was made on the merits.

In another action of Spellman v. Nelson, which was reported in the "Toronto Globe," of the same date, the plaintiff had sued for $1,000 damages for injuries by being knocked off a bicycle by a runaway horse. At the trial, judgment was given plaintiff for $100 and costs, and an appeal by the defendants was dismissed with costs. Apparently in this case also, the jurisdiction of the court to try the action became absolute on the failure of the defendant to dispute same.

Transfer by Plaintiff.

(3) Where the notice mentioned in the next preceding sub-section is given, the plaintiff may on præcipe require all papers and proceedings in the action to be transmitted to the proper office of the supreme court in the county or district in which the action was brought, and it shall be the duty of the clerk of the county or district court forthwith to transmit the same to such office.

(4) When the papers and proceedings so transmitted are received at the proper office of the supreme court, the action shall *ipso facto* be transferred to the supreme Court. 10 Edw. VII. c. 30, s. 22 (3-4).

Transfer by Defendant.

(5) Where the plaintiff does not exercise the right conferred by sub-section 3 the defendant may, after the expiration of ten days from the entry of appearance if he has given notice that he disputes the jurisdiction of the court on entering his appearance, or after the expiration of ten days from the filing of his statement of defence if he has given such notice in his statement of defence, apply to a judge of the supreme court for an order transferring the action to that court. 10 Edw. VII. c. 30, s. 22 (5); 3-4 Geo. V. c. 18, s. 15 (2).

Terms of Transfer.

(6) Where the court or a judge makes an order under the provisions of sub-section 2 allowing the

defendant to question the jurisdiction of the court the court or judge may direct the action to be transferred to the supreme court, on such terms as to costs and otherwise, as may be deemed just.

Scale of Costs.

(7) Where an action is transferred to the supreme court under the provisions of this section, if the plaintiff is awarded costs, unless otherwise ordered by the court or a judge, they shall be taxed according to the scale of the supreme court, whether or not the action be in fact within the proper competence of the county or district court. 10 Edw. VII. c. 30, s. 22 (6-7).

See Donkin v. Pearson, 80 L.J.K.B. 1069.

In Scott v. Governors of University of Toronto, 4 O.W.N. 994, which had been transferred into the high court at the request of the defendants, and in which the plaintiff obtained a judgment for $600 damages, the entire costs were ordered to be taxed on the high court scale.

For forms of appearance and order, see forms Nos. 1 and 2.

See Brownridge v. Sharpe, 13 O.W.R. 508, where, under the former practice, an order was made after judgment, and upon the granting of a new trial by the divisional court, for the transfer of the action to the high court.

Where Counterclaim beyond Jurisdiction.

23.—(1) Where the defendant pleads a set-off or counterclaim either party, within six days after the plaintiff has delivered his reply to such defence of

set-off, or his defence to the counterclaim, may apply to a judge of the supreme court for an order transferring the action and counterclaim to the supreme court on the ground that such set-off or counterclaim involves matter beyond the jurisdiction of the court.

Order of Transfer.

(2) The judge if satisfied that the set-off or counterclaim involves matter which exceeds the jurisdiction of the court, may order the transfer upon such terms as to costs and otherwise as he may deem just.

When Jurisdiction Established.

(3) If no such application is made within the time limited, or if an application so made has been refused, the jurisdiction of the court to hear and determine the whole matter involved in the set-off or counterclaim shall be deemed to be established. 10 Edw. VII. c. 30, s. 23.

For form of order, see form No. 3.

This section supersedes, and makes a radical change in the practice established by section 29 of the former Act, which was as follows:—

29. Where in a proceeding before a county court any defence or counterclaim of the defendant involves matter beyond the jurisdiction of the court, such defence or counterclaim shall not affect the competence or the duty of the court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the court has jurisdiction to administer shall be given to the

defendant upon such counterclaim. R.S.O. 1887, c. 27, s. 22.

Under the former Act it was held that the power to grant relief in respect of such counterclaim was limited to the same amount as the plaintiff had claimed in the action: Davis v. Flagstaff Mining Co., 3 C.P.D. 228; Wallace v. People's Life Insurance Co., 30 O.R. 438; and that the relief which a defendant could obtain against a third party brought in under Con. Rule 209, was similarly limited to protection against the plaintiff's demand: Neald v. Corkindale, 4 O.R. 317; and that a defendant who had obtained a judgment in a county court on a counterclaim, the amount of which was beyond the jurisdiction of that court, might sue in the high court for the balance, and the defendant in the high court was estopped from denying the cause of action, the only question being the amount of damages: Webster v. Armstrong, 54 L.J.Q.B. 236.

In Breese v. Clark, 1 O. W. R. 805, a judgment was given in the district court for $597, on the counterclaim, and on an appeal on the ground of excess of jurisdiction, the counterclaim was reduced, on the evidence, to $150, thereby dispensing with the necessity of deciding the legal question raised.

Sub-section (3) of the present section will evidently permit of the trial of the entire set-off or counterclaim in the county court, no matter what may be the amount thereof, unless the prescribed proceedings are taken to transfer the action to the supreme court.

Proceedings after Transfer.

24. Where an action has been transferred to the supreme court or to another county or district court, under any provision of this Act, it shall be in the same plight and condition as it was in at the time of

the transfer, and thereafter may be proceeded with as if it had been commenced in the court into which it has been so transferred. 10 Edw. VII. c. 30, s. 24.

It was held in Hankey v. G. T. Ry. Co., 17 U.C.R. 472, before the legislation upon which this section is based, that where a cause was removed from the county court after issue joined, the plaintiff should declare *de novo*.

It was held in Corley v. Roblin, 5 U.C.L.J. 225, that the defendant was entitled to costs on the high court scale, although the action had been transferred at his request, as no terms were imposed.

In Struthers v. Green, 14 P.R. 486, it was held that the provisions of former Rule 1219, as to the lower scale of costs, were applicable to an action transferred from the county court to the high court, and that the costs of the proceedings after the transfer should be taxed upon the lower scale by reason of the plaintiff seeking equitable relief, and the subject-matter involved not exceeding $200.

In Tucker v. Young, 30 S.C.R. 185, it was held that, where an action had been commenced in the county court and transferred to the high court, there was no right of appeal to the supreme court of Canada, because the action did not originate in a superior court. Gwynne, J., dissented on the ground that, after the transfer because of the county court having no jurisdiction, the action was, to all intents and purposes as if it had been originally begun in the high court.

Transfer to other County Court.

25. Where it appears in an action brought in a county or district court that such court has not cognizance thereof, but that the court of some other county or district has jurisdiction to try the same,

the judge before whom the action is pending may, at any time before or during the trial thereof, order the action to be transferred to such other county or district court upon such terms as to costs and otherwise as he may deem just. 10 Edw. VII. c. 30, s. 25.

For form of order, see form No. 4.

Prior to this enactment, there was no provision for the transfer of such an action from one county court to another, the provisions of section 30, *infra*, and Rule 1219, (now 767), as to change of place of trial being applicable only to cases where "the action is properly pending in the county court from which the proceedings are to be removed." See Howard v. Herrington, 20 A.R., at page 179, and notes to section 30, *infra*.

In Corneil v. Irwin, 2 O.W.R. 466, which was decided before the enactment of this section, and in which the action had been brought in the wrong county, the power of transferring to another court now given by this section was assumed by the master in chambers, apparently because Rule 245 (*b*) is applicable to county courts; but the above decision of the court of appeal was evidently not brought to his attention.

In Leach v. Bruce, 9 O.L.R. 380, however, which was decided some months after the above section was passed, the master in chambers, in a similar case, followed his previous decision in Corneil v. Irwin, *supra*, without making any reference to this section.

In Berthold v. Holton, 4 O.W.N. 458, the plaintiff obtained a judgment in the county court of York, on condition that execution should not issue until the trial of a counterclaim. Defendants then moved to transfer the action to the county court of Hastings, on the ground that it was the proper place for the trial of the counterclaim. This was refused on the ground that there was no power

to transfer an action after judgment. An appeal was also dismissed (4 O.W.N. 458), hut leave was given defendants to withdraw their counterclaim, if so advised, and sue for same in the Hastings county court. This application was made to the master in chambers and no objection was made to his jurisdiction to hear it. See notes to section 30, *infra.*

Prohibition Abolished.

26. Prohibition shall not lie in respect of an action or counterclaim which may be transferred under the provisions of this Act to the supreme court, or from one county or district court into another county or district court. 10 Edw. VII. c. 30, s. 26.

This section effects a very important and salutary change in the practice. Theretofore prohibition was frequently resorted to when the county court, or a particular county court, had not jurisdiction in the action, instead of an application being made to transfer the action to the high court or to another county court. See sections 22 (5) and 23, *supra,* and section 29, *infra,* as to cases in which the action may he transferred to the supreme court, and section 25, *supra,* as to the transfer of actions to another county court.

Abandonment of Excess.

27.—(1) Where it appears that the claim of the plaintiff is for an amount beyond the jurisdiction of the court he may, by writing signed by him and filed, upon such terms as the judge deems proper as to costs and otherwise abandon the excess and in such case the plaintiff shall forfeit such excess, and shall not be entitled to recover it in any other action.

(2) A defendant shall have the like right in respect of his set-off or counterclaim. 10 Edw. VII. c. 30, s. 27.

Prior to the passing of this section, it was held in *Re* MacKenzie v. Ryan, 6 P.R. 323, that the plaintiff could not, after action brought, abandon any part of his claim, so as to give the court jurisdiction, though he might have done so in his claim.

In Cleveland v. Fleming, 24 O.R. 335, it was held that where the claim in an action beyond the jurisdiction of the division court was brought in that court, the judge at the trial had no power to strike out the excess so as to bring the amount within the jurisdiction.

In Thompson v. Eede, 22 A.R. 105, however, the plaintiff was allowed, on application to amend, to abandon one of two unliquidated claims, each within, but together beyond the jurisdiction of the county court, on condition that he should abandon his right to bring another action for the portion of his claim withdrawn.

Partial prohibition has been granted in several cases to prevent the enforcement of judgment for the excess over the jurisdiction, where such excess was caused only by the addition of interest. *Re* Elliott v. Biette, 21 O.R. 595; *Re* Trimble v. Miller, 22 O.R. 500, and *Re* Lott v. Cameron, 29 O.R. 70.

In Meeke v. Scobell, 4 O.R. 553, it was held that a plaintiff in a division court, cannot abandon a part of his claim in an action founded partly on contract and partly on tort, without indicating how much of the abandonment is applicable to each.

In Jarvis v. Leggatt, 10 C.L.T. 155, the plaintiff sued in a division court on a solicitor's bill amounting to $135.38, abandoning the excess thereof over $100. The trial judge deducted from plaintiff's bill $71.53, and entered judgment for $63.86, being the balance of the

whole claim. An application for prohibition was refused, as it was held that what the trial judge did was tantamount to deducting $36.14 from plaintiff's claim as sued, in addition to the amount abandoned on entering the suit.

In Winger v. Sibbald, 2 A.R. 610, it was held that the commencement of a suit for part only of an entire claim is not *per se* a release of the excess, but the part so abandoned cannot be sued for after the recovery of judgment in such suit.

In Davidson v. Belleville & North Hastings Ry. Co., 5 A.R. 315, it was held that, where the plaintiff sued for two items of wages amounting to $320, and was allowed to amend by striking out one item, leaving an amount within the jurisdiction of the county court, that court had power to grant judgment for the amount remaining, but that such judgment was a bar to any future action for work done at any time before the commencement of the suit.

Extent of Relief to be Granted.

28. The Court shall, as regards all causes of action within its jurisdiction, have power to grant and shall grant such relief, redress or remedy, or combination of remedies, either absolute or conditional, including the power to grant vesting orders and to relieve against penalties and forfeitures, but shall not have the power to remove a trustee or to appoint a new trustee under The Trustee Act; and shall give such and the like effect to every ground of defence or counterclaim, equitable or legal, by the same mode of procedure, and in as full and ample a manner as might and ought to be done in the like case by the supreme court. 10 Edw. VII. c. 30, s. 28; 1 Geo. V. c. 17, s. 39.

In Plummer v. Colwell, 15 P.R. 144, it was held, in an action to restrain the defendants by injunction from negotiating a promissory note for $230, and to compel them to deliver it up to the plaintiff, or for damages for its detention, that the action sounded in tort and not in contract, and was not within the jurisdiction of the county court.

In Martin v. Bannister, 4 Q.B.D. 491, it was held that the provisions of the Judicature Act enabled county court judges, in all causes of actions within their jurisdiction, to grant injunctions in as full and complete a manner as if they were judges of the high court, including the enforcing of obedience by attachment.

The opinion had been formerly entertained that a county court could not grant an injunction if that were the only remedy claimed. The court of appeal expressly declined to decide this question in the cases of Shaw v. Jersey, 4 C.P.D. 329, and Frearson v. Loe, 9 Ch. D. 48, but in the recent case of Stiles v. Eccelstone (1903), 1 K.B. 544, it was held that the county court had jurisdiction where an injunction only is claimed, if the claim for damages (supposing it to have been made) must necessarily have been within the jurisdiction in point of amount.

In Rich v. Melancthon Board of Health, 26 O.L.R. 48, an action was brought in the county court to recover a claim for medical services, and also for a mandatory order to enforce it. The action was dismissed, and on appeal the judgment was affirmed on the ground that the writ asked for was the prerogative writ of mandamus or the order now substituted therefor, and that this could be granted only by the high court on a summary application. The mandamus which may be awarded in an action is either in the nature of the old equitable mandatory injunction, or is merely ancillary to the enforcement of a legal right for which an action may be maintained at law.

Rules in Interpleader.

The following Con. Rules govern interpleader applications in the county conrts, which presumahly come under this section, as suh-section 6 of thc former section 23, has not heen re-enacted:—

644. Rclief hy interpleader may he granted in a county court,

1. (*a*) Where the applicant is sued in the connty court;

(*b*) Where the applicant is not so sued and the deht, money, goods or chattels in question do not exceed in value $500;

2. Where the applicant is a sheriff acting under a writ or writs of execution issued from a county court or different county courts the application may he made to the judge of his own county. C.R. 1123, *amended.*

645. All suhsequent proceedings shall he had and taken in the county where the application is made; hnt the judge to whom the application is made may order that the suhsequent proccedings he had and taken in any other county, if that course seems just and more convenient. C.R. 1124.

646. Where the amount claimed under or hy virtue of writs of execution, in the sheriff's hands, does not exceed the sum of $400, exclusive of interest and sheriff's costs, or when thc goods seized are not, in the opinion of the judge or other person making the order, of the value of more than $400, the issue may he directed to he tried in a county court and in such case all suhsequent proceedings shall he had and taken in the county court.

647. Where the amount of the execution or the value of the goods does not exceed $100, the issue may be directed to he tried in a division court, and thereafter all proceedings shall he carried on in snch court. C.R. 656.

648. When money has been paid into court and an issue has been directed to be tried in the county or division court the money shall be paid out upon the order of the county or division court. C.R. 1127, *amended*.

See Anderson v. Barber, 13 P.R. 21; Close v. Exchange Bank, 11 P.R. 186; Coyne v. Lee, 14 A.R. 503; Clancey v. Young, 15 P.R. 248; Teskey v. Neil, 15 P.R. 244; Frost v. Lundy, 14 C.L.T. 191; Connell v. Hitchcock, 15 A.R. 518.

Section 40 (1), clause (*b*), provides for appeals in interpleader proceedings.

Attachment of Debts.

The following Rule respecting attachment of debts specifically applies to county courts:—

597. Where the debt claimed to be due or accruing from a garnishee is of the amount recoverable in a county court, the order to shew cause shall require the garnishee to appear before the judge of the county court of the county within which the garnishee resides, at a day and place within his county to be appointed by such judge; and the garnishee shall be served with notice of the day and place appointed. All subsequent proceedings shall then be taken and carried on before such judge. C.R. 917, *amended*.

In *Re* Williams v. Bridgman, 4 O.W.R. 53, an application was made by a claimant for prohibition against further proceedings in a garnishee matter pending in the county court, under an order of the junior judge, or, in the alternative, for a transfer of the issue to the high court, on the ground that the amount involved was beyond the county court jurisdiction, it was held that, in all cases of county court attachments, the county judge was empowered to determine whether a debt was attachable to the extent of satisfying the judgment, no matter what

the amount thereof. This was affirmed by a divisional court, 4 O.W.R. 232.

See Cochrane v. Morrison, 10 P.R. 606; Millar v. Thompson, 19 P.R. 294.

Section 40 (1), clause (*b*), provides for appeals in proceedings for attachment of debts and against garnishees.

What Actions Removable.

29. Except in the cases mentioned in sub-sections 3, 5 and 6 of section 22 and in section 23, no action shall be removed by order of *certiorari*, or otherwise, into the supreme court unless the debt or damages claimed amount to upwards of $100, and then only on affidavit and by leave of a judge of the supreme court, if it appears to the judge fit to be tried in the supreme court, and upon such terms as to costs, giving security for debt or costs and otherwise as he deems just. 10 Edw. VII. c. 30, s. 29.

For forms of order and certiorari see forms Nos. 5 and 17.

In *Re* Emmens v. Dymond, 4 O.W.N. 1363, upon an application to transfer an action to the high court, it was held that the words "fit to be tried in the high court" mean "that ought to be tried in the high court, rather than in the county court," and the application was refused, because no such reason for transfer was shewn.

In Holmes v. Reeve, 5 P.R. 58, it was held that where a defendant knew all the facts of the case before the day of trial, but nevertheless, argued it and obtained an opinion from the judge, the case should not be removed, and the fact that the judge was desirous that the case should be disposed of in the superior court could make no difference.

In *Re* Knight v. Medora and Wood, 11 O.R. 138, it was held that where the case had been tried before the division court judge, who gave his decision in favour of the plaintiff, but formally reserved the giving of judgment to a subsequent day to enable the defendants to move for certiorari, the defendants could not thus wait and take the chances of a decision in their favour, and finding it adverse, apply for a writ of certiorari.

In Sherk v. Evans, 22 A.R. 242, it was held that an action could not be removed from a county court to the high court after judgment in the former court in favour of the plaintiff leaving the judgment in force with the right to either party to move against it in the high court.

In Roche v. Allan, 23 O.L.R. 478, an application was made to remove a county court action after judgment, into the high court, so that the plaintiff might have an opportunity of a further appeal. It was held that there was no power to remove such an action into the high court after trial and judgment.

See also Christie v. Cooley, 6 O.W.R. 214.

As to what have been considered good grounds for the removal of actions under section 126, from the English county courts to the high court, see Longbottom v. Longbottom, 8 Ex. 203; Potter v. G. W. Collier Co., 10 T.L.R. 380; Rees v. Williams, 7 Ex. 51; Box v. Green, 9 Ex. 503.

In Banks v. Hollingsworth, 62 L.J.Q.B. 236, it was held that the words "fit to be tried" in the Borough and Local Courts of Record Act mean "ought to be tried," and that the question whether an action was fit to be tried in the superior court was a matter of opinion of the judge, and that he had discretion in all cases as to whether an action should be removed into the superior court. See also Cherry v. Endean, 55 L.J.Q.B. 292; Donkin v. Pearson, 80 L. J. K. B. 1069.

In Harrison v. Bull, 81 L.J.K.B. 656, it was held that where an order had been made by consent for the removal

of the action from the county court into the high court, by a writ of certiorari, and subsequently on the application of the defendants, a writ of certiorari was granted removing the action into the high court, the plaintiff was under no obligation to proceed with the action in the high court.

In Challis v. Watson, 82 L.J.K.B. 529, it was held that the jurisdiction of the court to make an order of transfer, was not confined to cases in which it considered that the case was in itself more fit to be tried in the high court than in the county court, but extended to cases where it thought that for any reason, it was better that the action should be tried in the high court.

Sections 65, 66 and 69 of the English County Courts Act permit the transfer of actions of contract and of tort and equitable actions from the high court to the county court under certain circumstances.

The following section 186 was contained in the Judicature Act of 1897, and the sub-section was added thereto by sub-section (5) of section 7 of the Statute Law Amendment Act, 1910:—

186. In any case in a county or division court where the defence or counterclaim of the defendant involves matter beyond the jurisdiction of the court, the high court or any judge thereof, may on the application of any party to the proceeding, order that the whole case be transferred from such court to the high court, and thereupon all the proceedings in such case shall be transmitted by the clerk or other proper officer, of the county or division court to the said high court; and the same shall thenceforth be continued and prosecuted in the high court as if it had been originally commenced therein. 58 V. c. 12, s. 186.

186*a*. Where a plaintiff has brought an action of the proper competency of a county or district court in the

high court, the action may, by leave of a judge, be transferred at any time before the trial to the county or district court on such terms, including payment of the additional costs incurred by the defendant owing to the action having been brought in the high court, as to the judge may seem just.

These provisions have however both been omitted from the Judicature Act of 1913, and R.S.O. 1914. Section 23, *supra*, contains similar provisions as regards transfers from county courts, and the following section of the Division Courts Act has been retained in R.S.O. 1914, c. 63:—

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 sub-section 1, may order that the defence or counterclaim be struck out, but an order made under this sub-section 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 counter-claim.

(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.

For form of order see Form No. 6.

The following section of the Division Courts Act provides for the transfer of actions, to the supreme court only, instead of allowing such transfer to the county court in proper cases, as is done by section 71, *supra*:—

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 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.

The present state of the law therefore leaves the following cases entirely unprovided for:—

1. Transfers from the supreme court to the county court of actions within the jurisdiction of the latter;

2. Transfers from the division court to the county court of actions (as distinguished from defences or counterclaims), beyond the jurisdiction of the former, but within that of the latter.

Regulation as to Transfers.

The following "regulation of court" was published among the legal news in "The Toronto Globe" on June 26th, 1914:—

Where an action has been transferred from a county court or surrogate court to the supreme court a memorandum should be added to the record shewing this fact and the authority for the transfer, e.g.

"This action was brought in the county (or surrogate) court of the County of York and was transferred to the supreme court under section 22, sub-section 3 of the County Courts Act, or by order of the Hon. Mr. Justice

A. B. under section 22, sub-section 5 of the County Courts Act, or as the case may be."

Venue in Certain Actions.

30.—(1) Unless by consent of the parties, or unless the place of trial is changed, actions under clauses (*c*) and (*d*) of section 22 shall be brought and tried in the court of the county or district in which the land is situate, and actions under clause (*g*) of that section shall be brought and tried in the court of the county or district where the partnership has or had its principal place of business, and actions under clause (*h*) of that section shall be brought and tried in the court of the county or district where letters probate or of administration have issued, or where the deceased resided at the time of his death.

(2) Actions for the recovery of real property shall be brought and tried in the court of the county or district in which the property sought to be recovered is situate. 10 Edw. VII. c. 30, s. 30.

The actions under the above mentioned clauses are as follows:—

(*c*) For trespass or injury to land.
(*d*) For obstruction of an easement.
(*g*) Partnership actions, and
(*h*) Actions by legatees under a will.
See McKenzie v. Scott, 15 O.W.R. 342.

Rule 245 is as follows:—

245.—(1) Subject to any special statutory provisions the place of trial of an action shall be regulated as follows:—

(*a*) The plaintiff shall, in his statement of claim, or where the writ is specially indorsed, in the indorsement, name the county town at which he proposes that the action shall he tried;

(*b*) Where the cause of action arose and the parties ıeside in the same county the place to he named shall he thc county town of that county;

(*c*) Save in mortgage actions, where possession of land is claimed, the place to he named shall he the county town of the county in which the land is situate;

(*d*) The action shall he tried at the place so named, unless otherwise ordered upon the application of either party. C.R. 529.

Change of Place of Trial.

Rule 767 provides as follows:—

767. In all actions hrought in a county court the judge of the county court where the proceedings were commenced, or the master in chamhers, (snhject to appeal in either case as if the case were in the high court) may change the place of trial, and in the event of an order being ohtained for that purpose, the clerk of the county court in which the action was commenced shall forthwith transmit all papers in the action to the clerk of the county court to which the place of trial is changed, and all suhsequent proceedings shall he entitled in such last mentioned court, and carried on in such last mentioned county as if the proceedings had originally heen commenced in such last mentioned court. R.C. 1210.

In Brigham v. McKenzie, 10 P.R. 406, douhts were thrown upon the jurisdiction of the master in chamhers to make an order under this rule, so the words " or the master in chamhers " were inserted on the consolidation of the rules in 1888. Boyd, C., in his judgment on appeal

from the master, expressed the opinion that an application of this kind was neither a "matter" nor a "proceeding" in the high court.

In Ferguson v. Golding, 15 P.R. 43, it was held that where a motion is made to a master in chambers under this rule to change the venue, the papers should not be intituled in the high court of justice, but in the county court.

In McAllister v. Cole, 16 P.R. 105, it was held that where an application is made to the master in chambers under this rule to change the place of trial, no appeal lay from his order thereon, and if the application was made to a judge in chambers, no appeal lay from his decision to a divisional court. This was followed in Cameron v. Elliott, 17 P.R. 415, reversing Milligan v. Sills, 13 P.R. 350. In consequence of these decisions the words "subject to appeal in either case, as if the case were in the high court" were inserted on the last consolidation.

In O'Donnell v. Duchenault, 14 O.R. 1, it was held, under the statute then in force, that the venue in an action of replevin in a county court, except for goods distrained, might be changed to any other county under section 155 of R.S.O. c. 50 (now Rule 767). Since that decision, however, the statute has been changed, and now by 9 Edw. VII. c. 38, s. 8, all county court actions of replevin for property "distrained, taken or detained" must be brought in "the county wherein the property was distrained, taken or detained."

In Hicks v. Mills (unreported), an order was made by the master in chambers changing the venue from the County of York to the County of Wentworth, and on appeal to Street, J., this order was reversed and the venue restored to Toronto. On appeal to the divisional court, the defendant contended that Street, J., had no jurisdiction to entertain the appeal, but if he had jurisdiction, a further appeal lay to the divisional court. The

plaintiff contended that no appeal lay from Street, J., to the divisional court. The appeal was dismissed on the merits, the court refusing to interfere with the discretion exercised by the judge in chambers. (Divisional court, March 15th, 1898). After the trial an application was made to Street, J., 18 C.L.T. 223, for a direction as to the scale of costs on the application for change of venue, and it was held that the costs of the application to the master in chambers should be taxed on the county court scale, but the costs of the two appeals should be taxed on the high court scale.

In Burke v. Smith (unreported), an order was made by the master in chambers changing the venue in a county court action from Stratford to Walkerton. On appeal to Rose, J. (June 7th, 1898), this order was reversed and the venue restored to Stratford, on the ground that the difference in expense was not sufficient to warrant the change. It was also held that there is no difference of principle between an action in the high court and one in the county court as to the determination of the question of venue. In both the preponderance of convenience is to govern. See also Mahon v. Nicholls, 31 U.C.C.P. 22, and Slater v. Purvis, 10 P.R. 604.

In Palmer v. Hampton (unreported), the defendant moved before Meredith, C.J., (February 3, 1899), to change the venue in a county court action from Toronto to Belleville, and also appealed from an order made by the judge of the county court of York under Rule 531, providing for the trial of different questions of fact at different times and places. It was held that no appeal lay from the order of the county court judge, although it should not have been made while the motion to change the venue was pending. An order was made changing the venue to Belleville, upon the defendant consenting to have the case tried without a jury, if the plaintiff desired it.

It was held in Corneil v. Irwin, 2 O.W.R. 466, that paragraph (*b*) of sub-section 1, of Rule 245, which provides that where the cause of action arose and the parties reside in the same county, the place of trial shall he the county town of that county is applicable to county courts as well as to the high court. In this case the action was brought in the county court of Elgin, although the cause of action arose, and all the parties resided in the County of Middlesex, and an order was made transferring the action to the county court of the latter county.

This decision, which was given prior to the enactment of section 25, *supra,* seems to he in conflict with the decision of the court of appeal in Howard v. Herrington, 20 A.R. 175, *supra,* note to section 25, as regards the right to transfer to another county court. In the latter case the defendant appealed from the judgment of the county court on the ground that the action, which was one of replevin, had been brought in the wrong county, and Osler, J.A., said, at page 179: "I do not see that under Rule 1260 (now 767) there would be power to change the place of trial from one county to another in a case thus brought in a county court which nad no jurisdiction to entertain it. I mean that this rule does not aid the plaintiff, as it assumes that the action which is to be transferred to another county court is properly pending in the county court from which the proceedings are to he removed. Possihly the plaintiff might, hefore judgment, have had the case removed into the high court, as provided by 54 V. c. 14 (O.), but in this appeal all that we can consider is whether the court belo v had jurisdiction." See, however, Leach v. Bruce, 9 O.L.R. 380, and notes to section 25, *supra.*

In Noxon v. Cox, 6 O.L.R. 637, the master in chambers refused to change the venue from the county court of Oxford to the county court of Huron, hecause in the agreement upon which the action was based, it was provided that, on default of payment, suit might be entered and tried in the Oxford county court.

In Hisey v. Hallman, 2 O.W.R. 403, the master in chambers refused to change the venue from the county court of York to the county court of Waterloo, on the plaintiff undertaking to pay such amount as the trial judge might consider reasonable to meet the extra expense caused by the trial taking place at Toronto. See also Baker v. Weldon, 2 O.W.R. 432.

After an order has been made changing the venue, and the papers have been transmitted, the judge of the court in which the writ issued has no further jurisdiction. Mahon v. Nicholls, 31 U.C.C.P., at p. 28; Hornby v. Hornby, 3 U.C.R. 274.

For form of order, see form No. 18.

See also Empire v. Pettypiece, 13 O.W.R. 740 and 902; Can. Carriage Co. v. Down, 1 O.W.N. 444; McReedie v. Dalton, 1 O.W.N. 740; Bank of Montreal v. Hoath, 1 O.W.N. 892; Metal Shingle Co. v. Anderson, 2 O.W.N. 1018; Keenan v. Woodware Co., 3 O.W.N. 1451; Ontario Bank v. Bradley, 4 O.W.N. 588; Berthold v. Holten, 4 O.W.N. 523; Ferguson v. Anderson, 4 O.W.N. 830; Banghart v. Miller, 4 O.W.N. 1368; Martini v. McLeod, 5 O.W.N. 79, and notes to section 25, *supra*.

When Judge Party to Action.

31. An action by or against a judge shall not be brought in the court of which he is a judge, but shall be brought in the court of a county or district adjoining that in which such judge resides. 10 Edw. VII. c. 30, s. 31.

This section apparently applies, even in counties where there is a junior judge.

Section 3 of the Creditors Relief Act, is as follows:—

"Where a judge is disqualified to act in a matter arising under this Act, a judge of the county court in an adjoining county shall have jurisdiction to act in his

place." Section 3 of the Assignments and Preferences Act, 1910, is exactly similar.

In Jones v. Wing, 3 O.S. 36, it was held, before the passing of the above section, that where two plaintiffs, one of whom was sole judge of the district court of the district in which the defendant resided, sued in the King's Bench on a cause of action within the district court jurisdiction, they were entitled to full costs.

In an anonymous case reported in 4 P.R. 310, it was held that the fact of a defendant being a county court judge, where the plaintiff might otherwise have proceeded under the Over-holding Tenants Act, and thereby have obtained a more summary remedy, was a sufficient reason to change the place of trial in an action of ejectment. *Quære,* whether the circumstance of defendant being a county court judge was not in itself sufficient to give plaintiff the right to have the place of trial changed on grounds of public policy.

In *Re* The Judge of the County Court of Elgin, 20 U.C.R. 588, a garnishee summons having issued in the county court, one H. opposed it as assignee of the judgement debtor, and in answer to his claim an affidavit was filed in which it appeared that the judge was interested with H. in his claim. The judge then declined to act further in the matter, and signed a memorandum stating, as an additional reason for refusing to proceed, that H. was his brother-in-law. The court, under these circumstances, refused a mandamus to compel the judge to dispose of the case.

Procedure in Courts.

32. Subject to the provisions of The Judicature Act and to Rules of Court, the practice and procedure of the supreme court shall apply to the county and district courts. 10 Edw. VII. c. 30, s. 32.

By section 109 of the Judicature Act, the judges of the supreme court may make rules for regulating the pleading, practice and procedure in county courts. The following Rule contains substantially the same provisions as the above section 32:—

768.—(1) These Rules, and the practice and procedure in actions in the supreme court shall, so far as the same can be applied, apply and extend to actions in the county court. C.R. 1216.

Section 119 of the Judicature Act further provides as follows:—

119. In addition to the provisions of this Act which are expressly made applicable to all courts or county courts or are otherwise by their terms so applicable, sections 24, 32, 34, 36, 50 to 52, 58 to 62, 71, 72, 74, 115 and 116 shall *mutatis mutandis* apply to the county courts. 3-4 Geo. V. c. 19, s. 121.

In *Re* Oliver v. Fryer, 7 P.R. 325, it was held that a practice, adopted in the county court of York, requiring the filing of a promissory note before entering a judgment by default in an action thereon, was contrary to law, and a mandamus was granted to compel the signing of such judgment without the filing of the note.

In *Re* Hill v. Telford, 12 O.W.R. 1090, it was held that a judge of a county court had jurisdiction to make an order for security of costs under R.S.O. 1897, c. 89, in an action brought by an Indian, and that the manner in which the judge exercised the jurisdiction was not a subject for prohibition, but for his own sound discretion.

As to the proper practice in certain matters connected with trials in the county court, see Stewart v. Rounds, 7 A.R. 575; Williams v. Crow, 10 A.R. 301; Ferguson v. McMartin, 11 A.R. 731, and McConnell v. Wilkins, 13 A.R. 438.

Effect of Judicial Decisions.

In Crowe v. Graham, 22 O.L.R. 145, it was held by Riddell, J., following Can. Bank of Commerce v. Perram, 31 O.R. 116, that decisions of a divisional court in county court appeals were not binding in subsequent appeals. (See an article by the author in vol. 47 C.L.J., page 443, discussing this and other similar decisions). In 1912, sub-section 2 of section 81 of the Judicature Act was repealed and a new section substituted therefor. This new section, as redrafted, now forms section 32 of the Judicature Act, and is as follows:—

32.—(1) The decision of a divisional court on a question of law or practice unless overruled or otherwise impugned by a higher court shall be binding on all divisional courts and on all other courts and judges and shall not be departed from in subsequent cases without the concurrence of the judges who gave the decision.

(2) It shall not be competent for any judge of the high court division in any case before him to disregard or depart from a prior known decision of any other judge of co-ordinate authority on any question of law or practice without his concurrence.

(3) If a judge deems a decision previously given to be wrong and of sufficient importance to be considered in a higher court, he may refer the case before him to a divisional court.

(4) Where a case is so referred, it shall be set down for hearing, and notice of hearing shall be given in like manner as in the case of an appeal to a divisional court. 3-4 Geo. V. c. 19, s. 32.

See judgment of Riddell, J., in *Re* Stinson v. College of P. & S. of Ontario, 27 O.L.R. 565, in which he questioned the effect of the amending Act of 1912. Probably it was in consequence of this expression of doubt that the section was redrafted as above stated. See also *Re* Dinnick v. McCallum, 3 O.W.N. 1061, in which, under the provisions of sub-section (3), Riddell, J., referred a case to a divisional court.

In Bellamy v. Timbers, 31 O.L.R. at page 628, Riddell, J., said: "A county court judge is wholly right in following the opinion of one judgo of the Appellate Division where the other judges express no contrary opinion."

Payment into Court.

Rules 764 to 771 inclusive apply only to county and surrogate courts. They will be fonnd under appropriate sections in different parts of this work, except those governing payment of money into and out of court. The latter rules are as follows:—

769.—(1) Money to he paid into the connty court or surrogate courts, shall he paid into some incorporated hank designated for that purpose, from time to time, hy order of the lieutenant-governor in council; or where there is no such hank, then into some incorporated hank in which puhlic money of the province is then heing deposited, and which has heen appointed for that purpose hy any general rule in that hehalf; or if no hank has heen appointed, into any hank in which puhlic money of the province is heing deposited.

(2) The money shall he paid in to the credit of the cause or matter in which the payment is made, with the privity of the clerk or registrar (as the case may he) of the conrt, and in no other manner; and such money shall he withdrawn only on the order of the conrt or a jndge thercof, with the privity of the clerk or registrar of the conrt.

(3) Where money is paid in under a plea of payment into court, the clerk, on the production of the receipt of the hank for the money or other satisfactory proof of such payment, shall sign a receipt for the amount in the margin of the pleading. C.R. 1221.

770. The clerk of a county court and registrar of a surrogate court shall each keep a hook, such containing an acconnt of all money so paid into their respective courts, and of the withdrawal thereof; and shall prepare

in the month of January in every year a statement of all moneys so paid in and withdrawn, and a statement of the condition of the various accounts upon the thirty-first day of the preceding December, and shall transmit to the provincial secretary and to the judge or each of the judges of such courts, a copy of such statement, with a declaration thereto annexed. C.R. 1222.

771.—(1) The book so to be kept shall be open for inspection during office hours; and the clerk or registrar shall give a certificate of the state of an account or an extract therefrom at the request of any party interested or his solicitor on his paying to the clerk or registrar the sum of twenty cents for such inspection or certificate and the sum of ten cents per folio for such extract. C.R. 1223.

(2) The official guardian shall be entitled to make any such search without payment of any fee. *New.*

For form of return, see Form No. 19.

Costs where no Jurisdiction.

33. Where the plaintiff fails to recover judgment by reason that the court has not jurisdiction, the court shall nevertheless have jurisdiction over the costs of the action or other proceeding, and may order by and to whom the same shall be paid. 10 Edw. VII. c. 30, s. 33.

The following Rule contains substantially the same provisions:—

766. Where the plaintiff fails to recover judgment in an action or other proceeding brought in a county or division court by reason of such court having no jurisdiction over the subject matter thereof, the county court, or the judge presiding in the division court, as the case may be, shall have jurisdiction over the costs of such

action, or proceeding, and may order by and to whom the same shall be paid. C.R. 1215.

Prior to this enactment, no costs could be recovered by the defendant where the plaintiff failed for want of jurisdiction. Powley v. Whitehead, 16 U.C.R. 589.

In *Re* The Cosmopolitan Life Association, 15 P.R. 185, an order had been made by a county court for the winding up of a company. On appeal the court held that there was no jurisdiction to make the winding up order and that all proceedings were irregular or null, being *coram non judice*, and that there was no jurisdiction to order the payment of costs as the above section and rule do not apply to proceedings under the Winding-up Act.

In Teskey v. Neil, 15 P.R. 244, an order had been made by the master in chambers by consent, directing the trial of an interpleader issue in the county court. It was held on appeal that there was no jurisdiction to make an order, and, therefore, no right to appeal from the judgment of the county court upon the issue. The appeal was, therefore, quashed with costs.

In Empire Oil Co. v. Vallerand, 17 P.R. 27, judgment was given in the county court in an action on a contract made in Quebec, the writ having been served on the defendant in that province. It was held on appeal that there was no jurisdiction to make the order for service of the writ. The appeal was allowed with costs.

In Sherk v. Evans, 22 A.R. 242, an appeal from the county court was allowed with costs on the ground of want of jurisdiction in the county court by reason of the amount claimed being too great. No order was made, however, as to the costs in the court below, as the appeal was allowed on the want of jurisdiction, and the above rule seemed to leave the matter in the discretion of the county court judge.

Enforcing Judgments and Orders.

34. Every county and district court shall have the like power as is possessed by the supreme court of enforcing its judgments and orders in any part of Ontario, and may issue the like writs and process as may be issued out of the supreme court; and the same shall have the like force and effect as writs and process issued out of the supreme court. 10 Edw. VII. c. 30, s. 34.

Rules 533 to 579 inclusive provide for the various means by which judgments and orders of the supreme court may be enforced.

In Rustin v. Bradley, 28 O.R. 119, the action was brought in the county court of York for a legacy of $5 charged on land in the county of Peel, in which latter county the probate of the will had been granted. It was held that the county court of York had power to order a sale of the land.

Punishment for Contempt of Court.

35. Every county and district court may punish by fine or imprisonment, or by both, for any wilful contempt of or resistance to its process, rules or orders; but the fine shall not in any case exceed $100, nor shall the imprisonment exceed six months. 10 Edw. VII. c. 30, s. 35.

In the second edition of Oswald on Contempt, at page 49, it is stated that, "Most direct contempts are punishable, summarily and instanter, by fine or commitment at the discretion of the judge. In the case of an advocate, the further penalty of partial suspension from his privilege of practising as such may be inflicted, though an absolute suspension by disbarring or striking off the

rolls would seem an excessive and improper penalty to impose (Smith v. Justice of Sierra Leone, 3 Moore P.C. Ca. 362). An advocate may be ordered to resume his seat, or even to be removed from the court, if he behaves irregularly. In the case of such commitments as those now referred to, no warrant is necessary (Carus Wilson's Case, 7 Q.B. 984); nor need the cause of commitment be set out at length in any warrant (*Ex parte* Fernandez, 10 C.B.N.S. 3). . . . If a direct contempt is not punished on the spot, the proper course is to proceed upon notice for committal or attachment. Contempts committed before officers of the court are punishable in the same manner by the court to which the officer is attached."

In Callow v. Young, 56 L.T. 147, Chitty, J., points out the former distinction between committal and attachment as follows: "Committal was the proper remedy for doing a prohibited act, and attachment was the proper remedy for neglecting some act ordered to be done." He quotes Sir George Jessel as saying that "for most practical purposes the former distinction has been abolished, but there may be cases where it would still be maintained." As to the difference in practice on applications for attachment and committal, see Taylor v. Plinston, 81 L.J.Ch. 34. See forms of order for committal and warrant, Nos. 7 and 8.

In *Re* Pacquette, 11 P.R. 463, it was held that a judge of a county court, who was acting under the Assignment Act was not exercising the powers of the county court, but an independent statutory jurisdiction as *persona designata,* and had, therefore, no power to direct the issue of a writ of attachment.

Subsequently the following statute was passed, which now forms section 2 of R. S. O. 1914, c. 79:—

"2. Where jurisdiction is given to a judge as *persona designata,* and no other mode of exercising it is prescribed, he shall have jurisdiction as a judge of the court

to which he helongs, and the same jnrisdiction for enforcing his orders, as to proceedings generally, as to costs and otherwise as in matters under his ordinary jurisdiction as a judge of such conrt."

In *Re* Clark and Heermans, 7 U.C.R. 223, it was held that where a power resides in any conrt or judge to commit for contempt, it is the power or privilege of such court or judge to determine on the facts, and it does not belong to any higher trihunal to examine into the truth of the case.

In *Re* Lees v. The Judge of the County Court of Carleton, 24 U.C.C.P. 214, it was held that every court of record has the power to punish for contempt, hut if the court is one of inferior jurisdiction, the superior court may intervene and prevent any usurpation of jurisdiction by it. It was held in this case, however, that there was no excess of jurisdiction, and that the court could not interfere. See also *Ex parte* Pater, 5 B. & S. 299.

In Young v. Saylor, 23 O.R. 513, which was an action against a justice of the peace, it was held that if the defendant had issued his warrant for the commitment of the plaintiff, and had therein stated sufficient grounds for his commitment, the court could not have reviewed the facts alleged by him in his commitment. On appeal this jndgment was affirmed hy the court of appeal, 20 A.R. 645.

In *Re* Anderson v. Vanstone, 16 P. R. 243, it was held that an order made by the judge of a county court in chambers for the commitment of a party to an action in that court for default of attendance as a judgment dehtor, is " process " in an action within the meaning of the exception in section 1 of the Haheas Corpus Act, and where such a party was committed under such an order, a writ of haheas corpus was quashed as having been improvidently issued.

In Regina v. Lefroy, L.R. 8 Q.B. 134, it was held, nnder the corresponding section of the English County

Courts Act, that the judge had no power to proceed under this section, or by virtue of his authority as a judge, against a person for contemptuons and insulting writing published out of court.

In Regina v. Judge of Brampton County Court (1883), 2 Q.B. 195, it was held that a judge could not commit a person for contempt for practising as a solicitor without heing duly qualified.

In Levy v. Moylan, 19 L.J.C.P. 308, it was held that a warrant was not had for uncertainty in specifying the cause of commitment, nor for omitting to describe the nature of the insults, and that the recital that the plaintiff had insulted the judge was a sufficient adjudication of the offence.

In Regina v. Jordan, 57 L.J.Q.B. 483, it was held that the judge had jurisdiction to decide conclusively whether any particular act amounted to an insult, interruption or misbehaviour, if there was any evidence on which he could reasonahly hold it to he so; and it was not necessary that the commitment should state more than that the judge had heen wilfully insulted. It was further held that to say to a judge in reference to an ohservation in his judgment: "That is a most unjust remark," was a wilful insult within the section. It was also held that the warrant, issued at the rising of the court, was regular, although the judge had made the order orally, and it was entered in the registrar's book. See also Martin v. Bannister, 4 Q.B.D. 491; Richards v. Cullerne, 7 Q.B.D. 623; Hutchinson v. Hartmont, W.N. (1877), 29; Harvey v. Hall, L.R. 11 Eq. 31; Hyman v. Ogden, 74 L.J.K.B. 101.

See *Re* Bolton and County of Wentworth, 23 O.L.R. 390.

Accounts and Inquiries.

36.—(1) Where it is proper to direct a reference, the same may be made to any officer to whom a refer-

ence may be directed by the supreme court or to the clerk of the court.

(2) Where the judge of the court is local master, the reference may be made to himself, but no fees shall be charged by him on such reference.

(3) Upon every such reference the fees to be paid and the costs to be allowed, whether as between party and party, or solicitor and client, shall be according to the county court tariff. 10 Edw. VII. c. 30, s. 36.

For form of order, see Form No. 9.

The following section of the Judicature Act provides as to referees:—

86.—(1) Subject to the Rules, judges of county courts, the master in ordinary, the master in chambers, the clerk of the Crown and pleas, registrars, local masters, local registrars, deputy clerks of the Crown and pleas, and deputy registrars shall be official referees for the trial of such questions as may be directed to be tried by an official referee.

(2) Where the business requires additional official referees, the lieutenant-governor in council may appoint them.

Rules 399 to 459 contain the provisions as to such references.

It was held in McClure v. Township of Brooke, 5 O.L.R. 59, that a drainage referee is not an official referee, and he cannot act as such unless he is appointed by the parties as a special referee.

Power to Order Reference.

37.—(1) In an action in a county or district court the judge shall have the same powers with regard to the making of an order of reference as

may be exercised by a judge of the supreme court in an action therein.

The following are the provisions of the Judicature Act as to such references:—

64.—(1) Snbject to the Rules and to any right to have particular cases tried by a jury, a judge of the high court division may refer any question arising in an action for inquiry and report either to an official referee or to a special referee agreed upon by the parties.

(2) Snb-section 1 shall not, unless with the consent of His Majesty authorize the reference to an official referee of an action to which His Majesty is a party or of any question or issue therein. 3-4 Geo. V. c. 19, s. 64.

65. In an action,

(*a*) if all the parties interested who are not under disability consent, and where there are parties under disability the judge is of opinion that the reference should be made and the other parties interested consent; or

(*b*) where a prolonged examination of documents or a scientific or local investigation is required which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court directly; or,

(*c*) where the question in dispute consists wholly or partly of matters of account,

a judge of the high court division may at any time refer the whole action or any question or issue of fact arising therein or question of account either to an official referee or to a special referee agreed upon by the parties. 3-4 Geo. V. c. 19, s. 65.

66.—(1) In the case of a reference to a special referee he shall be deemed to be an officer of the court.

(2) The remuneration to be paid to a special referee may be determined by a judge of the high court division.

(3) The remuneration, fees, charges and disbursements payable to an official referee, and, in the absence of any special direction, to a special referee shall be the same as are payable to a local master.

(4) Where the judge at the trial instead of trying an action refers the whole action under the provisions of section 65 to an official referee who is a local registrar or deputy registrar, a deputy clerk of the Crown and pleas, a local master or other officer of the court, paid wholly or partly by salary, no fees, either in law stamps or otherwise, shall be charged by the referee. 3-4 Geo. V. c. 19, s. 66.

67. The referee shall make his findings and embody his conclusions in the form of a report, and his report shall be subject to all the incidents of a report of a master on a reference as regards filing, confirmation, appealing therefrom, motions thereupon and otherwise, including appeals to a divisional court. 3-4 Geo. V. c. 19, s. 67.

68. The evidence of witnesses examined upon the reference, and the exhibits shall forthwith, after the making of the report, be transmitted by the referee to the proper officer of the court. 3-4 Geo. V. c. 19, s. 68.

Appeal from Referees.

(2) An appeal, in like manner and within the same time as in like cases in actions in the supreme court, shall lie from the report on the reference to the judge of the county or district court in chambers, who shall, upon such appeal, have the same power as may be exercised by a judge in like cases in the supreme court.

In *Re* Crossman v. Williams, 4 O.W.R. 14, it was held that the words, "a judge in chambers," contained in the former section 49, corresponding to the above sub-section,

meant a judge of the county court in chambers, not a judge of the high court.

The following Rules apply to such appeals:—

502. Every report or certificate of a Master shall be filed and shall be deemed to be confirmed at the expiration of fourteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time.

503. An appeal from the report or certificate of a master or referee shall be to the court upon seven clear days' notice, and shall be returnable within one month from the date of service of notice of filing of the report or certificate. C.R. 770.

504. An appeal shall lie under the two preceding rules from every decision of a master, except an order made under the authority of Rule 433. C.R. 1264.

Further Appeal.

(3) An appeal shall lie from any order, judgment or decision of the judge of a county or district court, and from the report upon a reference made under sub-section 2 of section 36 to a divisional court, and the proceedings and practice on the appeal as to staying proceedings and otherwise shall be similar to the proceedings and practice relating to an appeal from a judgment under the provisions of section 39.

For procedure on such appeals see new Rule 492 (2), passed June 19th, 1914.

Not to Apply to Crown.

(4) Nothing in this section shall empower the judge of a county or district court to refer any proceeding to which His Majesty is a party, or any

question or issue in any such proceeding, to an official referee, without the consent of His Majesty. 10 Edw. VII. c. 30, s. 37 (1-4).

See s.-s. (2) of s. 64 of the Judicature Act, *supra*, for similar provision in actions in the supreme court.

APPEALS.

Meaning of Terms.

38. The terms "party to a cause or matter," and "appellant," hereinafter used shall include a person suing or being sued in the name of another, and a person on whose behalf or for whose benefit an action is prosecuted or defended. 10 Edw. VII. c. 30, s. 38.

Suh-section (o) of section 2 of the Judicature Act is as follows:

> (*o*) "Party" shall include a person served with notice of or attending, a proceeding, although not named on the record.

In Henderson v. Rogers, 15 P.R. 241, it was held that a claimant in a garnishee issue, though not a party to the original action, is a "party" within the meaning of this section: Sato v. Huhhard, 6 A.R. 546, distinguished.

Who May Appeal.

39.—(1) Any party to a cause or matter may appeal to a divisional court from any judgment directed to be entered at or after the trial or from a

refusal to enter a judgmcnt. 10 Edw. VII. c. 30, s. 39 (1); 2 Geo. V. c. 17, s. 11 (3).

(2) A motion for a new trial shall be deemed an appeal, and shall be made to a divisional court. 10 Edw. VII. c. 30, s. 39 (2).

This simple provisiou as to appeals, has beeu substituted for the former complicated section 51, which was productive of so much unnecessary litigatiou, and which was as follows:

51.—(1) Auy party to a cause or matter iu a couuty court may appeal to a divisional court of the high court of justice from any judgmeut directed by a judge of the couuty court to he eutered at or after the trial in auy case tried without a jury, aud also iu auy case tried with a jury, to which sub-sectiou 4 does uot apply.

(2) Iustead of appealing to a divisioual court of the high court of justice auy party may move hefore the couuty court within the first two days of its uext quarterly sittings to set aside the judgment aud enter any other judgmeut upou any grouud.

(3) A motiou for a uew trial ou the ground of discovery of uew evideuce or the like, shall he made hefore the county court.

(4) Where there has been a trial with a jury any motiou for a new trial, whether made for that relief alone or comhined with, or as an alternative for any other relief, shall he made to the county court.

(5) If a party moves before a couuty court uuder subsection 2 in a case in which he might have appealed to the high court he shall not be eutitled to appeal from the judgmeut of the couuty court to the high court, but the opposite party shall be entitled to appeal therefrom to the high court. 58 V. c. 13, s. 44 (1); 60 V. c. 15, Sched. A. (69).

In consequence of this amendment, all the numerous cases decided under the old section, as to the proper court to which an appeal should be made in each particular case, and which were the occasion of so much refinement of reasoning, have been rendered obsolete.

In Emerson v. Cook, 3 O.W.N. 968, which was tried by a jury, and in which there was a counterclaim, the jury could not agree on all the questions, and the judge refused to order any judgment to be entered, leaving the case to be tried again. Both parties appealed, but their appeals were dismissed, without any determination as to whether an appeal lay. The words, " or from a refusal to enter a jndgment," which were snbsequently added to above section were probably intended to cover similar cases in futnre.

Additional Appeals.

40.—(1) An appeal shall also lie to a divisional court at the instance of any party to a cause or matter from

Under Rule or Statute.

(*a*) Every decision of a judge under any of the powers conferred upon him by any Rules of Court or by any statute, unless provision is therein made to the contrary;

Interpleader, etc.

(*b*) Every decision or order made by a judge in chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees;

Disposing of Right or Claim.

(*c*) Every decision or order in any cause or matter disposing of any right or claim; and from

Scale of Costs.

(*d*) Any decision or order of a judge, whether pronounced or made at the trial, or on appeal from taxation or otherwise, which has the effect of depriving the plaintiff of county court costs on the ground that his action is of the proper competence of the division court, or of entitling him to county court costs on the ground that the action is not of the proper competence of the division court. 10 Edw. VII. c. 30, s. 40 (1); 2 Geo. V. c. 17, s. 11 (4).

In the Act of 1904 the first three clauses of the above sub-section 1 formed one undivided section, as follows:—

52. (1) An appeal shall also lie to a divisional court of the high court of justice, at the instance of any party to a cause or matter from every decision made by a judge of a county court under any of the powers conferred upon him by any rules of court or any statute, unless provision is therein made to the contrary; and from every decision or order made by a judge of a county court sitting in chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees; and from every decision or order made in any cause or matter disposing of any right or claim, provided always that the decision or order is in its nature final and not

merely interlocutory. R.S.O. 1887, c. 47, s. 42; 58 V. c. 13, s. 44 (2); 59 V. c. 18, Sched. (48); c. 19, s. 14.

In the revision of the Act in 1910, the section read as follows:—

40.—(1) An appeal shall also lie to a divisional court at the instance of any party to a cause or matter from

(*a*) Every decision of a judge under any of the powers conferred upon him by any of the rules of court or by any statute, unless provision is therein made to the contrary;

(*b*) Every decision or order made by a judge in chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees;

(*c*) Every decision or order in any cause or matter disposing of any right or claim, if the decision or order is in its nature final and not merely interlocutory; and from

(*d*) Any decision or order of a judge whether pronounced or made at the trial or on appeal from taxation or otherwise, which has the effect of depriving the plaintiff of county court costs on the ground that his action is of the proper competence of the division court or of entitling him to county court costs on the ground that the action is not of the proper competence of the division court. 4 Edw. VII. c. 10, s. 13.

The proviso formerly in section 52 (1) of the Act of 1904, and afterwards in clause (*c*) of sections 40 of the Act of 1910, and now forming part of s.s. (2) *infra*, as to the necessity for the decision or order being "in its nature final, and not merely interlocutory" to render it appealable, had been held, under the Act of 1904, to be equally applicable to all the matters now contained in

these three clauses. See *Re* Taggart v. Bennett, 6 O.L.R. at page 77. It was suggested, however, in the second edition of this work, that the altered construction of the section in the Act of 1910, rendered this proviso inapplicable to decision under clauses (*a*) and (*b*). This view was advanced by counsel in Gibson v. Hawes, 24 O.L.R. 543, and although the Court did not find it necessary to decide the point in that case, the proviso was subsequently transferred to sub-section 2 *infra*. See the judgment of Mr. Justice Middleton in the last mentioned case for an interesting discussion of the history of this section.

See McIlhargey v. Queen, 2 O.W.N. 364, 781 and 916 as to appeals under above clause (*d*). Prior to the passing of that clause, it was held in Leonard v. Burrows, 7 O.L.R. 316, distinguishing Babcock v. Standish, 19 P.R. 195, and Kreutziger v. Brox, 32 O.R. 418, that there was no appeal in cases of the kind referred to, as to the proper scale of costs applicable.

Limitation of Appeals.

(2) This section shall not apply to an order or decision which is not final in its nature but is merely interlocutory or where jurisdiction is given to the judge as *persona designata*. 10 Edw. VII. c. 30, s. 40; 2 Geo. V. c. 17, s. 11 (5).

This sub-section (like the former sub-section 2 of section 23, and the former section 51 of the Act of 1904, both now repealed), has been the occasion of a great many decisions containing fine-drawn distinctions—in this case, as to the meaning of the words "final" and "interlocutory." As regards the use of the latter word in this connection, see the judgment of Anglin, J., in Smith v. Traders Bank, 11 O.L.R., at page 27, where he preferred the word "intermediate." In Salaman v. Warner (1891), 1 Q.B. 734, following Standard Discount Co. v.

LaGrange, 3 C.P.D., at page 71, a "final order" is defined as one made on such an application or proceeding that, for whichever side the decision is given, it will if it stands, finally determine the matter in litigation. In Bozson v. Altrincham Urban Council, 72 L.J.K.B. 271, the court of appeal followed the earlier inconsistent decision on Shnbrook v. Tufnel, 9 Q.B.D. 621, in preference to Salaman v. Warner, and laid down the following test, viz.: if the order finally disposes of the rights of the parties, it ought to be treated as final; if, on the other hand, further proceedings are necessitated, it ought to be treated as interlocutory. See also *Re* Alexander, 61 L.J.Q.B. 377; *Re* Binstead, 62 L.J.Q.B. 207; *Re* Vulcan, 67 L.J.P.D. 101; *Re* Herbert Reeves & Co., 71 L.J.Ch. 70; Bank of Toronto v. Keilty, 17 P.R. 250; Rural Municipality of Morris v. L. & C. L. & A. Co., 19 S.C.R. 434; Maritime Bank v. Stewart, 20 S.C.R. 105; Baptist v. Baptist, 21 S.C.R. 425; The Queen v. Clark, *Ib.* 656; *Re* Page, 79 L.J.Ch. 482.

Notwithstanding section 34 (3) of The Surrogate Courts Act that "the practice and procedure upon and in relation to an appeal shall be the same as is provided by The County Courts Act as to appeal from the county court," the above sub-section does not apply to interlocutory orders of a surrogate judge: Forbes v. Forbes, 23 O.L.R. 518.

Right to Appeal Decided.

In the following cases in which the point has been specifically raised, the orders have been held to be final, and therefore appealable, under this sub-section:—

An order for leave to enter judgment under Rule 603: Bank of Minnesota v. Page, 14 A.R. 347; even where the order is made conditionally only on security not being given: Castle v. Kouri, 18 O.L.R. 462. See also Nelson v. Thorner, 11 A.R. 616, and Collins v. Hickok, *Ib.* 620.

An order committing the defendant to jail npon his examination as a jndgment debtor for selling or making away with his property in order to defeat or defrand his creditors. Baby v. Ross, 14 P.R. 440. See also *Re* Anderson v. Vanstone, 16 P.R. 243.

An order under the Ontario Winding Up Act approving of the sale of the assets of a company. *Re* The D. A. Jones Co., 19 A.R. 63.

An order disposing of an issne directed by an order made npon a garnishee application. Henderson v. Rogers, 15 P.R. 241.

An order dismissing a petition to vacate and set aside a partition of land. Jenking v. Jenking, 11 A.R. 92.

An order dismissing a motion to set aside jndgment entered as for default of defencc. Voight Brewery Co. v. Orth, 5 O.L.R. 443; O'Donnell v. Guinane, 28 O.R. 389, *infra*, distinguished.

An order directing jndgment npon a specially endorsed writ, for delivery of possession of land and for the trial of an issne to ascertain defendant's interest in the land. Vivian v. Taylor, Divisional Court, March 4th, 1901 (nnreported).

An order allowing the defendant to set off his costs in excess of snch costs as he would have incurred in a division court against the costs of the plaintiff, and to enter judgment and issue execution for the excess, if any. Babcock v. Standish, 19 P.R. 195. See also Kreutziger v. Brox, 32 O.R. 418. See, however, Leonard v. Burrows, 7 A.R. 316, and see now section 41, *infra*.

An order purporting to be made nnder Con. Rule 261, striking ont certain paragraphs of a statement of defence as disclosing no reasonable answer, even though snch order is, in form "intermediate." Smith v. Traders Bank, 11 O.L.R. 24.

An order granting or refusing an application for discharge from custody, under an order for arrest. Elliott v. McCuaig, 13 P.R. 416; McVeain v. Ridler, 17 P.R. 353.

An order made on the summary trial of an interpleader issue in a high court action. Vipond v. Griffin, 2 O.W.R. 532.

An order dismissing an action for want of prosecution. Diamond Harrow Co. v. Stone, 7 O.W.R. 685.

Right to Appeal Assumed.

In the following cases appeals have also been entertained, but the question of the right to appeal was not raised:—

From a judgment in a partition matter under R.S.O. c 123. Furness v. Mitchell, 3 A.R. 510.

An order in interpleader proceedings. Fee v. Bank of Toronto, 10 U.C.C.P. 32. See also Whiting v. Hovey, 12 A.R. 119.

A judgment on a special case. Shaver v. Hart, 31 U.C.R. 603. See also Osler v. Muter, 19 A.R. 94.

An order imposing terms on a defendant as a condition of giving him leave to defend. McVicar v. McLaughlin, 16 P.R. 450.

An order under the Creditors' Relief Act setting aside a judgment and execution. Molsons Bank v. McMeekin, 15 A.R. 535. See also Bowerman v. McPhillips, 15 A.R. 679.

An order allowing execution to issue on a judgment. Mason v. Johnston, 20 A.R. 412.

An order refusing to allow execution to issue on a judgment. McMahon v. Spencer, 13 A.R. 430.

An order for the examination of the wife of a judgment debtor as a person to whom the latter had made a transfer of his property. Goodeve v. White, 15 P.R. 433.

Cases Not Appealable.

In the following cases, in which the right to appeal has been questioned, the orders have been held to be interlocutory, and therefore not appealable under this section:—

An order dismissing an application by the plaintiff for summary judgment under Rule 603. Fisken v. Stewart, 17 C.L.T. 82.

An order enlarging *sine die* until after the happening of a named event, a motion by the defendant to dismiss the action for want of prosecution. Slater v. Mader, 17 C.L.T. 83.

An order upon an interpleader application, imposing upon the appellants terms as to payment of costs in relieving them from an order barring their claim. Elley v. Evans, Divisional Court, Oct. 11, 1897 (unreported).

An order setting aside a judgment by default as irregular upon terms of the defendant paying costs. O'Donnell v. Guinane, 28 O.R. 389. (This objection does not seem to have been raised in McVicar v. McLaughlin, 16 P.R. 450, *supra*).

An order dismissing, except upon terms as to payment of costs, security, etc., a motion by defendant to set aside as irregular, a judgment in favour of plaintiff entered under an order whereby the defence was struck out for irregularity. Nesbitt v. Malone, Divisional Court, Jan. 10, 1898 (unreported).

An order upon an interpleader application made by the sheriff, directing security to be given for the goods and for costs and the trial of an issue in the event of security being given, and in default for the sale of the goods, and the payment of the proceeds to the execution creditor. Hunter v. Hunter, 18 C.L.T. 114.

An order striking out a jury notice. McPherson v. Wilson, 13 P.R. 339.

An order npon the application of the defendants after jndgment dismissing the action, requiring the plaintiffs to give security for costs, staying proceedings in the meantime, and directing that in default of secnrity heing given within the time limited, the action to he dismissed with costs. Arnold v. Van Tuyl, 30 O.R. 663.

An order made after jndgment, directing the jndgment debtors to attend for examination hefore a special examiner, and ordering their alleged transferee to attend and produce the hooks of account used hy the dehtors in their bnsiness. *Re* Ganlt v. Carpenter, 1 O.W.R. 404.

An order discharging an application to vary the minutes of judgment. *Re* Taggart and Bennett, 6 O.L.R. 74.

An order dismissing an appeal from a ruling as to the scale of costs npon taxation of the plaintiff's costs of the action awarded hy the judgment. Bahcock v. Standish, 19 P.R. 195, *supra,* distinguished. Leonard v. Burrows, 7 O.L.R. 316. See also McCormick Harvester Co., 3 O.L.R. 427. (See now, however, clause (*d*), *supra.*

An order dismissing an application to commit a defendant for contempt for refusing to he sworn on an examination. New Hamhurg Mfg. Co. v. Barden, 21 C.L.T. 377.

An order discharging a defendant from arrest nnder a *ca. sa.* Gallagher v. Gallagher, 31 O.R. 172.

An order made hy a connty jndge directing the trial of an interpleader issue. Lipskin v. Lipovitch. Divisional Court, Novemher 24th, 1910. (Unreported).

Appeals in Other Cases.

In addition to tbe ahove, snh-section 3 of section 37, *supra,* provides for appeals from jndgments on references, Rnles 505 and 506 provide for appeals from local jndges, and Rule 767 provides for appeals in applications to change the place of trial. See notes to section 30, *supra.*

Where Judge Persona designata.

The following provisions are made by R.S.O. c. 79 for the exercise of powers given to a judge as *persona designata,* and for appeals from his decisions:—

2. Where jurisdiction is given to a judge as *persona designata,* and no other mode of exercising it is prescribed, he shall have jurisdiction as a judge of the court to which he belongs, and the same jurisdiction for enforcing his orders, as to proceedings generally, as to costs and otherwise as in matters under his ordinary jurisdiction as a judge of such court. 9 Edw. VII. c. 46, s. 2.

3.—(1) Where made by a judge of the supreme court the order may be filed in the central office of the supreme court, or with a local registrar, deputy registrar or deputy clerk of the Crown, and where made by a judge of a county or district court the order may be filed with the clerk of the court.

(2) Upon an order being so filed it shall become an order of the supreme court or of the county or district court, as the case may be, and may be enforced in the same manner and by the like process as if the order had been made by such court.

(3) The like fees shall be payable as are payable upon the issue of an order made by the judge in the exercise of his ordinary jurisdiction.

(4) The order shall be entered in the same manner as a judgment of the court in which the order is so filed. 9 Edw. VII. c. 46, s. 3.

4. There shall be no appeal from such order unless an appeal is expressly authorized by the statute giving the jurisdiction or unless special leave is granted by the judge making the order or by a judge of the supreme court, in which case the appeal shall be to a divisional court whose decision shall be final. 9 Edw. VII. c. 46, s. 4.

In Coyne v. Lee, 14 A.R. 503, an order had been made in a bigh court action for an interpleader issue to be tried by the county court of Middlesex. By a snhsequent order made on consent, the trial of sucb issue was withdrawn from Middlesex, and a special case was agreed on, and tbe venue changed from Middlesex to York, wbere the special case was argued. On appeal from tbe dccision of the latter court to tbe court of appeal it was beld that the proceedings in tbe county court of York could be rcgarded only as a summary trial hy consent, from which no appeal lay.

In *Re* Pacquette, 11 P.R. 463, a judge of a county court removed an assignee for creditors and substituted anotber. Tbe first assignee refnsed to deliver over the keys, and the judge made an order for the issuc of a writ of attachment for contempt. It was held that the judge in acting under tbe Assignment Act was not exercising the powers of the county court, but an independent statutory jnrisdiction as *persona designata,* and bad, therefore, no power to direct the issue of tbe writ of attachment, and probihition was ordered. Tbis was followed in *Re* Young, 14 P.R. 303, where it was beld that the county court judge bad no power to order payment of costs as tbe proceedings were not in any court, and Rule 1170 (*a*), now 679, did not apply to them.

In *Re* Simpson and Clafferty, 18 P.R. 402, the connty conrt judge made an order dismissing an application hy a claimant to vary tbe scbeme of distribntion made by the assignec of an insolvent, and it was held tbat it was made by him as *persona designata,* and there was no appeal therefrom.

In *Re* Waldie and the Village of Burlington, 13 A.R. 104, an order was made by the judgc of the county court of the county in which certain lands were situatc altering and amending the plan thercof, notwithstanding this tho council passed a by-law declaring open some streets

closed by the order, and the plaintiff thereupon took proceedings to quash the by-law, which application was granted. While it was not necessary to decide the point it was suggested that an appeal would have lain from the decision of the judge under the Registry Act.

In Hutton v. Valliers, 19 A.R. 154, it was held that where the parties in a mechanics' lien proceeding had consented to the matter being disposed of by the judge of the county court who had no jurisdiction otherwise than under the consent, neither party could appeal from his judgment.

In Charron v. Barrie, Divisional Court, March 1st, 1898, (unreported), the county court judge dismissed an action for an injunction and declaration of a lien on certain logs. On appeal it was held that as the sum claimed exceeded $200, the county Court had no jurisdiction, but the parties having consented to the judge trying the action, he was in the position of a quasi-arbitrator from whose decision no appeal lay, and the appeal was therefore quashed without costs.

In *Re* Moore and Township of March, 20 O.L.R. 67, an appeal was taken to the divisional court from the audit and judgment of the county court judge of Carleton, under 3 Edw. VII. c. 22, s. 4, whereby he disallowed a portion of the charges made by Moore against the township. The Act provides that the account of an engineer employed under the Municipal Drainage Act shall, upon the request of the municipal council, be audited by the county judge. Special leave to appeal was given by the judge, but the majority of the divisional court held that an appeal did not lie.

See further, as to jurisdiction being given to a judge as *persona designata*:—*Re* Allen, 31 U.C.R. 458; *Re* Waldie and Burlington, 13 A.R. 104; C. P. Ry. Co. v. Little Seminary of Ste. Therese, 16 S.C.R. 606; *Re* T. H.

& B. Ry. Co. v. Hendrie, 17 P.R. 199; St. Hilaire v. Lambert, 42 S.C.R. 264; Godson v. City of Toronto, 16 A.R. 452, 18 S.C.R. 36; *Re* Alexander Boyes, 13 O.R. 3; McLeod v. Noble, 28 A.R. 528, 24 A.R. 459.

After Judgment Signed.

41. An appeal may be had, notwithstanding that judgment has been signed. 10 Edw. VII. c. 30, s. 41.

Prior to the enactment of this section by 45 V. c. 6, there could be no appeal after judgment was entered. Murphy v. Northern Ry. Co., 13 U.C.C.P. 32; Duffil v. Dickinson, 14 U.C.C.P. 142; Wood v. G. T. Ry. Co., 16 U.C.C.P. 275.

Judge to Certify.

42.—(1) The judge shall, at the request of the appellant, certify under his hand to the proper officer of the supreme court the pleadings in the cause and all motions or orders made, granted or refused therein, and his judgment or decision, and, where a trial has been had, his charge to the jury, if any, the evidence and all objections and exceptions thereto, or to his charge, and all other papers in the cause affecting the question raised by the appeal.

(2) The judge shall be required to certify only the pleadings, motions, orders, affidavits, evidence and other material necessary for the full understanding of the matter in appeal, together with his judgment or decision. 10 Edw. VII. c. 30, s. 42.

For form of certificate, see form No. 11.

Former Con. Rule 793 contained the following provisions, but it has been omitted in the recent revision, as being only a substantial repetition of the above section:—

793. (1) In appeals from county courts, the pleadings, motions, orders and other papers to be certified to the proper officer of the high court under section 51 (*x*) of the Act respecting county courts, shall include:—

(*a*) The original pleadings;

(*b*) Notices of motion, and orders affecting questions raised by appeal;

(*c*) The judgment or orders appealed from and the written opinion or decision of the judge;

also where a trial has been had

(*d*) The judge's notes, or where the evidence has been taken by a stenographer, his notes, of the evidence and of any objections and exceptions thereto, and of the rejection of any evidence, and of the judge's charge;

(*e*) The exhibits put in at the trial.

(2) The said papers shall be fastened together and transmitted to the central office and the same shall be returned to the county court when the appeal is disposed of.

(3) It shall not be necessary to certify or transmit the evidence or the objections or exceptions thereto, where the appeal is from a judgment or decision upon the pleadings, or upon a motion not founded upon the evidence. See Rules 1 Jan., 1896, 1489 (835).

In Lees v. O. & N. Y Ry. Co., 31 O.R. 567, an objection was taken that the original pleadings were not certified, but only copies of them, but it was held that, as it was only the Rule and not the above section that required the original pleadings to be certified, the court might dispense with what the rules required to be done, or permit it to be done *nunc pro tunc*.

In Baby v. Ross, 14 P.R. 440, it was held that it was not a valid objection to an appeal, that the judge of the county court had not, in certifying the proceedings, expressed in his certificate that they were certified to the court of appeal, to which an appeal lay.

In Gilmour v. McPhail, 16 P.R. 151, it was held that until the proceedings in the court below had been sent up to the court of appeal (to which an appeal then lay) by the county court judge as directed by the above section, the appeal was not lodged, and the court could neither dismiss it nor extend the time for setting it down for hearing. See also Paul v. Rutlidge, 16 P.R. 140.

In Smith v. Hay, Divisional Court, 7th June, 1899 (unreported), an application was made to quash the appeal on the ground that the case was improperly set down, the proceedings not having been certified by the judge as required by this section. The appellant asked to be allowed to have the proceedings certified *nunc pro tunc*, and the setting down taken as properly done. The court held that the appeal could not be considered as set down because the proceedings were not certified, and as the section required that it should be done within a certain time, and gave no power to extend the time, it would be useless to allow the proceedings to be certified then, as the appeal would have to be set down again and it would then be too late.

In Reekie v. McNeil, 31 O.R. 444, it was held that the provisions of this section are peremptory, and that there was no power to dispense with such provisions or to enlarge the time for setting down the appeal. A judge of a district court having refused to certify the pleadings so as to allow an appeal to be set down for the divisional court, an order was obtained from a judge to allow such an appeal to be set down, but it was held that the order

was of no avail and the appeal was struck out. This was followed in *Re* Rogers v. McFarland, 19 O. L. R. 622.

In Taggart v. Bennett, 2 O.W.R. 184, the above case was distinguished. The judgment appealed from having been given on the 9th December, 1902, the appeal should have been set down for the sittings of the divisional court, beginning 12th January, 1903, such sittings not being merely a postponed sittings, and the appeal having been set down for a later sittings was out of time, but it was held that the court had power under Rule 353 (now 176) to enlarge the time, and as the appellant was misled by the change of date, the case was one for the granting of the indulgence.

In a subsequent application in the latter case, reported in 6 O.L.R. 74, it was held that the fact that there may be no right of appeal is no reason why the county judge should not certify the papers. Whether there is an appeal or not is for the court appealed to. The judge's duty is ministerial and the certificate should be given upon request.

In Lucas v. Holliday, 8 O.L.R. 541, the court appears to have entertained the appeal, notwithstanding the omission to have the proceedings certified, no objection having been taken thereto. See judgment of Meredith, J., page 543.

The judge can be compelled by mandamus to certify the papers where he has been applied to and has refused to do so. *Re* Keenaban v. Preston, 21 U.C.R. 461; but not after the time to appeal has expired. Orr v. Barrett, 9 C.L.T.; and see *Re* Taggart v. Bennett, 6 O.L.R. 74.

See remarks of Mr. Justice Riddell in McCnaig v. Lalonde, 23 O.L.R. at page 317, and of the Chancellor in Rich v. Melancthon Board of Health, 26 O.L.R. at page 50, as to the necessity for county court judges giving reasons for their decisions.

Staying Proceedings.

43. Subject to the next following section, any judge of the county or district court appealed from may, upon application to him, stay proceedings in the action to enable the appeal to be brought, upon such terms and for such time as he may deem just. 10 Edw. VII. c. 30, s. 43.

For form of order, see form No. 12.

The following Rules provide for stay of execution preparatory to, and pending an appeal:—

495. The judge at the trial may stay the issue of execution for a period of thirty days. *New.*

496. Unless otherwise ordered by a judge of a divisional court the execution of the judgment appealed from shall, upon an appeal being set down to be heard, be stayed, pending the appeal, but if the judgment appealed from awards a mandamus or an injunction, execution shall not be stayed unless so ordered by the judge appealed from or by a judge of a divisional court. C.R. 827.

497. Where an execution has been issued and is thereafter stayed upon an appeal, the appellant shall be entitled to obtain a certificate from the registrar of the appellate division that the execution has been stayed pending the appeal, and upon the certificate being lodged with the sheriff the execution shall be superseded, but the execution debtor shall pay the sheriff's fees; and the sum so paid shall be allowed to him as part of the costs of the appeal. C.R. 828. *Amended.*

498. Where the execution of a judgment is stayed pending an appeal, all further proceedings in the action, other than the issue of the judgment, and the taxation of costs thereunder, shall be stayed, unless otherwise ordered by a judge of the divisional courts. C.R. 829.

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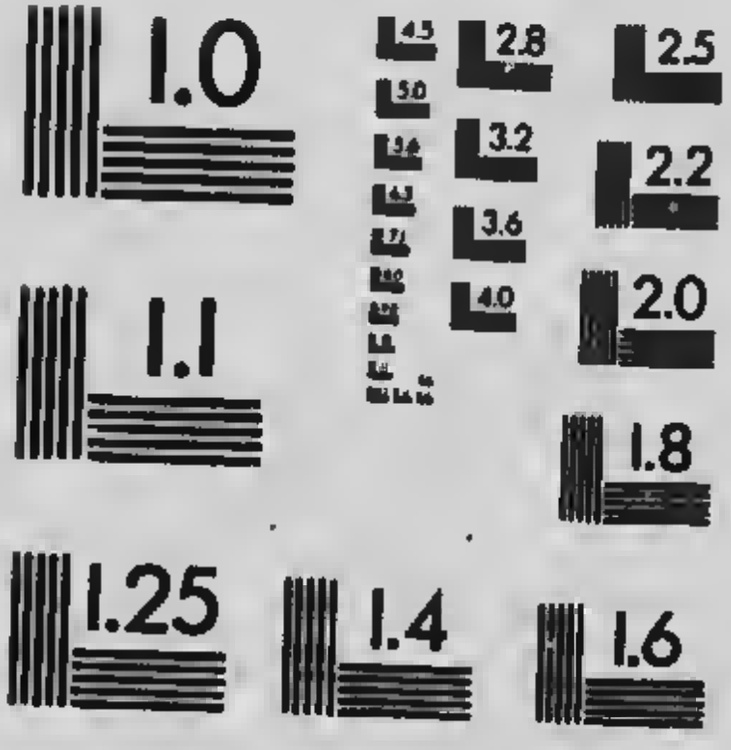

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Setting Down Appeals.

44.—(1) The appeal shall be set down for argument at the first sittings of a divisional court which commences after the expiration of thirty days from the judgment, order or decision complained of.

As there is now no distinction under the Rules between appeals from the supreme court and the county court, the provisions of this section may be held to be modified accordingly, by the following new Rule with reference to such appeals, which was passed on June 19th, 1914, in substitution for Rules 491 and 492:—

492. (1) An appeal from a judgment pronounced at a trial or a motion for a new trial shall be by a notice of motion returnable before a divisional court seven days after service and shall be set down to be heard within fifteen days from the date of the judgment.

(2) All other appeals shall be by a notice of motion returnable before a divisional court two clear days after service and shall be set down to be heard within seven days from the date of the judgment or order.

(3) Cases shall be entered on the list for hearing as soon as the papers are completed.

(4) If the evidence is not deposited within seven days after notice from the office of the registrar of the high court division that it has been received from the stenographer, the appeal shall be deemed to be abandoned and costs may be taxed as provided by Rule 660.

For form of notice of appeal under this Rule, see form No. 10.

The following additional Rules apply to such appeals:—

493. Every notice of motion by way of appeal shall set out the grounds of the motion or appeal. C.R. 789.

494.—(1) The appellant shall when setting the appeal down deliver to the registrar of the appellate division all papers necessary for the proper hearing of the appeal, including 5 copies of the judgment or order in question (or the settled minutes thereof) and of the reasons therefor unless reported, and, where evidence is to be used, five copies of the evidence, certified as correct by the official stenographer.

(2) If the copies of evidence have not then been prepared, it shall be sufficient if such copies have been duly bespoken and are deposited so soon as received from the stenographer. C.R. 791, 792.

Under the former Rule 352 (*e*) it was expressly declared that the time for appealing in county court cases ran during the long vacation and the Christmas vacation, but the following rule does not contain any such exception:—

179. Unless otherwise directed by the court, the time of the long vacation, or of the Christmas vacation, shall not be reckoned in the computation of the times appointed or allowed by these Rules for filing, amending, or delivering any pleading, or in the times allowed for the following purposes:—

(*a*) Appeals to a judge in chambers;

(*b*) Reports becoming absolute;

(*c*) Moving to discharge an order adding a party;

(*d*) Moving to add to, vary, or set aside a judgment by a party served therewith;

(*e*) Doing an act or taking a proceeding in appealing to a divisional court of the appellate division. C.R. 352.

In Fawkes v. Swazie, 31 O.R. 256, it was held that the time begins to run from the day of the judicial opinion or decision oral or written, pronounced or delivered, and the judgment or order founded upon it must be referred to

that date. If such opinion or decision is not pronounced or delivered in open court, it cannot he said to be pronounced or delivered until the parties are notified of it. *Quaere,* whether after a judgment has heen settled and entered a judge has power to re-settle it. This was followed in Allen v. Place, 15 O.L.R. 148.

In Lees v. O. & N. Y. Ry. Co., 31 O.R. 567, it was held that neither the above section nor former Rule 795 prohihited a county court appeal from heing set down to he heard at a sitting of the divisional court commencing within thirty days from the decision complained of, as these provisions were designed only to prevent the appeal heing unduly delayed.

Extension of Time.

(2) Subject to thc Rules of Court, a divisional court, or a judge of the supreme court, notwithstanding that the judge of the county or district court has not certified the pleadings and other papers, or that they have not been filed in the supreme court, may extend the time for setting down the appeal or for giving notice of setting down or for doing any act or taking any proceeding in or in relation to the appeal; and may, if thc certificate is incomplete or incorrect, direct the same to be amended or to be sent back to the judge for amendment. 10 Edw. VII. c. 30, s. 44.

Rnle 176 is as follows:—

176. The court may from time to time enlarge or abridge the time prescribed by the Rules, or by an order, for doing any act or taking any proceeding, and this power may be exercised although the application is not made until after the expiration of the time prescribed. C.R. 353.

In Young v. McKay, 3 O.W.R. 447, the defendant moved to extend the time from appealing from a judgment of the district court, and for leave to set the appeal down for argument. The divisional court made the order as asked, upon terms that the defendant should pay the costs of the application, and the plaintiff should have leave to cross-appeal if so advised. The notice of appeal which had been given was allowed to stand as a good notice, and the appeal was allowed to be set down for the current sittings.

In Hunter v. Patterson, 16 O.W.R. 993, the plaintiff moved to have time for appealing, from a county court judgment extended, he having failed to have served notice of appeal, and to have the appeal set down in time. The divisional court held that they had jurisdiction to grant the order, as asked, following *Re* Molson, Ward v. Stevenson, 21 O. L. R. 289. It was also held that, on the merits, a case had been made out for so extending the time, and the motion was granted on the terms that the appellant should pay the costs of the motion to the respondent in any event, upon the final taxation.

See also Moxon v. Irwin, 15 O.L.R. at page 89.

For form of order see form No. 13.

Amendment and Further Evidence.

45.—(1) The divisional court shall have all the powers and duties, as to amendment and otherwise, of the judge appealed from, and full discretionary power to receive further evidence upon questions of fact, either by oral examination before the court, or as may be directed.

(2) Such further evidence may be given without special leave as to matters which have occurred after

the date of the judgment, order or decision complained of.

(3) Except as provided by sub-section 2, upon an appeal from a judgment, order or decision given upon the merits at the trial or hearing, such further evidence shall be admitted on special grounds only, and not without the special leave of the court. 10 Edw. VII. c. 30, s. 45.

This is substantially similar to Rule 232, which is as follows:—

232.—(1) On all appeals, or hearings in the nature of appeals, and on all motions for a new trial, the court or judge appealed to shall have all the powers as to amendment and otherwise of the court, judge or officer appealed from, and full discretionary power to receive further evidence, either by affidavit, oral examination before the court or judge appealed to, or as may be directed.

(2) Such further evidence may be given without special leave as to matters which have occurred after the date of the judgment, order or decision from which the appeal is brought.

(3) Upon appeals from a judgment at the trial, such further evidence (save as mentioned in sub-section (2)) shall be admitted on special grounds only, and not without leave of the court. C.R. 498.

See also sections of Judicature Act in notes to section 46, *infra*.

When an appeal is dismissed on the ground that no appeal lies, the costs should be only those of a motion to quash, but such costs should be taxed on the supreme court scale, and are recoverable by execution in the supreme court. Frances v. Huff, 11 O.W.R. 343.

In Farmers Bank v. Big Cities R. & A. Co., 1 O.W.N. on an appeal from the refusal of a county judge to allow

the defendants to cross-examine the plaintiff upon an affidavit filed in reply, upon a motion for speedy judgment, the court allowed the appeal with costs in the cause to the defendants, and sent the case back to the county judge for his disposal after the defendants had had an opportunity of fully developing their defence.

Order on Appeal.

46.—(1) On an appeal the divisional court may set aside the judgment and may direct any other judgment to be entered, or may direct a new trial to be had, and make such other order as to costs and otherwise as appears just.

The following are the provisions of the Judicature Act as to appeals:—

27.—(1) The court upon an appeal may give any judgment which ought to have been pronounced and may make such further or other order as may be deemed just.

(2) The court shall have power to draw inferences of fact not inconsistent with any finding of the jury which is not set aside, and if satisfied that there are before the court all the materials necessary for finally determining the matters in controversy, or any of them, or for awarding any relief sought, the court may give judgment accordingly, but if the court is of opinion that there are not sufficient materials before it to enable it to give judgment the court may direct the appeal to stand over for further consideration and may direct that such issues or questions of fact be tried and determined and such accounts be taken and such inquiries be made as may be deemed necessary to enable the court on such further consideration finally to dispose of the matters in controversy.

(3) The powers conferred by sub-sections 1 and 2 may be exercised notwithstanding that the appeal is as to part only of the judgment, order or decision, and may be exercised in favour of all or any of the parties, although they may not have appealed. 3-4 Geo. V. c. 19, s. 27.

28.—(1) A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, or because the verdict of the jury was not taken upon a question which the judge at the trial was not asked to leave to the jury, unless some substantial wrong or miscarriage has been thereby occasioned.

(2) If it appears that a substantial wrong or miscarriage was so occasioned but it affected part only of the matter in controversy or some or one only of the parties, the court may give final judgment as to any part or any party not so affected, and direct a new trial as to the other part only, or only as to the other parties. 3-4 Geo. V. c. 19, s. 28.

29. A new trial may be ordered upon any question without interfering with the decision upon any other question. 3-4 Geo. V. c. 19, s. 29.

30. Where the jury disagrees or makes no finding on which judgment can be entered, the court may, on the application of the defendant, dismiss the action on the ground that there is no evidence to warrant a judgment for the plaintiff, or that for any other reason he is not entitled to judgment. 3-4 Geo. V. c. 19, s. 30.

31. In any cause or matter pending before a divisional court any direction incidental to it not involving the decision of the appeal, may be given by a judge of the appellate division; and a judge of that division may during vacation make any interim order to prevent prejudice to the claim of any of the parties pending an appeal, as he

may think fit; but every such order made by the judge shall be subject to appeal to a divisional court. 3-4 Geo. V. c. 19, s. 31.

As to binding effect of previous decisions of divisional courts, see notes to section 32, *supra*.

Certificate of Decision.

(2) The decision of the divisional court shall be certified by the registrar of the appellate division to the clerk of the court with whom the judgment or order appealed from was entered, who shall thereupon cause the same to be entered in the proper judgment or order book, and all subsequent proceedings may be taken thereupon, as if the decision had been given in the court below. 10 Edw. VII. c. 30, s. 46.

For form of certificate, see form No. 14.

This sub-section is a modification of former Rule 818 which applied only to the court of appeal, and which has been omitted from the recent revision. The form of certificate is now similar in all appeals.

No Further Appeal.

Formerly, there was some question as to whether an appeal lay to the court of appeal from a divisional court in a county court action, but that has become of no consequence since all appeals from judgments at the trials of actions are now to the same tribunal.

As regards appeals to the supreme court, there is a difference between the law applicable to the province of Ontario, on the one hand, and to the provinces of Nova

Scotia, New Brunswick, British Columbia and Prince Edward Island on the other. It is provided by subsection (*b*) of section 37 of tho Supreme Conrt Act, that an appeal may be had to that court from the latter provinces in cases where "the sum or value of the matter in dispute amounts to $250 or upwards, and in which the court of first instance possesses concurrent jurisdiction with a superior court." In these provinces a county court has such concurrent jurisdiction. See also s.-s. (*c*) as to appeals from Alberta and Saskatchewan. See R.S.N.S. 1900, c. 156, ss. 28-31 and 87, C.S.N.B. 1903, c. 16, ss. 9-12, and c. 111, s. 379; R.S.B.C. 1897, c. 52, ss. 23, 27, 32, 40 and 42; and 41 V. (P.E.I.) c. 12. Appeals from the province of Ontario are governed by sections 36 and 48 of the Supreme Court Act, which limit the appeal to one "from any final judgment of the highest court of final resort, in cases in which the court of original jurisdiction is a superior conrt," and then only where "tbe matter in controversy in the appeal exceeds the sum or value of $1,000, exclusive of costs," and in certain other specified cases.

In Tucker v. Young, 30 S.C.R. 185, the action had been commenced in the county court of Lambton, and upon defendant pleading want of jurisdiction in that conrt, an order was made transferring the action to the higb court. At the trial a reference was ordered to a drainage referee, who held that the plaintiff had no cause of action, which holding was reversed by the court of appeal (26 A.R. 162). An appeal to tbe supreme court of Canada was qnashed with costs, on tbe ground that the action did not originate in a superior court, Gwynne, J., dissenting. Tbe latter judge held that as the case had been transferred from the county court to the high court because the former court had no jurisdiction, it was to all intents and purposes as if it had been originally entered in the bigh court. See section 24, *supra*.

Tariff of Costs.

47.—(1) The Board of County Judges appointed under the Division Courts Act, may frame a tariff of costs to be allowed to solicitors and counsel in respect of actions, matters and proceedings in the county and district courts.

(2) The Board shall certify to the judges authorized to make rules under the Judicature Act, any tariff so framed, or any alteration thereof; and the judges may approve, disallow or amend such tariff or alteration; and such tariff or alteration, when approved, shall have the same force and effect as if made under that Act by the judges approving the same. 10 Edw. VII. c. 30, s. 47.

Rule 676 provides as follows:—

676.—(1) Costs shall be allowed and taxed according to Tariff A appended to these Rules, and no other fees, costs or charges than are therein set forth shall be allowed in respect of the matters thereby provided for.

(2) The fees and disbursements payable upon proceedings in the supreme court and in the county courts shall be those enumerated in the Tariff B appended to these Rules.

(3) The fees and allowances to be taken and received by sheriffs other than those provided for by any statute shall be the fees and allowances set forth in the Tariff C appended to these Rules.

The new tariffs of fees and disbursements in county courts will be found *post*. It is disappointing to find that the old proportion between the high court and county court tariffs has not been preserved, especially in view of

the fact that the jurisdiction of the county courts has been doubled since the previous tariff was framed. For instance, item 1 in the supreme court tariff: "For the institution of an action," is $20, which the corresponding item in the county court tariff is only $10, whereas it should be $15. Similarly, item 2 in the supreme court tariff: "Defence" is $10, while in the county court tariff it is only $5, instead of $7 or $8. A still greater lack of proportion is shewn between item 8 of the former tariff: "Upon ex-parte motions in chambers, including affidavits, etc.," which is $15, and the similar item in the latter tariff, which is only $5. When, however, one compares the disbursements under the two tariffs, the county court tariff is found, in some cases, to be even higher than that of the supreme court. For instance, down to and including a judgment by default, the total disbursements in the supreme court amount to only $5 besides filings, while the similar disbursements in the county court amount to $6. And while the fee for an execution in the latter court, including disbursements, remains at $4, the clerk's portion of this fee is increased from 60 cents to $1, being the same as that payable in the supreme court. The writer regrets that he had no opportunity to make these criticisms before the county court tariff was promulgated, and that subsequent representations to the authorities have been of no avail.

Security for Costs.

Rule 374 (2) as to præcipe orders for security for costs, provides that "in actions in the county court, the amount of the security shall be $200." Rule 383 (4) as to security on motions for judgment, provides that "in actions in the county court, the amount of the partial security shall be $25."

THE GENERAL SESSIONS ACT

CHAPTER 60.

An Act respecting the Courts of General Sessions of the Peace.

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

Short Title.

1. This Act may be cited as *The General Sessions Act*. 9 Edw. VII. c. 30, s. 1.

Interpretation.

2. In this Act "the court" shall mean "the Court of General Sessions of the Peace." 9 Edw. VII. c. 30, s. 2.

For an interesting summary of the history of this court, see the introductory chapter to Paley on Convictions.

Jurisdiction.

3. The courts of general sessions of the peace shall have jurisdiction to try all criminal offences

except homicide, and the offences mentioned in section 583 of the Criminal Code of Canada. 9 Edw. VII. c. 30, s. 3.

Abandoned Legislation.

The following section formed part of the Law Reform Act, 1909, as first introduced, but it was subsequently dropped:—

22. (1) Subject to the provisions of sub-section 2 and 3, all courts of general sessions of the peace are hereby abolished, and the jurisdiction, power and authority now vested in or which are possessed or may be exercised by the court of general sessions of the peace for any county or district, shall hereafter be vested in and shall be possessed and may be exercised by the county or district court of such county or district.

(2) In the county of York there shall be excepted from the jurisdiction, power and authority vested in the county and district courts under sub-section 1, the jurisdiction, power and authority now vested in or possessed or which may be exercised by the court of general sessions of the peace for the county of York to try indictable offences.

(3) In all matters and proceedings which have been fully heard and in which judgment shall not have been given, or having been given has not been signed, drawn up, passed, entered or otherwise perfected, judgment or order may be given or made, signed, drawn up, passed, entered or otherwise perfected in the name of the same court and by the same judges and officers and generally in the same manner as if this section had not been enacted, and for these purposes such court shall be deemed to continue to exist.

(4) Every judgment or order of any such court which has been perfected may be executed and enforced and if

necessary amended or discharged hy the proper county or district court in the same manner as if it had heen a judgment or order of that court and all matters and proceedings pending in any of the courts herehy aholished shall he continued and concluded in and hefore the proper county or district court which shall have jurisdiction for so continuing and concluding matters criminal as well as civil.

(5) The proper county or district court shall have the same jurisdiction as to all such matters and proceedings as if the same had heen commenced therein and so far as relates to the form and manner of procedure, the same shall he continued and concluded in and hefore snch court conformahly to the procedure thereof, of if there is no such procedure applicahle the procedure shall he such as such county or district court shall direct or prescrihe.

(6) In this section the proper county or district court shall mean the county or district court of the county or district in which under the provisions of suh-section 1 the jurisdiction of the court of general sessons of the peace for the county or dstrict to which the particular provision relates is vested.

The following are the provisions of the Criminal Code, as amended hy 8-9 Edw. VII c. 9, s. 2, as to the jurisdiction of the sessions:—

582. Every court of general or quarter sessions of the peace, when presided over hy a superior court judge, or a county or district court judge, or in the Cities of Montreal and Quehec hy a recorder or judge of the sessions of the peace, and in the Province of New Brunswick every county court judge has power to try any indictahle offence except as hereinafter provided. 55-56 V. c. 29, s. 539; 56 V. c. 32, s. 1.

583. No court mentioned in the last preceding section has power to try any offence under sections—

(*a*) seventy-four, treason; seventy-six, accessories after the fact to treason; seventy-seven, seventy-eight, and seventy-nine, treasonable offences; eighty, assaults on the King; eighty-one, inciting to mutiny; eighty-five, nnlawfully obtaining and commnnicating official information; eighty-six, communicating information acquired in office; or,

(*b*) One hundred and twenty-nine, administering, taking or procuring the taking of oaths to commit certain crimes; one hnndred and thirty, administering, taking or procuring the taking of other unlawful oaths; one hnndred and thirty-fonr, seditious offences; one hundred and thirty-five, libels on foreign sovereigns; one hundred and thirty-six, spreading false news; or,

(*c*) One hundred and thirty-seven, to one hundred and forty inclusive, piracy; or,

(*d*) One hundred and fifty-six, judicial, etc., corruption; one hundred and fifty-seven, corruption of officers employed in prosecuting offenders; one hundred and fifty-eight, frands upon the government; one hundred and sixty, breach of trust by a pnblic officer; one hundred and sixty-one, municipal corruption; one hundred and sixty-two, (*a*) selling offices; or,

(*e*) Two hundred and sixty-three, murder; two hundred and sixty-four, attempt to murder; two hundred and sixty-five, threat to murder; two hundred and sixty-six, conspiracy to murder; two hundred and sixty-seven, accessory after the fact to murder; two hundred and sixty-eight, manslaughter; or,

(*f*) Two hundred and ninety-nine, rape; three hundred, attempt to commit rape; or,

(*g*) Three hnndred and seventeen to three hundred and thirty-four, defamatory libel; or,

(*h*) Four hundred and ninety-eight, combination in restraint of trade; or,

(*i*) Conspiracy or attempting to commit, or being accessory after the fact to any of the offences in this section before mentioned; or,

(*j*) Any indictment for bribery or undue influence, personation or other corrupt practise under the Dominion Election Act. 55-56 V. c. 29, s. 540; 57-58 V. c. 57, s. 1; 63-64 V. c. 46, s. 3.

Under Ontario Statute.

The following were the provisions of R.S.O. 1897, c. 58, intituled "An Act relating to the Jurisdiction of Court of General Sessions of the Peace and other Inferior Criminal Courts," which was repealed by 1 Geo. V. c. 17, s. 43:—

1. No court of general sessions of the peace, no county or district judge's criminal court, no judge of any connty court, no junior or deputy judge thereof, anthorized to act as chairman of the general sessions of the peace for the county, no judge of any provisional judicial district, no judge of any district court authorized respectively to act as chairman of the general sessions of the peace, nor any court but the high court of justice or conrts of assize, *nisi prius,* oyer and terminer and general gaol delivery, shall have power to try any treason, any crime punishable with death, or any homicide, or any libel. 53 V. c. 18, s. 1.

2. The courts of general sessions of the peace and the county and district judge's criminal courts shall have jurisdiction to try any person for any offence which was formerly included under any of the provisions of sections 28 to 31, both inclusive, of the Revised Statutes of Canada, chapter 165, intituled "An Act respecting forgery." 53 V. c. 18, s. 2; 60 V. c. 15, Sched. A. (38).

In Regina v. Toland, 22 O.R. 505, it was held by MacMahon, J., that procedure in criminal matters which by the B. N. A. Act, s. 97, sub-sec. 7, is assigned exclusively to the parliament of Canada, includes the trial and punishment of the offender, and that, therefore, this section 2 was *ultra vires* of the provincial legislature. In the subsequent case of Regina v. Levinger, 22 O.R. 690, however, it was held by a divisional court that the power granted by the B. N. A. Act, s. 78, sub-sec. 14, to the provincial legislature, constituting courts of civil and criminal jurisdiction, necessarily includes the power of giving jurisdiction to those courts and impliedly includes the power of enlarging, altering and amending the jurisdiction of such courts. It was further held that the above section, so far as it provided that the courts of general sessions of the peace should have jurisdiction to try any person for any offence under the Act respecting forgery, was within the powers of the legislature of Ontario as being in relation to the constitution of a provincial court of criminal jurisdiction, and did not in any way trench upon the exclusive authority given to the parliament of Canada by secton 91, sub-section 27, to make laws in relation to criminal law and criminal procedure.

See further as to jurisdiction of sessions, Daly's Canadian Criminal Procedure, p. 363, *et seq.*

Exceptions from Repeal.

The following sections of the General Sessions Act, R.S.O. 1897, c. 56, are expressly excepted from the repeal of that Act by 9 Edw. VII. c. 30, and they do not appear to have been subsequently repealed or consolidated:—

2. The authority under which commissions of the peace have been issued, and the authority under which the courts of general sessions of the peace have been held and are now held, and all matters and things done by or by virtue of the same, shall be, so far as relates to the

authority under which such commissions were issued and such courts have been held, good and valid. R.S.O. 1887, c. 48, s. 2.

9. It shall not he necessary, in opening any court of general sessions, to read the commission of the peace, or other commission issued for the county for which the court is held; hut the conrt shall have the same powers and authorities, and proceed in the same manner, as if the commission had been read. R.S.O. 1887, c. 48, s. 9.

In Regina v. Grover, 23 O.R. 92, the defendant was convicted at the general sessions on an indictment for a nnisance in obstructing the highway hy the erection of a wall thereon, and directed to ahate the nuisance. This not having heen done, the sessions made an order directing the sheriff to ahate the nuisance at defendant's costs and charges, and to pay the county Crown attorney forthwith after taxation the costs of the application and order and the sheriff's fees and costs, and incidental expenses arisng out of the execution of the order. It was held that the sessions had no authority to make the order to the sheriff, the proper mode in such cases heing by a writ of *de nocumento amovendo;* that the order being a judicial act was properly removed by certiorari and must he quashed. The question as to the right of the general sessions to award costs was also considered.

Appellate Jurisdiction.

The appellate jurisdiction of the general sessions is prescrihed by certain sections of the Criminal Code and of the Ontario Summary Convictions Act, R.S.O. 1914, c. 90. The section of the former is as follows:—

749. (As amended, 1907). Unless it is otherwise provided in any special Act under which a conviction takes place or an order is made hy 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.

The provisions of the latter Act are as follows:—

10.—(1) Unless it is otherwise provided in the 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 order of dismissal, the prosecutor or complainant as well as the defendant, may appeal where 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 in which the cause of the information or complaint arose.

(2) Where, by any statute of Ontario, an appeal is given to the judge of the county or district court without a jury from a summary conviction had or made before a justice, and no special provision is made therefor, the appeal shall be to the division court of the division in which the cause of the information or complaint arose. 10 Edw. VII. c. 37, s. 10.

(3) No such order or conviction shall be removed into the supreme court by writ of *certiorari* or otherwise except upon the ground that the appeal provided by any Act under which the conviction takes place or the order is made or by this Act would not afford an adequate remedy. 2 Geo. V. c. 17, s. 19.

See also R.S.C. c. 85, s. 335, as to appeals under the Inspection and Sales Act; and R. v. Hamlink, 26 O.L.R. 381.

Times of Sittings.

4.—(1) Except in the Counties of Carleton, Middlesex, and York, sittings of the court shall be held in every county semi-annually, commencing on the second Tuesday in the months of June and December in each year.

York and Wentworth.

(2) In the Counties of York and Wentworth, sittings of the court shall be held four times in the year, commencing on the first Tuesday in the months of December and March, and on the second Tuesday in the months of May and September in each year.

Carleton and Middlesex.

(3) In the Counties of Carleton and Middlesex two such sittings shall be held in each year to commence on the first Tuesday in June and December. 9 Edw. VII. c. 30, s. 4; 10 Edw. VII. c. 26, s. 32; 1 Geo. V. c. 17, s. 11 (2), (3).

These dates synchronize with the times fixed for the jury sittings of the county courts by section 15 of The County Courts Act, *supra*.

Place of Sittings.

5. The sittings of the court shall be held in the county town of the county, unless the Lieutenant-Governor, by proclamation, authorizes the holding

of the sittings at some other place in the county. 9 Edw. VII. c. 30, s. 5.

In Districts.

6. In the provisional judicial districts sittings of the court shall be held at the same time and place as the sittings of the district courts for the trial of issues of fact and assessment of damages with or without a jury. 2 Geo. V. c. 17, s. 12.

The former section, which has been replaced by section 6, assumed to give the times of the various sittings in detail, as is provided by section 16 of "The County Courts Act," *supra*, but it was found that, by mistake, the dates fixed for the sessions did not always correspond with those fixed for the district courts. Sometimes too, the section of the County Conrts Act was amended without a corresponding amendment being made in the section of this Act. It will be noticed that, while section 4 provides for sittings of the sessions in counties only at the times provided by section 15 of "The County Courts Act," *supra*, for the holding of jury sittings, section 6 is differently worded, because no regular sittings of district courts exclusively without jury are provided for by the County Courts Act.

Judge to Preside.

7. The judge of the county or district court as the case may be, or, in case of his death, illness or absence or at his request the junior or deputy judge shall be the chairman of the court and shall preside at the sittings thereof. 9 Edw. VII. c. 30, s. 7.

Associate Justice Unnecessary.

8. Where a judge is present it shall not be necessary, in order to constitute the court, that an associate or other justice of the peace should be present. 9 Edw. VII. c. 30, s. 8.

Adjournment.

9.—(1) Where a judge is unable to hold the sittings at the time appointed the sheriff or his deputy may, by proclamation, adjourn the court to any hour on the following day to be by him named, and so from day to day until a judge is able to hold the court or until he receives other directions from the judge or from the Attorney-General.

(2) The sheriff shall forthwith give notice of such adjournment to the Attorney-General. 9 Edw. VII. c. 30, s. 9.

Rescinding Orders of Court.

10. Except where otherwise provided by law an order, which has been passed or recorded by any number of justices of the peace, shall not be rescinded unless at least the same number is present. 9 Edw. VII. c. 30, s. 10.

Clerk of the Peace.

11.—(1) There shall be a clerk of the peace for every county and district, who shall be appointed by the Lieutenant-Governor in Council.

To be a Barrister.

(2) No person shall be appointed clerk of the peace who is not a barrister of at least three years' standing at the Bar of Ontario; and, except in the County of York, every clerk of the peace shall be *ex-officio* crown attorney for the county or district of which he is clerk of the peace.

Vacancy.

(3) Except in the County of York, whenever a vacancy occurs in the office of the clerk of the peace for a county or district in which the clerk of the peace was not, previous to such vacancy occurring, also crown attorney, the crown attorney for the county or district shall be *ex-officio* clerk of the peace.

Resignation.

(4) Where a person holding the office of crown attorney and clerk of the peace desires, on account of the condition of his health or from his age, to resign the former, retaining the latter office, he may do so with the approval of the Lieutenant-Governor in Council; and in such case the person appointed in his place shall, on a vacancy occurring in the office of the clerk of the peace, be *ex-officio* clerk of the peace.

(5) In the County of York, the offices of clerk of the peace and crown attorney may be held by different persons. 9 Edw. VII. c. 30, s. 11.

As to fees of clerk of peace, see the Administration of Justice Expenses Act.

Tariff of Fees.

12.—(1) The Board of County Judges appointed under the Division Courts Act, or the majority of them, may frame a tariff of fees and costs to be allowed in respect of proceedings in the courts of general sessions of the peace to counsel and solicitors practising therein, and to witnesses and to the clerk of the peace, including the crown attorney.

(2) The Board or any three members thereof shall certify any tariff so framed or any amendment thereof to the judges authorized to make rules under the Judicature Act, who may approve, disallow or amend such tariff or amendment.

(3) A tariff so approved, or amended and approved, shall have the same force and effect as if it had been enacted by this Legislature. 9 Edw. VII. c. 30, s. 12.

The present tariff of fees is contained in Schedule A to R.S.O. 1914, c. 96, and will be found, *infra*.

COUNTY JUDGES' CRIMINAL COURTS ACT

CHAPTER 61.

An Act respecting the County Court Judges Criminal Courts.

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

Short Title.

1. This Act may be cited as "*The County Court Judges' Criminal Courts Act,*" 9 Edw. VII. c. 31, s. 1.

Powers and Duties of Judges.

2.—(1) The judge of every county and district court, or the junior or deputy judge thereof, authorized to preside at the sittings of the court of the general sessions of the pease, is constituted a court of record for the trial, out of sessions and without a jury, of any person committed to gaol on a charge of being guilty of any offence for which such person may be tried at a court of general sessions of the peace, and for which the person so committed consents to be tried out of sessions, and without a jury;

and the court so constituted shall have the powers and perform the duties mentioned in Part XVIII. of the Criminal Code.

Style of Court.

(2) The court so constituted shall be called the County or District Court Judges' Criminal Court of the county or district in which the same is held, as the case may be. 9 Edw. VII. c. 31, s. 2.

See section 15 of the County Courts Act, *supra*, and notes thereto, also R.S.C. 1906, c. 38, ss. 30, 31 and 32, as to territorial jurisdiction of county court judges.

As to offences which may be tried at the sessions, see notes to the General Sessions Act, *supra*.

Provisions of the Code.

The following are the provisions of the part of the Criminal Code above referred to, as amended by 6-7 Edw. VII. c. 45, s. 6, and 8-9 Edw. VII. c. 9, s. 2:—

824. (1) The judge sitting at any trial under this part for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a court of record, and in every province of Canada, except in the Province of Quebec, and except as hereinafter provided, such court shall be called the county court judge's criminal court of the county or union of counties, or judicial district, in which the same is held.

(2) The record in any such case shall be filed among the records of the court over which the judge presides, and as part of such records. 55-56 V. c. 29, s. 764; 6 & 7 Edw. VII. c. 45, s. 6.

825. Every person committed to gaol for trial on a charge of being guilty of any of the offences which are

mentioned in section five hundred and eighty-two as being within the jurisdiction of the general or quarter sessions of the peace, may, with his own consent, be tried in any province of Canada, and, if convicted, sentenced by the judge.

(2) An entry shall be made of such consent at the time the same is given.

(3) Such trial shall be had under and according to the provisions of this part, out of sessions and out of the regular term or sittings of the court, and whether the court before which, but for such consent, the said person would be triable for the offence charged or the grand jury thereof is or is not then in session.

(4) A person who has been bound over by a justice or justices under the provisions of section six hundred and ninety-six, and has been surrendered by his sureties, and is in custody on the charge, or who is otherwise in custody awaiting trial on the charge, shall be deemed to be committed for trial within the meaning of this section. 63-64 V. c. 46, s. 3; 6 & 7 Edw. VII. c. 45, s. 6.

(5) Where an offence charged is punishable with imprisonment for a period exceeding five years, the Attorney-General may require that the charge be tried by a jury, and may so require notwithstanding that the person charged has consented to be tried by the judge under this part, and thereupon the judge shall have no jurisdiction to try or sentence the accused under this part.

(6) A person accused of any offence within sub-section 1 of this section, who has been bound over by a justice or justices under the provisions of section 696, and is at large under bail, may notify the sheriff that he desires to make his election under this part, and thereupon the sheriff shall notify the judge, or the prosecuting officer, as provided by section 826.

(7) In such case, the judge having fixed the time when, and the place where the accused shall make his

election, the sheriff shall notify the accused thereof, and the accused shall attend at the time and place so fixed, and the subsequent proceedings shall be the same as in other cases under this part.

(8) The recognizance taken when the accused was bound over as aforesaid shall in such case be obligatory upon each of the persons bound thereby, as to all things therein mentioned, with reference to the appearance of the accused at the time and place so fixed and to the trial and proceedings thereupon, in like manner as if such recognizance had been originally entered into with reference thereto: Provided that notice in writing shall be given either personally or by leaving the same at the place of residence, as described in the recognizance, of the persons bound as sureties by such recognizance, that the accused is to appear at such time and place to make his election as aforesaid.

826. Every sheriff shall, within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial, notify the judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him, whereupon, with as little delay as possible, such judge shall cause the prisoner to be brought before him.

(2) Where the judge does not reside in the county in which the prisoner was committed, the judge having received the notification and having obtained the depositions on which the prisoner was committed, if any, may forward them to the prosecuting officer with instructions to cause the prisoner to be brought before him instead of the judge, naming as early a day as possible for the trial in case the prisoner shall elect to be tried by the judge, without a jury, and the prosecuting officer shall, in such case, with as little delay as possible cause the prisoner to be brought before him.

827. The judge, having first obtained the depositions on which the prisoner was so committed, if any, or the prosecuting officer, as the case may be, shall state to the prisoner,—

(*a*) That he is charged with the offence, describing it;

(*b*) That he has the option to be tried forthwith before a judge without the intervention of a jury, or to remain in custody or under bail, as the conrt decides, to be tried in the ordinary way by the court having criminal jurisdiction.

(2) If the prisoner has been brought before the prosecuting officer, and consents to be tried by the judge, without a jury, the trial shall proceed on the day named by the judge in the manner provided by the next following sub-section.

See Rex v. Stewart, 15 Can. Crim. Cases 331, *infra.*

(3) In snch case or if the prisoner has been bronght before the judge and consents to be tried by him withont a jury, the prosecuting officer shall prefer the charge against him for which he has been committed for trial, and if, upon being arraigned upon the charge, the prisoner pleads guilty, the prosecnting officer shall draw np a record as nearly as may be in form 60.

(4) Such plea shall be entered on the record, and the judge shall pass the sentence of the law on such prisoner, which shall have the same force and effect as if passed by a court having jurisdiction to try the offence in the ordinary way.

828. If the prisoner on being brought before the prosecuting officer or before the judge as aforesaid demands a trial by jury, he shall be remanded to gaol.

(2) Any prisoner who has elected to be tried by a jury, may, notwithstanding such election, at any time before such trial has commenced, and whether an indictment has been preferred against him or not, notify the

sheriff that he desires to re-elect, and it shall thereupon be the duty of the sheriff and judge or prosecuting officer to proceed as directed by section eight hundred and twenty-six.

(3) Thereafter unless the judge, or the prosecuting officer acting under sub-section two of section eight hundred and twenty-six, is of opinion that it would not be in the interests of justice that the prisoner should be allowed to make a second election, the prisoner shall be proceeded against as if his said first election had not been made. 63-64 V. c. 46, s. 3. Provided, that if an indictment had been preferred against the prisoner the consent of the prosecuting officer shall be necessary to a re-election, and in such case the sheriff shall take no action upon being notified of the prisoner's desire to re-elect unless such consent is given in writing.

829. If one of two or more prisoners charged with the same offence demands a trial by jury, and the other or others consent to be tried by a judge without a jury, the judge, in his discretion, may remand all the said prisoners to gaol to await trial by a jury. 55-56 V. c. 29, s. 768.

830. If, under Part XVI. or Part XVII., any person has been asked to elect whether he would be tried by the magistrate or justices, as the case may be, or before a jury, and he has elected to be tried by a jury, and if such election is stated in the warrant of committal for trial, the sheriff, prosecuting officer or judge shall not be required to take the proceedings directed by this part.

(2) If such person, after his said election to be tried by a jury, has been committed for trial he may, at any time before the regular term or sittings of the court at which such trial by jury would take place, notify the sheriff that he desires to re-elect.

(3) In such case it shall he the duty of the sheriff to proceed as directed hy section eight hundred and twenty-six, and thereafter the person so committed shall be proceeded against as if his said election in the first instance had not been made. 55-56 V. c. 29, s. 769.

831. Proceedings under this part commenced before the judge may, where the judge is for any reason unable to act, he continued before any other judge competent to try prisoners under this part in the same judicial district, and such last mentioned judge shall have the same powers with respect to snch proceedings as if snch proceedings had heen commenced hefore him, and may cause such portion of thc proceedings to he repeated before him as he shall deem necessary. 55-56 V. c. 29, s. 770.

832. If, on the trial under Part XVI. or Part XVII. of any person charged with any offence triahle under the provisions of this part, the magistrate or justices decide not to try the same summarily, hut commit such person for trial, snch person may afterwards, with his own consent, be tried under the provisions of this part. 55-56 V. c. 29, s. 771.

833. If the prisoner upon being arraigned under this part consents as aforesaid and pleads not guilty the judge shall appoint an early day, or the same day, for his trial, and the prosecuting officer shall suhpœna the witnesses namcd in the depositions, or such of them and such other witnesses as he thinks requisite to prove the charge, to attend at the time appointed for such trial, and the judge may proceed to try such prisoner, and if he he found guilty, sentence as aforesaid shall be passed upon h'i.n.

(2) If he hc found not guilty thc jndge shall immediatcly discharge him from cnstody, so far as respects the charge in qnestion.

(3) The prosecuting officer in such case shall draw up a record as nearly as may be in form 61. 55-56 V. c. 29, s. 772.

834. The prosecuting officer may, with the consent of the judge, prefer against the prisoner a charge for any offence for which he may be tried under the provisions of this part other than the charge for which he has been committed to gaol for trial or bound over, although such charge does not appear or is not mentioned in the depositions upon which the prisoner was committed or is for a wholly distinct and unconnected offence: Provided, that the prisoner shall not be tried under this part or upon any such additional charge unless with his consent obtained as hereinbefore provided.

(2) Any such charge may thereupon be dealt with, prosecuted and disposed of, and the prisoner may be remanded, held for trial or admitted to bail thereon, in all respects as if such charge had been the one upon which the prisoner was committed for trial. 55-56 V. c. 29, s. 773.

835. The judge shall, in any case tried before him, have the same power as to acquitting or convicting, or convicting of any other offence than that charged, as a jury would have in case the prisoner were tried by a court having jurisdiction to try the offence in the ordinary way, and may render any verdict which might be rendered by a jury upon a trial at a sitting of any such court. 55-56 V. c. 29, s. 774.

836. If the prisoner elects to be tried by a judge without the intervention of a jury the judge may, in his discretion, admit him to bail to appear for his trial, and extend the bail, from time to time, in case the court be adjourned or there is any other reason therefor.

(2) Such bail may be entered into and perfected before the clerk of the court. 55-56 V. c. 29, s. 775.

836a. Whenever a prisoner who has been admitted to bail pursuant to section 836, does not appear at the time mentioned in the recognizance or to which the court is adjourned, the judge may issue a warrant for his apprehension which may be executed in any part of Canada.

837. If a prisoner elects to be tried by a jury the judge may, instead of remanding him to gaol, admit him to bail, to appear for trial at such time and place and before such court as is determined upon, and such bail may be entered into and perfected before the clerk of the court. 55-56 V. c. 29, s. 776.

838. The judge may adjourn any trial from time to time until finally terminated. 55-56 V. c. 29, s. 777.

839. The judge shall have all the powers of amendment which are possessed by any court before which an indictment may be tried under this Act. 55-56 V. c. 29, s. 778.

840. Any recognizance taken under section six hundred and ninety-two, for the purpose of binding a prosecutor or a witness, shall, if the person committed for trial elects to be tried under the provisions of this part, be obligatory on each of the persons bound thereby, as to all things therein mentioned with reference to the trial by the judge under this part, as if such recognizance had been originally entered into for the doing of such things with reference to such trial: Provided that at least forty-eight hours' notice in writing shall be given, either personally or by leaving the same at the place of residence of the persons bound by such recognizance as therein described, to appear before the judge at the place where such trial is to be had. 55-56 V. c. 29, s. 779.

841. Every witness, whether on behalf of the prisoner or against him, duly summoned or subpœned to attend and give evidence before the judge sitting on any such trial on the day appointed for the same shall be bound to attend and remain in attendance throughout the trial.

(2) If he fails so to attend he shall be held guilty of contempt of court, and may he proceeded against therefor accordingly. 55-56 V. c. 29, s. 780.

842. Upon proof to the satisfaction of the judge of the service of a subpœna upon any witness who fails to attend before him as required by such snhpœna, and upon such judge heing satisfied that the presence of such witness before him is indispensahle to the ends of jnstice, he may, by his warrant, cause the said witness to he apprehended and forthwith hrought hefore him to give evidence as required by such subpœna, and to answer for his disregard of the same.

(2) Such witness may be detained on such warrant before the said judge, or in the common gaol, with a view to secure his presence as a witness; or, in the discretion of the judge, such witness may he released on recognizance with or without sureties, conditioned for his appearance to give evidence as therein mentioned and to answer for his default in not attending upon the said suhpœna, as for a contempt.

(3) The judge may, in a summary manner, examine into and dispose of the charge of contempt against any witness who, if found guilty thereof, may he fined or imprisoned, or hoth, such fine not to exceed one hundred dollars, and such imprisonment to be in the common gaol, with or without hard labour, and not to exceed the term of ninety days, and he may also he ordered to pay the costs incident to the execntion of such warrant and of his detention in custody.

(4) Such warrant may he in form 62 and the conviction for contempt in form 13, and the same shall be authority to the persons and officers therein required to act to do as they are therein respectively directed. 55-56 V. c. 2, s. 781.

If after a commitment the accused elects to be tried at the county judges criminal court, and pleads there to

the charge, and is convicted, the conviction is not invalidated, because of the invalidity of the commitment for trial. *Habeas corpus* proceedings do not lie to enquire into the validity of a conviction made at a county jndges criminal court, as the latter is a court of record. Proceedings can be reviewed only upon a writ of error. The Qneen v. Mnrray, 1 Can. Crim. Cases 529; The King v. Kavanagh, 5 Can. Crim. Cases 507.

A provincial legislature has power to enact that in case of a vacancy in the office of judge for a district or connty, the Lieutenant-Governor-in-Conncil may designate the judge of another district or connty to act *pro tem*, during the vacancy. On a vacancy occuring by death and hefore the appointment of a new judge, the jndge so designated hy the provincial Lieutenant-Governor-in-council has authority to hold "speedy trials," under the Criminal Code. The King v. Brown, 13 Can. Crim. Cases. 133.

Where a trial had heen begun in a county court judge's criminal court and decision reserved upon a motion to dismiss at the close of the case of the prosecution whereupon the accused elected speedy trial hefore the same court on another charge of a similar offence, and the second charge was proceeded with and a conviction made hy the county court judge, hefore concluding the first trial in which the accused was afterwards acquitted on the ground that it was not safe to convict on the testimony of the complainant therein, the court of appeal of British Columbia was equally divided on the question whether such intermixing of the trials invalidated the conviction so made, although the county court judge certified that, in convicting on the second charge, he was not influenced by the evidence previously given on the first. The King v. Iman Din, 18 Can. Crim. Cases 82. See also R. v. Faulkner, 19 Can. Crim. Cases 50; R. v. Whistnant, 20 Can. Crim. Cases 322.

On the accused electing trial without a jury under the Speedy Trials Clauses (Code section 827), the county court judge's criminal court acquires jurisdiction over the person and the offence, and this jurisdiction continues notwithstanding the failure to proceed with or adjourn the trial at the date first appointed. If the county judge, through illness or other cause, fails to attend to hold the trial at the time appointed when the accused made his election, the Judge may appoint another date for the trial without a re-election by the accused. The King v. Stewart, 15 Can. Crim. Cases 331.

TARIFF "A."

(See comments on this tariff in notes to Section 47 of the County Judges Act, *supra.*)

Under the decision in Delap v. Charlebois, 18 P. R. 147, a ruling was made that only the items of a bill which represented work done since this tariff came into force, were to be taxed thereunder. The question was raised but was not necessary to be decided in the case of *Jolicoeur* v. *Cornwall*, 5 O. W. N. 597. Subsequently the matter came before the Chief Justice of the Common Pleas in Re Solicitors, 6 O. W. N. 625. The learned Chief Justice ruled that, on account of the foot-note to the tariffs declaring that they "shall be used in all taxations after these rules come into force," they are applicable to costs incurred before as well as after they come into force, and which were not taxed before 1st September, 1913.

See rulings of DOYLE, Co.J., in Thompson v. Canada F. & M. Co., 6 O. W. N. 723, and Daer v. Thompson, 6 O. W. N. 724, on items 6 and 13 of the present tariff.

TARIFF OF FEES TO BE ALLOWED SOLICITORS IN COUNTY COURTS.

1. For the institution of an action $10 00

This item covers all costs except those of application in court or chambers up to and including search for appearance.

2. Defence 5 00

This item covers the entry of appearance, but does not include any application in court or chambers.

3. Pleadings 15 00

This item covers all pleadings, affidavits on production, jury notices, etc., etc.

4. Third party notice or summons to party added by counter-claim 3 00

5. Record and entry for trial	$3 00
6. Preparation for trial, including notice of trial, notices to produce and admit subpoenas and advising on evidence	10 00
Subject to increase in the discretion of the judge, in cases involving more than $200, to.....	25 00
7. Brief at trial, por folio (not to exceed $5)	10
8. Upon ex-parte motion in chambers including affidavits	5 00
9. Upon contested interlocutory chambers motion	10 00
Subject to increase in the discretion of the Judge to a sum not exceeding	15 00
(The judge may fix any smaller sum.)	
10. On ex-parte motions in court	10 00
11. On contested interlocutory motions in court	15 00
Subject to increase in the discretion of the judge to a sum not exceeding	30 00
(The judge may fix any smaller sum.)	
12. Examinations:	
Preliminary attendances arranging for examinations, to cover all attendances except the counsel fee:	
To the party examining	3 00
To the party examined	1 00
Counsel fee on examination:	
To the party examining	5 00
To the party examined	3 00
Subject to increase in cases involving over $200 in the discretion of the judge to a sum not exceeding	10 00
13. Counsel fee at trial, up to	25 00
Subject to an increase in the discretion of the judge, in cases involving $200 or more, to a sum not exceeding	50 00

And in cases involving $400 or more to a sum not exceeding	$70 00
(In cases where the claim is not a money demand the judge shall determine the amount involved.)	
14. Solicitor attending in court when not counsel or partner of counsel, in cases involving over $200...	10 00
15. Judgment:	
To party having carriage	5 00
To other parties	3 00
This includes attendance to hear judgment, drawing and settling same, taxation of costs, etc.	
16. Correspondence, not exceeding	5 00
17. On originating notices in court:	
To party moving for preliminary proceedings, affidavits, notices, etc.	15 00
Subject to increase to, not exceeding	25 00
To party appearing for preliminary proceedings ..	5 00
Subject to increase when affidavits necessary to..	15 00
Allowance for counsel fee in discretion of judge, not exceeding	20 00
Issuing order to party having carriage	8 00
To all parties	3 00
18. Originating notices in chambers:	
To party moving for preliminary proceeding	10 00
Subject to increase to	20 00
To party appearing	5 00
Subject to increase where affidavits necessary to.	10 00
Counsel fee in discretion of judge, not exceeding ..	15 00
Issuing order, to party having carriage	8 00
To other parties	3 00
19. Upon motions, copies, affidavits properly served on opposite party, per folio	10
20. Upon appeals to a divisional court of the appellate division:	

	Preliminary proceedings:	
	To party appealing	$15 00
	To the respondent	10 00
	Counsel fee in discretion of taxing officer at Toronto, not exceeding	50 00
	Issuing order, etc.:	
	To party having carriage	8 00
	To other parties	3 00
21.	References:	
	Attending on reference, per hour	1 00
	Subject to increase to	2 00
	Drawing notices, affidavits and other documents necessary upon the reference, per folio	20
	For each copy, per folio	10
	For every ordinary attendance	50
	For conducting sale	10 00
22.	Signing default judgment	3 00
23.	Commission (in addition to costs of motion)	3 00
	Attending on execution, foreign agents' fees, etc., in discretion of judge.	
24.	Writs of execution, including disbursements	4 00
	Renewals, including disbursements	3 00

NOTE.—Unless otherwise specified, the allowances in the above tariffs of solicitor's fees are exclusive of proper disbursements.

Upon taxation between a solicitor and his client, additional allowances may be made in the discretion of the officer taxing, but the exercise of such discretion shall be subject to review upon any appeal.

The following note was published in the legal news column of the "Toronto Globe" of March 2nd, 1914.

The county court tariff of solicitors' fees was amended by inserting at the end thereof the following clause:—"In the Counties of Carleton, Middlesex, Wentworth and York, where a fee, (other than the counsel fee at the trial), may be increased by the judge, the clerk may allow the increase, subject to an appeal to the judge. Upon any such appeal the exercise of discretion by the clerk shall be subject to review;" and ordered the rule to come into force forthwith.

TARIFF "B."

Tariff of Disbursements.

The following portion of the general tariff of disbursements is applicable equally to the supreme court and to county courts:—

Fees payable to witnesses, in both supreme court and county court:	
To witnesses residing within three miles of the court house, per diem	$1 00
To witnesses residing over three miles from the court house, per diem	1 50
Barristers and solicitors, physicians and surgeons, other than parties to the cause, when called upon to give evidence in consequence of any professional service rendered by them, or to give professional opinions, per diem, unless otherwise provided by statute	5 00
Engineers, surveyors and 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, unless otherwise provided by statute	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 cause only.

The travelling expenses of witnesses, over three miles, shall be allowed, according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile, one way.

A reasonable sum may be allowed for the preparation of any plan, model or photograph when necessary for

the due understanding of the evidence. (Added Dec. 24th, 1913.)

FEES PAYABLE TO COUNTY COURT CLERKS.

1. Upon issue of writ (in lieu of all fees heretofore payable by a plaintiff prior to entry for trial or assessment, except those provided for by item 5) ..	$3 00
2. Upon entry of appearance (in lieu of all fees heretofore paid by a defendant prior to entry of action for trial or assessment, except those provided for by item 5)	1 00
(Any number of defendants may appear at the same time by the same solicitor without extra charge.)	
3. Upon entry of action or issue for trial or assessment:	
Non-jury case	3 00
Jury case	5 00
4. Upon entry of judgment (including taxation of costs)	3 00
5. Upon examinations and references:	
Appointment	50
Not exceeding one hour	1 50
Additional per hour after first	1 00
Marking exhibits, each	20
Copies of depositions per folio	10
For each oath	20
For each certificate	50
Drawing reports per folio	20
Engrossing reports per folio	10
6. On every writ of execution and renewal	1 00
7. Every certificate not otherwise provided for	50
8. Exemplification of judgment (including certificate and seal)	1 50

9. Every search not made in the ordinary course of an action, or made after the close of the action, if within three years	$0 10
If made after that time	30
10. On appeal from county court to high court (including making up and forwarding papers, preparing certificate and entry of judgment of appellate court)	2 00
Disbursements for express or postage to be added.	
11. For every subpœna in matters outside of actions such as in municipal and voters' list proceedings, etc., and all other proceedings in which a subpœna is issuable out of the county court	1 00
12. On all applications and proceedings before a County court judge, other than application in an action, not otherwise provided for, and upon all applications in an action after judgment	1 00
Where there is a trial or hearing upon oral evidence in any matter other than an action or issue, a further fee of	2 00

See also section 18 of the County Courts Act, *supra*, which provides a fee of $4 for each day's attendance of the clerk at all sittings of the court.

TARIFF "C."

Fees of Sheriffs.

1. Service on one party of any writ, subpœna, notice, pleading, or other paper, including receiving, filing, return, affidavit of service and one letter (exclusive of mileage); when more than one paper served at the same time, it shall be considered as one service..	$2 00
2. Each additional party served	50
3. When writ returned without service being made ..	75
4. On writs of *fieri facias* and *ven. ex* and renewals thereof covering receiving, filing warrant and return and one letter (payable in advance; see 9 Edw. VII. c. 6, sec. 30)	1 50
5. Transmitting copy execution to Master of Titles (1 Geo. V. c. 29, sec. 62)	50
6. Executing each order or writ relating to arrest, attachment, absconding debtor, replevin, sequestration, possession, hab. fac. pos., escheat and striking a special jury, and including receiving, filing return, preparing warrant, precept, bond and affidavits when necessary and other necessary attendances and including correspondence (exclusive of mileage, of poundage when chargeable, and of reasonable and necessary actual disbursements) ...	8 00
7. Poundage on executions and on attachments. In county court cases, 5% on the sum made. (Exclusive of mileage and of all reasonable and necessary actual disbursements)	
8. Schedule made on the execution of any process, including copy for the debtor not exceeding 5 folios..	1 00
9. Each folio above 5	20

10. Drawing advertisement and copies, including transmitting and posting	$1 00
11. Every notice of sale or postponement thereof	25
12. For each day's attendance upon a view by a jury (exclusive of mileage and reasonable and necessary disbursements)	3 00
13. Mileage from the court house to the place where a paper is served, writ executed or other service performed (one way, except in the case of an arrest, when mileage is both ways) per mile (see 9 Edw. VII. c. 6, sec. 30)	15
14. Every letter not above provided for and required by a party or his solicitor	30
15. Bringing up prisoner on attachment or habeas corpus besides travel at 20 cents per mile	1 50
16. Certificate of surrender by sureties	1 00
17. Where a sheriff is directed by the court to perform any service or do any act for which no fee is provided, he may be allowed such fee as the court may think fit, and it shall be payable as the court may direct (9 Edw. VII., c. 6, sec. 29).	
18. Every search for writs against one debtor not being by a party to a cause or his solicitor	30
19. When search embodied in a certificate, including mailing to solicitor ..... (It shall include any sales during the six months preceding its date.)	1 00
20. Maximum fee for a land certificate relating to the investigation of one title and in which shall be included all names required (see 9 Edw. VII. c. 6, sec. 21)	4 00

SESSIONS TARIFF.

TARIFF PRESCRIBED BY SCHEDULE TO R.S.O. 1914, CHAPTER 96.

Clerks of the Peace and County Crown Attorneys.

1. Drawing precepts to summon the grand and petit juries, attending justices to sign, and transmitting to the sheriff	$6 00
2. Attending each general session for the first day	6 00
3. For each additional day, not including time occupied by the county court	4 00
4. Making up records of each general sessions (when completed), including quarterly record of returns of convictions required by s. 6, R.S.O. c. 93	15 00
5. Notice of every appointment of a constable, under R.S.O. c. 99, or other officer appointed by the justices in session or by the chairman	25
6. Drawing every special order of the court of general sessions necessary to be communicated to any party, and entering it on record	1 00
7. Notice of any order made by the general sessions, and letter transmitting same, when required to be notified to any person or party	50
8. Copying orders of the court and causing the same to be published where it is requisite; for each order, exclusive of the expense of publication, per folio	10
9. For issuing subpœna	75
10. For every subpœna ticket, or copy of subpœna (when necessary and when not made out or charged for by the county Crown Attorney)	25

11. For issuing bench warrant	$1 00
12. For drawing out and taking every recognizance of the peace, or for good behaviour if the person to be bound is in indigent circumstances	1 00
13. For drawing out and taking every recognizance to appear, whether of a prosecutor, prisoner, or defendant, witness or other person	50
14. For calling parties on their recognizance and recording their non-appearance, for each person called ..	25
15. For discharging a recognizance	50
16. Drawing order of the sessions, or chairman to estreat and put in process (on the whole list)	1 00
17. Entering any order of the sessions, or of the chairman who presided at the sessions, to remit any estreat, and recording an entry on the same	50
18. Preparing list each session; specifying names of persons making default under R.S.O. c. 106, s. 7 ....,	50
19. Entering and extracting upon a roll, in duplicate, the fines, issues, amerciaments, and forfeited recognizances recorded in each session, making oath to the same, and transmitting to the sheriff	2 00
20. Making out and delivering to the sheriff the writ of *fieri facias* and *capias* thereon	75
21. Making out and certifying copy of roll and return of the sheriff and transmitting it to the provincial treasurer	1 00
22. Copies of depositions or examinations furnished to prisoners accused of felony, or their counsel, per folio of 100 words (when required by the accused, or his counsel, and ordered by the court. This fee is not to be charged when copies are furnished by the Crown Attorney)	10
23. Receiving and filing each indictment when bill returned by the grand jury	50
24. Receiving and filing each presentment of the grand jury	50

25. For a copy of the presentment of the grand jury, forwarded by order of the court of general sessions to the government, or to the inspector of prisons, or to county council, per folio	$0 10
26. Arraigning each prisoner, or defendant indicted	75
27. Recording plea, or receiving and filing demurrer	50
28. Empanelling and swearing the grand jury in every case	1 00
29. Empanelling and swearing the petit jury in every case	75
30. Swearing each witness to go before, or sworn before the grand jury	20
31. Charging the jury with prisoner, or defendant, upon each indictment	1 00
32. For filing each exhibit, list, return, or other paper connected with the proceedings in the court of general sessions where no charge therefor is specially provided	10
33. Swearing each witness upon any trial or proceeding before the court	20
34. Receiving and recording verdict of petit jury	50
35. Recording each judgment or sentence of the court upon a verdict of confession	1 00
36. Making out and delivering to the sheriff a calendar of the sentences at each court	1 50
37. Making out a certified copy or abstract of sentences sent with the prisoners to the penitentiary, central prison, or reformatory, after each session	1 00
38. Making up record of conviction or acquittal in any case where it may be necessary	1 00
39. Discharging prisoner by proclamation, each	50
40. Every allowance of *certiorari* to be paid by the party applying, except when he is in indigent circumstances	1 00

41. Furnishing to sheriff and each of the coroners revised lists of constables, when a revision has been made and when ordered to be done by the justices in general or adjourned sessions, for each list $1 00

42. Reading statute or public proclamation when required to be done by law 25

43. Making every copy or extract of a record or paper or document of any kind, required to be made by law, or by the order of the justices in sessions, or by the order of the government in any of its departments, or for the information and use of the government when required, and when no charge is fixed by law, per folio 10

44. Causing public notice to be proclaimed in open court of the general sessions, of an intention to alter or rescind previous orders respecting the number and extent of any one or more of the division court limits under s. 15 of the Division Courts Act 50

45. Drawing out such orders of sessions, for altering the limits of division courts, per folio 20

46. Making out and transmitting copies of such orders to the government, per folio 10

47. Making out and transmitting copies of such orders to each clerk of a division court affected by such alterations, per folio 10

48. Making up book of orders of sessions, declaring the limits of division courts 1 50

49. Making out and transmitting copies (with letter) to the clerk of each division court 1 00

50. Making out and transmitting a copy thereof to the government 1 00

51. For every necessary certificate, per folio 20

52. Making out and transmitting to the provincial treasurer a return or schedule of all convictions which have taken place before the court, each list including letter 1 00

53. Causing notice to be published of any special or adjourned sessions, when directed by the chairman or other two justices, so to do, besides amount paid for publication $1 00

54. Sending notice of any such sessions to the justices individually, when it is directed by the chairman or other two justices, for each notice 20

55. Attending each adjourned or special sessions and making up record of same, when completed 5 00

56. Making out warrant of distress or commitment in any case where no fee is specially assigned therefor by any statute, or by this tariff 1 00

57. Swearing constable in open court 20

58. Receiving, filing and recording each oath of qualification of a justice of the peace 25

59. Every letter written, by direction of the justices in sessions, to the Government, or justices, or coroners, or constables or others, upon matters connected with the business of the court or the administration of justice 25

60. All necessary outlays for postage and publishing to be added in all cases.

The above tariff of fees and costs shall also be applicable in all proceedings where costs are chargeable or ordered to be paid by private parties, together with the following additional items:

61. Certifying the result of each appeal heard and determined by the court to the convicting justice, or to any other party respecting the same under any statute 50

62. For every single search 20

63. For every general search 50

64. Receiving and filing notices of appeal and the appeal from any judgment or conviction by one or more justices where an appeal is given by law to the court of general sessions of the peace 50

65. When the appeal called, on reading the conviction, notice of appeal and recognizance $0 50

66. For all other services upon the trial of such appeal case, when tried by a jury, the same charges as hereinbefore specified in other trials.

67. Issuing process to enforce the order of the court in appeal case when required by law 1 00

68. For each copy of schedule of the times and places of holding the division courts, with the order of sessions, and forwarding the same to each division court clerk 50

69. Drawing bill of costs, including taxation and filing the same where necessary to be made and filed, as in cases of assault, nuisance, or the like, and in appeals (to be paid by the party) 50

70. For every certificate required of proof of a deed (to be paid by the party applying for same) 1 00

71. Receiving and filing affidavit of bastardy (see Rev. Stat., c. 169, s. 3) (to be paid by the party producing it) 25

72. Receiving and filing each tender for any public work, or supply, or printing, or other service 25

73. Making out a list of the several tenders on each occasion as they are opened, specifying the names, prices and other particulars, and filing the same when required to be done by the justices 50

74. Drawing bonds or agreements for the delivery of articles, or for doing the work for the gaol or other county purposes, and attending execution when required by the justices 1 00

75. Receiving and filing accounts and demands, preferred against the county, numbering them, and submitting them for audit, and making out the cheques 4 00

76. Making out and delivering lists of orders on the treasurer, made at each audit 2 00

77. For every report or return required by statute, or by the Government, where no remuneration has been provided by this table or by statute $1 00

78. Making out and transmitting a return to the Government of justices and coroners who have taken the oaths, when required to be done, for each return .. 1 00

79. Swearing each party to an affidavit, where no charge is elsewhere provided for it (to be paid out of the county funds, or by the party by whom the affidavit is sworn, according to the nature of the case) 20

80. Drawing certificate of approval by the justices in sessions, of sureties tendered by the sheriff (to be paid by the sheriff) 50

81. Administering oaths to any public officer, when authorized so to do (to be paid by officer) 25

82. For distributing the statutes to the justices and county officers, or others, when directed by the statutes or the Government so to do, and taking receipts therefor, from each justice or officer 10

83. For accounting to the county member for copies of statutes not called for by the justices or county officers, and delivering the same to him, whenever such duty is required by statute or by the Government, and no other fee allowed 1 00

84. For receiving and filing voters' lists for an entire municipality under Rev. Stat., c. 7, ss. 20 and 21, each list 25

85. For filing each list, return, or other paper, where no charge is specially provided for, except accounts and claims against the county, and papers connected with matters to be charged against private individuals (to be paid out of the county funds, or by the party for whom the service is rendered, according to the nature of the case) 08

(*a*) When the offices of the clerk of the peace and county Crown Attorney are held by the same individual, and there is a similar or same fee provided

for the same service to each officer, only one fee is to be charged or allowed.

(*b*) Items number from 1 to 67 of the foregoing tariff shall apply only to proceedings in the courts of general sessions of the peace, and shall not supersede any existing tariff of fees for services rendered by the clerk of the peace out of sessions.

FOR SERVICES IN COUNTY JUDGE'S CRIMINAL COURT.

86.	Attending and service in court and making all necessary entries, for each prisoner brought before the judge and not consenting to be tried, in all	$0 50
87.	For attendance in court and services rendered at trial, making necessary record of proceedings, and all necessary entries including calendar of conviction, for each prisoner	2 00
88.	Preparing judge's warrant to bring up the body of prisoner, and delivering the same to the sheriff, for each prisoner	50
89.	Issuing writ of summons to witness when necessary	40
90.	Copy of summons, each	20
91.	Warrant of remand, when issued and delivered to sheriff	50
92.	For warrant to arrest, taking and estreating recognizances and proceedings to enforce same (the same fees as allowed for like services at the general sessions of the peace).	

CROWN ATTORNEY.

In all criminal cases at the courts of general sessions of the peace, in which no costs have been ordered to be paid, or if ordered to be paid, cannot be made of the defendant, the county Crown Attorney shall be entitled to receive, for the services rendered by him in each such case, the following fees to be paid

upon the certificate of the chairman, and to be taken in lieu of, and not in addition to, the fees which have been heretofore payable for services rendered in such cases, viz.:—

1. For receiving and examining all informations, depositions, documents, and papers connected with a criminal charge	$2 00
2. For preparing draft and engrossed copy of every indictment or charge	2 00
3. For all business (except items 1 and 2 *supra*, and the following), in conducting the prosecution to judgment, as well before as after trial	10 00
4. For every copy of subpœna	20
5. For every other service not specified above, and for reports on cases of unusual and important character, a *quantum meruit* to be determined by the Attorney General, on a consideration of the particular circumstances.	
6. Receiving and examining all informations and other documents and papers in connection with each c .al case at a sittings of the High Court Division upon a certificate of the counsel for the Crown at the trial, that the fee should be allowed	4 00
N.B.—Half the fee to be charged if the case has remained undisposed of from a prior court and is prosecuted to judgment. These fees not to be allowed if the crown attorney is also counsel for the Crown.	
7. Every copy of a subpœna at a trial at a sittings of the high court division	10
8. Affidavit and application to judge for *habeas corpus ad testificandum* and writ, etc.	2 00
9. Postage per quarter	2 00
10. For attendance on the judge of the county court by his special requisition in writing, where application is made by a prisoner to be admitted to bail ..	1 00
11. For attending police court in summary trials under Part XVI. of The Criminal Code where requested in writing by the police magistrate to attend	5 00

(*a*) Where a number of charges are pending against the same person, and a conviction has been obtained on one or more indictments, fees, and costs on the further proceedings upon the other charges, are not to be made or allowed on taxation unless in cases where the chairman would, in the event of additional convictions, impose a heavier sentence, or unless there are special circumstances, which, in the opinion of the chairman, render it expedient that the other cases, or some of them, should be proceeded with and tried.

(*b*) In cases of indictment for the obstruction, or the non-repair of a highway or bridge, or of indictment for nuisance (where there is a *bona fide* dispute as to boundary, or title, or claim of right, and where no present public inconvenience is being suffered from what is complained of), the crown attorney shall not be entitled to charge costs to the public, without the special sanction of the Attorney-General, but will collect his fees and costs from the parties only.

(*c*) When the offices of crown attorney and clerk of the peace are held by the same individual, and a similar or the same fee is provided for the same service to each officer only one fee is to be charged or allowed.

SPECIAL FORMS

FORM 1.

Appearance under section 22 (2).

IN THE COUNTY COURT OF THE COUNTY OF .

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

Enter an appearance for the defendant in this action.

The defendant disputes the jurisdiction of this court to try this action, on the ground that the amount claimed is beyond the jurisdiction of the court (*or*, "the value of the property in question is beyond the jurisdiction of the court," *or* "the amount or value of the subject-matter involved is beyond the jurisdiction of the court," *or* "the joint stock or capital of the partnership exceeds in amount or value $2,000," *or* "the estate of the testator exceeds in value $2,0000").

DATED at , this day of , 19 .

Solicitor for defendant.

FORM 2.

Order transferring action under section 22(5).

IN THE SUPREME COURT OF ONTARIO.

(*Name of Judge.*)

In Chambers. (*Date.*)

IN THE MATTER of a certain action pending in the county court of the county of .

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

UPON the application of the defendant, and upon reading the affidavits of filed, and upon hearing the solicitors (*or* counsel) for the parties, and it appearing that the defendant, in his appearance (*or* in his statement of defence), stated that he disputes the jurisdiction of the said county court, and that the plaintiff has not exercised the right to have the papers and proceedings in the action transmitted to the supreme court; (*or*, "the defendant desiring to be allowed to question the jurisdiction of the said county court"):

1. IT IS ORDERED that this action and all proceedings therein be and the same are hereby transferred from the said county court to the supreme court.

2. AND IT IS FURTHER ORDERED that, if the plaintiff be awarded costs, they shall be taxed according to the scale of the supreme court.

3. AND IT IS FURTHER ORDERED that the costs of this application be

FORM 3.

Order transferring action under section 23.

IN THE SUPREME COURT OF ONTARIO.

(*Name of Judge.*)

In Chambers. (*Date.*)

IN THE MATTER of a certain action pending in the county court of the county of .

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

UPON the application of the , and upon reading the affidavits of filed, and upon hearing the solicitors (*or* counsel) for the parties, and it appearing that the defendant has pleaded a set-off (*or* counterclaim) involving matter beyond the jurisdiction of the county court:

1. IT IS ORDERED that this action and all proceedings therein including the said set-off (*or* counterclaim) be and the same are hereby transferred from the said county court to the supreme court.

2. AND IT IS FURTHER ORDERED that the costs of this application be

FORM 4.

Order transferring action to another county court under section 25.

IN THE COUNTY COURT OF THE COUNTY OF .

(*Name of Judge.*)

In Chambers. (*Date.*)

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

UPON the application of , and upon reading the affidavits of filed, and upon hearing the solicitors (or counsel) for the parties, and it appearing that this court has not cognizance of this action, but that the county court of the county of has jurisdiction to try ths same:

1. IT IS ORDEREN that this action and all proceedings therein be and the same are hereby transfsrred to the county court of the county of .

2. AND IT IS FURTHER ORNEREN that the costs of this application be

FORM 5.

Order transferring action under section 29.

IN THE SUPREME COURT OF ONTARIO.

(*Name of Judge.*)

In Chambers. (*Date.*)

IN THE MATTER of a certain action pending in thc county court of the county of .

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

UPON thc application of the , and upon reading the affidavits of filed, and upon hearing the solicitors (or

counsel) for the parties, and it appearing that the debt or damages claimed amount to upwards of $100, and that the action is one fit to be tried in the supreme court;

1. IT IS ORDERED that this action and all proceedings therein be and the same are hereby transferred from the said county court to the supreme court.

2. AND IT IS FURTHER ORDRED that (*insert terms as to costs, security, etc., as ordered*).

3. AND IT IS FURTHER ORDERED that the costs of this application he

FORM 6.

Order for transfer from division court to county court, under section 71 of Division Courts Act.

IN THE COUNTY COURT OF THE COUNTY OF

(*Name of Judge.*)

In Chambers. (*Date.*)

IN THE MATTRR of an action in the division court in the county of

BETWEEN:

A. B., *Plaintiff,*

and

C. D., *Defendant.*

UPON the application of the , and upon reading the affidavits of filed, and upon hearing the solicitors (*or* counsel) for the parties, and it appearing that the defence (*or* counterclaim) pleaded in this action involves matter beyond the jurisdiction of the said division court, and that such defence (*or* counterclaim) is not frivolous or vexatious, and that the same is within the jurisdiction of the county court:

1. IT IS ORDERED that this action and all proceedings therein be, and the same are hereby transferred from the said division court to this court.

2. AND IT IS FURTHER ORDERED (*insert here terms as to payment of additional costs, etc., as ordered*).

3. AND IT IS FURTHER ORDERED that the costs of this application be

FORM 7.

Order for committal under section 35.

IN THE COUNTY COURT OF THE COUNTY OF

(*Name of Judge.*) (*Date.*)

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

UPON motion, etc., by counsel for the , and upon reading, etc. (*here set out the evidence read, and proving the contempt alleged, and state the nature of the conduct constituting such contempt*), and this court being of opinion that the above named has, by his conduct as hereinbefore appears, been guilty of a contempt of this court, NOTH ORNER that the said do stand committed to the common gaol of the county of for his said contempt for the term of months, and that a warrant of attachment for the arrest of the said be forthwith issued.

ANN THIS COURT DOTH FURTHER ORDER that the said do pay the costs of the of this application and of the said attachment.

FORM 8.

Warrant of committal under section 35.

IN THE COUNTY COURT OF THE COUNTY OF
(*Name of Judge.*) (*Date.*)
BETWEEN:

A. B., *Plaintiff,*

and

C. D., *Defendant.*

To the sheriff of the county of , and to all constables and peace officers of the said county, and to the gaoler of the common gaol of the county of ;

WHEREAS by an order bearing date the day of , 19 , it was ordered that the said should stand committed to prison for contempt of this court;

THESE ARE THEREFORE to require you forthwith to arrest and apprehend the said , and him safely convey and deliver to the gaoler of the common gaol of the county of ; and you, the said gaoler, to receive the said and him safely keep in the common gaol aforesaid until the further order of this court.

FORM 9.

Order of reference under section 36.

IN THE COUNTY COURT OF THE COUNTY OF
(*Name of Judge.*)
In Chambers.
BETWEEN: (*Date.*)

A. B., *Plaintiff,*

and

C. D., *Defendant.*

UPON hearing the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for :

1. IT IS ORDERED that the (*state whether all or some, and, if so, which of the questions are to be tried*) in this action be tried by .

2. (*To be used in a case where it is not necessary to reserve any questions as to costs or otherwise.*) AND IT IS FURTHER ORDERED that the defendant (*or* the party by whom any amount shall be found by the referee to be due) do pay to the plaintiff (*or*, the party to whom such amount shall be found due) the amount which the referee shall find to be payable, forthwith after the confirmation of the referee's report (*or* as the case may require).

3. AND IT IS FURTHER ORDERED that the costs of this application (*or*, of this action) be (*as may be ordered*).

FORM 10.

Notice of Appeal to a Divisional Court. (*Rule* 492 (5)).

IN THE COUNTY COURT OF THE COUNTY OF .

BETWEEN:

Plaintiff,

and

Defendant.

TAKE NOTICE that the appeals to a divisional court from the judgment (*or* order) pronounced by his honor the judge of this court, on the day of , 19 , on the following grounds:—

(*State them briefly.*)

Dated the day of 19 .

To C. D., Esq.,
Solicitor for

A. B.,
Solicitor for

FORM 11.

Certificate under section 42.

IN THE COUNTY COURT OF THE COUNTY OF

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

I, , judge of the county court of the county of , pnrsuant to section 42 of the County Courts Act, at the request of the and for the purpose of an appeal by him from the judgment pronounced by me herein, dated the day of , 19 , hereby certify that annexed hereto are the following papers and documents, viz.:

1. The pleadings in this action.
2. The judgment appealed from dated , 19 .
3. My written opinion or reasons for pronouncing the said jndgment.
4. The notes taken at the trial by a stenographer (*or* my notes) of the evidence, and of any objections and exceptions thereto and of the rejection of any evidence.
5. The exhibits put in at the trial.

which said papers and documents constitute, in my opinion, all the papers and documents in this action affecting the questions raised by the said appeal and necessary for the full understanding thereof.

DATED this day of , 19 .

Judge of the county court of the county of .

FORM 12.

Order staying proceedings under section 43.

IN THE COUNTY COURT OF THE COUNTY OF

(*Name of Judge.*)

In Chambers. (*Date.*)

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

UPON the application of the , and upon reading the affidavits of filed, and upon hearing the solicitors (*or* counsel) for the parties:

1. IT IS ORDERED that all further proceedings in this action under the judgment (*or* order) made herein on the day of , 19 , be stayed for the period of days to enable the above named to appeal from the said judgment (*or* order).

2. AND IT IS FURTHER ORDERED that the costs of this application be .

FORM 13.

Order extending time under section 44(2).

IN THE SUPREME COURT OF ONTARIO.

(*Name of Judge or Divisional Court Judges.*) (*Date.*)

IN THE MATTER of a certain action pending in the county court of the county of .

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

UPON the application of the , and upon reading the affidavits of filed, and upon hearing the solicitors (*or* counsel) for the parties:

1. IT IS ORDERED that the time for setting down the appeal herein from the jndgment (*or* order) prononnced herein on the day of , 19 , and for giving notice of the setting down of such appeal (*or* as the case may be) be extended for a period of days from this date.

2. ANN IT IS FURTHER ORDERED that the certificate of the judge of the said county court issued herein on the day of , 19 , be sent back to the said judge for amendment as follows:

3. ANN IT IS FURTHER ORDERED that the costs of this application be .

FORM 14.

Certificate on appeal under section 46(2).

IN THE SUPREME COURT OF ONTARIO.

The Hon. the Chief Justice
The Hon. Mr. Justice
The Hon. Mr. Justice
The Hon. Mr. Justice
The Hon. Mr. Justice

day, the day of , 19 .

IN THE MATTER of a certain action pending in the county court of the county of .

BETWEEN:

Plaintiff,

and

Defendant.

1. THIS IS TO CERTIFY that upon motion made unto this court this day by counsel for the by way of appeal from the judgment pronounced by his honor , judge of the county court of the county of , on the day of 191 , herein, in the presence of counsel for the , and upon hearing read the pleadings, the evidence adduced at the trial and the judgment aforesaid certified to this Court, and upon hearing what was alleged by counsel aforesaid:

2. THIS COURT DID ORDER that the said appeal be and the same was with costs to be paid by the to the forthwith after taxation thereof, upon the same being duly certified to the said county court pursuant to the statute in that behalf.

Registrar.

FORM 15.

Order for prohibition.

IN THE SUPREME COURT OF ONTARIO.

(*Name of Judge.*)

In Chambers. (*Date.*)

IN THE MATTER of a certain action pending in the county court of the county of

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

UPON the application of the , and upon reading the affidavits of filed, and upon hearing the solicitor (*or* counsel) for , and it appearing that the said has (*entered an action against*) C.D., in the said court, and that the said court has no jurisdiction in the said (*cause*) or to hear and determine the said (*action*) by reason that (*state facts shewing want of jurisdiction*):

1. IT IS ORDERED that the said be and he is hereby prohibited from further proceeding in the said (*action*) in the said court.

FORM 16.

Order in nature of mandamus.

IN THE SUPREME COURT OF ONTARIO.

(*Name of Judge.*)

In Chambers. (*Date.*)

IN THE MATTER of a certain action pending in the county court of the county of .

BETWEEN:

A. B., *Plaintiff,*

and

C. D., *Defendant.*

UPON the application of , and upon reading the affidavits of filed, and upon hearing the solicitor (*or* counsel) for :

1. IT IS ORDERED that the judge of the county court of the county of , or other judge presiding in the said court, do try the above mentioned action now pending in the said court, and do adjudicate upon the same.

2. AND IT IS FURTHER ORDERED that the costs of this application be (*as may be ordered*).

FORM 17.

Order of Certiorari to County Court.

IN THE SUPREME COURT OF ONTARIO.

(*Name of Judge.*)

In Chambers. (*Date.*)

IN THE MATTER of a certain action pending in the county court of the county of .

BETWEEN:

Plaintiff,

and

Defendant.

UPON the application of , and upon reading the affidavit of filed, and upon hearing the solicitor (*or* counsel) for .

1. IT IS ORDERED that the judge of the county court of the county of do forthwith send to the office of the court at (*or* as may be necessary), the proceedings and papers in a certain action in the said county court between plaintiff and defendant, with all things touching the same, together with this order, that this court may further cause to be done therenpon what it shall see fit to be done, and no fnrther proceedings are to be taken in said county court in said action until further order of this court or a judge thereof.

2. AND IT IS FURTHER ORDERED (*special terms if any*).

FORM 18.

Order changing place of trial.

IN THE COUNTY COURT OF THE COUNTY OF .

The Master in Chambers.
(*or* His Honor Judge , In Chambers.) } the day of day,

BETWEEN:

A. B.,

Plaintiff,

and

C. D.,

Defendant.

UPON the application of the defendant, and upon reading the affidavits of filed, and upon hearing the solicitors (*or* counsel) for the parties:

1. IT IS ORDERED that the place of trial of this action be changed from the of to the of .

2. AND IT IS FURTHER ORDERED that the costs of this application be costs in the cause (*or* costs in the cause to the defendant, *or*, be paid by the plaintiff to the defendant in any event in this cause, *or as may be ordered*).

FORM 19.

Verification of Return of Moneys paid into Court. (*Rule* 770.)

I hereby solemnly declare that the annexed statement is a full and true statement of the moneys paid into the county court of the county of , during the year 19 , and that it correctly shews the state of the various accounts therein mentioned upon the thirty-first day of December last.

(Signature) A. B.
Clerk or Registrar.

Subscribed and declared before me, at this day of January, 19

C. D.,
Commissioner for taking affidavits
or Justice of the Peace.

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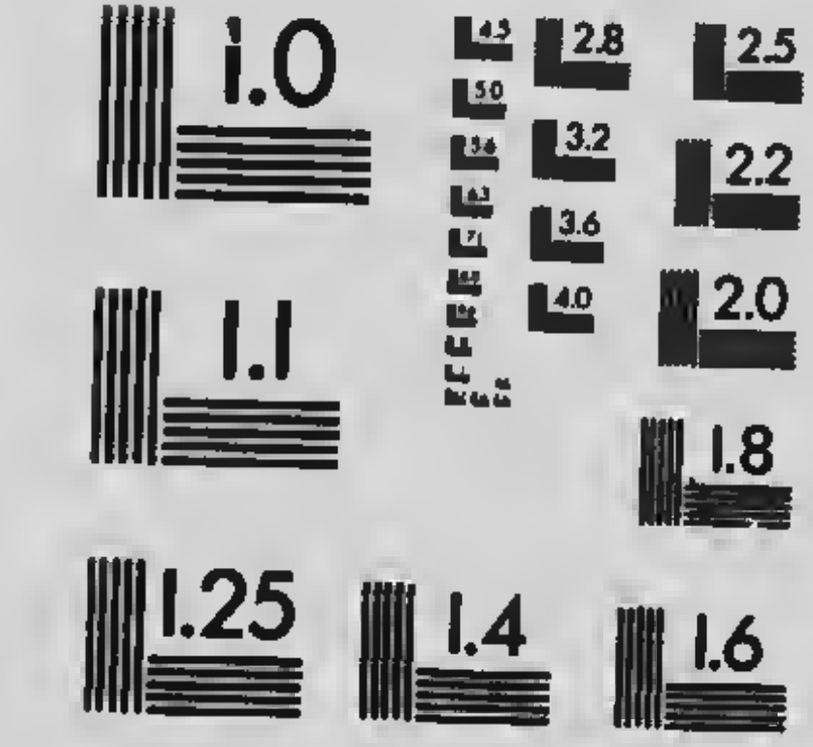
MICROCOPY RESOLUTION TEST CHART

(ANSI and ISO TEST CHART No. 2)



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