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THE NEW RULES OF PRACTICE

AND

THE PROPOSED

NEW RULES OF PLEADING

OF THE

Queen's Bench and Common Pleas.

UPPER CANADA,

WITH

Schedule of Forms and Table of Costs.

UNDER THE

COMMON LAW PROCEDURE ACT, 1856.

WITH NOTES.

EDITED

BY W. G. DRAPER, M. A.,

BARRISTER AT LAW.

TORONTO:

MACLEAR & CO., 45 KING STREET EAST.

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RULES

OF THE

COURTS OF QUEEN'S BENCH

AND

COMMON PLEAS.

ATTORNEY.

1. (*a*) It is ordered that every person applying to be admitted a member of either of the said Courts, shall leave or cause to be left with the Clerk of the Crown and Pleas, at least seven days before he shall apply to such Court for admission, his articles of clerkship, and also any assignment that may have been made thereof, together with answers to the several questions hereunto annexed, signed by the applicant, and also by the attorney or attorneys with whom he shall have served his clerkship.

QUESTIONS TO BE ANSWERED BY THE CLERK.

1. What was your age on the day of the date of your articles?

2. Have you served the whole term of your articles at the office where the attorney or attorneys, to

(*a*) A person who has been admitted a solicitor of the Court of Chancery upon service with a solicitor (who had not been admitted an attorney of a Court of law), may be admitted an attorney in England under sec. 15 of 6 & 7 Vic. cap. 73—notwithstanding Reg. Gen. Hil. 1853, No. 5.—In re Lucas, 2 Jur. N. S. 65.

whom you were articled or assigned, carried on his or their business? If not, state the reason.

3. Have you at any time, during the term of your articles, been absent, without the permission of the attorney or attorneys to whom you were articled or assigned? and if so, state the length and occasions of such absence.

4. Have you, during the period of your articles, been engaged or concerned in any profession, business, or employment, other than your professional employment as clerk to the attorney or attorneys to whom you were articled or assigned?

5. Have you, since the expiration of your articles, been engaged or concerned, and for how long time, in any and what profession, trade, business, or employment other than the profession of an attorney or solicitor?

QUESTIONS TO BE ANSWERED BY THE ATTORNEY.

1. Has A. B. served the whole time of his articles at the office where you carry on your business? and if not, state the reason.

2. Has the said A. B. at any time during the term of his articles, been absent without your permission? and if so, state the length and various occasions of such absence.

3. Has the said A. B., during the period of his articles, been engaged or concerned in any profession, business, or employment, other than his professional employment as your articled clerk?

4. Has the said A. B., during the whole time of his clerkship, with the exceptions above mentioned, been faithfully and diligently employed in your professional business of an attorney and solicitor?

5. Has the said A. B., since the expiration of his articles, been engaged or concerned, and for how

long time, in any and what profession, business or employment, other than the profession of an attorney or solicitor?

And I do hereby certify that the said A. B. hath duly and faithfully served under his articles of clerkship (or assignment, as the case may be), bearing date, &c., for the term therein expressed; and that he is a fit and proper person to be admitted an attorney. Rule 51, H. T., 13 Vic.

2. It is ordered, that whenever hereafter any attorney of this Court shall be struck off the roll of attorneys, or be prohibited from practising as an attorney therein, by order of this Court, for malpractice or misconduct as an attorney, or other sufficient cause, the clerk of this Court shall forthwith certify such dismissal or prohibition, and the grounds thereof, expressed in general terms, under the seal of this Court, and shall transmit such certificate to each of the other Superior Courts of Upper Canada; and that this Court, on receipt of any similar certificate from the Court of Chancery or the Court of Common Pleas, of any attorney or solicitor of either of the said Courts respectively, having been struck off the roll of such Court, or prohibited from practising therein, shall thereupon take proceedings for striking such person, being an attorney of this Court, from the roll of attorneys, or for prohibiting his practising therein, according to the course and practice (and in like manner and under like circumstances) observed in similar cases in the superior courts in England—T. T. 15 Vic. *Mem.* A similar rule exists in the Common Pleas.

TRINITY TERM, 20TH VIC.

WHEREAS the practice of the Courts of Queen's Bench and Common Pleas in and for Upper Canada has been, to a great extent, superseded or altered by the Common Law Procedure Act, 1856, and it is expedient that the written rules

of practice of the said Courts should be consolidated: It is therefore ordered that all existing rules of practice in either of the said Courts in regard to civil actions—save and except as regards any step or proceeding taken before these rules come into force—shall be, from and after the first day of Trinity term, 1856, annulled, and that the practice, to be thenceforth observed in the said courts with respect to the matters hereafter mentioned, shall be as follows, that is to say :—

APPEARANCE.

1. The clerks and deputy-clerks of the Crown shall enter, in books to be kept by them for that purpose, every appearance of which a memorandum according to the statute shall be delivered to them respectively, and shall file such memorandum on the day they receive the same. (*a*)

Eng Rule 2. Fin 1a. 520.

2. If two or more defendants in the same action shall appear by the same attorney and at the same time, the names of all the defendants so appearing shall be inserted in one memorandum of appearance.

ATTORNEY AND GUARDIAN.

Eng rule 3. Fin. 520.

3. (*b*) An attorney not entering an appearance in

(*a*) An appearance entered by defendant waives all irregularity in the process, and even the total want of it — Forbes v. Smith, 24 L. J. (Exch.) 263; Humble v. Bland, 6 T. R. 255. Quære whether, when a defendant who has been served with a writ specially endorsed under Imp. Act 15 & 16 Vic. s. 25 (C. L. P. Act, U.C., s. 41) enters an appearance after the time limited for an appearance has expired, but before judgment is signed, such appearance is regular, and prevents plaintiff signing judgment under s 27 (C. L. P. Act, U. C., s. 60).—Rogers v. Hunt, 18 Jur 1084 Exch.

(*b*) An attachment will not be granted against an attorney for non-compliance with the undertaking, unless he has been first asked to comply with it.—Jacobs v. Magnay, 12 L. J. (Q.B.) 93. A verbal undertaking has been considered sufficient.—Anon 2 Chit 36

pursuance of his undertaking, shall be liable to an attachment.

4. (c) No attorney shall be changed without the order of a judge. E. R. 4. Fin. 520.

5. A special admission of prochein amy or guardian to prosecute or defend for an Infant shall not be deemed an authority to prosecute or defend in any but the particular action or actions specified. E. R. 5. Fin. 520.

JOINDER OF PARTIES.

6. Whenever a plaintiff shall amend the writ after notice by the defendant, or a plea in abatement of a non-joinder by virtue of the Common Law Procedure Act, 1856, section 69, he shall file a consent in writing of the party or parties whose name or names are to be added, together with an affidavit of the handwriting, and give notice thereof to the defendant, unless the filing of such consent be dispensed with by order of the court or of a judge. E. R. 6. Fin. 520.

PLEADINGS.

7. No side bar rule for time to declare shall be granted. E. R. 7. Fin. 520.

8. (a) The defendant shall not be at liberty to waive his plea, or enter a *relictâ verificatione* after a E. R. 8. Fin. 520.

(c) No order is necessary when an attorney dies, but notice should be given to the opposite party of the appointment of a new attorney.—Ryland v. Noakes, 1 Taunt. 342.

(a) If the defendant waive his plea without leave, the plaintiff may sign judgment.—Palmer v. Dixon, 5 D & Ry. 623. The court or a judge will generally give leave to do so, on defendant's agreeing to take short notice of trial.—Taylor v. Joddrel, 1 Wils. 255; Wilkes v. Wood, 2 Wils. 204. If the defendant be allowed to withdraw his plea, and be ordered to plead forthwith, he must plead within twenty-four hours; when ordered to plead *instanter*, he must plead on the same day, or the plaintiff may sign judgment.—Chit. Arch. Pr. 7th Ed. 181. As to present practice see 9th Ed. 267.

demurrer without leave of the court or of a judge, unless by consent of the plaintiff or his attorney.

E R 9. Fin. 520

9. In case the time for pleading to any declaration or for answering any pleading, shall not have expired before the first day of July in any year, the party called upon to plead, reply, &c., shall have the same number of days for that purpose after the twenty-first day of August, as if the declaration or preceding pleading had been delivered or filed on the twenty-first day of August.

E. R 10 Fin. 521.

10. When a defendant shall plead a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment, and if such judgment shall be in a court of record, the number of the roll (if any) on which such proceedings are entered, and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea, and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea.

PAYMENT OF MONEY INTO COURT.

E. R. 11. Fin. 521.

11. No affidavit shall be necessary to verify the plaintiff's signature to the written authority to his attorney to take money out of court, unless specially required by the master.

E R. 12. Fin. 521.

12. (*x*) When money is paid into court in respect of any particular sum or cause of action in the de-

(*x*) Vide Act 1856, sec. 120, for form of plea of payment into court. An action was brought in the superior court for a sum exceeding £20, and defendant paid £7 15s. into court, which the plaintiff took in full satisfaction of his claim—Held that plaintiff was entitled to costs of the action: Chambers v Wiles, 1 Jur. N S. 476.

claration, and the plaintiff accepts the same in satisfaction, the plaintiff, when the costs of the cause are taxed, shall be entitled to the costs of the cause, in respect of that part of his claim so satisfied, up to the time the money is so paid in and taken out, whatever may be the result of any issue or issues, in respect of other causes of action; and if the defendant succeeds in defeating the residue of the claim, he will be entitled to the costs of the cause in respect of such defence commencing at "Instructions for plea," but not before.

13. (*y*) Where money is paid into court in several actions which are consolidated, and the plaintiff, without taxing costs, proceeds to trial on one, and fails, he shall be entitled to costs on the others, up to the time of paying money into court. E. R. 13. Fin. 521. 27 E.T. 5 Vic.

DEMURRER.

14. The party demurring may give a notice to the opposite party to join in demurrer in four days, which notice may be delivered separately, or endorsed on the demurrer, otherwise judgment. E. R. 14. Fin. 521.

15. No motion or rule for a concilium shall be required, but demurrers as well as all special cases, special verdicts and appeals from county courts shall be set down for argument at the request of either party with the proper officer, four days before the day on which the same are to be argued, and notice thereof shall be given forthwith by the party setting the same down to the opposite party. E. R. 15. Fin. 521.

16. (*e*) The party whose pleading has been de-

(*y*) When a plaintiff refuses a sum of money tendered through the medium of a judge's summons, in satisfaction of his claim, and afterwards takes out of court a sum slightly exceeding that refused—Held, he is entitled to his costs.—Shaw v. Hughes, 15 Q. B. 660.

(*e*) A demurrer commencing, "and the defendant says that the said declaration is not sufficient in law," and then

27 H.T 13 Vic

murred to, shall, with his joinder in demurrer, or at any time within the time allowed for joining in demurrer, or within such further time as a judge on application may allow, deliver to such opposite party a notice in writing, of all exceptions, intended to be taken on the argument to any preceding pleading of the party demurring, and in default of such notice, shall be precluded from arguing any such exception, and all exceptions whereof notice has been so given, shall be entered on the demurrer books, to be delivered to the judges, and if the party setting down the case for argument shall omit to enter on the demurrer book any exception made by the opposite party, of which he has had due notice, the court may, in its discretion, either give judgment in favor of such opposite party, or may strike the case out of the paper, and allow the opposite party reasonable costs for attending to argue the demurrer.

28 H T. 13 Vic.

17. Four days before the day appointed for argument, the party setting down the case for argument, shall deliver a copy of the demurrer book, special case or special verdict to each of the judges, otherwise the case shall not be heard.

E. R. 17 Fin. 522

18. When there shall be a demurrer to part only of the declaration, or other subsequent pleadings, those parts only of the declaration and pleadings to which such demurrer relates, shall be copied into the demurrer books, and if any other parts shall be copied, the master shall not allow the costs thereof on

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proceeding to assign separate causes to each count, is in form a demurrer to the whole declaration; and if any count be good, the plaintiff is entitled to Judgment, the demurrer being too large.—Parrett Navig Co. v. Stower, 6 M. & W. 564. A special demurrer for duplicity must point out expressly, and not by way of description, in what the duplicity consists.—Smith v. Clench, 2 Gal. & D. 225; Small v Beasley, 3 U C. R. 40

taxation, either as between party and party, or as between attorney and client. (*f*)

CHANGE OF VENUE.

19. (*d*) No venue shall, unless upon consent of parties, be changed, without an order of the court or of a judge, made after a rule to show cause or a judge's summons; but such order may nevertheless be made before issue joined in those cases in which it could have been so made before this rule; and in all cases the venue may or may not be changed, according as it shall appear to the court or

(*f*) Either party may set down a demurrer for argument, and causes of general demurrer should be delivered to the judges in the form of notes, by the opposite party to the one setting down the demurrer for argument.—Jones v. Dunn, 1 U. C. C. P. R. 204. Although a plea in abatement need not be demurred to specially, yet all objections intended to be urged, must be noted in the demurrer books according to this rule.—March v. Burns, 1 U. C. C. P. R. 344, per Macaulay, C. J.

(*d*) The application to change the venue must be made on the common affidavit before plea pleaded.—Begg v. Forbes, 13 C. B. 614; 23 L. J. (C. P.) 222. On special grounds it should not be made until after issue joined.—Cotterill v. Dixon, 1 C. & M. 661; Hodge v. Churchward, 5 C. B. 495; DeRothschild v. Shilston, 22 L. J. Exch. 279. This rule varies from the English one, as given in Chit. Arch. Pr. 9th Ed. 1267. The chief object appears to be to prevent parties from changing the venue as a matter of course, and to afford the plaintiff an opportunity of resisting the application when first made, instead of bringing it back after it has been changed. The venue will be changed where justice and convenience manifestly require it, and the plaintiff being an attorney will not prevent.—Robertson v. Hayne, 16 C. B. 560. When the plaintiff is entitled to change the venue as a matter of right, the court will not impose terms at the instance of defendant.—Turnley v. London and North Western Railway Co., 16 C. B. 575. Venue may be changed before issue, but the order must be on special *application*, although it need not necessarily be on special *grounds*.—Finlason, 522.

judge, that the cause may be more conveniently and fitly tried in the county in which the cause of action arose, or in that in which the venue has been laid.

PARTICULARS OF DEMAND OR OF SET-OFF.

E R 19 Fin 522

20 With every declaration (unless the writ has been specially endorsed under the provisions contained in the 41st section of the Common Law Procedure Act, 1856,) delivered, containing causes of action, such as those set forth in Schedule B of that act, numbered from one to eleven inclusive, or of a like nature, the plaintiff shall deliver full particulars of his demand under such claim, where such particulars can be comprised within three folios, and where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios; and with every plea of set off containing claims of a similar nature as those in respect of which a plaintiff is required to deliver particulars, the defendant shall, in like manner, deliver particulars of his set off; and to secure the delivery of particulars in all such cases, it is ordered that, if any such declaration shall be delivered, or if any plea of set off shall be delivered without such particulars or such statement as aforesaid, and a judge shall afterwards order a delivery of particulars, the plaintiff or defendant, as the case may be, shall not be allowed any costs in respect of any summons, for the purpose of obtaining such order, or of the particulars he may afterwards deliver, and a copy of the particulars of the demand and set off shall be annexed by the plaintiff's attorney to every record at the time it is entered for trial with the proper officer.

E R 20. Fin 523.

21. A summons for particulars and order thereon, may be obtained by a defendant before appearance,

and may be made, if the judge think fit, without the production of any affidavit.

22. A defendant shall be allowed the same time for pleading, after the delivery of particulars, under a judge's order, which he had at the return of the summons, unless otherwise provided for in such order. E. R. 21. Fin. 523.

SECURITY FOR COSTS.

23. (*k*) An application to compel the plaintiff to give security for costs, must, in ordinary cases, be made before issue joined. E. R. 22. Fin. 523.

DISCONTINUANCE.

24. (*l*) To entitle a plaintiff to discontinue after plea pleaded, it shall not be necessary to obtain the defendant's consent, but the rule shall contain an undertaking on the part of the plaintiff to pay the costs, and a consent, that if they are not paid within four days after taxation, the defendant shall be at liberty to sign judgment of *non Pros.* E. R. 23. Fin. 523.

STAYING PROCEEDINGS.

25. (*m*) In any action against an acceptor of a Bill of Exchange, or the maker of a promissory E. R. 24. Fin. 523.

(*k*) Where a plaintiff is insolvent, and has assigned the debt for which the action is brought, and is suing for the benefit of the assignee, the court will compel him to give security for costs.—Goatley v. Emmott, 15 C. B. 291.

(*l*) If an administratrix has been made defendant in an action commenced against the intestate by a suggestion, (sec. 211 C. L. P. act, 1856,) and has pleaded to the suggestion, the court will not allow the plaintiff to discontinue without payment of all the costs in the cause.—Benge v. Swaine, 15 C. B. 784. A plaintiff having obtained a judge's order to discontinue on payment of costs, and having acted upon the order by attending the taxation under it, the court refused to allow him afterwards to abandon it.—Ib.

(*m*) The holder of a dishonoured Bill of Exchange brought an action against the acceptor, and simultaneously with it instituted proceedings against him in bankruptcy.

note, the defendant shall be at liberty to stay proceedings on payment of the debt and costs in that action only.

COGNOVIT.—WARRANT OF ATTORNEY. JUDGE'S ORDER FOR JUDGMENT.

26. No warrant of attorney to confess judgment in any action or cognovit actionem, given by any person, after the first day of next Michaelmas term, shall be of any force, unless there shall be present some attorney on behalf of such person expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or cognovit, before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney, and in the affidavit of execution, the attendance of such attorney, and the fact of his being a subscribing witness, shall be plainly stated, which affidavit and the warrant of attorney or cognovit, shall be filed at the time of entering judgment thereon.

E. R. 26. Ein. 523.

27. (*n*) Leave to enter up judgment upon any cognovit or warrant of attorney above one and under ten years old, is to be obtained by order of a judge made *exparte*, and if ten years old or more upon a summons, to shew cause.

E. R. 27. Fin 523.

28. Every person who shall prepare any cognovit or warrant of attorney to confess judgment, which is

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The action having been stayed on payment of the debt and costs, the plaintiff claimed to hold the bill until he should have obtained the amount of his costs in bankruptcy, Held, that he was not so entitled, and that the bill should be delivered up to the defendant.—Cows v. Taylor, 18 Jur. 963 Exch.

(*n*) Filling in the date of a warrant of attorney, when it is left in blank after execution, is not such an alteration as will avoid the instrument.—Keene v Smallbone, 17 C. B. 179

to be subject to any defeasance, shall cause such defeasance to be written on the same paper or parchment on which the cognovit or warrant is written, or cause a memorandum in writing to be made on such cognovit or warrant containing the substance or effect of such defeasance.

EVIDENCE.

ADMISSION AND INSPECTION OF DOCUMENTS. SUBPŒNA TO PRODUCE RECORDS. DEPOSITIONS ON INTERROGATORIES.

29. The form of notice to admit documents referred to in the Common Law Procedure Act, 1856, section 165, may be as follows :— E. R. 29. Fin. 524.

In the Q. B. or C. P.

A. B., *Plaintiff*,
v.
C. D., *Defendant*.

Take notice that the plaintiff (or defendant) in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the plaintiff (or defendant), his attorney or agent, at ——, on ——, between the hours of ——. And the defendant (or plaintiff) is hereby required, within forty-eight hours from the last mentioned hour, to admit that such of the documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been, that such as are specified as copies are true copies, and such copies as are stated to have been served, sent, or delivered, were so sent, served, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this cause. Dated, &c.

G. H.,

Attorney or agent for (plaintiff or defendant.)

Here describe the documents, the manner of doing which may be as follows :—

ORIGINALS

DESCRIPTION OF DOCUMENTS	DATE.
Deed of Covenant between A B & C D. of the first part, and E F of the second part	1st January, 1856
Indenture of Lease from A B to C D . . .	1st February, 1856
Indenture of Release between A B, &c., of the first part, C. D, &c, of the second part, &c .. ,	2d February, 1856
Letter, defendant to plaintiff	3d February, 1856
Policy of Insurance on —— , ...	1st January, 1856
Memorandum of Agreement between C D & E F	2d January, 1856
Bill of Exchange for £100, at three months, drawn by A B., on and accepted by C D, endorsed by E. F. and G. H	3d January, 1856.

COPIES

Description of Documents.	*Date*	*Original or duplicate served, sent, or delivered, when, how, and by whom.*
Register of Baptism of A. B., in the Parish of ——	1st January, 1808.	
Letter, plaintiff to defendant..	1st February, 1838.	Sent by post, 2d February, 1838
Notice to produce papers	1st March, 1856.	Served 2d March, 1856, on defendant's attorney, by E. F of ——.
Record of Judgment of the Court of Queen's Bench, in an action J S. *v.* J. N.	Trinity Term, 15 Victoria.	
Letters Patent of King George the Third	1st January, 1800.	

E. R. 30. Fin. 526.

30. In all cases of trials, assessments or inquisitions of any kind, either party may call upon the other party by notice, to admit documents in the manner provided by and subject to the provisions of the Common Law Procedure Act, 1856, and, in case of the refusal or neglect to admit after such notice given, the costs of proving the documents shall be paid by the party so neglecting or refusing, whatever the result of the trial may be, unless, at the trial

assessment or inquisition, the judge or presiding officer shall certify that the refusal to admit was reasonable, and no costs of proving any document shall be allowed, unless such notice be given, except in cases where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

31. No subpœna for the production of an original record, or of an original memorial from any registry office shall be issued, unless a rule of Court, or the order of a judge shall be produced to the officer issuing the same, and filed with him, and unless the writ shall be made conformable to the description of the document mentioned in such rule or order. E. R. 32. Fin. 526.

32. All depositions of witnesses taken under the order of a judge, rule of Court, or commision, shall be returned to, and filed in the office of the Clerk of the Crown and Pleas of the Court in which the action or proceeding is pending. E. R. 33. Fin. 526.

ISSUE BOOKS.

33. (*o*) The Common Law Procedure Act, 1856, having dispensed with the sealing and passing of the Nisi Prius Record, the practice in England as to

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(*o*) For the English Practice see Chit. Arch. Pr. 9th Ed p. 275 et seq. The issue contains an entry of all the pleadings in the order in which they are pleaded, with their dates, and concludes with an award for a jury to come and try the matters in issue; see forms, No. I., &c. It must be delivered before or at the time of giving the notice of trial, and at least such number of days previous to the assizes at which it is intended to try the cause, as it is necessary to give as notice of trial.—See post rule 36. It is irregular if it does not recite the writ of summons.—Emery v. Howard, 9 M. & W. 108; Cooze v. Neumegen, 9 M. & W. 290, or its date; Lycett v. Tenant, 4 Bing. N. C. 168. But this irregularity will be waived by defendant appearing at trial without objecting.—Emery v. Howard, supra. The proper course appears to be on discovering the error, either to return the issue within four days or else apply to set it aside.—Cooze v. Neumegen, supra.

making up and delivering paper books and Issue Books is to be followed in future

TRIAL.—TRIAL BY PROVISO.—ASSESSMENT—NOTICE OF TRIAL; &c.

E. R. 35. Fin. 526. 34. The expression "Short notice of trial," or "Short notice of assessment," shall in all cases be taken to mean four days' notice.

E. R. 38. Fin. 526. 35. On a replication or other pleading denying the existence of a record pleaded by the defendant, a rule for the defendant to produce the record shall not be necessary or used, and instead thereof a four days' notice shall be substituted, requiring the defendant to produce the record; otherwise judgment.

E. R. 40 Fin. 527. 36. In all cases where the plaintiff's pleading is in denial of the pleading of the defendant, without joining issue, the plaintiff's attorney may give notice of trial at the time of delivering his replication or other subsequent pleading, and in case issue shall afterwards be joined, such notice shall be available, but if issue be not joined on such replication or other subsequent pleading, and the plaintiff shall sign judgment for want thereof, and forthwith give notice of assessment of damages, such notice shall operate from the time that notice of trial was given as aforesaid, and in all cases where the defendant demurs to the plaintiff's declaration, replication, or other subsequent pleading, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of assessment on the back of the joinder in demurrer; and in case the defendant pleads a plea in bar or rejoinder, &c., to which the plaintiff demurs, the defendant's attorney, or the defendant, if he plead in person, shall be obliged to accept notice of assessment on the back of such demurrer.

E. R. 41. Fin. 527. 37. Notice of a trial at bar shall be given to the Clerk of the Crown and Pleas of the Court before giving notice of trial to the party.

38. No rule for a trial by proviso shall be necessary.

VIEW.

39. (*p*) Upon any application for a view, there shall be an affidavit stating the place at which the view is to be made, and the distance thereof from the Sheriff's office; and the party obtaining the order for the view, shall deposit with the Sheriff the sum of six pounds and five shillings in case of a common jury, and eight pounds and ten shillings in case of a special jury, if such distance do not exceed five miles; and seven pounds and fifteen shillings in case of a common jury, and ten pounds fifteen shillings in case of a special jury, if the distance be above five miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the party who obtained the view, or his attorney and if such sum shall not be sufficient to pay such expenses, the deficiency shall forthwith be paid by such party or his attorney to the Sheriff; and the Sheriff shall pay and account for the money so deposited according to the scale following, that is to say:

See 13 & 14 Vic. c. 55 s. 50. et seq. E. R. 49. Fin. 523.

For travelling expenses to the Sheriff, Shewers, and Jurymen—expenses actually paid, if reasonable.

	£	s.	d.
Fee to the Sheriff, when the distance does not exceed five miles from his office.....	0	10	0
Where such distance exceeds five miles.....	0	15	0
In case he shall be necessarily absent more than one day—then for each day after the first, a further fee of.....	0	15	0
Fee to each of the Shewers—the same as to the Sheriff, calculating &c.			
Fee to each common juryman, per diem.....	0	5	0

(*p*) An action for work and labour is not a case in which a side bar rule for a view ought to be granted.—Semble That such a rule, omitting the names of the shewers, and the time and place of meeting is irregular. "The necessity of a view seems to me to apply chiefly to actions of a local nature, such as Trespass q. c. f., nuisance, and the like."—Per Parke. B., Stones v. Menhem, 2 Exch. 382.

Fee to each special juryman, per diem..	0	10	0
Allowance for refreshment to the Sheriff, shewers, and jurymen, common or special, each, per diem.....	0	5	0
To the Sheriff for summoning each juryman, whose residence is not more than five miles distant from the Sheriff's office	0	2	0
And for each whose residence exceeds five miles from Sheriff's office.....	0	3	0

NEW TRIALS.—MOTIONS IN ARREST OF JUDGMENT.—JUDGMENT NON OBST. VER°.

E. R 50 Fin 529.

40. (*q*) No motion for a new trial or to enter verdict or non-suit—motion in arrest of judgment, or for judgment *non obstante veredicto*, shall be allowed, after the expiration of four days from the day of trial, nor in any case after the expiration of the term, if the cause be tried in term; or when the cause is tried out of term after the expiration of the first four days of the ensuing term, unless in either case, entered in a list of postponed motions, by leave of the Court.

E R. 51. Fin 529.

41. No suitor who appears in person, shall be at liberty to set down any motion in such list of postponed motions, without the express leave of the court.

E R. 52 Fin. 529

42. No affidavit shall be used in support of a motion for a new trial in any case, unless such affidavit shall have been made within the time limited for the making of such motion, without the special permission of the court for that purpose.

E. R [illegible] Fin 529

43. If such motion as above mentioned, be entered in such list of postponed motions the attorney, who has instructed counsel to make the motion, shall give notice of it to the attorney of the opposite party, otherwise, judgment signed on behalf of the opposite party shall be deemed regular, and every suitor who appears in person shall give a similar notice.

(*q*) The rule *nisi* may be amended when cause is shewn See Drayson v. Andrews, 10 Exch 472

44. If a new trial be granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed in the second. E. R. 54. Fin. 529.

45. No rule granting a new trial to a party, on condition of payment of costs, or other condition, shall be discharged, on account of default in performing such condition by a rule absolute in the first instance; but a rule for such discharge shall issue, which shall make itself absolute, unless cause be shewn on or before the day mentioned for that purpose in the rule, and which shall in no case be earlier than the fourth day inclusive, after service thereof. 29 H. T. 13 Vic.

JUDGMENT.

46. No rule for judgment shall be necessary.

47. All judgments, whether interlocutory or final, shall be entered of record of the day of the month and year, whether in term or vacation, when signed, and shall not have relation to any other day; but it shall be competent for the court or a Judge to order a judgment to be entered *nunc pro tunc.* (*r*) E. R. 56. Fin. 529.

COSTS: SETTING OFF DAMAGES OR COSTS.

48. One day's notice of taxing costs, together with a copy of the bill of costs and affidavit of increase, if any, shall be given by the attorney of the party, whose costs are to be taxed to the other party or his attorney in all cases where a notice to tax is necessary. E. R. 59. Fin. 530.

49. One appointment only shall be deemed necessary for proceeding in the taxation of costs or of an attorney's bill. E. R. 60. Fin. 530.

50. Notice of taxing costs shall not be necessary E. R. 61. Fin. 530.

(*r*) It is only where delay in signing judgment has arisen from the act of the court, that judgment can be entered *nunc pro tunc*, two terms having elapsed since the verdict. —Freeman v. Tranah, 12 C. B. 406.

in any case where the defendant has not appeared in person, or by his attorney or guardian.

E R 2. Fin 550. 51. (s) When issues in law or fact are raised, the costs of the several issues both in law and fact will follow the finding or judgment, and if the party entitled to the general costs of the cause obtain a verdict on any material issue, he will also be entitled to the general costs of the trial; but if no material issue in fact be found for the party otherwise entitled to the general costs of the cause, the costs of the trial shall be allowed to the opposite party.

E R 63. Fin 550 52. No set off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit awarded to the adverse party may be deducted.

43 H T, 3 Vic 53 No privilege shall hereafter be allowed to any person to exempt him as plaintiff from the operation of any statute or rule of court which restrains costs on any causes of action of the proper competence of the county court.

EXECUTION.

54. No writ of execution shall issue until the proceedings to the end of the judgment are duly en-

(s) The plaintiffs brought an action against M alone, to recover a sum exceeding £600. M. pleaded in abatement the non-joinder of B and G., and the plaintiffs amended by adding the names of B. and G. The three defendants pleaded separately. M. as to £230 parcel, &c., payment into court, and as to the residue never indebted B and G. respectively to the whole demand, never indebted The verdict was found for M on his plea that no more than £230 was due, and against the other defendants that they were jointly liable with M to the amount of £212 7s. 9d Held that M. was entitled to the costs of his plea in abatement, and of the amendment, and also to the general costs of the cause. Held also that the plaintiffs were entitled to no costs as against B. and G —Cazneau v. Morrice, 2 Jur N. S 139

tered on the roll; nor shall any writ against lands issue until the judgment has been duly minuted and docketed.

55. A *præcipe* for every writ of execution shall be filed with the proper officer, and the endorsement upon every such writ, for debt or damages, shall be to the effect, and as nearly as the circumstances will allow in the form following:—"Levy (*or* take) the "sum of £ being the debt, (*or* damages) and "the sum of £ being the costs taxed in this "cause, with interest, (*according to the circum-*"*stances*); also the sum of £ for this writ, "(and former writs, *if any*, and Sheriff's fees "thereon,) together with your own fees, poundage, "and incidental expenses;" and shall also be endorsed with the name and place of abode, or office of business of the attorney actually suing out the same; and when the attorney actually suing out the writ, shall sue out the same, as agent for any attorney in the country, the name and place of abode of such attorney in the country, shall also be endorsed upon the said writ, and in case no attorney shall be employed to issue the writ, then it shall be endorsed with a memorandum, expressing that the same has been sued out by the plaintiff or defendant in person, as the case may be, mentioning the city, town, incorporated or other village, or township, within which such plaintiff or defendant resides.

56. Every writ of execution shall be tested in the name of the Chief Justice of the Court from which the same shall issue, or in case of a vacancy of such office, then in the name of the senior puisne judge of the said court. Vide C. L. P Act, 1856, s 21.

PROCEEDINGS AGAINST GARNISHEE.

57. All writs, rules, orders, or other proceedings against a Garnishee, shall be issued, taken, and had in the Court in which the judgment was rendered

in favor of the party applying to attach the debt due to his judgment debtor.

58 The entries of the proceedings against a Garnishee, in the debt attachment book, shall be made according to the form hereafter given

REVIVOR AND SCIRE FACIAS.

E R 78. Fin. 532. 59. A plaintiff shall not be allowed a rule to quash his own writ of *scire facias* or revivor, after a defendant has appeared, except on payment of costs.

6 H T 10 Vic 60. A *scire facias* upon a recognizance taken before a judge or a commissioner in the country, and recorded at Toronto, shall be brought in the County of York only, and the form of the recognizance shall not express where it was taken.

6 H T. 10 Vic. 61. (*t*) No judgment shall be signed for non-appearance to a *scire facias*, without leave of the court or a judge, unless defendant has been sum-

(*t*) An affidavit in support of a rule absolute for judgment on a *scire facias*, at the suit of executors, must show that probate has been granted to them —Vogel et al Exrs v. Thompson, 1 Exch. 60. Where a defendant resided abroad at Boulogne, the court granted leave to sign judgment against him on *sci fa*, on an affidavit of service of notice of the writ upon him in that place —Stockport v. Hawkins, 1 D. & L 204. Where a notice of *sci fa* was left with a person who represented herself to be defendant's housekeeper, and who stated the defendant was somewhere in London, and that she could not account for his absence, except that he was avoiding legal process, the court granted a rule to sign judgment for non-appearance.—Dixon v. Thorold, 8 M. & W. 297. The affidavit of the existence of the debt, on which to ground a motion for a *sci fa* to revive a judgment, ought either to be made by the plaintiff himself, or by the person who was his attorney at the time of the judgment.—Duke of Norfolk v. Leicester, 1 M. & W. 204. Where a defendant has been absent from the country for years, the proper course is to take out a rule to shew cause; notice of the rule to be stuck up in the office (Crown office), and to be served on defendant's tenants.—Macdonald v. McLaren, 11 M. & W. 465.

moned, but such judgment may be signed by leave after eight days from the return of one *scire facias*.

62. A notice in writing to the plaintiff, his attorney or agent, shall be sufficient appearance by the bail or defendant on a *scire facias*. 6 H. T. 10 Vic.

63. In all suits, actions, or proceedings, by *scire facias*, information or otherwise, by or at the suit of, or in the name of the Queen, or of the Attorney or Solicitor General for the time being, commenced or taken to enforce, or protect any of the civil rights of the Crown, or concerning any matter or thing affecting such rights, or for any penalties or forfeitures under any Custom's Act, or other act of Parliament in force in this Province—rules to appear, plead, rejoin, join in demurrer, &c., may be had and issued on filing a *præcipe* either in term or vacation, and all such rules, excepting rules to appear, shall be eight day rules, and the party or parties named in any such rules shall be bound to appear, plead, rejoin, join in demurrer, &c., within the time mentioned in such rules respectively, but the Court or a Judge may extend the time mentioned in any such rules in their or his discretion; Provided that nothing in this rule shall affect or restrict any right, privilege, or prerogative now enjoyed or possessed by the Crown. 53 H. T. 13 Vic.

ENTRY OF SATISFACTION ON ROLL.

64. In order to acknowledge satisfaction of a judgment, it shall be requisite only to produce a satisfaction piece in form as hereinafter mentioned, and such satisfaction piece shall be signed by the party or parties acknowledging the same or their personal representatives, and their signatures shall be witnessed by some practising attorney, expressly named by him or them, and attending at his or their request to inform him or them of the nature and effect of such satisfaction piece before the same is signed; which attorney shall declare himself in the attestation thereto to be E. R. 80; Fin. 53.

the attorney for the person or persons so signing the same, and state he is witness as such attorney (provided that a Judge at chambers may make an order dispensing with such signature under special circumstances, if he think fit); and in cases where the satisfaction piece is signed by the personal representative of a party deceased, his representative character shall be proved by the production of the probate of the will, or of the letters of administration, to the officer in custody of the judgment roll.

Form of Satisfaction Piece.

In the
day the day of A.D. 185
to wit. Satisfaction is acknowledged between plaintiff and defendant, in an action for £ and costs. And do hereby expressly nominate and appoint attorney at law to witness and attest execution of this acknowledgment of satisfaction.

Judgment entered on the day of in the year of our Lord 185 .

Roll No.

Signed by the said in the presence of me of one of the attorneys of the Court of . And I hereby declare myself to be attorney for and on behalf of the said expressly named by and attending at request to inform of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by). And I also declare that I subscribe my name hereto as such attorney.	(Signature) the above named plaintiff. Date.

65. Every satisfaction must be entered in the principal office of the proper court at Toronto, and

every deputy clerk of the Crown shall transmit the judgment roll and papers belonging thereto for that purpose, upon the satisfaction piece being exhibited to him, unless such roll shall have been previously transmitted under the direction of the Common Law Procedure Act, 1856, section fifteen.

BAILABLE PROCEEDINGS AND BAIL.

66. Where the defendant is described in the writ of capias or affidavit to hold to bail (*a*) by initials, or by wrong name, or without a Christian name, the defendant shall not for that cause be discharged out of Custody, or the bail bond be delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that due diligence has been used to obtain knowledge of the proper name. E. R. 82. Fin. 534.

67. An action may be brought upon a bail bond by the Sheriff himself in either court. E. R. 83. Fin. 534.

68. In all cases where the bail bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it. E. R. 84. Fin. 534.

69. Proceedings on the bail bond may be stayed on payment of costs in one action, unless sufficient reason be shewn for proceeding in more. E. R. 85. Fin. 534.

70. When bail to the sheriff becomes bail to the action, the plaintiff may except to them though he has taken an assignment of the bail bond. E. R. 86. Fin. 534.

71. A plaintiff shall not be at liberty to proceed

(*a*) Where an affidavit of debt was sworn in Ireland, before a Commissioner of Common Pleas and Exchequer—Held that the title of the Court need not be prefixed to the affidavit when sworn, but that the affidavit might be taken before such commissioner, to be afterwards entitled and used in either court. Perse vs. Browning, 1 M. & W. 362. vide Hollis vs. Brandon, 1 B. & P. 36. If affidavit is sworn after the issuing of the writ, it must be entitled in the cause otherwise it is irregular.—Schletter vs. Cohen, 7 M. & W. 389.

E R 87 Fin 534

on the bail bond pending a rule to bring in the body of the defendant

E R 88 Fin. 534

72. No rule shall be drawn up for setting aside an attachment regularly obtained against a sheriff for not bringing in the body, or for staying proceedings regularly commenced on the assignment of any bail bond, unless the application for such rule shall, if made on the part of the original defendant, be grounded on an affidavit of merits, or if made on the part of the sheriff, bail, or any officer of the sheriff, be grounded on an affidavit shewing that such application is really and truly made on the part of the sheriff, or bail, or officer of the sheriff, as the case may be, at his or their own expense, and for his or their indemnity only, and without collusion with the original defendant.

E R. 89 Fin 534.

73. Whenever a plaintiff shall rule, (*b*) the sheriff on a return of *capi corpus* to bring in the body, the defendant shall be at liberty to put in and perfect special bail at any time before the expiration of such rule.

74. (*c*) In case a rule for returning a writ of capias, shall expire in vacation, and the Sheriff or other

(*b*) The Sheriff may be ruled immediately after the execution of the writ.—Hodgson v Mee, 5 N. & M. 302; but not where the plaintiff has taken an assignment of the bail bond.—2 Saund. 60 b., provided it be a valid one, or where he accepts a cognovit or other security from the defendant, without the privity of the Sheriff.—R. v. Sheriff of Surrey in Brewer v. Clarke, 1 Taunt 159, Chit. Arch. Pr. 9th Ed., 750

(*c*) Care should be taken that there be no unnecessary delay in obtaining this rule. Where a writ of latitat was returned in Hilary Term, and the rule to bring in the body not taken out until Michaelmas following, the Court set aside an attachment for not obeying it.—Rex. v. Sheriff of Surrey, 7 T. R. 452; Peacock v. Leigh, 1 Taunt. iii.; R. v. Sheriff of Middlesex, 1 Dowl. 55. It may be obtained even on the day the Sheriff returns the writ, provided the time for putting in bail has then expired.—R v Sheriff of

officer having the return of such writ, shall return *cepi corpus* thereon, a rule may thereupon issue requiring the Sheriff or other officer within the like number of days after the service of such rule, as by the practice of the court, is prescribed with respect to rules to bring in the body, issued in term, to bring the defendant into court, by forthwith putting in and perfecting bail above to the action, and if the Sheriff or other officer shall not duly obey such rule, an attachment shall issue in the following term, for disobedience of such rule, whether bail shall or shall not have been put in and perfected in the meantime. E. R. 90. Fin. 534.

75. Notice of more bail than two shall be deemed irregular, unless by order of the Court or of a judge. E. R. 91. Fin. 535.

76. The bail of whom notice shall be given, shall not be changed without leave of the court or a judge. E. R. 92. Fin. 535.

77. No person or persons shall be permitted to justify himself or themselves as good and sufficient bail for any defendant or defendants, if such person or persons shall have been indemnified for so doing by the attorney or attorneys concerned for any such defendant or defendants. E. R. 93. Fin. 535

78. No attorney shall take any recognizance of bail in a case in which he is employed as attorney or agent for either party. T. T. 1 & 2 W. IV.

79. If any person put in as bail to the action, except for the purpose of rendering only, be a practising attorney, or clerk to a practising attorney or sheriff's officer, bailiff, or person concerned in the execution of process, the plaintiff may treat the bail as a nullity, and sue upon the bail bond as soon as the time for putting in bail has expired, unless good bail be duly put in, in the meantime. E. R. 94. Fin. 535.

Middlesex, in Pouchee v. Lieven, 4 M. & Sel. 427. See Hutchins v. Hird, 5 T. R. 479. But it seems not before that time.—Potter v. Marsden, 8 East. 525. Vide also Chitty's Arch. Pr. 9th Ed., 751.

T. T. 3 & 4 W. IV.

80. When bail which has been put in, in the country, is to be justified in court, the bail piece, with the affidavit of the due taking thereof, and the affidavit of justification, shall be transmitted by the deputy clerk of the Crown for the county in which they have been filed to the principal office in Toronto, to be filed and produced in court, upon the motion for allowance, on proper notice being given to such deputy clerk to transmit the same.

E. R. 98. Fin. 535.

81. If the notice of bail shall be accompanied by an affidavit of each of the bail, (*d*) according to the following form, and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification, and if such bail are rejected, the defendant shall pay the costs of opposition, unless the court or a judge thereof shall otherwise order.

FORM OF AFFIDAVIT OF JUSTIFICATION OF BAIL.

In the————

Between A. B., Plaintiff,
and C. D., defendant.

B. B., one of the bail for the above named defendant, maketh oath and saith, that he is a house-

(*d*) The affidavit of justification cannot be sworn before the defendant's attorney.—Koyle v. Wilcox, 2 O. S. 113. Bail will be allowed to justify by the affidavit made at the time of the acknowledgment, though an exception to them be entered, when nothing is shown to repel such affidavit.—Duggan v. Derrick, H. T. 6 W. IV. The court will not grant leave to enter an exoneretur when bail have surrendered their principal, without a certificate from the Sheriff to whom he was rendered.—Linley v. Cheeseman, Dra. Rep. 55; *Semble*, That bail are not bound by what the attorney for their principal may choose to do as the attorney for the principal.—Mitchell v. Noble, 1 U. C. Cham. Rep. 284. On an application to set aside a *ca. sa.* in the original action or proceedings against bail, the affidavits are rightly entitled in the action against the bail.—Beattie v. Mackay, et al, 2 U. C. Cham. Rep. 56. See also Rule 84, as to what amount must be sworn to.

keeper, (*or* freeholder, *as the case may be*,) residing at (*give particular description of the place of residence*,) that he is worth property to the amount of £ (*double the amount sworn to*) over and above what will pay all his just debts, (*if bail in any other action add*, and every other sum for which he is now bail,) that he is not bail for any defendant, except in this action, (*or if bail in any other action or actions, add*, except for C. D., at the suit of E. F., in the Court of in the sum of £ , for G. H., at the suit of J. K., in the Court of in the sum of £ , *specifying the several actions with the Courts in which they are brought, and the sums in which the deponent is bail.*) Sworn, (&c., as usual.)

82. If the plaintiff shall not give one day's notice of exception to the bail by whom such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit. E. R. 99. Fin. 536.

83. Where notice of bail shall not be accompanied by such affidavit, the plaintiff may except thereto within twenty days next after the putting in of such bail, and notice thereof given in writing to the plaintiff or his attorney, or where special bail is put in before any commissioner, the plaintiff may except thereto within twenty days next after the bail piece is filed in the proper office, and notice thereof given as aforesaid, and no exception to bail shall be admitted after the time hereinbefore limited. E. R. 100. Fin. 536.

84. Affidavits of justification shall be deemed insufficient, unless they state that each person justifying is worth double the amount sworn to over and above what will pay his just debts, and over and above every other sum for which he is then bail, except when the sum sworn to exceeds one thousand pounds, when it shall be sufficient for the bail to justify in £1000 beyond the sum sworn to. E. R. 101. Fin. 536.

85. It shall be sufficient in all cases if notice of

E. R. 102. Fin. 536. justification of bail be given two days before the time of justification.

E. R. 103. Fin 535. 86. In all cases, bail to the action shall be justified, when required within four days after exception, before a judge at chambers, both in term and vacation.

E. R. 104. Fin. 537. 87. Bail, though rejected, shall be allowed to render the principal without entering into a fresh recognizance.

E. R. 108. Fin. 537. 88. When the plaintiff proceeds by action on the recognizance of bail, the bail shall be at liberty to render their principal at any time within the space of eight days next after the service of the process upon them, but not at any later period, and upon notice thereof given, the proceedings shall be stayed upon payment of the costs of the writ and service thereof only.

E. R. 109. Fin. 537. 89. Bail shall only be liable to the sum sworn to by the affidavit of debt and the costs of suit, not exceeding in the whole, the amount of their recognizance.

E. R. 110. Fin. 537. 90. To entitle bail to a stay of proceedings, pending a writ of error or appeal, the application must be made before the time to surrender is out.

E. R. 111. Fin. 537. 91. Whenever two or more notices of justification of bail shall have been given before the notice on which bail shall appear to justify, no bail shall be permitted to justify without first paying (or securing to the satisfaction of the plaintiff, his attorney, or agent) the reasonable costs incurred by such prior notices, although the names of the parties intended to justify, or some of them, may not have been changed, and whether the bail mentioned in any such prior notice shall not have appeared, or shall have been rejected.

EJECTMENT.

92. (*e*) No judgment in ejectment for want of appearance or defence, whether limited or otherwise, shall be signed without first filing an affidavit of the service of the writ, according to the Common Law Procedure Act 1856, together with the writ or a copy thereof, where there is a limited defence, or where personal service has not been effected, without first obtaining a Judge's order, or a rule of court authorizing the signing such judgment, which said rule or order, or a duplicate thereof, shall be filed together with the writ. E. R. 112. Fin. 538.

93. (*f*) Where a person not named in the writ in

(*e*) Quære whether the affidavit required by rule 88 of service of writ of ejectment under the 170th sec. of 15 & 16 Vic. c. 76, Imp. Act (C. L. P. Act, 1856, sec. 223 et seq.) should show, as under the old practice, that the nature and object of the service were explained to the party served. At all events, an irregularity in that respect is waived by subsequent attornment.—Edwards v. Griffith, 15 C. B. 397. As to service of papers where premises are abandoned, see Doe d. Laundy v. Roe, 12 C. B. 451.

(*f*) In ejectment under Imp. Act, 15 & 16 Vic. c. 76, a landlord on complying with the requisites of 172d sec. (C. L. P. Act, 1856, s. 225) is entitled, as a matter of right, to be let in to defend, and the court or a Judge has no power in the case of a landlord residing out of the jurisdiction, to impose upon him the condition of finding security for costs.—Butler v. Meredith, 11 Exch. 85. In ejectment, on an application to be allowed to appear and defend, it is enough if the affidavit shows a *prima facie* case of possession by the applicant or his tenant.—Croft v. Lumley, 4 El. & Bl. 608. Therefore the owner of a box in an opera house, which had been demised by deed to defendant for a term of years, with free ingress, &c., during performance, was admitted to defend. —Ib. But when the applicant was a tenant by *elegit* who had recovered the premises in ejectment against the defendant, but had not been put into actual possession, the court refused to allow him to appear and defend.—Ib. Plaintiff and defendant in ejectment are placed in the same position as parties to other suits are, and therefore a judgment by default may be pleaded as an estoppel.—Wilkinson v. Kirby, 1 Jur. N. S. 166, per Crowder J.

E. R. 113 Fin. 538. ejectment has obtained leave of the court or a Judge to appear and defend, he shall enter an appearance according to the Common Law Procedure Act, 1856, entitled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's attorney, or to the plaintiff, if he sues in person.

E. R. 114 Fin. 538. 94. If the plaintiff in ejectment appears at the trial, and the defendant does not appear, the defendant shall be taken to have admitted the plaintiff's title, and the verdict shall be entered for the plaintiff without producing any evidence, and the plaintiff shall have judgment for his costs of suit as in other cases.

PENAL ACTIONS, COMPOUNDING OF.

E. R. 118. Fin. 538. 95. Leave to compound a penal action shall not be given in cases where part of the penalty goes to the Crown, unless notice shall have been given to the proper officer, (*g*) but in other cases it may.

E. R. 119. Fin. 539 96. The rule for compounding any *qui tam* action shall express therein that the defendant thereby undertakes to pay the sum for which the court has given him leave to compound such action. (*h*)

F.R. 120 Fin. 538. 97. When leave is given to compound a penal action, the Queen's proportion of the composition shall be paid into the hands of the Clerk of the Crown of the Court granting such leave, for the use of Her Majesty. (*i*)

(*g*) Where the Crown is concerned, the consent of the Attorney General must be procured.—Howard v. Sowerby, 1 Taunt. 101. Leave is not necessary in actions by the party grieved.—Kirkham v. Wheeley, 1 Salk 30. It is entirely in the discretion of the Court to grant it or not.—Maughan v. Walker, 5 T. R. 98; Sheldon v. Mumford, 5 Taunt. 268.

(*h*) The payment of such sum may be enforced by attachment.—R. v. Clifton, 5 T. R. 257.

(*i*) Brown v. Bailey, 4 Burr. 1929.

PRISONERS AND PROCEEDINGS AGAINST THEM.

98. Every rule or order of a Judge directing the discharge of a defendant out of custody, upon special bail being put in and perfected, shall also direct a *supersedeas* to issue forthwith. E. R. 123. Fin 539.

99. The plaintiff shall proceed to trial or final judgment against a prisoner in the term next after issue is joined, or at the sittings or assizes next after such term, unless the court or a Judge shall otherwise order, and shall cause the defendant to be charged in execution within the term next after such trial or judgment. E. R. 124. Fin. 539.

100. In all cases in which a defendant shall have been or shall be detained in prison on any writ of *capias*, or being arrested thereon, shall go to prison for want of bail, and in all cases in which he shall have been or shall be rendered to prison before declaration on any such process, the plaintiff in such process shall declare against such defendant before the end of the next term after such arrest or detainer, or render and notice thereof, otherwise such defendant shall be entitled to be discharged from such arrest or detainer, upon entering a common appearance, unless further time to declare shall have been given to such plaintiff by rule of court or order of a Judge. (*j*)

SHERIFFS, RULES TO RETURN WRITS, &c.

101. All rules upon sheriffs to return writs, or to bring in the bodies of defendants, shall be six day rules, and shall be issued from the same office whence the writ was sued out.

102. No Judge's order shall issue for the return of any writ or to bring in the body of the defendant, but a side bar rule shall issue for that purpose in va- E. R. 132. Fin. 540.

(*j*) This is rule number 3 Easter Term 3 & 4 Vic., referred to in the C. L. P. Act, 1856, section 22.

cation as in term, which shall be of the same force and effect as side bar rules made for that purpose in term.

103. The sheriff shall file the writ in the office from which the rule to return the same was issued, at the expiration of the rule, or as soon after as the office shall be open, and the officer with whom it is filed shall endorse the day and hour when it was filed.

104. In case a rule to bring in the body of a defendant shall expire in vacation, having been duly served, but not having been obeyed, an attachment shall issue for disobedience of such rule, whether the rule shall or shall not have been obeyed in the mean time.

105 Where any sheriff, before his going out of office, shall arrest any defendant and take a bail bond and make return of *capi corpus*, he shall and may, within the time allowed by law, be called upon to bring in the body by a rule for that purpose, notwithstanding he may be out of office before such rule shall be granted.

IRREGULARITY.

E R 135. Fin 541.

106. No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity. (*k*)

E R 136 Fin 541.

107. Where a summons is obtained to set aside proceedings for irregularity, the several objections intended to be insisted on shall be stated therein.

E R 137 Fin 541.

108. In all cases where a rule is obtained to show cause why proceedings should not be set aside for irregularity with costs, and such rule is afterwards

(*k*) Vide Edwards v. Griffiths, 3 C. L. Rep 1. Hutton v. Whitehouse, 2 Jur N.S 379, as to setting aside a Judge's order for leave to a plaintiff to proceed in an action against a British subject resident abroad, under sec. 35 of C. L. P. Act, 1856.

discharged generally without any special directions discharged matter of costs, it is to be understood as upon the with costs.

AFFIDAVITS.

109. The addition and true place of abode of every person making an affidavit shall be inserted therein. E R 138. Fin 541.

110. In every affidavit made by two or more deponents, the names of the several persons making such affidavit shall be written in the jurat. E R 139 Fin 541

111. No affidavit shall be read or made use of in any matter depending in court, in the jurat of which there shall be any interlineation or erasure. E R 140. Fin 541

112. Every affidavit, sworn within this Province, to be hereafter used in any cause or civil proceeding, shall be written in a plain legible hand, and shall be drawn up in the first person, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any affidavit or part of an affidavit substantially violating this rule; nor shall any affidavit violating this rule be used on any motion to obtain or to show cause against a rule *nisi*, without the express permission of the Court. *This rule is not to be in force till Michaelmas Term next.* E R 1 Fin. 541.

113. When any affidavit is sworn before any Judge or any commissioner by a person who from his or her signature appears to be illiterate, it shall be certified in the jurat that the affidavit was read in the presence of the party administering the same to the party making the same, and that such last mentioned party seemed perfectly to understand the same, and also wrote or made his or her signature or mark in the presence of the party administering the oath. E. R 141. Fin 541.

114. No affidavit shall be read or made use of for any purpose, if sworn before the attorney of the party in the cause on whose behalf such affidavit is made,

or before the clerk or partner of such attorney; but this rule shall not extend to affidavits to hold to bail.

E. R. 144 Fin. 541.

115. An affidavit sworn before a Judge of either of the courts shall be received in the court to which such Judge belongs, though not entitled of that court, but not in any other court, unless entitled of the court in which it is to be used.

E. R. 145. Fin. 541.

116. Where a special time is limited for filing affidavits, no affidavit filed after that time shall be made use of in court or before the Master, unless by leave of the court or a Judge.

E. R. 146 Fin. 542.

117. No rule, which the court has granted upon the foundation of any affidavit, shall be of any force unless such affidavit shall have been actually made before such rule was moved for and produced in court at the time of making the motion.

118. In all cases in which a defendant appears in person, and an application is made to the Judge of the proper county court for any summons under the authority of the Common Law Procedure Act, 1856, which ought to be served on the defendant, the affidavit on which the plaintiff grounds his application shall, among other things, state that the defendant resides at some place within the jurisdiction of such county court.

RULES, SUMMONSES AND ORDERS.

E. R. 149. Fin. 542.

119. Every rule of Court shall be dated the day of the month and year on which the same is drawn up, and need not specify any other time or date.

120. All rules which by the English practice may be had as a matter of course upon signature of counsel at side bar, or are given by the Master, Clerk of the Papers or Clerk of the Rules in England, are to be given by the Clerks of the Crown and Pleas, or their deputies, in the same manner, and the same may issue on any day in term or in vacation.

121. A rule may be enlarged if the Court think fit, without notice. E. R. 151. Fin. 542.

122. All enlarged rules shall be drawn up for the first day in the ensuing term, unless otherwise ordered by the court. (*l*) E. R. 152. Fin. 542.

123. It shall not be necessary to issue more than one summons for attendance before a judge upon the same matter, and the party taking out such summons shall be entitled to an order on the return thereof, unless cause is shewn to the contrary. E. R. 153. Fin. 542.

124. An attendance on a summons or on an appointment before a master for half an hour next immediately following the return thereof, shall be deemed a sufficient attendance. E. R. 154. Fin. 542.

125. All written consents upon which orders for signing judgments are obtained shall be filed and preserved by the clerk of the judge's chambers (*m*) E. R. 155. Fin. 542.

126. In actions in which the defendant has appeared by attorney, no such order shall be made unless the consent of defendant be given by his attorney or agent. E. R. 156. Fin. 542.

127. Where the defendant has not appeared, or has appeared in person, no such order shall be made, unless the defendant attends the judge and gives his consent in person, or unless his written consent be F. R. 157. Fin. 542.

(*l*) It is not the practice of the Queen's Bench in England to serve an enlarged rule.—Anon. 1 Smith, 199.

(*m*) One partner has no implied authority to consent to an order for judgment in an action against himself and his co-partner.—Hambridge v. De la Crouèe, 3 C. B. 742. The order does not operate as a stay of proceedings during the time given by it for the payment of debt and costs, unless so expressly stated. Michael v. Myers, 6 M. & Gr. 702. If any fraud be practised on defendant in obtaining the order, it may be set aside with any proceedings had under it. Thorne v. Neale, 2 Q. B. 726. And under very special circumstances even without fraud. Wade v. Simeon, 13 M. & W. 647.

attested by an attorney acting on his behalf, unless the defendant is a barrister or attorney.

E. R. 158. Fin. 542. 128. Where a judge's order is made during vacation it shall not be made a rule of court before the next term, unless in any case otherwise provided for by statute.

E. R. 159. Fin. 543. 129. When a judge's order, or order of nisi prius is made a rule of court, it shall be a part of the rule that the costs of making the order a rule of court shall be paid by the party against whom the order is made, provided an affidavit be made and filed that the order has been served on the party, his attorney, or agent, and disobeyed.

E. R. 160 Fin. 543 130. Rules to shew cause shall be no stay of proceedings unless two days' notice of the motion shall have been served on the opposite party, except in the cases of rules for new trials, or to enter verdict or non-suit, motion in arrest of judgment or for judgment *non obstante veredicto*, or to set aside an award, or to enter a suggestion, or by the special direction of the court.

NOTICES—SERVICE OF, AND OF RULES, PLEADINGS, &c.

E. R. 161 Fin. 542. 131. All notices required by these rules or by the practice of the court shall be in writing.

132. (*n*) A copy of every declaration and subsequent pleading shall be served upon the opposite party, whether the case be bailable or not bailable, and whether the action be against any person having privilege or otherwise, and as well where the plaintiff has entered an appearance (*o*) for the defendant, as where the defendant has appeared in person or by attorney.

(*n*) This is rule No. 4 of Easter term, 5th Vic, referred to in C. L. P. Act, 1856, section 22.

(*o*) Under the C. L. P. Act this cannot be the case, though this is the language of the original rule.

133. Where the residence of a defendant is unknown, pleadings, rules, notices, and other proceedings may be stuck up in the proper office, but not without previous leave of the court or of a Judge. E. R. 162. Fin. 543.

134. It shall not be necessary to the regular service of a rule or order that the original rule or order shall be shown, unless sight thereof be demanded, except in cases of attachment. E. R. 163. Fin. 543.

135. Service of pleadings, notices, summonses, orders, rules, and other proceedings shall, after the first day of Michaelmas term next, be made before seven o'clock *p.m.*, except on Saturdays, when it shall be made before three o'clock *p.m.* If made after seven o'clock *p.m.* on any day except Saturdays, the service shall be deemed as made on the following day; and if made after three o'clock *p.m.* on Saturday, the service shall be deemed as made on the following Monday. E. R. 164. Fin. 543.

136. A book shall be kept by the clerk of the Crown of each of the courts in Toronto, at his office, to be there inspected by any attorney or his clerk without fee or reward; and every attorney practising in the said courts and residing within the city of Toronto or the liberties thereof, or having an office and carrying on his business within the said city, shall enter in such book (in alphabetical order) his name and place of business or some other proper place within the city where he may be served with pleadings, notices, summonses, orders, rules, and other proceedings; and as often as any such attorney shall change his place of business or the place where he may be so served as aforesaid, he shall make the like entry thereof in the said book; and all pleadings, notices, summonses, orders, rules, and other proceedings which do not require a personal service shall be deemed sufficiently served on such attorney, if a copy thereof shall be left at the place lastly entered in such book with any person resident at or belonging

to such place; and if any such attorney shall neglect to make such entry, the fixing up of any notice or of the copy of any pleadings, notice, summons, order, rule, or other proceedings for such attorney in the office aforesaid shall be deemed a sufficient service.

137. (*p*) Every other attorney practising in the said courts shall enter in the said book (in like alphabetical order) his name and place of business, and also in an opposite column the name of some attorney having an office and carrying on business in the city of Toronto as his agent; and all pleadings, notices, summonses, orders, rules and other proceedings which do not require a personal service, shall be deemed sufficiently served on such first mentioned attorney, if a copy thereof shall be served on his booked agent in manner mentioned in the next preceding rule. And if any such attorney shall neglect to make the entry in this rule mentioned, the fixing up of any notice or of the copy of any pleading, notice, summons, order, rule, or other proceeding for such attorney in the Crown office at Toronto, shall be deemed a sufficient service. And as often as any such attorney shall change his place of business or his agent, he shall make an entry in the said books of such change, which last entry shall supersede all former ones. Provided always that in all cases service on

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(*p*) See Com. Law Procedure Act, s. 9, which enacts that service of all papers and proceedings subsequent to the writ shall be made on the defendant or his attorney according to the existing practice in the absence of special provision in that Act, and that if the attorney of either party do not reside or have not a duly-authorized agent residing in the county wherein such action was commenced, service may be made on the attorney, or on his duly-authorized agent in Toronto; or if he have no such agent, by leaving a copy of the paper for him in the office where the action was commenced, *marked on the outside as copies left for such attorney.* See also Parke v. Anderson, 5 U.C. rep. Q. B. 2. Houghton v. May, 1 Prac. rep. U. C. 160. Taylor v. Carver, C. P. U. C., Easter term last.

the attorney at his office or usual place of business in the manner mentioned in the next preceding rule, instead of on the booked agent, shall be deemed good service.

138. In all cases where a party sues or defends in person, he shall upon issuing any writ of summons or other proceeding, or entering an appearance, leave a memorandum with the clerk or deputy clerk of the Crown, who shall file the same as a paper in the cause, stating an address or place in the county, within which the first process in the cause shall have been or shall be sued out, at which all pleadings, notices, summonses, orders, rules, or other proceedings not requiring personal service may be left: such address or place to be not more than two miles from such office; and if such memorandum shall not be left, or if such address or place be more than two miles from the office aforesaid, then the opposite party shall be at liberty to proceed by sticking up all pleadings, notices, summonses, orders, rules and other proceedings in such office. C. L. P. Act, 1856, s. 63.

139. In all cases where a plaintiff shall have sued out a writ in person or a defendant shall have appeared in person and either party shall by an attorney of the court have given notice in writing to the opposite party, or the attorney or agent of such party, of such attorney being authorized to act as attorney for the party on whose behalf such notice is given, all pleadings, notices, summonses, orders, rules and other proceedings, which according to the practice of the courts are to be delivered to or served upon the party on whose behalf such notice is given, shall thereafter be delivered to or served upon such attorney. E. R. 167. Fin. 544.

ATTACHMENT.

140. Rules for attachment shall be absolute in the first instance in the two following cases only: 1st, for non-payment of costs on a master's *allocatur;* E. R. 168. Fin. 544.

and 2nd, against a sheriff for not obeying a rule to return a writ or bring in the body.

AWARDS.

E. R 169. Fin. 544

141. Where a rule to shew cause is obtained to set aside an award, the several objections thereto intended to be insisted upon at the time of moving to make such rule absolute shall be stated in the rule to shew cause.

E R 170. Fin 544.

142. Costs may be taxed on an award although the time for moving to set aside the award has not elapsed.

INSOLVENT DEBTORS.

143. The affidavit on which a debtor in close custody in execution shall apply under the Common Law Procedure Act, 1856, section 300, for his discharge from custody, shall not be sworn sooner than the day after that on which the notice of application shall expire, and shall in all cases state whether any interrogatories were served before the expiration of the fifteen days' notice, and if so, whether answers thereto upon oath have been duly made and filed, and when notice thereof was given.

CLERKS AND DEPUTY-CLERKS OF THE CROWN.

E R 172 Fin 544.

144. On every appointment made by the clerks or deputy clerks of the Crown, the party on whom the same shall be served shall attend such appointment without waiting for a second, or in default thereof such clerk or deputy may proceed *ex parte* on the first appointment.

145. No business shall be transacted in any of the offices of the courts, either in procuring or suing out process, or in re-entering judgments or taking any proceeding whatever in a cause, unless upon the personal attendance of the party on whose behalf such business is required to be transacted, or of the counsel or attorney of such party, or the clerk or agent of the attorney, or the clerk of the agent.

146. The offices of the clerks of the Crown and Pleas shall be kept open as follows, that is to say: —during term from ten in the morning until four in the afternoon, and (except between the first day of July and the twenty-first day of August) at other times from ten in the morning until three in the afternoon—Sundays, Christmas-day, Good Friday, Easter Monday, New Year's-day, and the birth-day of the Sovereign, and any day appointed by general proclamation for a general fast or thanksgiving, excepted; and between the first day of July and the twenty-first day of August, the said offices shall be open from eleven in the forenoon until two in the afternoon.

147. All rolls and records shall be upon parchment or paper of such width and length as the clerks of the Crown shall prescribe by written notice, to be put up in some conspicuous place in their respective offices and in the offices of the several deputy clerks of the Crown, and none of these officers shall be bound to receive any roll or record not made up in conformity to such notice, and such rolls and records shall not exceed, when folded, fourteen inches in length and four in breadth, written upon at least a sheet of paper, and folded accordingly.

148. Whenever a deputy clerk of the Crown is required to transmit any roll, record or paper in any cause to the principal office in Toronto, he shall enclose and seal up the same in an envelope and shall address such envelope to the clerk of the Crown in the proper office, and he may thereupon deliver such sealed envelope to the attorney who has required the transmission thereof, (taking a receipt from him), or may send the same by post, and in no case shall any original papers be delivered out of the custody of the deputy clerk of the Crown, except for the purpose of being transmitted to Toronto, unless by order of the court or a judge.

149. In counties where the petit jurors are paid by the county or united counties, the marshal or clerk of assize, or person discharging his duties, shall previous to the entry of each record be entitled to demand and receive from the party entering the same the sum of seven shillings and six pence for each record marked "inferior jurisdiction," and the sum of fifteen shillings for every other record.

CLERK OF THE PROCESS.

150. The clerk of the process shall, on receiving a *præcipe* to be filed by him, issue any writ of summons required for the commencement of an action; and on receiving a *præcipe* with the affidavit of debt required by law, or a *præcipe* and affidavit with a Judge's order for the arrest of a party, to be also filed by him, shall issue any writ of *capias* for the commencement of an action; and on receiving a *præcipe*, affidavit and a Judge's order, to be also filed by him, shall issue any writ of attachment against an absconding debtor.

151. After issuing either of such writs for the commencement of an action in one of the superior courts, he shall issue the next writ, whatever it may be, for the commencement of an action in the other of such courts.

152. All other writs required by the Common Law Procedure Act, 1856, to be issued by the clerk of the process to the parties or their attorneys, shall be issued according to the established practice.

153. The clerk of the process shall attend in his office at all times, when the clerks of the Crown and Pleas are required to attend in their respective offices, and shall permit all necessary searches respecting writs so issued by him, and the affidavits and papers whereon such writs are grounded, and shall grant office copies of all such affidavits and papers on payment of the usual fees.

TAXATION OF COSTS AND DIRECTIONS TO TAXING OFFICERS.

154. The practice of the courts as to costs and the services to be allowed for in all proceedings in the taxation of costs, shall be governed, in all cases not otherwise provided for, by the established practice of the Court of Queen's Bench in England.

155. In any action of the proper competence of the county court in which final judgment shall be obtained without a trial, and in which the papers shall not be marked "inferior jurisdiction," no more than county court costs shall be taxed, without the special order of the court or a judge. See 13 & 14 Vic. c. 52.

156. In any action of the proper competence of the county court, in which the venue could not, according to the law and practice of the superior courts, be changed upon the usual affidavit only, it shall not be a sufficient ground to certify at the trial thereof that it is a fit cause to have been withdrawn from the county court, and commenced in either of the superior courts, or for either of those courts or for a judge in chambers to order the allowance of any other than county court costs, that the defendant or defendants, or any of them, had removed from the county in which the debt was contracted, or the cause of such suit or action accrued, into any other county or elsewhere out of such county, or that he or they resided or were served with process in any other place than within such county.

157. Fees shall in no case be taxed as between party and party to more than two counsel upon any trial or argument.

158. No counsel fee shall be taxed on any rule which may be obtained without filing a motion paper in court in term.

159. At the foot of, or accompanying every bill of costs, when the action is special and the disburse-

ments are large, and the fees paid to counsel exceed those which the taxing officer is permitted to tax, there shall be an affidavit of the attorney in the cause or the agent or clerk having had the management thereof, that the disbursements charged in such bill are correct and were actually paid, and that the several sums charged for mileage were actually paid (naming the party to whom payment was made), that the sum of £ with brief at trial or argument, or as the case may have been, was paid to Mr.——, and that the pleadings are special and were revised by Mr. ——.

C L P Act 1852, s. 311

160. In all cases an affidavit of payment of mileage, and to whom paid, is required.

161. When judgment is signed on a cognovit, or on a judge's order authorising the plaintiff to sign judgment, no declaration to ground judgment shall be necessary or allowed on the taxation of costs.

162. The costs of attendance by counsel before a judge in chambers shall in no case be allowed as between party and party, unless the judge shall certify for such allowance.

163. Any number of names may be included in one *Subpœna*, and no more than one shall be allowed on taxation of costs, unless a sufficient reason be established to the satisfaction of the taxing officer for the issuing more than one.

164. The same fees shall be taxed and allowed to coroner for services rendered by them in the execution and return in process in civil suits as would be allowed to a sheriff for the same services, and when, according to the nature of the process and the service rendered thereon, the sheriff, if he had discharged the same duty, would have been entitled to poundage, the same poundage shall be allowed to coroners, and each coroner shall be allowed one shilling for every juror necessarily summoned, and whose name is returned to the clerk of assize, in lieu of any other fee for summoning jurors.

165. All affidavits of increase must be made by the attorney in the cause or some clerk having the management thereof, or by the client. They must set forth the sums paid to counsel, naming them, and for what service, the names of witnesses, their places of abode, the places at which they were subpœnaed, and the distance which each such witness was necessarily obliged to travel, in order to attend the trial, that every such witness (*q*) was necessary and material for the client in the cause, that they did attend, and that they did not attend as witnesses in any other cause. (*or otherwise, as the case may be.*) The number of days which each witness was necessarily absent from home in order to attend such trial must also be accurately stated. If an attorney attends as a witness, it must be stated whether or not he attended at the place of trial as attorney or witness in any other cause, and whether or not he had any other business there. The day on which the trial occurred should be stated. If maps or plans were used at the trial, the necessity for them must be shewn in the affidavit, or no allowance will be made for them; the sum paid for them must also be set forth, and that they were prepared or procured with a view to the trial of the cause. The taxing officer is authorised in such case to make a reasonable allowance for maps and plans.

(*q*) Where a witness is rejected at nisi prius, and the ruling of the Judge is acquiesced in by the parties, and upheld by the court, the expenses of his attendance is not allowed on taxation as between party and party.—Galloway v. Keyworth, 15 C. B. 228. So, where a witness is rejected by an arbitrator, whether upon a sufficient or an insufficient ground.—Ib. When a cause at the assizes is over at three o'clock in the afternoon, witnesses may reasonably be allowed the following day for their return home, though their place of residence be distant only about fifty miles, and accessible by trains on the same evening.—Fryer v. Sturt, 16 C. B. 218. It is not a general rule that parties, if witnesses, are to have an allowance for their attendance.—Dowdell v. Australian Royal Mail Steam Navigation Co., 3 El. & Bl. 902.

MISCELLANEOUS.

E R 174
Fin 545

166 In all cases in which any particular number of days, not expressed to be clear days, is prescribed by the rules of practice of the courts, the same shall be reckoned inclusively of the first and last day, unless the last day shall happen to fall on any day on which the Crown offices are not required to be open, in which case the time shall be reckoned exclusively of the last day. (*r*)

167. Wherever the word folio is used in any rule or order, it shall be deemed to mean one hundred words.

168. In all cases unprovided for by statute or rule of court, the practice as it existed in these courts before the passing of the Common Law Procedure Act, 1856, shall be followed.

FORMS OF PROCEEDINGS.

169. The forms of proceedings contained in the schedule annexed, marked A, may be used in the cases to which they are applicable, with such alterations as the nature of the action, the description of the court, the character of the parties, or the circumstances of the case may render necessary; but any variance therefrom, not being in matter of substance, shall not affect their regularity.

170. From and after the last day of this term, the tables of costs in civil actions in the courts of Queen's Bench and Common Pleas shall be rescinded, and the costs set down in the schedule annexed, marked B, shall be those allowed in taxation.

(*r*) This rule does not apply to the computation of days, under the Common Law Procedure Act, 1856, for signing judgment for non-appearance to writs specially endorsed. —Rowberry v. Morgan, 18 Jur. 452.

RULES ORDERS AND REGULATIONS

AS TO

PLEADING AND PRACTICE,

MADE BY THE JUDGES,

IN PURSUANCE OF THE

COMMON LAW PROCEDURE ACT,

1856.

RULES OF PLEADING.

TRINITY TERM, 20 VICTORIA.

WHEREAS, under the authority of the Statute of Upper Canada, 7 William 4th, chapter 3, the Judges of the Court of Queen's Bench in Upper Canada made certain rules, orders, and regulations as to the mode of pleading and other matters, which, by a statute passed in the sixth year of her Majesty's reign, chaptered 19, were confirmed.

AND WHEREAS it is provided by the Common Law Procedure Act, 1856, among other things, that it shall be lawful for the Judges of the Superior Courts of Common Law in Upper Canada, or any four or more of them, of whom the Chief Justices shall be two, by any rule or order to be from time to time by them made in term or vacation, at any time within five years after the Common Law Procedure Act, 1856, shall come into force, to make such further alterations in the time and mode of pleading, and of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and in the time and manner of objecting to errors in pleadings and

other proceedings in actions at law, and in the time and manner of objecting to errors in pleadings and other proceedings; and in the mode of verifying pleas and obtaining final judgment without trial in certain cases, as to them may seem expedient, anything in the said Act to the contrary notwithstanding; and that all such rules, orders, or regulations shall be laid before both Houses of the Parliament of this Province, if Parliament be then sitting, immediately upon making the same; or if Parliament be not sitting, then within twenty days after the next meeting thereof; and that no such rule, order, or regulation shall have effect until three months after the same shall have been so laid before both Houses of Parliament; and any rule, order, or regulation so made shall, from and after such time as aforesaid, be binding and obligatory on the said courts and on all courts of error and appeal in this Province into which the judgment of the said court, or either of them, shall be removed, and be of like force and effect as if the provision contained therein had been expressly enacted by the Parliament of this Province: Provided that the Governor of this Province by proclamation, or either House of Parliament by any resolution at any time, within three months next after such rules, orders, or regulations shall have been laid before Parliament, may suspend the whole or any part of such rules, orders, or regulations.

AND WHEREAS it is expedient, for the effectual execution of the said Common Law Procedure Act, 1856, that the said rules, orders, and regulations respectively made in pursuance of the said Act of the Parliament of Upper Canada should be repealed, and that other rules, orders, and regulations should be framed in lieu thereof.

IT IS THEREFORE ORDERED, that from and after the first day of Easter term next inclusive, unless Parliament shall in the meantime otherwise enact, the

said rules, orders, and regulations, made in pursuance of the said Act of Upper Canada, shall be and the the same are hereby repealed; excepting so far as the same or any of them are necessary or applicable to any pleadings, proceedings, or other matters to which they relate, had or taken previous to the said first day of Easter term next, and the following rules, orders, and regulations shall be in force, that is to say:—

1. (*a*) Except as hereinafter provided, several counts on the same cause of action shall not be allowed, and any count or counts used in violation of this rule, may, on the application of the party objecting within a reasonable time, or before an order made for time to plead, be struck out or amended by the court or a Judge, on such terms as to costs or otherwise as such court or Judge may think fit.

2. (*b*) Several pleas, replications, or subsequent

(*a*) The several indebitatus counts given in the schedule to the C. L. P. Act, 1856, when stated under one allegation of the plaintiff's suing "for money payable by the defendant to the plaintiff," constitute only one count.—McGregor v. Graves, 8 Exch. 34; Morse v. James, 8 Dowl. & L. 240; et vide Spyer v. Thelwell, 4 Dowl. 512. The plaintiff may recover the whole of his claim, on any of the considerations thus stated.—Dawson v. Collis, 10 C. B. 523. Two counts upon the same agreement introduced into the declaration, for the evident purpose of removing a difficulty as to its legal effect, will not be allowed.—Smith v. Thompson, 5 C. B. 486. It does not appear to be a correct test to ascertain that nothing can be recovered under one set of counts, which cannot be recovered under another.—Gilbert v. Hales, 2 D. & L. 227; Bulmer v. Bousfield, 9 Q. B. 986, Lush's Prac. 365. The question is, "Are the counts different on the face of them? Can it be said, by looking at them, that the same evidence will apply to either count?"—Gilbert v. Hales, supra; Cahoon v. Burford, 13 M. & W., 136; Ramsden v. Gray, 7 C. B. 961.

(*b*) On an application to rescind the order of a Judge allowing several pleas, the plaintiff is not confined to the ob-

pleadings, or several avowries, or cognizances founded on the same ground of answer or defence, shall not be allowed, provided that on application to the court or a judge to strike out any count, or on an objection taken before the Judge on a summons to plead several matters to the allowance of several pleas, replications, or subsequent pleadings, avowries, or cognizances, on the ground of such counts or other pleadings being in violation of this rule, the court or Judge may allow such counts on the same cause of action or such pleas, replications, or subsequent pleadings, or such avowries or cognizances founded on the same ground of answer or defence, as may appear to such court or Judge to be proper for determining the real question in controversy between the parties on its merits, subject to such terms as to costs and otherwise, as the court or a Judge may think fit.

3. When no such rule or order has been made as to costs by the Court or Judge, and on the trial there is more than one count, plea, replication, or subsequent pleading, avowry, or cognizance on the record,

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jections taken to the pleas, when the summons was heard before a Judge; and the 15th & 16th Vic. ch. 76, s. 83 (C. L. P. Act, 1856, s. 132) has made no alteration in this respect.—Griffith v. Selby, 9 Exch. 893; 18 Jur. 178. To an action for breach of a contract, by which the defendant agreed with the plaintiff, to purchase of him all the articles of a certain description, which might be required for working a patent, the Court refused to allow to be pleaded together; first, a traverse of the readiness and willingness of the plaintiff to supply such articles; and, second, that the articles, which he was so ready and willing to supply, were not reasonably fit for the working of the patent.—Ib. Where the several pleas together amount only to one answer to the whole of the declaration, they may be pleaded without any leave, as a plea in abatement to part, and in bar to the residue.—Archer v. Garrard, 6 Dow. 132; Daniels v. Lewis, 1 Dow. N. S. 844. Where it is doubtful whether pleas should be allowed, the practice was to allow them.—Trickey v. Yeandell, 1 Bing. 66; Smith v. Dixon, 4 Dow. 571.

founded on the same cause of action or ground of answer or defence, and the Judge or presiding officer before whom the cause is tried, shall at the trial certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea, or other pleading, in respect of which he has failed to establish a distinct cause of action, or distinct ground of answer or defence, including the costs of the evidence as well as those of the pleading.

4 (*c*) The name of a County shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, or in any subsequent pleading; Provided, that in cases in which local description is now required, such local description shall be given.

5. In all actions by and against the assignee of an insolvent debtor, or against executors or administrators, or persons authorized by Act of Parliament to sue or be sued as nominal parties, the character, in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue, unless specially denied.

6. In all actions on simple contract, except as hereinafter excepted, the plea of *non assumpsit*, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement may be implied by law.

(*c*) The neglect to state any venue is demurrable.—Remington v. Taylor, 1 Lutw. 235. If it be local and be laid in a wrong county, the defendant may demur, provided the defect appear on the face of the declaration —Tremeere v. Morrison, 4 M. & S. 609; otherwise the objection should be pleaded.—Richards v. Easto, 3 D. & L. 515; Boyes v. Hewetson, 2 Bing. N. C. 575.

Exempli Gratiâ —In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties.

In actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach.

To causes of action to which the plea of "never was indebted" is applicable, as provided in Schedule B. (32) of the Common Law Procedure Act, 1856, and to those of a like nature, the plea of *non assumpsit* shall be inadmissible; and the plea of "never was indebted" will operate as a denial of those matters of fact from which the liability of the defendant arises, *exempli gratiâ*, in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery, in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of money and the existence of those facts, which make such receipt by the defendant a receipt to the use of the plaintiff.

7. In all actions upon bills of exchange and promissory notes, the pleas of "*non assumpsit*" and "never indebted" shall be inadmissible. In such actions therefore, a plea in denial must traverse some matter of fact, *exempli gratiâ*, the drawing, or making, or endorsing, or accepting, or presenting, or notice of dishonour of the bill or note.

8. In every species of actions on contract, all matters in confession and avoidance, including not only

those by way of discharge, but those which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded, *exempli gratiâ*, infancy, coverture, release, payment, performance, illegality of consideration either by statute or common law, drawing, endorsing, accepting bills, &c., or notes by way of accommodation, set off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded

9. In actions on policies of insurance, the interest of the assured may be averred, thus, "that A, B, C, and D (or some or one of them), were or was interested," &c. And it may also be averred "that the insurance was made for the use and benefit, and on the account of the persons so interested."

10. In actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable

11. The plea of *nil debet* shall not be allowed in any action.

12. All matters in confession and avoidance shall be pleaded specially, as above directed in actions on simple contracts.

13. In all cases in which the plaintiff (in order to avoid the expense of the plea of payment or set off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the payment or set off of such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he

seeks to recover a certain balance, without giving credit for any particular sum or sums, or to cases of set off, where the plaintiff does not state the particulars of such set off.

14. Payment shall not in any case be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.

15. In actions for detaining goods, the plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea.

16. In actions for torts, the plea of "not guilty" shall operate as a denial only of the breach of duty, or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement, and no other defence than such denial, shall be admissible under that plea; all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration, *Exempli gratiâ.*

In an action for nuisance to the occupation of a house by carrying on an offensive trade, the plea of "not guilty" will operate only as a denial that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house.

In an action for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way.

In an action for slander of the plaintiff in his office, profession, or trade, theplea of "not guilty" will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, and with reference to the plaintiff's office, profession, or trade, but it will not operate as a denial of the fact of the plaintiff holding the office, or being of the profession or trade alleged.

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers, but not of the debt, judgment, or preliminary proceedings.

In actions against a carrier, the plea of "not guilty" will operate as a denial of the loss or damage, but not of the receipt of the goods as a carrier for hire, or of the purpose for which they were received.

17. All matters in confession and avoidance shall be pleaded specially, as in actions on contract.

18. In actions of trespass to land, the close or place in which, &c., must be designated in the declaration by name, or abuttals, or other description, in failure whereof, the plaintiff may be ordered to amend, with costs, or give such particulars as the court or Judge may think reasonable.

19. In actions of trespass to land, the plea of "not guilty" shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially.

20. In actions for taking, damaging, or converting the plaintiff's goods, the plea of "not guilty" shall operate as a denial of the defendant having committed the wrong alleged, by taking, damaging, or converting the goods mentioned, but not of the plaintiff's property therein.

21. In every case in which a defendant shall plead the general issue, intending to give the special matter in evidence, by virtue of an Act of Parliament, he shall insert in the margin of the plea the words "By statute," together with the year or years of the reign in which the Act or Acts of Parliament upon which he relies for that purpose were passed, and also the chapter and section of each of such Acts, and shall specify whether such acts are public or other-

wise, otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; and such memorandum shall be inserted in the margin of the issue and of the *nisi prius* record.

22. A plea containing a defence, arising after the commencement of the action, may be pleaded together with pleas of defences arising before the commencement of the action, provided, that the plaintiff may confess such plea, and thereupon shall be entitled to the costs of the cause, up to the time of pleading such first-mentioned plea.

23. When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, the plaintiff shall be at liberty to confess such plea, and shall be entitled to the costs of the cause, up to the time of pleading such plea; provided that this and the preceding rule shall not apply to the case of such plea pleaded by one or more only out of several defendants.

24. If a plaintiff in ejectment be non-suited at the trial, the defendant shall be entitled to judgment for his costs of suit.

25. No entry of continuances by way of imparlance, *curia advisare vult*, *vicecomes non misit breve*, or otherwise, shall be made on any record or roll whatever, or in the pleadings.

SCHEDULE A

OF

FORMS

TO THE

COMMON LAW PROCEDURE ACT,

1856.

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1. *Form of an Issue in general.*

In the Q. B. (*or* C. P., *as the case may be*).
The day of in the year of our Lord 18 . (*date of Declaration*).
(*The Venue*) A. B. by P. A., his attorney (*or* in person, *as the case may be*) sues C. D., who has been summoned to answer the said A. B., by virtue of a writ issued on the day of in the year of our Lord (*the date of the first writ*) out of her Majesty's Court of Queen's Bench (*or* Common Pleas, *as the case may be*) for, &c. (*copy the Declaration from these words to the end, and all the Pleadings with their dates, writing each Plea or Pleading in a separate paragraph, and numbering the same as in the pleading filed, and conclude thus*) Therefore let a Jury come, &c.

2. *Special Case for the opinion of the Court, under sec.* 85, *where the allowance or disallowance of a particular item or items depends on a question of law.*

In the Q. B. (*or* C. P.)
Between A. B. plaintiff,
and
C. D. defendant.

The following case is stated for the opinion of the Court under a rule of Court (*or* order of the honorable Mr. Justice) dated the day of 18 made pursuant to the eighty-fifth section of the Common Law Procedure Act, 1856 (*here state the material facts of the case bearing upon the question of law to be decided.*)

The question (*or* questions) for the opinion of the Court is (*or* are)

First—Whether, &c.

Second—Whether, &c.

3. *Issue to be tried by a Jury where the Court or a Judge has directed it under Section* 85 *where the allowance or disallowance of a particular item or items depends on a question of fact.*

In the Q. B. (*or* C. P.)

The day of 18 , (*date of Issue when delivered by the Plaintiff.*)

(*Venue*) A. B. by his Attorney sues C. D., and the Plaintiff (*or* defendant) affirms and the defendant (*or* Plaintiff) denies that &c., (*Here state the question of fact to be tried as directed by the Court or a Judge. In some cases it may be advisable to state an inducement before stating the question in dispute. If there be more than one question to be decided, state it thus*) and the said Plaintiff (*or* defendant) also affirms, and the defendant (*or* plaintiff) also denies that &c. And it has been ordered by the Court (*or* by the Honorable Mr. Justice) that the said question (*or* questions) shall be tried by a Jury. Therefore let the same be tried accordingly.

4. *Special case stated by an Arbitrator under Section* 86.

(*In the Special Case the Arbitrator must state whether the Arbitration is under a Compulsory reference under the Act, or whether it is upon a reference by consent of the parties where the submis-*

sion has been or is to be made a Rule of one of the Courts. In the former case the Award must be entitled in the Court and Cause and the Rule of Court must be set forth. In the latter case, the terms of the reference relating to the submission being a Rule of Court must be set forth.)

5. *Form of a Nisi Prius Record in ordinary cases.*

(*The Nisi Prius Record will be a copy of the Issue as delivered in the Action.*)

6. *Form of a Postea on a verdict for the Plaintiff on all the Issues and where the Defendant appears at the Trial.*

Afterwards on the day of A. D., at in the County (*or* United Counties) of before one of the Justices of our Lady the Queen assigned to take the Assizes in and for the within County (*or* United Counties) come the parties within mentioned by their respective Attorneys within mentioned and a Jury of the said County (*or* United Counties) being summoned also come, who, being sworn to try the matters in question between the said parties, upon their oaths say, that (*state the negative or affirmative of the Issue as it is found for the plaintiff and in the terms adopted by the pleading; if there be several Issues joined and tried then say*) as to the first Issue joined, upon their oath say that, &c. (*state the affirmative or negative of the Issue as it is found for the Plaintiff*) and as to the second Issue within joined, the Jury aforesaid upon their oath aforesaid say, that &c. (*so proceed to state the finding of the Jury upon all the Issues. Conclude by stating an assessment of the damages thus*) and they assess the damages of the Plaintiff on occasion of the premises within complained of by him, over and above his costs of suit, at £ . Therefore &c.

7. *Postea on the Issue numbered* 3, *ante.*

(*The same as in ordinary cases except that there is no assessment of damages.*)

8. *Postea where a Judge, upon a Trial before him, directs a reference on some of the Issues and of the Accounts involved therein, and takes a Verdict on others of the Issues, referring the amount of damages under sec.* 156.

Afterwards on the day of 18 , (*the Commission day of the Assizes*) at in the County (*or* United Counties) of at the Assizes there holden before the Honorable one of Her Majesty's Justices of the Court of for Upper Canada come the parties within mentioned by their Attorneys within mentioned, and a Jury of the said County (*or* United Counties) being summoned, also come and are sworn to try the matters in question between the said parties, and as to the Plaintiffs claim in the Count of the Declaration within mentioned, it appears to the said Judge that the questions arising thereon involve the investigation of long Accounts on the Plaintiff's side, and that the questions arising on the Defendant's plea that the Plaintiff at the commencement of this Suit was and still is indebted to the defendant in an amount equal to (*or* greater than *as the case may be*) the Plaintiff's claim within mentioned, involve the investigation of long accounts on the defendant's side which cannot be conveniently tried before him. And hereupon the said Judge orders and directs that a verdict be entered on each of the Issues on the said Count of the declaration in favor of the Plaintiff, except as to the Issue on the plea to the said Count , that the alleged cause of Action did not accrue within six years before this suit—and that such verdict shall be subject to and that the matters in difference between the said parties on the said Count except as to

the said last mentioned plea be referred to the award of upon the terms that (*set forth the terms of the order*) and as to the said plea so excepted, the Jurors aforesaid upon their oath say, that the alleged cause of Action in the said Count did accrue within six years next before this suit. And as to the Plaintiff's claim in the Count (*or* Counts) within mentioned, the Jurors aforesaid upon their oath say that the defendant did not promise as alleged. Therefore, &c. (*This is only given as a general guide and must be varied according to the Pleadings, terms of reference, and circumstances of each case.*)

9. *Form of Judgment for Plaintiff on a Verdict.*

(*Copy the Nisi Prius Record, and then proceed thus*): Afterwards, on the day of , in the year of our Lord ; (*day of signing final Judgment*) come the parties aforesaid by their respective attorneys aforesaid (*or as the case may be*), and The Hon. Mr. Justice , assigned to take the Assizes in and for the said county, (*or* united counties) before whom the said Issue was (*or* 'Issues were') tried, hath sent hither his Record had before him, in these words, (&c., *copy the postea*). Therefore it is considered, that the plaintiff do recover against the defendant the said moneys, by the Jurors aforesaid, in form aforesaid, assessed, (*or if the action be in debt, and the Jury do not assess the debt, but only the damages, then say* do recover against the defendant the said debt of £ , and the moneys by the Jurors aforesaid, in form aforesaid assessed,) and also £ , for his costs of suit, by the Court here, adjudged of increase to the plaintiff, which said moneys and costs, (*or* debt, damages and costs) in the whole, amount to £ . (*In the margin of the Roll, opposite the words* "Therefore it is considered," *write* "Judgment signed the day of A. D., *stating the day of signing the Judgment*)

10. *Form of Postea, on a verdict finding a balance in favor of a defendant, on a plea of set-off, and on other pleas.*

Afterwards, on the day of , A. D., (*the commission day of the Assizes,*) before the Honorable , one of the Justices assigned to take the assizes in and for the within county, (*or* united counties) come the parties within mentioned by their respective attorneys within mentioned, and a jury of the said county (*or* 'united counties') being summoned, also come, who being sworn to try the matters in question between the said parties, upon their oath say, (*if non assumpsit was the first plea*) as to the first issue within joined, that the defendant did not promise as within alleged (*or if the first plea was, that he never was indebted* say "that the defendant never was indebted as within alleged.") And as to the second issue within joined, the Jurors aforesaid, upon their oath aforesaid, say that the plaintiff was, and is indebted to the defendant as within alleged, in an amount greater than the plaintiffs claim in the declaration within alleged; and they further say, that the balance due from the plaintiffs to the defendants, upon the matters contained in the said declaration, and the said second plea, amounts to £ . Therefore, &c.

11. *Form of Judgment for Defendant thereon.*

(*Proceed in the usual form to the end of the Postea, and then thus*): Therefore, it is considered that the plaintiff do take nothing by his said writ, but that the defendant do recover against the plaintiff the sum of £ , in form aforesaid, found to be due from the plaintiff to the defendant, together with £ , for his costs of defence—amounting in the whole to £ .

(*In the margin of the roll opposite the words* "Therefore it is considered" *write* "Judgment signed the day of , A D.

12. *Form of Judgment on a Special Case stated by an Arbitrator (vide ante No. 4.)*

(*Copy the Special Case, and then proceed thus*) Afterwards on the day of 18 , come here the parties aforesaid and the Court is of opinion that (*state the opinion of the Court on the question or questions stated in the Case, in the affirmative or negative as the case may be*) Therefore it is considered that the Plaintiff do recover against the defendant the said £ , and £ , for his costs of suit.

(*In the margin opposite the words* "Therefore it is considered &c., *write* Judgment signed the day of 18 " *inserting the day of final Judgment.*)

13. *Form of an Issue when it is directed to be tried by the Judge of the County Court.*

(*Commence the Issue as in Form No.* 1 *above prescribed, then copy all the pleadings, and after the joinder of Issue proceed as follows*) And forasmuch as the sum sought to be recovered and endorsed on the copy of the original process served, does not exceed £ , (*or* and forasmuch as the debt or demand sought to be recovered is alleged to be ascertained by the signature of the defendant) hereupon on the day of in the year 18 , (*date of the Writ of Trial*) pursuant to the Statute, the Judge of the County Court for the County (*or* United Counties) of is commanded that he proceed to try such Issue (*or* Issues) at the first (*or* second.) Sittings to be next hereafter holden of the said County Court by a Jury returned for the trial of Issues joined in the said Court—And when the same shall have been tried that he make known to the Court here what shall have been done by virtue of the Writ of our Lady the Queen to him in that behalf directed, with the finding of the Jury

thereon endorsed, within ten days after the execution thereof.

14. *Form of the Writ of Trial.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, defender of the Faith.

To the Judge of the County Court of .

Whereas A. B. plaintiff in our Court of Queens Bench (*or* Common Pleas) in and for Upper Canada at Toronto on the day of 18 , (*the date of the summons or other first Process*) impleaded C. D. in an action for, &c., (*here recite the Declaration in the past tense.*) And whereas the defendant on the day of last (*date of the plea*), by his attorney (*or as the case may be*), came into our said court and said (*here recite the pleas and pleadings to the joinder of issue.*) And whereas the sum sought to be recovered in the said action and endorsed on the Writ of Summons (*or as the case may be*) thereon, does not exceed £ (*or*). And whereas the debt or demand sought to be recovered in this action is alleged to be ascertained by the signature of the defendant, and it is fitting that the issue (*or* issues) should be tried before you the said judge, *We* therefore pursuant to the Statute in such case made and provided, command you that you do proceed to try the said issue (*or* issues) at the first (*or* second) sittings of the said County Court, to be holden next after the date of this our Writ by a jury, returned for the trial at the said sittings, of Issues joined in the said County Court, and when the same shall have been tried in manner aforesaid, We command you that you make known to our Justices of of our said Court of Queen's Bench (*or* Common Pleas) at Toronto what shall have been done by virtue of this writ with the finding of the jury, hereon endorsed, within ten days after the execution hereof.

Witness, &c.

15. *Form of endorsement of the Verdict on the Writ of Trial.*

Afterwards on the day of 18 , (*the day of trial*) before me , Esquire, Judge of the County Court within mentioned, came as well the within named Plaintiff as the within named Defendant by their respective Attorneys within named, (*or as the case may be*) and the Jurors of the Jury whereof mention is within made being summoned also came, and being duly sworn to try the Issue (*or* Issues) on their oath said that, &c. (*state the finding of the Jury as on a postea on a trial at Nisi Prius.*)

16. *The like in case a Nonsuit takes place.*

(*Proceed as in the above form but after the words* "duly sworn to try the Issue within mentioned" *proceed as follows*)—and were ready to give their verdict in that behalf, but the plaintiff being solemnly called came not nor did he further prosecute his suit against the defendant.

17. *Form of Judgment for Plaintiff after Verdict on Writ of Trial.*

(*Copy the Issue and then proceed as follows*)—Afterwards on the day of 18 , (*day of signing final Judgment*) come the parties aforesaid by their respective Attorneys aforesaid (*or as the case may be*) and the said Judge before whom the said Issue (*or* Issues) came on to be tried hath sent hither the said last mentioned Writ with an endorsement thereon, which said endorsement is in these words to wit (*copy the endorsement*). Therefore it is considered, &c. (*conclude as in other cases. See the form Supra No.* 9.

18. *Form of Entry after Judgment by default or on Demurrer, where the damages are to be assessed before a Judge of a County Court.*

(*Copy the pleadings commencing the Issue as in*

form No. 1 and proceed) and the Defendant in his proper person (*or* by his Attorney) says nothing in bar or preclusion of the said Action of the Plaintiff, whereby the Plaintiff remains therein undefended against the Defendant (*or copy to the end of the Demurrer book and then proceed*) and hereupon on the day of 18 (*the day of giving Judgment on the Demurrer*) came here as well the Plaintiff as the Defendant by their respective Attorneys aforesaid, and it appears to the Court here that the Declaration (*or* Replication) is good in substance (*or* that the plea aforesaid is bad in substance.) Wherefore the Plaintiff ought to recover against the Defendant his damages on occasion of the premises above complained of by him. But because it is unknown to the Court here what damages the Plaintiff hath sustained on occasion of the premises, hereupon on the day of 18 (*date of Writ of inquiry*) the Judge of the County Court of the County (*or* United Counties) of is commanded that he diligently enquire what damages the Plaintiff hath sustained by reason of the premises at the first (*or* second) sittings to be next hereafter holden of the said County Court by a Jury returned at such sittings, and that he make known to the Court here what shall have been done by virtue of the Writ of our Lady the Queen to him in that behalf directed, within ten days after the execution thereof.

19. *Form of Writ of Inquiry.*

Victoria, &c. (*as in form No.* 12.)

To the Judge &c. (*as before.*)

Whereas, &c. (*as in form No.* 12 *setting out to the end of the Declaration, and proceeding as in form No.* 16, *according as it is on judgment by default or judgment on demurrer, and proceed*) but because it is unknown to the said Court here what damages the Plaintiff hath sustained by reason thereof, and it is

fitting the same should be enquired of by you the said Judge, We therefore pursuant to the Statute in such case made and provided, command you that you do diligently enquire what damages the said Plaintiff hath sustained by reason of the premises at the first (*or* second) sittings to be next hereafter holden of the said County Court, by a jury returned at such sittings for the trial of Issues joined in such Court. And we further command you that you make known to our Justices of our said Court of Queen's Bench (*or* Common Pleas) at Toronto, what shall have been done by virtue of this Writ with the finding of the Jury hereon endorsed, within ten days next after the execution hereof.

Witness, &c.

20. *Form of Return to be endorsed.*

Afterwards on the day of 18 (*day of Assessment*) before me , Esquire, Judge of the County Court within mentioned, came the within named Plaintiff by his Attorney within named, and the Jurors of the Jury whereof mention is within made, being summoned, also came and being duly sworn to assess the damages sustained by the Plaintiff by reason of the premises within mentioned, say on their oath, that the Plaintiff hath, sustained damages on occasion thereof over and above his costs and charges by him about his suit in that behalf expended to £ .

21. *Form of Judgment thereon.*

Afterwards, &c. (*as in form No.* 15) came the plaintiff by his attorney aforesaid, and the said Judge before whom the said damages were assessed, hath sent hither the said last-mentioned Writ, with an Endorsement thereon, in these words, to wit (*copy the Endorsement*). Therefore it is considered, &c., (*conclude as in other cases*).

22. *Form of Issue, where there are Issues in fact to be tried, as well as damages to be assessed on default, or on issues in law before the County Court.*

(*Commence as in No.* 1, *copying the pleadings, the Joinder of Issue, adding the similiter, and inserting the Joinder of Issue to be tried by the record or the judgment by default as to part of the pleadings, or the judgment by the plaintiff on demurrer, as the case may be, and if there be judgment by default, or judgment for plaintiff on a trial by the record or upon demurrer, proceed thus.*) Wherefore the Plaintiff ought to recover against the Defendant his damages on occasion of the premises &c. And because it is at present unknown to the Court here whether the Defendant will be convicted of the premises upon which issue is above joined between the parties or not, and because it is also unknown to the Court here what damages the plaintiff hath sustained on occasion of the premises, whereof it is considered that the plaintiff ought to recover his damages as aforesaid, and it is convenient and necessary that there be but one taxation of damages in this suit, therefore let the giving of judgment in this behalf against the said defendant be stayed until the trial of the said Issue (*or* Issues) above joined between the said parties be tried by the Country (*or if judgment on demurrer, or on the trial by the record has not been given—then after the entry of the joinder of issue in fact and the demurrer or on the trial by the record—proceed.*) And because the Court here are not yet advised what judgment to give upon the premises whereof the parties have put themselves upon the Judgment of the Court (*or as the case may be.*) And because the Court here are not advised what judgment to give upon the premises whereon issue is joined between the said parties to be tried by the record. And because it is convenient and necessary that there be but one taxation of damages in this suit, and forasmuch as

the sum sought to be recovered and endorsed on the copy of the original process served, does not exceed £ , (*or* forasmuch as the debt or demand sought to be recovered is alleged to be ascertained by the signature of the defendant,) hereupon on the day of 18 , (*date of the Writ of Trial and enquiry*) the Judge of the County Court of the County (*or* United Counties) of is commanded that he proceed, as well to try the issue (*or* issues) joined between the parties to be tried by the Country, as also, diligently to enquire what damages the said plaintiff hath sustained on occasion of the premises, whereof it is considered that the plaintiff ought to recover against the defendant on occasion thereof as aforesaid, (*or according to the facts* the premises whereof the parties have put themselves upon the judgment of the Court as aforesaid, *or* the premises wherein issue is joined between the parties to be tried by the Record, if Judgment shall happen to be thereupon given for the plaintiff) at the first (*or* second sittings) to be next hereafter holden of the said County Court, by a Jury returned at such sittings for the trial of issues joined in the said Court, and that he make known to the Court here what shall have been done by virtue of the Writ of our Lady the Queen to him in that behalf directed, with the finding of the Jury thereon endorsed, within ten days next after the execution thereof.

23. *Form of Writ of Enquiry to try the issues and assess damages contingently on demurrer or issue by the record or where there is judgment by default or on demurrer as to part.*

(*Commence the Writ as in number* 17, *setting out the pleadings, joinder in issue, &c. &c., as the case may be, and according to the suitable form given in No.* 20, *and then proceed.*) We therefore pursuant to the statute in such case made and provided com-

mand you that you do proceed to try the issue (*or* issues) joined between the parties, to be tried by the Country, and also diligently enquire what damages the plaintiff hath sustained by occasion of the premises, whereof it is considered that the Plaintiff ought to recover against the Defendant his damages on occasion thereof as aforesaid (*or* the premises whereof the parties have put themselves upon the judgment of the Court as aforesaid *or* the premises whereon issue is joined between the parties to be tried by the record as aforesaid *as the case may be,*) if judgment shall happen to be thereupon given for the plaintiff, at the first (*or* second) sittings to be next hereafter holden of the said County Court by a jury returned at such sittings for the trial of issues joined in the said County Court—and that you make known to us in our said Court of Queen's Bench (*or* Common Pleas) at Toronto, what shall have been done by virtue of this Writ with the finding of the jury hereupon endorsed, within ten days after the execution hereof. Witness, &c.

24. *Form of endorsement of Verdict thereon.*

Afterwards on the day of 18 , (*day of the Trial, &c.*) before me Esquire Judge of the County Court of the County (*or* United Counties) within mentioned, came as well the within named parties by their respective Attorneys within named (*or otherwise as the case may be*) and the jurors of the Jury, whereof mention is within made, being summoned also come and being duly sworn to try the issue (*or* issues) and also to assess the damages sustained by the plaintiff on occasion of the premises within mentioned, on their oath, said (*&c. according to the finding of the Jury on the issues, and if for the Plaintiff proceed*) and the said jurors upon their oath aforesaid said that the plaintiff hath sustained damages on occasion thereof and on occasion of the other premises within mentioned, over and

above his costs and charges by him about his suit in this behalf expended, to £ .

25. *Form of Nonsuit thereon.*

(*Proceed as in form No.* 24, *to the statement that the Jury were sworn &c—after the end of which statement, proceed as follows*) were ready to give their Verdict in that behalf, but the plaintiff, being solemnly called, came not, nor did he further prosecute his said suit against the defendant.

26. *Form of Judgment thereon.*

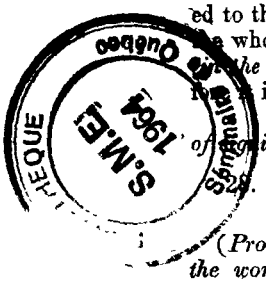
(*This will be mutatis mutandis, according to the directions given in No.* 21.)

27. *Form of Entry of Judgment, where the Court or a Judge decides in a summary manner under section* 84, *before declaration.*

In the Queen's Bench (*or* Common Pleas)
Upper Canada } The day of 18 , (*the*
to wit } *day on which Judgment is signed*)
A. B. in his own person (*or* by his Attorney) on the day of 18 , sued out a Writ of Summons against C. D., and the said C. D., on the day of 18 by his Attorney (*or* in person) caused an appearance to be entered for him to the said writ (*or* and the said C. D., did not cause an appearance to be entered for him pursuant to the exigency of the said Writ) and afterwards by a rule of the said Court of Q. B., (*or* C. P.) (*or* by an order of the Honorable one of the Justices of the Court of) dated the day of 18 , made in pursuance of the eighty-fourth section of the Common Law Procedure Act, 1856. It was ordered that the said C. D., should pay to the said A. B., the sum of £ (*setting out the terms or substance of the rule or order and if costs were ordered proceeding thus*) together with the costs of the said A. B., by

him expended in and about the said writ and the proceedings thereupon. And now on the day of 18 , (*the day of signing Judgment*) it is manifestly shown that the said C. D., hath not paid the said sum of £ , and the said costs, therefore it is considered that the said A. B., do recover against the said C. D., the said sum of £ so ordered to be paid as aforesaid and also £ for his costs of suit by the Court here adjudged to the said A. B., which said monies and costs in the whole amount to £

(*In the margin of the rule opposite the words* "therefore it is considered" *write* "judgment signed the day of A. D. " *stating the day of signing judgment*)



28. *The like where the Case is referred to an Arbitrator.*

(*Proceed as in foregoing Form No.* 27, *down to the words* "It was ordered," *and then proceed as follows*—It was ordered that the claim of the Plaintiff be referred to (*stating the name of the referee and the substance of the rule or order of reference*)—And afterwards the said (*referee*) by his Award (*or* certificate) did award (*or* certify) that there was due and payable from the said C. D., to the said A. B , the sum of £ and now on this day of 18 , (*the day of signing judgment*) it is manifestly shewn that the said C. , hath not paid the said sum of £ Therefore it is considered that the said A. B., do recover against the said C. D. , the said sum of £ , (*the amount awarded or certified, if any costs were given by the rule or order or were directed to abide the event of the reference,* and also £ , for his costs. *Conclude as in the preceding Form No.* 27.)

These two Forms Nos. 27 *and* 28 *may be so altered and modeled as to suit other Cases arising under section* 84.