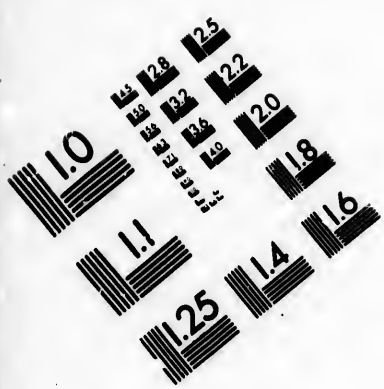

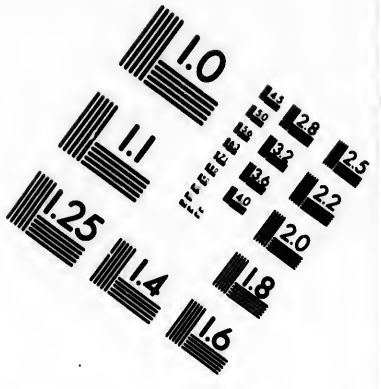

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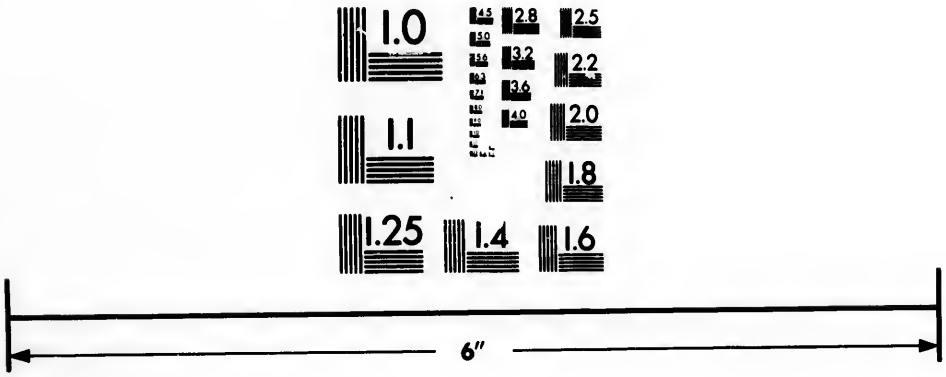

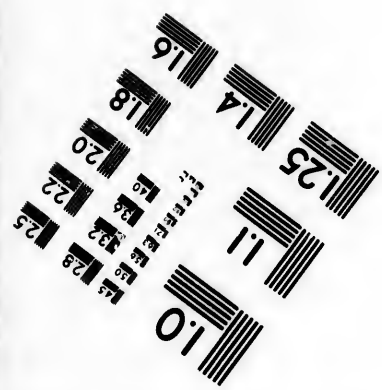

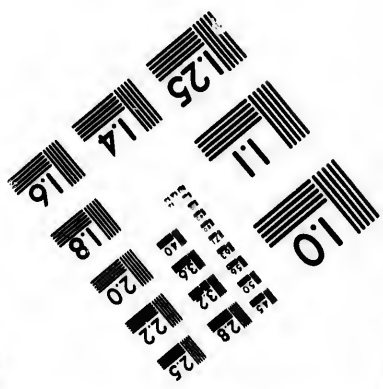

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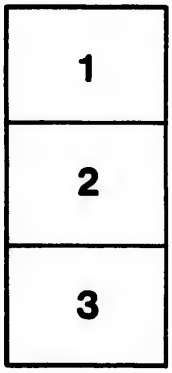

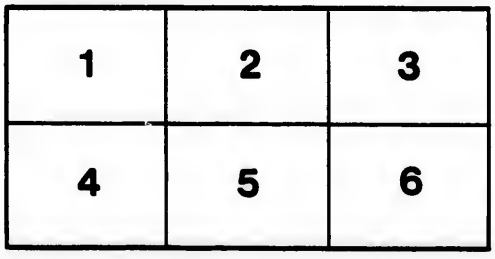

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THE

COMMON LAW PROCEDURE ACT, 1856;

THE

COUNTY COURTS' PROCEDURE ACT, 1856;

AND THE

NEW RULES OF COURT,

WITH NOTES OF ALL DECIDED CASES DIRECTLY EXPLAINING OR OTHERWISE ELUCIDATING THE STATUTES AND RULES:

TOGETHER WITH

AN APPENDIX;

CONTAINING THE

COMMON LAW PROCEDURE ACTS OF 1857.

BY

ROBERT A. HARRISON, Esq., B.C.L.,

BARRISTER-AT-LAW;

AUTHOR OF ROBINSON & HARRISON'S DIGEST; THE STATUTES OF PRACTICAL UTILITY; THE MANUAL OF COSTS IN COUNTY COURTS; THE COUNTY COURTS' RULES; AND JOINT EDITOR OF THE UPPER CANADA LAW JOURNAL.

"The Act of Parliament invests us with a large discretion to do what justice requires: and we ought, I think, to endeavour to carry the intention of the Legislature into effect"—(per JERVIS, C. J. in Messiter v. Rose, 13 C. B., 165).

Since the Legislature has abolished special demurrers, we are bound to follow out that spirit and not give effect to mere technicalities"—(per POLLOCK, C. B. in Flowers v. Welch, 9 Ex. 273).

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1858.

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TO

THE HONORABLE

JOHN ALEXANDER MACDONALD,

ATTORNEY-GENERAL

OF

UPPER CANADA,

TO WHOSE ABILITY AS A LAWYER,

AND

INFLUENCE AS A STATESMAN,

THE

PROFESSION ARE INDEBTED

FOR

THE ACTS HERE ANNOTATED,

THIS WORK

IS,

WITH THE MOST SINCERE RESPECT AND ADMIRATION,

INSCRIBED

BY

THE EDITOR.

PREFACE.

THE law, and the administration of the law, are two things essentially different. By the former we understand the great body of legal rights and liabilities which teach that justice should render to every man his due. By the latter we understand the practice of the Courts, or the machinery used for dispensing justice. All laws are designed either to prevent a mischief, to remedy it if committed, or to compensate the sufferer if no other remedy can be applied. The proper application of the remedy is thus of vital importance to the due dispensation of justice. The spirit of modern legislation is to make the remedy coëxtensive with the mischief intended to be prevented or redressed. For this the Courts have at all times struggled; for this the Legislature have labored; and for this has the Common Law Procedure Act, 1856, been passed.

I propose, *first*, briefly to consider the nature of the Act; and, *secondly*, the manner in which I have endeavoured to expound it.

First.—Mr. Whiteside, a leading law reformer of Great Britain, in one of his masterly speeches, said, he objected to the triumph of form over substance—of technicality over truth. He objected also to a suitor being driven like a shuttlecock from a Court of Law to a Court of Equity, and being sent to Chancery to be enabled to go to Common Law. He hoped that a remedy would be applied to these abuses, and thought that, to be satisfactory, the remedy should be searching, cheap and comprehensive. The remedy so forcibly invoked has been partially applied in England, in Ireland, and in Upper Canada: in England by the Acts of 30th June, 1852, and 12th August, 1854; in Ireland by the Acts of 28th August, 1853, and 29th July, 1856; and in Upper Canada by the Acts of 19th June, 1856, and 10th June, 1857. Here and at home the like remedy has been applied to like abuses. The triumph of form over substance is carefully guarded against by the enactment of general rules of pleading, extensive powers of reference, and liberal powers of amendment. The cruelty of driving a suitor from Court to Court in the manner described by Mr. Whiteside is also, to a great extent, prevented by the enlargement of the jurisdiction of the Courts of Common Law. The remedy is searching, because of the powers given to examine parties to a cause and their witnesses, under

certain circumstances, by interrogatories. It is cheap, because needless steps in a cause have been abolished, and the remaining steps made easy and simple. It is comprehensive, because the whole course of a suit, from summons to execution, is made the subject of legislation in a single Statute.

As to *Pleading:* Special demurrers are abolished, and forms are provided for almost every case which can occur in practice. These forms are simple, concise and intelligible. The work is done to the hand of the practitioner in a manner convenient and complete.

As to *References:* Submissions of all conceivable forms are provided for, and references of all kinds are much facilitated. There is a strong desire evinced to encourage references to arbitration: indeed in matters of account there is more than encouragement, for there is compulsion. As to cases wherein there is no compulsion, there is strict and anxious surveillance. Where the parties to any contract, anticipating the possibility of differences arising, have stipulated that they shall be referred to arbitration, there is provision made for staying any action that may be brought in disregard of such stipulation. If the referee named by the parties be dead, the Court may appoint a substitute. If there be no provision for the appointment of an umpire when one is necessary, the Court may appoint one of its own choosing. If there be several arbitrators, one of whom dies or becomes incapacitated, a successor may be appointed.

As to *Amendments:* There is almost unlimited discretion. The Judges have at all times the power of amending all defects and errors in any proceeding in any stage of the cause, whether there be anything in writing to amend by or not. All amendments necessary to the determining of the real question in controversy in the existing suit may be made.

As to the *Enlargement of jurisdiction:* The Courts of Common Law have conferred upon them, to some extent, powers to give the redress necessary to protect and to vindicate common law rights, and to prevent wrongs, whether existing or likely to happen unless prevented. With these objects the strong arm of injunction is added, and the arm of mandamus is strengthened. The power to entertain equitable defences, in consequence of the unsuited machinery of the Courts, is, however, very limited; but, so far as bestowed upon the Courts of Common Law, is an enlargement of their jurisdiction. This enlargement does not at all oust the Court of Chancery of any portion of its jurisdiction; in truth, a great portion of the latter still remains exclusive.

As to the *Comprehensiveness* of the Act, a glance at the repealing clause will convey some idea of the change made in our statute law. Little is left either of the Old King's Bench Act of 1822, or of the Common Pleas Act of 1849, or of the Act of 1853, regulating and amending the practice in these Courts. The Legislature, while engaged in the work of improve-

ment, have gone far towards removing obscurities and abuses. The Acts respecting Absconding Debtors, Absent Defendants and Insolvent Debtors have been, in general, wiped from the Statute book, and restored in a simple and consolidated form. The Absconding Debtors' law, from session to session of the Legislature, became obscure, owing to the accumulation of amending Statutes. The Absent Defendants' Act, nearly allied to the Absconding Debtors' Acts, served to make confusion more confounded. The Insolvent Debtors' Acts were nearly effete from sheer non-user of many of their provisions. There was a widely scattered heap of law, of which a great part was felt to be rubbish, and therefore removed.

It would be too tedious here to notice the changes in detail made in the steps of a cause from process to execution. Suffice it to say, that forms of action have been in a measure abolished; that with regard to the service and renewal of writs of mesne process, very decided improvements are enacted; that the appearance of defendants is placed upon a rational and intelligible basis; that unusual facilities are held out for the speedy trial of causes, and after trial equal facilities, for speedy execution; that the description of property made subject to execution is much extended; and that for the revival of judgments when obtained wise and beneficial provision is made.

Second.—A new Act is not always a new law. The Common Law Procedure Act is not so much a new law as a re-enactment, with amendments, of the old. For the sake of convenience, the provisions are brought together in a compact and logical form; but the provisions themselves are for the most part old and familiar. They carry with them a long train of decisions. To classify these decisions, and to bring them under the eye in a convenient form, has been one of my great objects. The less a new statute unsettles old and established practice, so far as consistent with the object of its enactment, the better. The Courts, in a long series of decisions, have given to particular words and expressions a definite meaning. The Legislature, in Acts subsequently passed, have used these words and expressions over and over again. Thus the language becomes familiar and well known to Judges and lawyers under the epithet of legal phraseology. Hence, when necessary to bring together Acts or legislative enactments upon a particular branch of law or of practice, the collection ought to be made as far as possible in the very words of the original text. Stability is more to be desired than novelty. To attain stability there must be certainty, and to attain certainty there must be the preservation of well understood words and expressions. When we reflect upon the cost, the trouble, and the vexation of working out an entirely new legislative provision, we are forced to acknowledge the value of old phraseology.

One important characteristic of our Common Law Procedure Act is that in it words are used as lawyers have at all times used them. We are

enabled to fall back upon the old, for the construction of the new law. Impressed with the value of decided cases, I have not failed to open up to the consideration of my professional brethren decisions apparently consigned to oblivion, but in truth as necessary for use as when first delivered from the Bench. Fairly to understand a new law, which is in nine cases out of ten a remedial law, we must not spurn that which is by the alteration thrown aside.

We speak of a Statute such as the Common Law Procedure Act being remedial—remedial of what? Of some law existing when it passed. Is it not then necessary, in order to apply the remedy, to have a knowledge of the mischief intended to be remedied? Before a lawyer can use a remedial statute correctly and satisfactorily, he must generally have some knowledge of the pre-existing law. Actuated by thoughts such as these, in stating the changes effected by the Common Law Procedure Act, I have done so by briefly showing what the practice was antecedently, and so presented the law as modified or otherwise altered. A new code of practice is enacted. Why? Because the old code was defective. Then in what was it defective? The attempt mentally to answer this question opens up a true idea of the work to be done. The real principle of expounding a remedial statute is, I conceive, such as I have described. While acting up to this standard, my main object has been, by exhibiting what the law was, concisely to show what the law is, and in such a manner that it will impress itself upon the memory of the reader or practitioner. This I have done particularly in noting a preamble introducing a number of sections on a given branch of practice. One example may be noticed. It is on page 94, being note *g* to the preamble beginning, "And as regards proceedings against absconding debtors," &c. In carrying out this plan, I have upon all occasions, when convenient, introduced the views of the English Common Law Commissioners, usually in their own words. The result is, that both reports of the Commissioners are embodied in my notes, instead of being published, as originally intended, in a separate form.

I may be allowed to observe, that I have had a great advantage over my fellow laborers in England, and have endeavored to avail myself of it so as to render my book more complete and reliable than any similar work hitherto published either in England or Ireland. I am the latest commentator on the Common Law Procedure Acts, and have not only the benefit of the experience of my predecessors, but the benefit of decisions pronounced by the Courts since the publication of their works. It is only by degrees that a new or even a modified practice "settles down." Many questions of construction are sure to arise and to require practical exposition. As the practice is studied and familiarized, and as doubtful points receive adjudication, its application becomes simple and easy to the practitioner. It is, however, a work of gradual development, and it is only as

point after point of doubtful construction is decided, that misapprehension is obviated and certainty secured.

In considering each section annotated, I have endeavored to get at the reason of the section and the principles involved in it. The meaning of an Act of Parliament, as well as a single section, can only be ascertained by reference to the principle which governs it. The Common Law Procedure Act is passed with a view "to simplify and expedite" proceedings in the Superior Courts of Common Law. The County Courts Procedure Act has a similar declared object. Two cognate principles, as applied to the whole Act, are thus enunciated: the one, to simplify; the other, to expedite. This much predicated, it is for the Court to advance the objects proposed, and so carry out the principles involved. The known aptness of the Court to respect precedents is a source whence there flows much good. But owing to human frailty former decisions are sometimes reluctantly doubted or overruled; and from this arises a desire for the very latest decisions on a doubtful point. When an old case is cited, the question is often put by the Court—"Is there no later authority than that?" The necessity for the latest cases, when solving a doubt, is sufficiently known to all practitioners to render any further reference to it here unnecessary. It only remains for me to say, that I have been most careful in noting the late decisions, sheet by sheet, as this work went to press. Those since decided will be found mentioned in the Addenda. More than *nine hundred cases*, decided since the passing of the English Acts and of our Acts upon the construction of one or other of them, have been noted in the work. No case, however, whether early or late, should, if possible, be viewed otherwise than as controlled by some governing principle. In matters of practice certain principles may be discovered which are of intrinsic value as the key notes of a great variety of cases. When it is laid down in general terms that he who endeavors to upset an opponent upon some ground of irregularity must be strictly regular himself, we have before us a principle applicable to every case of irregularity. When we are informed that the law favors the liberty of the subject, we reasonably conclude that in a proceeding to restrain the subject of that liberty there must be no irregularity. When the Court sets aside an arrest because the affidavit to hold to bail does not state that the debt is "due," we know that it is set aside not merely because there is an authority in point, but because that authority is consistent with reason and accords with the general principle that the liberty of the subject is to be favored. The Court in effect decides that the affidavit omits to make out a good case for depriving the subject of his liberty.

My only ambition in compiling this work was to produce a useful, complete and reliable vade mecum for the legal profession in Upper Canada. The only merit to which I lay claim is industry, and if that have not been

misapplied I am satisfied. I lay no claim to any display of originality of conception, but have contented myself with treading the beaten but sometimes uncertain paths of the law. I have striven in my progress to prepare the way for those who may have occasion to travel one or all of the paths through which I have travelled. In some places, perhaps, I have overstepped the limits of authority. In some instances I may have assumed that to be law for which there is no authority; but where such has been done it has not been done without a due sense of responsibility. Though law is said to be a science, it is in truth a most perplexing science. Though Reports and reported cases outstrip numerical calculation, yet cases do arise for which there is no express authority. Cases will arise which the most astute never could foresee; and still the law is for all cases, and must be applied to all cases so far as reason and analogy can suggest the mode of application. In the absence of decided cases I have frequently felt myself bound to state my impression by way of suggestion. That such impressions are free from error is more than I can expect. My only object in suggesting a construction unsupported by authority, was the desire of pointing the reader's attention towards what *might* be the right direction. In palliation of any errors that may be discovered, I have only to draw attention to the circumstances under which my impressions were formed. Before me there was a new Act, with scarcely a decision of our Courts. My task was to explain and expound it. I had not the advantage upon every point of doubt of an able argument from contending counsel; but even Judges, notwithstanding these advantages, are fallible. Those who are accustomed to speculate on the construction of new laws will, I am confident, be the first to appreciate my difficulties, and the readiest to bestow indulgence when needed. Many friends, upon whose knowledge and standing I have been too glad to rely, have kindly read the proof sheets, and so fortified my positions. Among these, I may mention the names of The Honourable Chief Justice Macaulay and His Honour Judge Gowan. Every page of the book, before it was worked off, was submitted to their perusal, and it is to me as much a duty as a pleasure thus publicly to acknowledge the advice and assistance with which I have been honoured. To Adam Wilson, Esq., Q. C., and Henry Eccles, Esq., Q. C., I have to express my thanks for similar services. The notes as to equitable defences have also been submitted to and approved by a leading member of the Equity Bar. To many others, whose names need not be given, I am greatly obliged for advice and assistance.

It is unnecessary to mention to any one who may open this volume, that it has been a work of great labor, not at all lightened by the responsibility under which I wrote. The immense number of cases consulted with a view to the extraction of guiding principles, being no less than *six thousand*, and the placing of these cases, when approved, in proper

order, has been a task requiring no ordinary perseverance and patience. This, too, was done with the prospect of pecuniary loss, consequent upon the size of the work and the low price at which it was promised. Bearing all these things in mind, I submit the work to those for whose benefit it is designed, and only ask of them a candid consideration and a fair judgment—more I do not ask, less I cannot expect. For the completeness of the Index of Subjects I am indebted to W. C. KEELE, Esq., and of the Index of Cases to MR. DAVID ALEXANDER, Student at Law.

I have, as promised, added the General Rules of Practice and Pleading, with copious notes upon the same plan as the Statutes. They add to the completeness of the volume, so as to make it, as intended, a ready, complete and reliable book of practice for the Common Law Practitioner. The Common Law Procedure Acts of 1857 are also added, but without notes. It was found that the work had grown to such dimensions under my hands, that to annotate them would make the volume much too bulky, and add much to the delay which has already taken place in its issue from the press. As I believe a very general impression was entertained that this volume would have appeared at a much earlier period than it does, I can only say in excuse that it was not possible to furnish the book in less time, while making it as complete as my anxiety to serve the profession led me to believe was necessary. A contrary course might have, as it is well known, saved me much trouble and no little expense. It is now, however, in my power to assert, with those kind friends who at much personal inconvenience to themselves lent me the aid of ripe experience, that the book is of its kind the most complete published. It contains *twice* the number of cases cited in the elaborate work of FINLASON, and *four* times the number of cases cited in KERR, THOMPSON, MARKHAM, or any other work in general use. This statement I make in no boastful spirit, but for the simple purpose of conveying to those inexperienced in the writing of books some idea of my protracted labor, and as an apology for what otherwise might be thought inexcusable delay.

R. A. H.

QUEEN STREET WEST,
February, 1858

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THE

COMMON LAW PROCEDURE ACT.

19 Vic.—Cap. 43.

An Act to amend, repeal and consolidate the provisions of certain Acts therein mentioned, and to simplify and expedite the proceedings in the Courts of Queen's Bench and Common Pleas in Upper Canada. [Assented to 19th June, 1856.] (*a*)

Preamble.

WHEREAS it is expedient to simplify and expedite the proceedings in the Courts of Queen's Bench and of Common Pleas for Upper Canada: Her Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows: (*b*)

(*a*) The modern plan, of naming a Statute, found so convenient in practice, has been followed in this Act. In citing the Act it will be sufficient to use the expression "The Common Law Procedure Act, 1856," (s. ccoxvii.)—Two hundred and eleven sections of the three hundred and eighteen sections which the Act contains have been made to apply to County Courts. (Co. C.P.A., s. 2.)

(*b*) As explained in the Introduction to this Work, this Act is for the most part copied from the Imperial Statutes, 15 & 16 Vic. c. 76, and 17 & 18 Vic.c.125. These Statutes were prepared upon the suggestions of the Common Law Commissioners appointed by the Queen, on the 13th May, 1850, "to inquire into the Process, Practice and System of Pleading of the Superior Courts of Law at Westminster, &c." On 30th June, 1851, their first Report was made, upon which the Statute 15 & 16 Vic. cap. 76 was framed. On 30th April, 1853, their second Report was made, which lead to the passing of the Statute 17 & 18 Vic. cap. 125. Both Reports will be found at length in the Introduction. They deserve a careful perusal. *Semble*—The English Statute of 1852 is confined to civil proceedings—(Campbell, C. J., in *R.* v. *Seale*, 24 L. J., Q. B. 221, 30: L. & Eq. 350.) It has been held to apply to personal actions commenced in inferior Courts, but removed into the superior Courts by *Certiorari*: (*Messiter* v. *Rose*, 13 C. B., 162.)

see addenda page 819.

Commencement of this Act.

I. The provisions of this Act shall come into operation on the twenty-first day of August one thousand eight hundred and fifty-six. (*c*)

Sealing and issuing writs.

And with respect to the sealing and issuing of Writs and to the officers of the Courts of Queen's Bench and Common Pleas in the different Counties or Unions of Counties; Be it enacted as follows:

Clerk of process to be appointed.

II. There shall be an officer appointed by the Governor of this Province, who shall be called the Clerk of the Process. (*d*)

Con Stat. of Up. Can. ch 10 § 24

(*c*) Questions may arise as to the effect of the Act upon proceedings in actions commenced before the 21st August, 1856. It is plain from the wording of many sections that the general scope of the Act is prospective—not retrospective. But no general rule can be laid down for all cases. Still, the general maxim, "*Nova constitutio futuris formam imponore debet non præteritis*," (2 Inst. 202) must not be forgotten. The Act, though in many respects prospective, is in others retrospective. In regard therefore to each particular case as it may arise, reference must be had to the section which governs it. The judges in England in the cases before them seem to have scrupulously confined their observations to the points for the time before the Court. It has been held that in the case of an appearance per Stat., entered before 24th Oct., 1852, when the first English Statute came into operation, that ss. 27 and 28 of that Act, (ss. lx. and lxi. of ours) did not apply (*Goodliffe* v. *Neave*, 8 Ex. 134.) So it has been held that special demurrers, pending at the time the act came into force, were not affected by it: (*Pinhorn* v. *Souster*, 8 Ex. R. 138, 14, L. & Eq. 415. So of the action of ejectment—if commenced before the statute came into force, that the action might still proceed. (*Doe* v. *Smith* v. *Roe*, 8 Ex. 127; 16 L. & Eq. 504.) It may be held that defects existing in proceedings before the Statute came into force cannot be cured by it. (See *The Queen* v. *Inhabitants of Crowan*, 14 Q. B., 221.) Proceedings were amended under s. 222 of the 1st C.L.P.A. (s. ccxcli of our act) though the action in which the amendments were allowed, had been *commenced* before the act came into force: (*Cornish* v. *Hocking*, 22 L. J. Q. B. 142.) The section abolishing the old mode of proceeding for judgment, as in case of nonsuit (s. cxlix. of our act) was held to apply to causes where issue had been joined, and default made in going to trial, pursuant to notice before the act came into operation: (*Morgan* v. *Jones*, 8 Ex. 128.) But of these decisions in their places—notes will be found under the different sections. In several sections special provision is made for pending proceedings: for instance—s. xxix. as to renewal of writs of summons; s. lix., as to appearances; s. cxli., as to rules to compute; s. cxlix., as to judgment in case of nonsuit; and see further the repealing clause, No. ccxviii.

(*d*) "*There shall be an Officer appointed by, &c.*"—There is no qualification for this officer prescribed by the statute, and therefore any one who is not disqualified by common law, may be appointed by the Governor of this Province. The disqualifications at common law, are want of skill, or holding some other office incompatible therewith, &c. (As to which hereafter.)—This office is, strictly speaking, one of "new creation." Before the year 1853, process in the Courts of Queen's

III. The Clerk of the Process shall be deemed an officer of both of the said Superior Courts of Common Law, and shall keep his office in Osgoode Hall, and shall have a reasonable allowance for printing, procuring and transmitting blank

To be an Officer of both Courts
con. Stat of U.C. ch. 10 § 24, 34, 36, 46.

Bench and Common Pleas were issued by the respective Clerks of these Courts. Then Statute 16 Vic., cap. 175, was passed. It recited that "it is desirable that the offices for issuing writs of summons and capias and other writs of mesne or first process in the Courts of Queen's Bench and Common Pleas, in Upper Canada, in the County of York, be united." It enacted that the Clerks of the two Courts should, from time to time, "select one of their Clerks, whose duty it shall be to issue all Writs of Summons, &c."

The officer contemplated by the section under consideration has different duties to perform, and is differently appointed. His duties are described in sections iv. and v. His appointment now rests with the Executive.

As the office is one of new creation, it may not be out of place to state a few of the leading principles applicable thereto, as a public office. The Queen is the universal dispenser of justice within her dominions. From her all offices are said to be derived. And yet she cannot create any new office not warranted by ancient usage, or written laws. (Bac. Abr. "Offices and Officers B.") Within this Province there is no such thing as ancient usage or immemorial custom. The body of written law or the common law of England before 1792, must be the guide. The Sovereign cannot of herself create any office inconsistent with these, or prejudicial to the subject. Hence the necessity for the express declaration by Act of Parliament that the Clerk of Process shall be appointed by the representative of the Sovereign. It is said that at common law all Officers of Justice had estates in their respective offices during life, and could not be removed but for misdemeanors. But of late it is a settled practice for the Crown to grant offices "during pleasure" only, unless there be in the Act creating the office, an express provision for a different tenure. Judges of the Superior Courts in Upper Canada hold office "during good behavior;" but there is a statutory provision to that effect. The Clerk of Process is, therefore, it seems, only entitled to hold office during pleasure. Though the appointment is in the gift of the Executive, the Courts would not be bound to receive the individual appointed if he should be unfit for the office (*Ib.* I.) It is recorded that where the office of Clerk of the Crown was granted by the monarch, to a person named Vintner, who exhibited his patent; but who was totally unsuited for the office, the Justices of the Kings Bench refused to receive him. Afterwards they recommended a fit person, whom the Monarch *ore tenus* commanded to be admitted, and was sworn. (*Ib.*) If an office of learning be given to a man utterly unfit, the grant is void. (Hob. 148).

It is an ancient rule of the Common Law that no one person shall hold two incompatible offices: *Nemo duobis utatur officiis*—(Co. Lit. 3 a.) Offices are said to be incompatible and inconsistent, so as to be executed by the same person, when from the multiplicity of business in them, they cannot be executed with care and ability, or where interfering with each other a presumption is raised, that they cannot be executed with impartiality and honesty. Bac. Abr. "Offices and Officers. K." By common law no judicial officer can appoint a Deputy (4th Inst. 88, 1 Salk. 368,) but most ministerial officers can do so unless the office be of such a nature that it must be presumed that the party granting it trusted the grantee and

forms of all Writs and Process, (*e*) and for necessary books and stationery, and shall be subject to such rules for his guidance, as shall be, from time to time, made according to and under the powers for making rules hereinafter set forth. (*f*)

To be subject to rules to be made.

IV. The Clerk of the Process shall have a seal for sealing Writs in each of the said Courts, to be approved by the Chief Justice of each Court respectively, (*g*) and he shall seal there-

To seal the writs, &c., of both Courts.

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him alone. (9 Rep. 49. Bro. Abr. Patents, pl. 66.) It has been held that the office of Clerk of Papers in the King's Bench Prison, cannot be exercised by deputy. Bac. Abr., "Offices and Officers. K." The Clerk of Process must perform his duties in person.

If an officer act contrary to the nature and duties of his office, or if he refuse to act at all, he forfeits his office. (*Ib.* M.) Every officer, whether such by common law or pursuant to statute, is punishable for corrupt and oppressive proceedings. He will be punished according to the nature and heinousness of the offence, either by indictment, attachment, or action, at the suit of the party injured. (*Ib.* N.) All Courts of Record have a discretionary power over their own officers, and are bound to see that no abuses are committed by them, that may bring disgrace on the Courts themselves. (*Ib.*) Extortion is punishable by fine and imprisonment, and also by a removal from the office, in the execution of which it was committed. (*Ib.*) Extortion may be defined to be the taking money by an officer, by color of his office, either where none at all is due, or not so much as taken, or where it is not yet due. (*Ib.*) A promise to pay an officer a reward for the doing of a thing for which the law will not suffer him to take anything, is void. This, too, however freely and voluntarily it may have been made. (*Ib.*) Bribery is punishable by fine and imprisonment, and forfeiture of office. Such a crime may be defined to be the receiving of an undue reward by any person whomsoever, whose ordinary profession or business relates to the administration of justice, in order to incline him to do a thing contrary to the known rules of integrity and honesty. (*Ib.*) The giving or taking a reward for an office of a public nature, is said to be bribery. (*Ib.* F.)

(*e*) The Clerk of Process, though appointed by the Executive will be subject to the control of the Judges. As an officer appointed by Government, he will be responsible to Government for the proper discharge of his duties. But like other officers of a Court of Justice, he will also be responsible to the Courts, and be liable to be dealt with for improper conduct. (See preceding note). For his guidance in the performance of his duties, he must look to the Courts. As an officer of both Courts, he must obey all regulations of the Courts not inconsistent with the provisions of this statute.* The allowance for printing, &c., though not so expressed, it is evidently intended shall be paid by Government. Since all fees must be funded by the officer, (s. v.) and he be paid by salary, the moneys to be received by him must be held to be public moneys. His appointment would appear to be "a situation of public trust," and he "concerned in the collection, receipt, disbursement, or expenditure of public moneys." This being the case, it may be held that he will be bound to give security to the Crown, under statute 4 & 5 Vic., cap. 91, s. 1.†

(*f*) s. cccxiii.

(*g*) At common law a Court of Record has the power of appointing a seal as a necessary incident to give effect to the authority delegated to it. The principle as to corporate seals applies

* see addenda page 619.

† " " " "

with and sign all Writs and Process whatsoever which are to be issued from such Courts respectively; he shall keep each Deputy Clerk of the Crown and Pleas supplied with all Writs and Process so signed and sealed in blank to be by them filled up and issued; and he shall in like manner keep the Clerks of the Crown and Pleas supplied with all Writs and Process other than those which he is required to issue; and the Clerk of the Process shall issue to the parties or their Attorneys all Writs of Summons and Capias and alias and pluries Writs of Summons and Capias, and Writs of Capias in actions already commenced and concurrent Writs, and shall renew such Writs as hereinafter authorized, which shall be required to be issued from the principal office at Toronto; And it shall be his duty and the duty of each Deputy Clerk of the Crown, to issue Writs for the commencement of actions alternately one from each Court and not otherwise, provided that this shall not be understood in any way to affect the issue of concurrent Writs. (*h*)

And supply Clerks and Deputy Clerks. § 36.

To issue writs, &c., to parties and their Attorneys. con stat for u.c. ch 22 § 4 & 5

Writs to issue alternately, from each Court.

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to Courts. (See 1 Bl.Com. 475 Bac. Abr. "Corporations. D.") The effect of this section would appear to be that each Court may order a seal which must be approved of by the *Chief Justice* of such Court.

(*h*) The duties of the Clerk of Process under this section are of a two-fold character:—

First—To seal and sign "all writs and process whatsoever" to be issued from either of the Courts, and to supply them in blank to the Clerks of the Crown and Pleas and their Deputies. *Second*—To issue all writs of Summons and Capias and alias and pluries writs of Summons and Capias, &c., which may be required to be issued from the principal office at Toronto. Upon reference to the repealed s. 1 of stat. 16 Vic., cap. 175, it will be found that the duties last mentioned nearly correspond with those enacted by the repealed provision. But as it was then thought that the Clerk's time would not be fully occupied he was bound to act in the discharge of such other duties in connection with the common law Courts as "either of the superior Clerks should require." The latter requirement has been omitted in the section under consideration. In lieu thereof the duties of the Clerk are much increased and his authority extended. The present act is a decided improvement upon the old law. The system of issuing writs in dozens for each Court was first authorised by s. 2 of stat. 16 Vic., cap. 175. The recital to that section explained the reason of the system. It recited that much public inconvenience arose from the unequal distribution of the business between the two superior Courts of Common Law, they having a common jurisdiction, (12 Vic., cap. 63, s. 8,) whereby one Court was often insufficiently employed, while the other was unduly pressed, to the great delay and injury of suitors, and detriment of justice. With a view to equalize the business of said Courts, it was enacted that first process should be issued in rotation by twelves. The alternate issue of writs, "one from each Court," adopted by s. iv., is much preferable

To make quarterly returns to Inspector General.

V. The Clerk of the Process shall make quarterly returns, verified by his affidavits, to the Inspector General, of all Writs and Process issued by him in suits brought at Toronto or supplied by him in order to be issued, to the Clerks or Deputy Clerks of the Crown; and such Clerks or Deputy Clerks shall account for and pay over all fees receivable by them on such Writs and Process, as they are now bound by law to do in respect to other fees received by them; (*i*) And the Clerk of the Process shall receive the fees on Writs and Process issued

Clerks and Deputy Clks to account as at present.

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to "rotation by twelves." Increased facilities are afforded to such suitors as may desire to make a choice of Courts, and yet the business of the two Courts as regards the number of writs issued is not in consequence made unequal. An exception to this rule in favor of writs of capias issued during the pendency of a cause is created by s. xlii.

Semble—a writ is irregular if not sealed: (*Smith* v. *Russell*, 1 U. C. Cham., R. 193.) Under the old practice a writ was held to be sufficiently signed when signed by the Deputy who issued it, though not signed by the Clerk of the Crown (*Ib.*) The Clerk of Process must, under s. iv, *seal* and *sign* all process whatsoever.

(*i*) By 12 Vic., cap. 63, it is enacted "that the said Clerks of the Crown and Pleas, in each of the said Courts, respectively, shall, on the four quarterly days hereinbefore mentioned, (1st Jan., 1st April, 1st July and 1st October; see s. 5. of same Act) make up and render to the Inspector General of Public Accounts of this Province, a true account in writing of all the fees, dues, emoluments, perquisites and profits received by, or on account of the said officers, respectively, in such form and with such particulars as the said Inspector General shall, from time to time, require; which said accounts shall be signed by the officer rendering the same, and shall be declared before one of the Judges of the Court to which he belongs; and such officers, respectively, shall, within ten days after the rendering of such account, pay over the amount of all such fees, dues, emoluments, perquisites, and profits to the Receiver General of this Province; and if default shall be made in such payment, the amount due by the officer making such default, shall be deemed a specialty debt to Her Majesty." (s. 15.) And "that the several Clerks of the County Courts in Upper Canada, shall be *ex-officio* Deputy Clerks of the Crown and Pleas in the said Courts of Queen's Bench and Common Pleas." Provided, &c., (a saving in favor of existing incumbents.) (s. 11.) And by s. 16 of the same statute "that the Clerks of the County Courts in Upper Canada, acting as the Deputies of the Clerks of the Crown and Pleas in the said several Courts of Queen's Bench and Common P' shall make up and render to the Inspector General of this Province, the like accounts, *in like manner, and at the same periods hereinbefore appointed for the said Clerks of the Crown and Pleas, respectively.*" (See commencement of this note.) "Which said accounts shall be signed by the officer rendering the same, and shall be declared before the Judge of the County Court to which he belongs; and every such officer shall, within ten days after the rendering such account, pay over the amount of all fees, dues, emoluments, perquisites, and profits received by him as such Deputy Clerk of the Crown, to the Receiver General of this Province; and if default shall be made in such payment, the amount due by the officer making such default, shall be deemed a specialty debt to Her Majesty."

by him as aforesaid at Toronto, and shall in like manner, account for and pay over such fees to form part of the Consolidated Revenue Fund of the Province. Clerk of Process to pay over fees received by him.

VI. In cases in which the cause of action shall be transitory, the Plaintiff may sue out the Writ for the commencement of the action from the office of the Clerk of the Crown and Pleas of either of the said Courts, or from the office of any of the Deputy Clerks of the Crown and Pleas. (*j*) Proper Office for taking out writs in transitory actions.

VII. When the venue is local, the Writ for the commencement of the action must be sued out from the office within the proper County. (*k*) When the venue is local.

(*j*) Actions are:—

Transitory, where the cause of action might be supposed to have accrued or happened anywhere, such as debt, contracts detinue, slander, assault, false-imprisonment; and usually, all matters relating to the person or personal property, even though all the facts arose abroad. As a general rule actions may be considered transitory when the idea of locality does not necessarily attach to the cause of action.

Local, where the cause of action could have accrued or happened in one County only. Thus, if the action be trespass for breaking the plaintiff's close, the action must be commenced, and the venue laid where the close is situated. Such trespass could not have happened anywhere else. (See Smith on Action 78, Steph. Pl. 288, Chit. Pl. I. 280.) Generally it may be stated that actions may be considered local when the cause of action could by possibility and in its nature have reference to a particular locality only.

It should be noticed that some actions are made local by statute. For example, actions brought against persons for something done by them in the performance of a public duty, or when acting under the express provisions of certain Acts of Parliament. The statute for the protection of Justices of the Peace, (16 Vic., cap. 180) may be referred to as an instance. Section 9 enacts that in actions brought against a Justice of the Peace, for any thing done by him in the execution of his office, "the venue shall be laid in the County where the act complained of was committed. &c." An arrest by a Justice of the Peace, if illegal, may, under this section, be deemed a local cause of action; whereas if the same act were committed by a private individual, the venue would be transitory. No action should be commenced against any person who could reasonably suppose that he was acting under the authority of an Act of Parliament, until it has been ascertained by reference to the act, whether any and what provision is made with respect to venue.

(*k*) The Testatum Writs Act, 8 Vic. cap. 36, has been repealed (s. cccxviii.) Though repealed, the principles of it are retained by this statute. The section under consideration is an extension of the principles of the Testatum Writs Act. In all cases where the venue is local "the writ for the commencement of the action *must* be sued out from the office within the proper county." Beyond all question actions of ejectment are embraced within this enactment—if any doubt could be entertained upon the construction of this section, a reference to s. ccxxi. will remove it. With respect to the action of ejectment it is

con stat R.S. ch 24 § 89 -

Provision, if the venue be changed.

VIII. The venue in any action may be changed according

there provided that the writ "*shall* be issued out of the office in the County or Union of Counties wherein the lands mentioned in such writ lie." The Testatum Writs Act, s. 6, enacted "that all writs against lands shall be issued out in the office of the Clerk of the Crown at Toronto." The last Ejectment Act (14 & 15 Vic. c. 114) allowed an election to be made between the principal office at Toronto and the office of the Deputy of the County in which the land was situate. In practice it was optional to issue from either. Now it is imperative to issue from the office of the County in which the lands are situate. It is apprehended that henceforward there will be no election in *any* local action; but that the proceedings must be necessarily commenced, and conducted in the office of the County where the cause of action accrued.

In an action on a recognizance the venue should be laid in the County in which the recognizance remains of record: (*McFarlane* v. *Allen*, 4 U. C. C. P. 438; *Smith* v. *Russell*, 8 U. C. R., 387.) As to venue made local by Statute, see conclusion of note (*j*) to s. vi. In local actions laying the venue in the wrong county has been held to be a ground of nonsuit: (*Boyes et al* v. *Hewetson*, 7 C. & P. 127; 1 Saund. 241 n.)—But with reference to our new practice, it should be noticed that in some local actions, (ejectment for example,) if the writ be issued from any county "other than the proper county," the error will appear on the face of the writ itself. It is apprehended that in such a case the writ would be irregular, if not void, and might at once be taken advantage of, upon motion. In other local actions, (trespass for example,) the error might not appear till d claration or other proceeding subsequent to the writ. The error when made known to the opposite party might in this case too, it is apprehended, be moved against. In some actions, local by statute, (actions against magistrates for example) the error might not disclose itself until the trial. A nonsuit in this case it is apprehended, would not be improper. The effect of laying the venue in a wrong County in local actions, under the new practice, has not yet been judicially decided. There is no enactment in either of the English Common Law Procedure Acts similar to our s. vii. In the case of a local action brought in a wrong County, it was held under the old practice that a judge in Chambers had no power to amend the proceedings. (*Vaughan* v. *Hubbs et al*, 1 U. C. Cham. Rep., 76: Macaulay, J. But see *Ward et al* v. *Sexmith*, 1 U.C. Pr. C. Rep., 382, and further, see s. cccix. as to the practice under this act.) A summons was sued out before the separation of Ontario from York and Peel, directing the defendant to appear in the office of the three United Counties. It was not served until after the separation. The venue in the declaration was laid in the three United Counties. Demurrer. Held not to be frivalous. (*Plaxton* v. *Smith et al*, 1 U. C. Prac. Rep. 228.) Under the old practice besides being a ground of nonsuit, it has been said that defendant might demur or otherwise specially plead to the error: (*Tremeere* v. *Morrison*, 4 M. & Scott, 609; *Richards* v. *Easto*, 15 M. & W., 244.) It is now probable that amendments, whenever practicable, would be allowed under s. ccxci.

Unnecessary delay and expense may sometimes be occasioned by the *trial* of a local action in the county where the cause of action arose. To remedy this stat. 7 Wm. IV. cap. 3. s. 14, has been passed. It enacts "that in any action depending in the Court of King's Bench (or Common Pleas, see 12 Vic., cap. 63, s. 8,) the venue in which is by law local, the the Court or any judge thereof may, on application of either party, order the issue to be tried or damages to be assessed in any other district than that in which the venue is laid, and for that purpose the said Court or a Judge

to the practice now in force, (*l*) but notwithstanding a change of the venue, the proceedings shall continue to be carried on

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thereof, may order a suggestion to be entered on the record, that the trial may be more conveniently had or damages assessed in the district where the same is ordered to take place. This practice is one that has for a long time prevailed in criminal cases. (See Arch. Crown Office, 66.) The form of suggestion may be the same *mutatis mutandis*, as that followed in criminal cases. (See *The King* v. *Hunt*, 3 B. & A., 444.)

(*l*) Venue may be changed "according to the *practice* now in force." The "practice now in force" is made up of decisions as well as rules of Court, &c. And it may be considered that decisions heretofore given, and not doubted or overruled, will, to a certain extent, have statutory effect. The practice as to changing venue may be noticed under the following heads:

1. *For a Review of the Practice*—See *Attorney General* v. *Churchill*, 8 M. & W. 171. *Forms*—Chit. F., 6 Edn., p. 559, et seq.; 7 Edn., p. 768.*

2. *Time for Application*—Application may be made by defendant at any time after declaration and before plea, on common affidavit. (Chit. Arch., 8 Edn. 1167; Bag. Cham., P. 250.) At all events should be made before issue joined. (*De Rothschild* v. *Shilston*, 8 Ex. 503.) If *after* issue joined, special affidavit necessary. (See *Youde* v. *Youde*, 4 Dowl. P. C. 32; *Hodge* v. *Churchward*, 5 C. B. 495; *White* v. *Neeld*, 30 L. & Eq. 504.) †

3. *Change by Defendant on Common Affidavit*—Actions and causes of action are either transitory or local. (ss. vi. vii.) In the former, plaintiff may lay his venue in whatever County he pleases. In the latter, he must lay it in the "proper County." (Chit. Arch. 8 Edn. 1164; Bag. Cham., P. 248; Bag. Prac. 319.) Plaintiff's right in transitory actions to lay his venue wherever he chooses, is subject to that of the defendant to change it upon the "common affidavit." (Chit. Arch., 8 Edn. 1164; also *De Rothschild* v. *Shilston*, 8 Ex. 508; *Chilee* v. *Bradley*, 13 C. B. 604; *Begg* v. *Forbes*, *Ib.* 614: *Ramsden* v. *Skipp*, 13 C. B. 601, e contra.) The common affidavit alleges "that the cause of action, if any wholly arose" in the County to which defendant desires a change. To this rule there are some exceptions. (See Chit. Arch. 8 Edn. 1164.) When defendant is under terms to plead "on the usual terms," or to take "short notice of trial, if necessary," venue will not be changed on common affidavit. (*Brettargh* v. *Dearden*, McL. & Y. 106; *Chilee* v. *Bradley*, 13 C. B. 604.) In our Courts the following authorities are to be found; R. & H. Digest, tit. "Venue." Venue not changed at instance of defendant, in an action on a bond where application made on the common affidavit. (*Lossing* v. *Horned*, Tay. U. C. R. 103.) Not changed where Sheriff was defendant, and applied because he could not attend trial. (*Brock* v. *McLean*, Tay. U. C. R. 312.) Not changed on common affidavit, in an action against carriers. (*Ham* v. *McPherson et al*, M. T., 5 Vic.; *MS.* R. & H. Dig., "Venue" 8.)††

4. *Change by Defendant on special grounds*—Chit. Arch. 8 En. 1170; Bag. Prac., 320; Bag. Cham., P. 251. Not changed from A. to B. on application of defendants who were more numerous than plaintiffs, and intended to be witnesses upon their own behalf. (*Rose* v. *Cook et al*, 2 U. C. Cham. Report 204.) It is no ground for changing, that a person required as a witness at one Assize, will be an associate at another, and that from the distance he cannot attend both. (*Smith* v. *Jackson*, M. T., 1 Vic.; *MS.* R. & H. Dig., "cases omitted," Venue.)‖

5. *Change how affected*—(See Chit. Arch., 8 Edn. 1167.) Venue not changed by Judge's order and service alone. It must be in fact altered. (*McNair* v. *Shelden*, Tay. U. C. R. 598; *Hornby* v. *Hornby*, 3 U. C. R. 274.) ‖‖

* see addenda p. 819
† " " "
†† see addenda p 819.
‖ " " " "
‖‖ " " " "

in the office from which the first process in the action was sued out. (*m*)

Proceedings to be carried on in office whence writ issues, &c., service of papers, &c.

(*App. Co. C.*)

IX. All proceedings to final judgment shall be carried on in the office from which the first process in the action was sued out, (*n*) and the service of all papers and proceedings subsequent to the Writ, (*o*) shall be made upon the Defendant or his Attorney, (*p*) according to the practice now in force, unless special provision is otherwise made in this Act, and if the At-

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6. *Right of Plaintiff to bring back Venue*—This plaintiff may do on undertaking to give "material evidence." (Chit. Arch., 8 Edn. 1168.) As to what is material evidence—see *Linley* v. *Bates*, 2 C. & J. 659; *Collin* v. *Jenkins*, 4 B. N. C. 225; *Greenway* v. *Titchmarsh*, 7 M. & W. 221; *Gilling* v. *Dugan*, 1 C. B. 8; *Jones* v. *Smith*, 2 Ex. 451; *Hall* v. *Story*, 16 M. & W. 63; *Clark* v. *Dunsford*, 2 C. B. 724; *Lee* v. *Simpson*, 3 C. B. 871; *Parratt* v. *Benassit*, *Ib.* 884 n.

7. *Change of Venue on application of Plaintiff*—A special affidavit is necessary. Plaintiff's application should be properly an application to amend his declaration. (Chit. Arch., 8 Edn. 1172; Bag. Prac. 322; *Crawford* v. *Ritchie*, Tay. U. C. R. 104; *Doe Crooks* v. *Cumming*, 3 U. C. R. 65; *Ward et al*, v. *Sexsmith*, 1 U. C. Prac. R. 382; but see *Vaughan* v. *Hubb et al*, 1 U. C. Ch. R.) After issue joined, the Court will not amend an application of plaintiff, unless very special grounds be shown for it. (*Crooks* v. *House*, 3 O.S. 308; *Smith* v. *Cotton*, 1 U. C. R. 397.) Affidavit, by whom to be made, in such cases: (*Williams* v. *Higgs*, 6 M. & W., 133.) If plaintiff is entitled to amend as a matter of right, Court will not impose terms: (*Turnley* v. *The London and N. W. Railway Company*, 32 L. & Eq. 377.)

8. *Present Practice in England*—When defendant is entitled to change venue on the common affidavit according to the old English practice which we still retain, the order was absolute in the first instance. In England the practice has been lately altered. By rule 18 of H. T., 1853, it is ordered "that no venue shall be changed without a *special* order of the Court or a Judge, unless by consent of parties. The meaning is, that no venue shall be changed by a common order issued as of course: (Per Martin, B., in *Begg* v. *Forbes et al*, 26 L. & Eq., 369.) No such rule prevails in Canada.

(*m*) Section 2, of the repealed Testatum Act, provided "That the Court of Queen's Bench, or any Judge thereof in Chambers, on making an order to change the venue in any suit, might order the papers in such suit to be transmitted to and filed in the office of the Clerk of the Crown at Toronto."

(*n*) The Court, under the old practise, set aside judgments entered upon cognovits by Deputy Clerks of the Crown, no previous proceedings having been had in their offices: (*Commercial Bank et al* v. *Brondgeest et al* 5 U. C. R. 325, *Laverty* v. *Patterson*, *Ib.* 641. But see s. x.

(*o*) Service of writ in ordinary actions, see ss. xxxi., xxxii., xxxiii., xxxiv. In Ejectment, see s. ccxxiii.

(*p*) See *Houghton et al* v. *Hudson*, 1 U. C. Prac. R. 160. Burns J. speaking of the provisions of the Testatum Writ, Act 8 Vic., cap. 36, s. 2, (now repealed,) is reported at page 169, as follows:—"The provision of the statute is only for the service of papers upon the defendant or his Attorney. It would seem not to apply to service upon the Plaintiff's Attorney, * * * and it may be said in such cases that the defendant must serve his papers upon the Plaintiff's Attorney, *wherever he may reside.*" Such is precisely the

* see addenda p. 819.
† " " " "
†† see addenda p. 819.

torney of either party do not reside or have not a duly authorised agent (*q*) residing in the County wherein such action was commenced, then service may be made upon the Attorney wherever he resides, or upon his duly authorized agent in Toronto, (*r*) or if such Attorney have no duly authorized agent there, then service may be made by leaving a copy of the papers for him (*s*) in the office where the action was commenced, marked on the outside as copies left for such Attorney. (*t*)

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enactment of the Legislature in the subsequent part of this section, as applied to either party, whose Attorney does not reside, or has not a duly authorised agent within the County in which the action was commenced.

(*q*) This contemplates, as applied to our counties, the appointment of a special agent by the Defendant's Attorney. The agency at Toronto may be looked upon as a general agency, but the agency in outer counties is confined to actions commenced in the several counties in which the agents may be appointed. There is no rule making it imperative for a practitioner to appoint agents for the general transaction of agency business in the outer counties of Upper Canada. But as regards the appointment of an agent in Toronto, the rules in force are very decided, (n. *r* post). The old rule of M. T., 4 Geo. IV., (Dra. Rules 2,) admitted the appointment of an agent in outer counties, but such were considered special agents. (See remarks of Burns J. at the conclusion of his judgment in *Houghton et al* v. *Hudson*.)

* (*r*) "Every Attorney not resident in the Home District, shall enter, in alphabetical order, in a book to be kept for that purpose by the Clerk of the Crown, his name and place of abode, and also, in an opposite column, the name of some practising Attorney in the City of Toronto, as his agent, who may be served with notices, summonses *and all other papers* not required to be personal; and if any Attorney shall neglect so to enter his name, with that of his agent, as before mentioned, fixing up the notice, summons, or other paper, in the Crown Office, shall be deemed good service." Rule M. T. 4, Geo. IV. (Dra. Rules 3.)

And "it is ordered that every Attorney residing in the Home District, and not having an office in the City of Toronto or the liberties thereof, shall have a booked agent in the said city conformably to the rule of this Court of M. T. 4, Geo. IV., upon whom papers may be served, as is provided in that rule with respect to Attornies not resident in the Home District, and subject to the same consequences, in case of the neglecting to enter the name of himself and his agent in the Crown Office, as directed by the said rule."—Rule H. T., 10 Vic., (Dra. Rule 3.)

The Rule M. T., 4 Geo. iv., (Dra. Rules 2,) regulating the service of papers in a cause on an attorney residing out of the District in which action was brought, was held to apply equally to all Districts, (including the Home District,) and to Attornies, for both parties in the cause. (*Clemow* v. *H. M. Ordnance*, 5 U. C. R. 458.)

(*s*) As the papers may be left *for him*, it is presumed that he (the Attorney) upon demand, would be entitled to receive them at the hands of the Clerk. This feature is new in our practice. The old practice was to put up the papers in the Crown Office, whence they were seldom if ever taken.

(*t*) Service of declaration on defendant after he appeared, by attorney, was held to be irregular. (*Ryan et al* v. *Leonard*, 3 O. S. 307.) It is irregular to serve papers by delivering them to a clerk, at a distance from the

* See addenda p. 819.

As to judgments on *cognovits*.

Con Stat of U.C. Ch 22 § 236 -

X. Final judgment may be entered upon a *cognovit actionem* or Warrant of Attorney to confess judgment, which shall have been given or executed, in the first instance and before the suing out of any process in any of the said offices, (*u*) or* at the

Attorney's residence or place of business. (*Tiffany* v. *Bullen*, 5 O. S. 137.) Service of a notice on Good Friday, is good service. (*Clarke* v. *Fuller*, 2 U. C. R. 99.) Declaration served on an Attorney who had not appeared irregular. (*Dobie* v. *McFarlane*, 2 O. S. 285.) In this case the Attorney when served did not deny that he was acting for defendant, and the Court in consequence, though they set aside the proceedings without costs, intimated that upon a proper application they would make the Attorney pay them. (*Ib.*) Service of a notice of assessment on an Attorney who had been in the habit of accepting service for defendant, good: (*Rutledge* v. *Thompson*, 1 U.C Pra. Rep. 275.) Declaration cannot be regularly delivered before appearance (*Ballard* v. *Wright*, 2 O. S. 218; but see ss. lix., lx. and lxi. of this act.) Where declaration was served before it was filed, defendant, who allowed interlocutory judgment to be signed and notice of assessment given, was held to be too late to object. (*Proctor* v. *Young*, H.T., 4 Vic. *MS.* R. & H. Digest "Irregularity" 15.) Service of a notice assessment by throwing it over defendant's fence to defendant's son, who refused to have anything to do with it, irregular. (*McGuin* v. *Benjamin*, 1 U. C. Cham. R. 142.) If one of two defendants appear by Attorney, it is irregular to serve papers for both on that Attorney. (*Huff* v. *McLean et al*, 5 O. S. 69.) Notice of action—proof of service by Bailiff. (*Gardener* v. *Burwell*, Tay. U. C. R. 64; *Brynes* v. *Wild et al*, 7 U. C. R. 104.) Notice of trial—time of service, (see s. cxlvi.) Summons for attachment on Sheriff—proof of service. (*Hilton* v. *Macdonell et al*, 1 U. C. Cham. R. 207.) Contradictory affidavits. (*Harper* v. *Brainton*, 1 U. C. Prac. R. 267.) Services of all rules, orders, and notices must be made before nine o'clock at night. (Rule II. T., 13 Vic., No. 47 (Dra. Rul. 118.) See further as to *Service of Notices*—(Chit. Arch. 8 Ed., 308, 741; Bag. Prac. 111.) *Service of Rules*—(Chit. Arch. 1415; Bag. Prac. 281.) *Service of Summons or Order*—(Chit. Arch. 1433; Bag. Prac. 291.)

(*u*) "*In any of the said Offices, &c.*" "Any" must relate either to one of the Principal Offices at Toronto, or to any of the offices in outer Counties; "*Unless some particular office* * * * *be expressly stated, &c.*" It seems clear that this statement, if made, must be in the body of the document. The intituling of a cognovit would only indicate *one* of two Courts, and not one of several offices. Warrants are not intituled in any Court.

A cognovit is a confession by the defendant, of the plaintiff's cause of action to be just and true, whereby judgment is entered against him without trial: (Smith on Action 21, note *a*.)

A Warrant of Attorney is an authority given by the debtor to an attorney named by the creditor, empowering him to confess judgment: (*Ib.* note *b*.)

In Upper Canada cognovits are much more in general use than warrants of attorney. And here the practice with respect to cognovits has always varied from that of England. In England the cognovit differs from the warrant of attorney in that the action must be commenced by the issue of a writ before a cognovit can be taken which in the case of a warrant of attorney is unnecessary. In Upper Canada no such difference has ever, in fact, existed between these two instruments. It has been usual to take cognovits before the issue of a writ and

* "Or" should have been omitted. It appears to be a mistake in the Act.

* See addenda p. 919

option of the Plaintiff, unless some particular office in which the judgment is to be entered be expressly stated in such *cognovit* or warrant.

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the Courts have sustained the practice. (*Walton* v. *Hayward*, 2 O. S. 473.) The object was to save expense.—Though no writ was in fact issued, yet the judgment roll on a cognovit has always presupposed a writ and declaration. The cognovit may be taken at any stage of a cause; but, if after plea pleaded it is proper that it should contain an agreement to withdraw the plea. From what has been said, it will be observed that s. x. is merely declaratory of an existing practice in Upper Canada. Perhaps it will be held that the act goes further than the old practice. As it now expressly enacted that final judgment may be entered on a cognovit given before the suing out of process, it may be inferred that the judgment roll need not for the future presuppose the issuing of writ. A judgment entered on a cognovit without common bail held to be irregular: (*Goslin* v. *Tune*, 1 U. R. R. 277.) The authority of this case is rendered doubtful by the new Practice. S. lix., enacts that "no appearance need be entered by the plaintiff for the defendant." A judgment entered upon a cognovit by a Deputy Clerk of the Crown, no previous proceedings having been had in his county, was held void: (*Laverty* v. *Patterson*, 5 U. C. R., 641; *Commercial Bank et al* v. *Brondgeest et al*, 5 U. C. R., 325.) Where a cognovit was given by one practising attorney and witnessed by another, who was absent from the Province, leave was given to enter judgment upon proof of the hand-writing of the defendant and and the witness: (*Cleal* v. *Latham*, 1 U. C. R., 412; *King* v. *Robins*, Tay. U. C. R., 409.) The Court gave leave to enter judgment against one defendant, the other being dead, and a suggestion to that effect entered of record: (*Nicholl* v. *Cartwright et al*, Tay. U. C. R., 639.) *Sed. qu.* In connexion with this case, see stat. U. C. 1 Vic. cap. 7, and ss. ccxi, ccxii, ccxiii. of this act. Where there are several defendants and a cognovit intituled in the cause against all, is executed by some only, judgment cannot be entered against the latter alone: (*Roach* v. *Potash et al*, T. T., 2 & 3 Vic., *MS.* R. & H. Dig. "Judgment" 8. Where a cognovit was given with a stay of execution till a future day, and a mem. was endorsed deferring payment of part of the debt for a longer time, and at the day of judgment was entered for the whole amount—the Court restrained the levy according to the mem., with costs—(*Fisher et al* v. *Edgar*, 5 O. S. 141; *Alexander* v. *Harvey*, T. T. 7, Wm. iv., *MS.* R. & H., Dig. "Judgment" 9. Where defendants, as executors in right of their testator, gave a cognovit which might be held to bind them personally, upon which a judgment against them as individuals was entered, the Court allowed the judgment to be amended, and set aside an execution issued against defendants in their individual capacities: (*Gorrie* v. *Beard et al*, 5 U. C. 626.) By Rule K. B.,* E. T., 9 Geo. iv.: (Dra. Rules 12.) "It is ordered that the 7th Rule of M. T. 4 Geo. IV., shall be rescinded, and that in future *no judgment shall be entered* on any warrant of attorney to confess judgment, or upon any *cognovit actionem*, that shall not have been obtained through the intervention of some practising attorney of this Court, whose name shall be endorsed on the warrant or cognovit; and unless the affidavit shall state the same to have been obtained through the intervention of some practising attorney, whose name is endorsed thereon." This rule does not it seems apply to cases where an attorney is himself plaintiff. (*McLean* v. *Cumming*, Tay. U. C. R. 240.) And the rule has been held to be sufficiently complied with where an attorney prepared the cognovit, and endorsed his name upon it, though neither

* see addenda p. 819.

Writs of execution.

XI. (*v*) All Writs of Execution may issue from the office wherein the judgment is entered, or after the transmission of

he nor his clerk was present at the execution of it. (*Thompson* v. *Zwick*, 1 U.C.R. 338, P. C., *McLean J.*; *Clarkson* v. *Miller*, 2. U. C. R. 96 P. C.; *Jones J.*; *Patterson* v. *Squire et al*, 1 U. C. Cham. R. 234.) In the last case, the late Mr. Justice Sullivan gave away to the weight of authority, though he disapproved of the practice. His words as reported are, "that if he had to decide the point in the first instance, he should have hesitated in coming to the same conclusion" as in the previous cases. Where one of the bail to a Sheriff, whose principal had left the Province, acting under the impression that his principal would not return, gave a cognovit to the Sheriff, proceedings were stayed upon an affidavit of merits. (*Roberts* v. *Hazleton*, Tay. U. C. R. 35.) Costs in such a case (See *Hazleton* v. *Brundige*, Tay. U.C.R. 105.) *Semble*—if a cognovit be so given, with a power to enter judgment and issue execution, but by contemporaneous verbal agreement it is understood immediate execution should not issue, the Court will in some cases act upon the agreement. (*Parker et al* v. *Roberts*, 3 U C. R. 114.) If plaintiffs improperly described, are so described in the subsequent proceedings, defendant who signed cognovit, without exception cannot afterwards take advantage of the error. (*Ib.*) In Ejectment plaintiffs were non-suited for not confessing lease, entry, and ouster. Subsequently defendant executed a cognovit; held that he had waived previous formal objections. (*Doe Kerr* v. *Shoff*, 9 U. C. R. 180.)

By Rule H., 11 Vic., (Dra. Rules 12) it is ordered, that "after the first day of next term, judgment shall not be entered up on any cognovit given in a case in which no process shall have been served, without the order of the Court or fiat of a Judge, in cases where, from lapse of time, an order or fiat would be required, in order to enter up judgment on a warrant of attorney, and the practice as to obtaining such order or fiat, shall be the same as upon warrants of Attorney." Within a year and a day from the date of a warrant of Attorney, judgment may be entered as of course, but not after that time, without the leave of the Court or a Judge—(Chit Arch., 8 Ed., 869, and cases there cited.) The Court refused leave on a cognovit 15 years old, where plaintiff had taken an assignment of personal property, though unproductive in satisfaction of his debt. (*Grant* v. *McIntosh*, [exe'rs of] IV. O. S. 184.) Leave was granted when the cognovit was seven years old, upon an affidavit from the plaintiffs of the whole debt being due, and also stating, that having received a letter from defendant, the plaintiff believed him to be still alive —(*Oliphant* v. *McGuinn*, 4 U. C. R. 170.) Final judgment upon a cognovit or warrant of attorney to confess judgment for a sum not exceeding £100, may be entered in County Courts. (Co. C. P. A. s. 6.) In accordance with previous legislation and the current of authorities, it may be presumed that when a plaintiff enters up judgment on a cognovit in a Superior Court, when the same falls within the cognizance of the County Court, that only County Court costs will be taxed. If the sum confessed be £100 or less than that sum, the County Officer will be bound to notice the fact and act accordingly. *Cognovit*,—Judgment—Execution, &c. See Chit. Arch., 8 Edn. 844; Tidd's New Prac., 287; Bag. Prac. 395; *Forms*, Chit Forms, 6 Ed., 308; Tidd's Forms, 6 Ed., 217; *Warrants of Attorney*—Judgment—Execution, &c., Chit Arch'd, 852; Tidd's New Prac., 275; Bag Prac., 395; *Forms*, Chitty's Form, 313; Tidd's Forms, 212.

(*v*) *All Writs of Execution may issue, &c.*—"May" indicates a choice—the word is sometimes synonymous with "must;" but such is not the case here

the roll to the principal office, such Writs may, at the option of the party entitled thereto, be issued out of such principal office.

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as appears from the context. There is a choice of offices held out to plaintiff—either the office in which judgment is entered, if the office of a Deputy Clerk, or the office of the Chief Clerk at Toronto. The latter only apparently "after the transmission of the roll." Mr. Justice Draper, under the old practice, in a case before him, in general terms, expressed himself as follows: "In order to justify the issuing of any writ of execution, alias and pluries, and a *fortiori* original from the office of a Deputy Clerk of the Crown, it is necessary that the judgment should be entered there"—(*Dalrymple* v. *Mullen*, 1 U. C. Prac. R. 327, note). The facts of the case were, that on 6th February, 1844, a *fi fa*, issued from the principal office at Toronto, to the Sheriff of Gore, which was returned to and filed in the same office, on 18th March, 1852. A *fi fa* against lands, issued from the office at Toronto, on 15th March, 1853. On 6th November, 1852, an original writ against goods, issued from the office of the Deputy Clerk of the Crown at Hamilton, (a *præcipe* for that writ being the only paper in the cause in that office,) directed to the Sheriff of Wellington, Waterloo and Grey. Writ set aside, upon the ground that it was "irregular to issue a writ of execution out of the office in which there have been no previous proceedings in the cause, and in which there is no judgment entered, or other matter upon which the officer of the court is presumed to found the execution, the award of which is technically presumed to be upon the roll." Subsequently, it was decided by Mr. Justice Richards in a case before him, in Practice Court, where the papers had been filed in the office of a Deputy Clerk of the Crown, though judgment was entered in Toronto, that a pluries writ of *fieri facias* issued from the office of the Deputy Clerk was regular. (*The President, Directors and Co. of the Gore Bank* v. *Gunn*, 1 U. C. Prac. R. 323). In cases where after entry of judgment in the office of a Deputy Clerk of the Crown, the roll is transmitted to Toronto, it may be held under this Act, that the Deputy Clerk of the Crown, not having the roll, has no further right to issue writs of execution. The Statutes, 12 Vic., cap. 63, s. 36, and 12 Vic., cap. 68, which were at variance with this opinion, have been repealed. The point is open to discussion, and will probably, at no very distant day, receive a judicial solution. Those in doubt will receive much assistance from the two cases already noticed.

Executions in general.—It is no part of an Attorney's duty, under the ordinary retainer, to issue execution—his authority ceases with the judgment—(*Scarson* v. *Small*, 5 U. C. R. 259). An Attorney has power to discharge defendant from custody on a *ca sa*, (s. cxci.) The Court has no power to compel a plaintiff to issue execution for the benefit of a Sheriff who claims indemnity, but is a stranger to the judgment.—(*Gamble et al* v. *Ivesell*, 5 O. S. 339). An execution issued by plaintiff's Attorney in a cause where plaintiff had fled from the Province, and been absent for seven years, was stayed until such time as the Attorney could show that plaintiff was home, and had given him authority to issue execution.—(*Hobson* v. *Shand*, 3 U. C. R. 74.) An assignment of a judgment by plaintiff for a valuable consideration, cannot be considered a satisfaction of his debt, so as to prevent his assignee issuing execution in the name of the original plaintiff.—(*Commercial Bank* v. *Boulton*, 6 U. C. R. 627). Plaintiffs, when paid their debt under execution, cannot consent to the issue of a second execution,

Revision of taxation of costs.

XII. Either party may as of right, upon giving two days' notice to the opposite party, have the taxation of costs made by any Deputy Clerk of the Crown and Pleas, revised by

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though, for the purpose of making good the title to land sold by the Sheriff under the first writ.—(*Bank U. C.* v. *Murphy*, 7 U. C. R. 328). Nothing can be done under a spent execution, unless to perfect what had commenced while the writ was current. —(*Doe d. Greenshields* v. *Garrow*, 5 U. C. R. 237). An execution against goods may be made returnable within an interval of several terms. In this case it was issued on 18th July, 1854, returnable on 1st W. T. T., 1855.—(*Foster et al* v. *Smith*, 13 U. C. R. 243). A writ against goods placed in a Sheriff's hands, with instructions not to sell until another writ comes in, is not in his hands to be executed, and will not bind either agent, a subsequent executor, or a *bona fide* purchaser for value.—(*Ib.*) Where a defendant had been discharged from arrest, as having been irregularly charged in execution, the Court upheld a *fieri facias*, afterwards issued against his goods.—*Dorman* v. *Rawson*, Tay U. C. R. 376). It is irregular to issue an execution against lands until after the return of the writ against goods.—(*Doe d. Spafford* v. *Brown*, 3 O. S. 92). It is irregular to issue an execution against goods after a levy has been made on a writ against lands that has not been returned.—(*Stevens* v. *Sheldon*, T. T. 3 & 4 Vic., P. C, Macaulay, *MS.* R. & H. Dig., "Irregularity," 14). A judgment against an executor, to recover *de bonis testatoris*, will warrant the issue of an execution against testator's lands, on the return of *nulla bona* as against his goods. (*Doe d. Jessup* v. *Bartlett*, 3 O. S. 206.) An original writ of *fieri facias* having been lost, plaintiff was allowed to issue a duplicate, in order to obtain a return, upon which to found an alias. (*McEwen* v. *Stoneburne*, T. T., 7 Wm. IV.; *MS.*, R. & H. Dig., "Fieri Facias" 10.) The Court will not restrain a plaintiff from levying the whole of his debt on one several defendants. (*Zavitz* v. *Hoover et al*, M. T., 2 Vic., *MS.*; R. & H. Dig., "Execution," 2.) Quære—Can an Elegit be regularly issued in this Province to the prejudice of the remedy of other creditors whose satisfaction from the sale of the lands would be indefinitely postponed? (*Doe. d. Henderson* v. *Burtch*, 2 O. S. 514, Robinson, C. J.) Form of endorsement on executions. See Rule 44 Trin. T., 13 Vic. See further as to executions in general. (Chit. Arch., 8 Ed., 510; Tidds New Prac., 294; Bag. Prac., 243: also ss. lx., lxi., lxvi., clxxxvi., clxxxix., and ccii., of this act.)

Writs of Fieri Facias.—A *fi. fa.* directed to no one, is void, and cannot be amended. (*Wood et al* v. *Campbell*, 3 U. C. R. 269.) A *fi. fa.* lands tested after the death of defendant, is void. (*McCarthy* v. *Low*, 2 O. S. 353.) An amendment was allowed in *fi. fa.* after a sale under it by the Sheriff. (*Fleming* v. *Executors of Wilkinson*, T. T. 1 & 2 Vic.,—*MS.*, R. & H. Dig., "Amendment" I. 1.) The Court allowed an original *fi. fa.* to an outer District, to be amended by making it a testatum and an original writ, to warrant the *testatum* to be sued out after the first writ had been placed in the Sheriff's hands. (*Fisher* v. *Brooks*, 3 O. S. 143.) The *testatum* writ act has been repealed. (s.cccxviii) Ground writs are unnecessary. (s. clxxxvi.) General powers of amendment(s.ccxci.) A *fi. fa.* was amended so as to have relation to the day of entry of judgment. (*Audruss* v. *Page*, Tay. U. C. R. 478.) Fi. fa. to one County upon which £10 levied.—After return day, *fi. fa.* to a second County for original debt, and without noticing £10 levy. Second writ set aside. (*McMurrich* v. *Thompson*, 1 U. C. Prac. R. 258.) After

the principal Clerk of the Court wherein the proceedings were had; and it shall be lawful for such Court or a Judge, by rule or summons, to call upon the Deputy Clerk who taxed any Bill, to show cause why he should not pay the costs of revising his taxation and of the application, if in the opinion of the Court or Judge, on the affidavits and hearing the parties, such Deputy Clerk has been guilty of gross negligence, or of wilfully taking fees or charges for services or disbursements larger or other than those sanctioned by the Rules and Practice of the Court. (*w*)

Costs of Revision may be charged to Deputy in certain cases.

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the expiration of *fi. fa.* against lands, upon which proceedings had been stayed by agreement between the parties, the Court allowed an *alias* to issue, returnable at such a distance of time as to allow the Sheriff to advertise, &c. (*Nickall* v. *Crawford*, Tay. U. C. R. 376;) see further, Chit. Arch. 8 Ed. 537; Tidd. N. P. 569; Bag. Prac. 246.

Writs of Capias ad Satisfaciendum.—Issue of a Writ of *Ca. Sa.* allowed upon an affidavit, sworn before a Judge of Lower Canada. (*Coit* v. *Wing*, 3 O. S. 439.) On a return of *devastavit*, a *Ca. Sa.* does not issue, as a matter of course, without enquiry. (*Willard* v. *Woolcut*, Dra. Rep. 211.) Court refused to set aside a *Ca. Sa.* issued several terms after the return of a *fi. fa.* goods: (*Glynn* v. *Dunlop*, 4 O. S. 111.) New *Ca. Sa.* refused although debtor discharged from first writ by plaintiff's attorney, acting upon the erroneous impression that the debt had been compromised: (*Bradbury et al* v. *Loney*, H. T., 5 Vic., *M.S.*, R. & H. Dig., "Capias ad Satisfaciendum" 9.) A *Ca. Sa.* commanding Sheriff to detain defendant in custody until he should satisfy plaintiff, without stating amount of debt to be recovered, held void: (*Henderson* v. *Perry et al*, 3 U. C. R. 252; *Billings et al* v. *Rapelje et al*, E. T., 4 Vic., *M. S.*, R. & H. Dig., "Amendment" I. 2.) Where the christian name of a defendant was erroneously given in a *Ca. Sa.*, the Court refused to allow amendment: (*Allison* v. *Wagstaff*, M. T., 7 Vic., M. S., R. & H. Dig. "Amendment" I. 3.) Not necessary for plaintiff who had two christian names to state the second in an affidavit of debt, where his identity sufficiently appeared by the affidavit: (*Perkins* v. *Connolly*, 4 O. S. 2.) Affidavit for *Ca. Sa.*; see cases collected in R. & H. Dig., "Arrest" div. I. *passim*; see further Chit. Arch. 8 Ed. 608; Tidd. N. P. 568; Bag. Prac. 265.

(*w*) This provision for the summary punishment of Deputy Clerks, if not in the nature of a penal enactment, will probably be construed strictly by the Courts, and unless "*gross* negligence" is brought home to the "*guilty*" party, the complainant will be left to his remedies at common law. Indeed, as the Deputy Clerk in taxing costs occupies a *quasi* judicial authority, little short of what would sustain a criminal proceeding, would, it is apprehended, move the summary and rigorous interference of the Courts. Nevertheless, the provision is a wise enactment. The power given for the punishment of gross or wilful misconduct could not be more safely reposed than in the "Court or a Judge." The appearance of such an enactment in the Statute book, is to some extent, evidence that the evil of hasty and ill-judged taxations by Deputy Clerks has not been unknown to the Courts. In any view of the matter, it is extremely important that such Deputies should act on uniform principles in the taxation of costs,

Deputy Clerks to keep their offices in the Court House if possible: and if not, at some convenient place in the same town.

Hours of attendance, &c.

XIII. Each Deputy Clerk of the Crown and Pleas shall, if proper accommodation be afforded him, keep his office in the Court House of his County, and until he can obtain such accommodation, he shall keep his office in some convenient place in the County Town; and every Deputy Clerk's office shall (except between the first day of July and the twenty-first day of August) be kept open from ten o'clock in the morning until three o'clock in the afternoon, Sundays, Christmas Day, Good Friday, Easter Monday, the birth-day of the Sovereign, and any day appointed by Royal proclamation for a general fast or thanksgiving, excepted; and between the first day of July

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and have ample materials to guide them, subject, as they will be, to stringent regulations in the discharge of multifarious duties. The Chief Clerks at Toronto, will doubtless deem it incumbent upon them at least to prepare instructions for their Deputies, embracing forms of bills, and meeting cases of usual occurrence by showing the charges and fees that should properly be allowed on ordinary taxations. This would be eminently calculated to secure uniformity in the outer counties, and to some extent save unnecessary appeals for revision to the chief taxing officer at Toronto. see add. p. 819

The old practice provided that either party might sue out a rule for taxation in Toronto: (Stat. 8 Vic. cap. 36, s. 3, 12 Vic., cap. 68, s. 1.) Now that the powers of Deputy Clerks of the Crown have been so much enlarged, the protection of suitors and the due administration of justice alike demand some such check as that imposed by this enactment. The powers of Deputy Clerks to tax costs have been gradually extended, until at length, by ss. ix. and xi. of this act, they have full authority to tax costs, enter judgment, and issue execution in actions commenced in their respective Counties. The tendency of this legislation is greatly to decentralize the administration of justice. With respect to revisions of taxation, it may be said that the Courts are in general disinclined to interfere with the decision of the taxing officer who has exercised a sound discretion. But if it can be shown that he acted upon an erroneous principle, a rule for revision will be granted. Upon application for a revision to the Court or a Judge they will frequently refuse to interfere where the objections raised were not taken before the officer. The application for revision must be supported by affidavit, pointing out specific objections to the taxation with which the party applying is dissatisfied: (Chit. Arch. 8 Ed., 1395; Tidd's N. P. 564; Bag. Prac. 202.) For the rules of Court governing taxations and costs, see Dra. Rules, p. 15, and cases there noted. Also, see R. & H. Dig. "Costs," where more than 100 cases decided in our Courts, upon the subject of costs between party and party, have been collected. As to costs between attorney and client, see same Digest, "Attorney" iii. As to costs upon rules served on Sheriff's to return process, see notes to s. xiv. Also see the various sections throughout this act, under which costs are imposed or refused. It was ordered in the King's Bench, by Rule 1 of M. T., 4 Geo. IV., that "In future the *practice* of the Court, as well as the *quantum* of costs to be allowed in all proceedings, is to be governed (when not otherwise provided for) by the established practice of the Court of King's Bench in England." The meaning of this rule is, that the general practice of the Court

see add p. 820

see add p. 820

and the twenty-first day of August, such offices shall be kept open from nine in the morning until noon. (x)(2)

in Upper Canada, shall be regulated by the practice of the Court of Queen's Bench in England, unless otherwise regulated by acts of our Legislature, or by rules of our Courts: (per Sherwood, J., in *Ross et al* v. *Balfour*, 5 O.S., 684.) The statute 2 Geo. IV., cap. 1, s. 38, enacts, "That the *allowance of costs* to either party, plaintiff or defendant, in all civil suits and penal actions, be regulated by the Statutes and usages which direct the payment of costs by the laws of England."

(x) Two things are to be observed upon the reading of this section. *First*, the place in which a Deputy Clerk of the Crown should keep his office. *Second*, the hours during which his office should be open. The place is sufficiently designated and needs no remark. The time may require some comment. The year, excepting holidays, is, by the section, divided into two periods. The long vacation, from 1st July to 21st August, and the remainder of the year not embraced within those days. In vacation, the office is to be kept open from 9 o'clock in the morning, till 12 o'clock, at noon. For the remainder of the year, the hours are from 10 o'clock, in the morning, till 3 o'clock, in the afternoon. The latter provision coincides with s. 12 of 12 Vic., cap. 66, which is still in force. It is as follows:— "And be it enacted, that from and after the passing of this Act, each and every Clerk of any such District Court, and the Deputy Clerk of the Crown in each District, shall hold his office in the Court House, or in some other convenient place within the District Town of his respective District, and shall keep such office open for the transaction of business appertaining to such office, (Sundays and the legal holidays excepted,) from the hour of ten in the forenoon, to the hour of three in the afternoon, *and in term time from the hour of nine of the clock in the morning, to the hour of four of the clock in the afternoon.*" It will be noticed that a regulation has by this section been made for *term*, which has been dropped in the C. L. P. Act. The difference, in point of time, is one hour. The latest hour under 12 Vic., during term, being 4 o'clock, and not 3 o'clock, as under 19 Vic. It may be possible, in construing the two Acts, to reconcile them. Stat. 12 Vic., cap. 63, s. 11, enacts "That the several Clerks of the County Courts in Upper Canada, shall be *ex-officio* Deputy Clerks of the Crown and Pleas." Now, under this enactment, the one man must discharge the duties of two distinct offices. Then if both 12 Vic., cap. 66, s. 12, and 19 Vic., cap. 43, s. 13, are to be taken together, during term in County Courts he would sit till 4 o'clock; but in Superior Courts only till 3 o'clock. It is presumed that the Legislature lost sight of the former Act in the repealing clause of the C.L. P. Act (cccxviii.) As it is, it may, on the other hand, be held that the latter Statute does in fact, as regards the office of Deputy Clerk of the Crown, supersede 12 Vic. cap. 66, s. 12. Another point of difference is, that Stat. 12 Vic. excepts "legal holidays," which, under the Interpretation Act, (12 Vic., cap. 10), includes *Corpus Christi* and other days not usually observed as legal holidays in Upper Canada. The C. L. P. Act, it will be observed, however, judiciously specifies the days, and leaves nothing in that respect to statutory interpretation.

The section under consideration is confined to offices of "*Deputy* Clerks of the Crown and Pleas." The offices of the Clerk of the Crown and Pleas, are regulated by rule of M. T., 18 Vic. "It is ordered that the 18th Rule of Court of Hilary Term, 13 Vic., be rescinded, so far as regards the opening of the offices of the Clerks of the Crown and Pleas, and that from and

Rules to return process, may be issued.

XIV. (*x*) Every Deputy Clerk of the Crown and Pleas may sign and issue rules on any Sheriff or Coroner to return Writs

after the end of this present term, the offices of the Clerks of the Crown and Pleas be kept open as follows, that is to say: During term from 10 o'clock in the morning, until 4 o'clock in the afternoon, Sundays, Christmas Day, 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 that between the first day of July and the twenty-first day of August, the said offices shall be open from 11 o'clock in the forenoon, until 2 o'clock in the afternoon. A writ issued by the officer at his own house, and before office hours, was decided not to be illegal: (*Rolker et al* v. *Fuller*, 10 U. C. R. 477). The Court, though refusing to set aside the writ, animadverted upon the inconvenience of the practice, both as regards the profession and the officer himself. (*Ib.*) It is irregular for a Deputy Clerk of the Crown to file papers at his private residence apart from his office, and out of office hours: (*Fralick* v. *Huffman*, 1 U. C. Cham. R. 80.) The delivery of a paper to him in the street, is not "filing or entering it." (*Ib.*) When the defendant's attorney is present at the opening of the office in the morning, to file a joinder in demurrer, and the plaintiff's attorney is also present to sign judgment, the former is entitled to precedence: (*Ib.*) An attachment was granted against a Deputy Clerk of the Crown, for having issued process without authority: (*R.* v. *Fraser*, 3 O. S. 247.) Afterwards, on his appearance in term to answer interrogatories, the Court ordered him to be dismissed from his office, and to pay the costs of the proceedings: (*Ib.*) Deputy Clerks of the Crown are paid by Government—salary in no case more than £100, or less than £20 per annum: (Stat. 12 Vic., cap. 63, s. 12.) No British subject, whatever his profession, calling, or employment, is disqualified from holding the office: (Stat. 12 Vic., cap. 66, s. 12.) Stat. 8 Vic., cap. 36, s. 7, now repealed, enacted that such Deputy should not be "a practising Attorney, or an articled clerk to a practising Attorney."

(*x*) This section resembles the repealed enactment 8 Vic., cap. 36, s. 9. It was in these words—"That it shall and may be lawful for each and every Deputy Clerk of the Crown, to issue rules upon the Sheriff, Coroners, or Elisors of his District, for the return of any Writ of Mesne or Final Process to him directed, in the same manner as may be now done in the principal office." The new practice authorises the Deputy Clerk not only to issue, but to *sign* the rules; yet restricts his authority to writs and process "issued out of the office of such Deputy." The repealed Stat. 8 Vic., cap. 36, mentioned Writs of "Mesne or Final Process." The words "Writs and Process issued, &c.," used in this section, mean the same thing.

The Sheriff or Coroner upon being served, is to return the writ to the office "from which such rule issued." It was under the old practice held that a rule to return a *fieri facias* could not be issued out of the office of a Deputy Clerk—as the writ itself did not issue out of that office: (*Anonymous*, Dra. Rep. 246.) A Sheriff having been ruled to return a writ without stating to what office, and it appearing that the writ had been issued from the office of a Deputy Clerk, to which office the Sheriff might have returned it, the Court refused an attachment against him, on an affidavit that the writ had not been returned to the Crown Office at Toronto: (*Scott* v. *Benson*, 1 U. C. Prac. R. 32.)

The rule for the return of process may issue in vacation: (*McGowan* v. *Gilchrist*, H.T., 7 Vic., P.C., McLean J., *MS.*, R. & H. Dig., "Sheriff" II 2.) It should be a six days rule: (*Hilton et al* v. *Macdonell et al*, 1 U. C. Cham.

and Process issued out of the office of such Deputy and directed to such Sheriff or Coroner; and it shall be the duty

sued by Deputy Clerks. (*App. Co. C.*)

R. 207.) Computation of time: (*Regina* v. *Jarvis*, 3 U. C. R. 125.) At the time of service the original rule should be shown to Sheriff: (*Hilton* v. *Macdonell et al*, *ante*.) If he do not return the writ within the time limited by the rule, the Court will impose the costs of the rule upon him: (*McGowan* v. *Gilchrist*. R. & H. Dig., "Sheriff" II 2.; *Bank of Upper Canada* v. *MacFurlane et al*, 4 U. C. R. 396.) It is no sufficient ground for opposing a rule for an attachment for not returning a writ against goods that there is a question pending before the Court as to the title to the goods: (*Stull* v. *McLeod*, I U. C. R. 402.) Where the rule served was for an attachment, because the Sheriff had not brought up the body under his return of *cepi corpus*, held that it was a good answer to such rule that the defendant was arrested under the *ca. sa.*, and placed in close custody, and was afterwards admitted to the limits, and that he had not since been confined to close custody by any process whatsoever: (*White* v. *Petch et al*, 7 U. C. R. 1.)

In connexion with the subject of returning writs as provided for in the section here annotated, it becomes important to refer to Stat. 7 Vic., cap, 33, of which a summary must suffice, as the Act is too long for insertion.—It is intituled "An Act to render more summary the means of enforcing the return of process by Sheriffs and Coroners, &c." Sec. 1.—If any Sheriff or Coroner neglect to return process within the time when he shall be ordered to return the same, it shall be lawful for any Judge of the Court to issue a summons, to show cause why an attachment should not issue. Upon the return of the summons, the Judge may give further time, or order an attachment. Sec. 2—Sheriff, if in default at the expiration of further time, liable to have attachment issued against him. Sec. 3.—Judge to have same powers as the Court in regard to *habeas corpus*, committing Sheriff to close custody, or taking bail. Sec. 4.—*Habeas corpus* may be made returnable in vacation, on a day which shall not be more than thirty days from the time of the issuing of the attachment or *habeas corpus*; same as regards Judges of District (County) Courts. Sec. 5.—Sheriff not returning writ within three months after attachment, to forfeit his office. If he act after the expiration of the three months, liable to a penalty of £100. Sec. 6.—Costs under this Act in the discretion of the Court or Judge. Sec. 7.—Act not to interfere with existing remedies. It has been said that personal service of a summons for an attachment, without showing the original, is sufficient: (*Hilton et al* v. *Macdonell et al*, 1 U. C. Cham. R. 207). The summons should name the Sheriff, instead of calling upon him by designation of his office: (*Ib.*) An attachment was granted against a Sheriff who was a Member of Parliament, for not returning a writ, pursuant to order, served upon him: (*Bell* v. *Buchanan*, M. T., 1 Vic., *MS.*, R. & H. Dig., "Sheriff," II. 7.) Before the passing of Stat. 7 Vic., cap. 33, it was held that a Judge in Chambers had no power to grant an attachment: (*Rex* v. *Sheriff of Niagara*, Dra. Rep. 343). It is undecided whether, since that Statute, a Judge in Chambers has power to pass judgment upon a Sheriff for contempt, when the object of the Statute has been attained by the return of the writ: (*Rex* v. *Jarvis*, 6 U. C. R. 558). Where the Sheriff returned the writ to the Crown Office, but it was not filed, because the postage was unpaid, and the plaintiff, with notice of these facts, obtained an attachment upon the usual affidavit, that the writ "was not on the files," the Court set the attachment aside: (*Regina* v. *Moodie*, 1 U. C. R. 410). Though the proceedings were characterized by the Court "as sharp and harsh," the Sheriff was

of each Sheriff or Coroner to return such Writs to the office

made to pay the costs, because, in order to make his return effectual, he was bound to pay the postage: (*Ib.*) Where the writ was enclosed to the Clerk of the Crown, three or four days after the expiration of the rule, so that it was not on the files when the search was made, but was produced in open Court by the Clerk, an attachment was refused, though asked, for the purpose of making the Sheriff pay the costs: (*Andrews* v. *Robertson et al*, 3 O. S. 304).

The U. C. Stat. 3, Wm. IV., cap. 8, s. 17, does not appear to have been repealed. It is as follows:—"That upon any application for, or granting of, by any of the Courts of this Province, any rule or rules, upon any Sheriff, for the return of any writ or writs, or for the performance of any other duty or matter relating to the said office of Sheriff, such Sheriff shall be liable to and pay to the party making such application, or obtaining such rule or rules, all taxable costs thereon, unless the Court shall otherwise order: Provided always, that if any such application shall be made, or any such rule [illegible] dated previous to the day next after [illegible] such return should have been [illegible] such duty or matter per- [illegible] Sheriff, against whom such [illegible] shall be made, shall not be [illegible] for any costs or charges which may arise or occur upon the same; And provided also, that if upon such application for a rule or rules, it shall appear to the said Judge or Judges of the said Courts respectively, that the same is frivolous or vexatious, the said Judge or Judges of the said Courts, respectively, may, upon discharging such application, order that all taxable costs and expenses for opposing the same, be paid to the said Sheriff." A Sheriff cannot be attached for non-payment of the costs of a rule to return a writ under this Statute, unless there has been a rule specially calling upon him to do so: (*Marcy* v. *Butler*, H. T., 2 Vic., *MS.*, *Doe d. McGregor* v. *Grant*, T. T., 2 & 3 Vic., *MS.* R. & H. Dig., "Sheriff" II., 11). A party who ruled a Sheriff, and afterwards gave an order to stay proceedings for a certain time, held not entitled after that time, (the writ not having been returned) to proceed by attachment under his rule: (*Bergin* v. *Hamilton*, M. T., 2 Vic., *MS.* R. & H. Dig., "Sheriff" II. 2). Where after the delivery of a writ against lands to the Sheriff, the plaintiff and defendant agreed to compromise, and after a delay of more than two years, the compromise was not effected, and the plaintiff obtained a rule for an attachment against the Sheriff, the rule was set aside: (*Crooks* v. *O'Grady*, 1 U. C. R. 400). Attachment refused, when applied for more than a year after the issue of the rule: (*Loucks* v. *Farrard*, 4., O. S., 5). An attachment will not be granted, for not returning a writ, pursuant to rule, issued on the same day that the writ was returnable: (*Regina* v. *Hamilton*, E.T., 2 Vic., *MS.* R. & H. Dig. "Sheriff" II. 13). The Sheriff cannot be regularly served with a rule to return a writ until the return day is past. (*Regina* v. *Jarvis*, 3 U. C. R., 125.) If an attachment issue on such a rule the proper course is to set aside the attachment and not the rule. (*Ib.*) A rule to return a writ was issued in Trinity Term (June). In July following the writ was in the hands of plaintiff's agent. In August attachment issued. The Court set it aside, upon payment of costs, up to the time the writ was returned. (*Rex* v. *Sherwood*, 3 O. S. 305.) Where a Sheriff had three writs of execution against goods, and having seized and sold, and partly satisfied the first and third writs, a stranger claimed the property. The plaintiff on the second writ refused the Sheriff indemnity, and he did not return his writ. An attachment was issued. (*Land* v. *Burn*, T. T., 3 & 4 Vic., *MS.*, R. & H. Dig., "Sheriff," II. 18.) An attachment may be granted for an insufficient return. (*Smith* v. *Bellows*, H. T., 4 Vic., *MS.*, R. & H. Dig.,

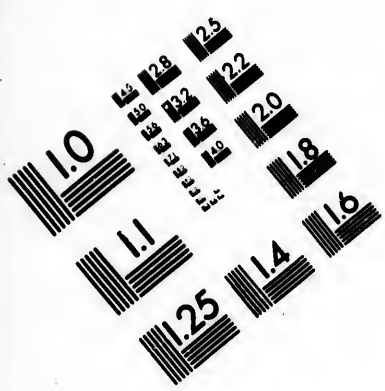
from which such rule issued, in case he shall be served with any such rule.

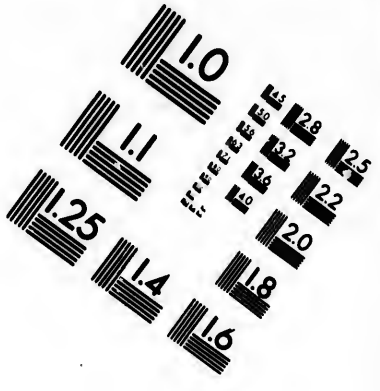
Sheriff, II. 19.) Where the writ was returned before the attachment issued though the return was disputed as false, the Sheriff was relieved from the attachment on payment of costs. (*The Bank of Upper Canada* v. *McFarlane et al*, 4 U.C.R. 396.) If the return were in fact false, the Sheriff would be liable to an action for it. (*Ib.*) An attachment may issue against a Sheriff for returning "goods on hand" to a *venditioni exponas*: (*Harper* v. *Powell*, E. T., 2 Vic., *MS.*, R. & H. Dig., Sheriff, II. 9.) Impertinent matter in a return is considered as a contempt in the Sheriff: (*Jones* v. *Schofield*, Tay. U.C.R., 610., R. & H. Dig., "Sheriff," II. 24.) Attachment refused where the Sheriff had been more than six months out of office, before rule issued against him: (*Ladd* v. *Burwell et al*, E. T., 3 Vic., *MS.*, R. & H. Dig., Sheriff, II. 17; *Mott* v. *Gray et al*, 1 U. C. R. 392). Where a return of *cepi corpus* was made, the Sheriff ruled to bring in the body, and attached for default, and the attachment set aside for irregularity; but while in existence, defendant having given bail, was discharged by *supersedeas*, the Court held a second attachment on a second rule, to bring in the body issued eight months after the setting aside of the first attachment to be irregular: (*Rex* v. *Sheriff of Niagara*, 2 O. S. 126). Second attachment refused, until costs of setting aside a former one, for irregularity, were paid: (*R.* v. *Ruttan*, 5 O. S. 155). The Court will sometimes, under special circumstances, relieve a Sheriff, by allowing the return of a writ, even after a motion has been made to bring in his body on the Coroner's return of *cepi corpus*: (*Regina* v. *Jarvis*, 1 U. C. R. 415).

In England, by rule 132 of H. T., 1853, the return of process, both in term and vacation, is to be ordered by a side bar rule. The writ of attachment, both in England and Upper Canada, is directed to the Coroner. (Chit. F., 6 Ed. 169; *Ib.* 7 Ed. 318.) If there be several Coroners for the same county, great care must be used in directing the Attachment. The practice is not clear. Most books of practice are silent upon the mode in which the writ ought to be directed under such circumstances. The editor is not in a position to do more than to put the practitioner upon his guard. If there are several Coroners in a county, the plaintiff, it would seem, cannot do wrong by having his writ directed to all the Coroners by their name of office. (2 Hawk, P.C., cap. 9, s. 45.) And although one only execute the writ, it seems the return must be in the name of all. (*Ib.*) Where there are several Coroners, some of whom only are interested, the process must be directed to and executed by the others. (Jervis Off. Coroners, 51.) If the writ be directed *Coronatoribus*, where there are more than two Coroners in the county, and after the writ issue one Coroner die, the writ may be executed by the survivors. But if one only survive he can neither execute nor return the writ, until the appointment of another Coroner. (*Ib.*53.) The writ of attachment should be personally delivered to the Coroner: in order to bring him into contempt, it is not sufficient to deliver it to a clerk in his office. (*Hever* v. *Aubin*, 1 H. & W. 332;) See further: Bag. Cham. Prac. 79, Chit. Arch., 8 Ed., 717; Tidd's N. P., 168; Bag. Prac., 430. *Forms*—Chit. F., 6 Ed., 230; (*Ib.*) 7 Edn. 317.

see add p. 820

A Sheriff is liable to a further penalty if he do not return writs within a proper time. "No Sheriff shall be entitled to any fees on any writ placed in his hands fifteen days before the return day mentioned therein if he does not return the same to the Attorney from whom he received it *within four days after the return thereof*, or enclose the same by post within that





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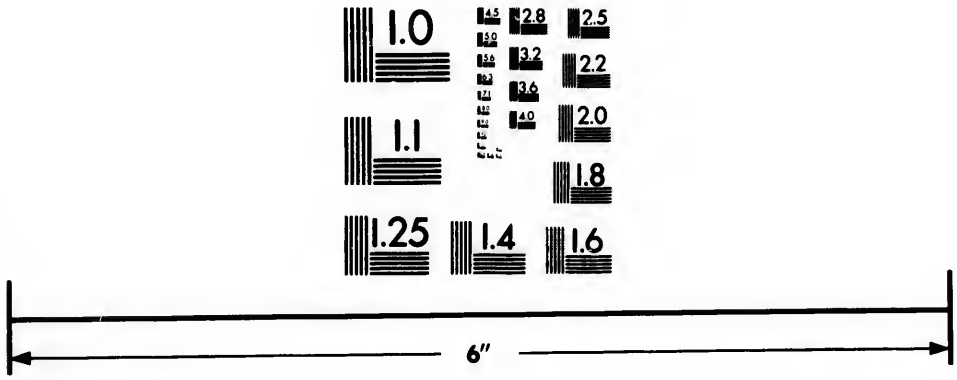

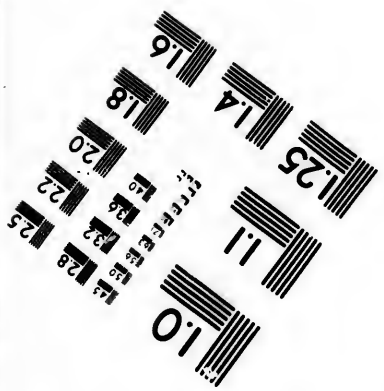

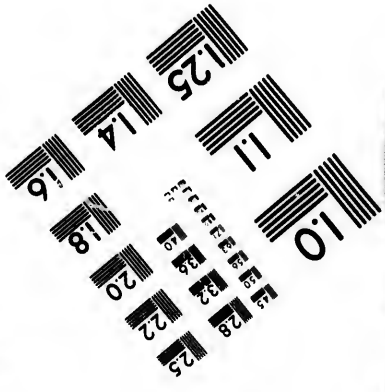

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Preserving evidence of Sheriff's sales.

And whereas many titles to land depend upon Sheriff's sales upon executions, and it is therefore important to provide for the preservation of evidence of the judgments upon which such executions issued, and also for the more speedy registration of judgments; (*y*) Be it enacted as follows:

Deputy Clerks to keep books for minuting all Judgments, &c.

XV. Every Deputy Clerk of the Crown and Pleas shall keep a regular book, in which shall be minuted and docketed all Judgments entered by such Deputy Clerk; and such minute shall contain the name of every Plaintiff and Defendant, the date of the commencement of the action, (*z*) the date of

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time to the Attorney, unless delayed on an order in writing from the party, his attorney or agent, placing the same in his hands." (Stat. U.C., 3 Wm. IV. cap. 8, s. 18.)

(*y*) The purchasers title to land, sold by the Sheriff, is *prima facie* good, when the sale is made upon a legal writ and the debtor is in possession at the time of sale: (*Doe d. Boulton* v. *Fergusson*, 5 U.C.R. 515.) A defendant seeking to defeat the title, on the ground of a defect in the proceedings anterior to the writ, must show clearly and conclusively that there was such a defect: (*Ib.*) The title is not liable to be defeated by irregularity in the proceedings anterior to the judgment: (*Ib.*) So long as the judgment subsists in full force, it supports the execution, *and the execution supports the sale:* (*Ib.*) Further annotation upon the subject of Sheriff's sales, would be foreign to the text. Such as desire to pursue the subject, can refer to R. & H. Dig., "Sheriff's deed" *passim*—"Sheriff's sale"—under which heading 19 cases have been collected; "Title" cases 1, 2, 3, 11, 12, 13, 14, 15, and 16; also to *McDonell* v. *McDonell*, 9, U. C. R. 259; *Doe d. Burnham* v. *Simmonds*, *Ib.* 436; *Doe d. Meyers* v. *Meyers*, *Ib.* 465; *Doe d. Elmsley et ux* v. *McKenzie*, *Ib.* 559; *In re Campbell and Ruttan*, 10 U. C. R. 641; *Burnham* v. *Daly*, 11 U. C. R. 211; *Ferguson* v. *Hill, et al*, *Ib.* 530; *Shenston* v. *Baker*, 12 U. C. R. 175; *White et al* v. *Brown*, *Ib.* 477; *Reaume et al* v. *Guichard*, 13 U. C. R. 275; *Stroud* v. *Kane*, *Ib.* 459; *Doe Mills* v. *Kelly*, 2 U. C. C. P. 1; *Douglas* v. *Bradford*, 3 U. C. C. P. 459; *Young* v. *Baby*, 4 U. C. C. P. 537.)

(*z*) The writ is the commencement of the action: both in personal actions and ejectment: (ss. xvi and ccxx.) And the action is commenced for all purposes on the day when it issues: (*Castrique* v. *Bernabo*, 6 Q. B. 498.) And see Rule E. T., 5 Vic., which provides that "In every case the suing out of process shall be regarded for all purposes, as the commencement of the action." The writ bears date on the day when it issue: (s. xix.) and such date will properly appear on the *Nisi Prius* Record and Judgment Roll. In ejectment the writ itself must be set forth on the Record: (See s. ccxxxii) It was the old practice both in England and Upper Canada, to hold that the declaration was the commencement of the action: (*Cameron* v. *Ferguson*, 3 O. S. 318.) In England, since the Uniformity of Process Act 8 & 4 Wm. iv., cap. 39, sec. 1, and in Upper Canada since the rule above quoted the writ has been deemed the commencement: (*Alston* v. *Underhill*, 1 C. & M. 492, 3 Tyr. 427; *Thompson* v. *Dicas*, 1 C. & M. 768. 3 Tyr. 873; *Castrique* v. *Bernabo*, 6 Q. B. 498.)

the entry of such judgment, (*a*) the form of action, (*b*) the amount of debt or damages recovered, the amount of costs taxed, and whether such judgment was entered upon, or by verdict, default, confession, *non pros*, non-suit, discontinuance, or how otherwise; and within three months after the entry of each judgment, the Deputy Clerk shall transmit to the principal Clerk of the proper Court in Toronto, every such judgment-roll, and all papers of or belonging thereto, and such judgment shall be also docketed in the principal office, (*c*) and in case the original judgment-roll be lost or destroyed, so that no exemplification or examined copy thereof can be procured, a copy of the entry in either of such docket books, certified by the Clerk or Deputy Clerk having such book in his custody, shall be evidence of all matters therein set forth and expressed: and when any such Deputy shall enter up any Judgment in either of the said Courts, he may give to the party on whose behalf it is entered, or to his legal representative, a certificate signed by him, of such Judgment, containing the like particu-

(1) § 243

Judgments to be also docketed at Toronto.

If the original roll be lost, copies may be used, &c.

(2) § 244

Deputy Clerks may give certificates of Judgments entered by

(*a*) *i. e.* Entered under ss. ix. & x.

(*b*) As the form of action need not be mentioned in the writ of Summons, (s. xvii.) and as the writ is the commencement of the action, the Clerk in some cases will have difficulty in entering the "form of action." He will be compelled to delay that part of his entry until declaration is filed. If judgment be signed before declaration, he may be unable to make the necessary entry. Even after declaration, since the forms of pleading in the several actions are now so general, (s. c.) the form of action may be uncertain. The Clerk is also required to make an entry containing besides the form of action, "the amount of debt or damages recovered, the amount of costs taxed." By s. cxliv. of this Act, the sum recovered may be awarded generally by the judgment, "without any distinction being therein made as to whether such sum is recovered by way of debt or damages." This language is not consistent with that of the sec. under consideration, and may occasion some difficulty. It will, probably, be sufficient for the entry to be made generally without distinction as to debt or damages, where no such distinction is made in the Judgment Roll. And the s. 7 of the Co. C. P. Act, (a similar enactment) not containing the words "debt or damages," would seem to confirm this opinion. Both sections are *pari materiæ*, and have but one common object in view—the preservation of evidence of judgments.

(*c*) It will be noted that upon transmission of the judgment roll and papers to the principal office, the judgment is only to be docketed. The 8 Vic., cap. 36, sec. 4, (now repealed) required the judgment upon transmission of the papers, to be entered of Record, *and* docketed. There is a distinction: (See *Laverty* v. *Patterson*, 5 U. C. R. 641, Draper J.) The former act prescribed an entry both by the Deputy Clerk, and at the principal office. The present act in case of entry by the Deputy, renders necessary simply a docketing at Toronto.

them, which certificates may be registered in the proper County and bind lands.

lars as are required in certificates of Judgments given by the Clerks of the Crown and Pleas, (*d*) and such certificate may be registered in the Registry Office of any County in Upper Canada, and the same certificate and the registration thereof, shall have the like force and effect in binding or operating as a charge upon lands, tenements and hereditaments situated within such County, as if the certificate had been granted at the principal office at Toronto. (*e*)(3)

(3) § 245. See also c. 22 Vic. ch 88 § 38

The object of the act is to secure duplicate entries—that one may be forthcoming if the other be lost, or that one or the other may be forthcoming "in case the original judgment roll be lost or destroyed, so that no exemplification or examined copy thereof can be procured."

(*d*) *i. e.* "In the Court of (*as the case may be*) I hereby certify that judgment was entered up between A. B., plaintiff, and C. D., defendant, on the————day of———— in a plea of————for———— pounds, debt, (or damages) and———— ————pounds, costs: E. T., *Clerk.*" (9 Vic., cap. 34, s. 13.) This certificate for the reasons given in n. (*b*) *supra*, is not strictly applicable to judgments entered up, under this Act. No doubt a form of certificate will be given by the Judges in the rules to be issued by them, which will set at rest the difficulty pointed out in that noto.

Deputies under repealed Stat. 16 Vic., cap. 175, s. 5, were supplied with these certificates by the Clerks of the Crown and Pleas. By the new Act, the Deputies are themselves empowered to sign the certificates.

(*e*) See Stat. 9 Vic., cap. 34, s. 13, as explained by 13 & 14 Vic., cap. 63, ss. 1 and 2; see also ss. 7 and 8 of the latter Statute. When a party purchases land upon which a judgment has attached, he holds the land subject to a right of sale, under a *fi. fa.* to be issued by the judgment creditor: (*Doe d. McPherson* v. *Hunter*, 4 U. C. R. 449; *Doe d. Dougall* v. *Fanning*, 8 U. C. R. 166.) The meaning of the 13 s. of 9 Vic., cap. 34, is that judgments shall bind lands from the date of their registry, not with reference only to remedy by *elegit*, but for the purpose of sale under a *fi. fa.*: (*Doe d. Dempsey* v. *Boulton*, 9 U. C. R. 532.) If the *fi. fa.* be issued at a time subsequent to the entry of judgment, plaintiff, in order to avail himself of this act, should make his *fi. fa.* retrospective upon the face of it. The ordinary writ of *fi. fa.* speaks from its date, and is dated when issued. It commands the Sheriff that of the lands and tenements of C.D. he should cause to be made, &c. This intends the lands and tenements of C.D. at the time the writ is placed in the Sheriff's hands. But if judgment were entered and registered sometime previously, and if C. D. had subsequently thereto, but before *fi. fa.*, conveyed away these lands, then with a view to the seizure of them, the *fi. fa.* must have a retrospective effect. The English forms of *elegit*, may in this particular be consulted with advantage: (Chit. Forms 6 Ed. 179, 7 Ed. 324; Bag. Prac. 264; Tidd Forms 451.) It directs the Sheriff to deliver to plaintiff all such lands and tenements as the said C. D [illegible]s seized or possessed of, "on the [illegible]————day of———— [*the day on which the judgment was entered up,*] or at any time afterwards, any disposing power." [The very words of Stat. 13 & 14 Vic., cap. 63, s. 2.]

As to the estates and interests in land upon which judgment attach—see Stat. 12 Vic., cap. 71, ss. 5 & 13, as amended by 14 & 15 Vic., cap. 7, s. 5. Also see Stat. 13 & 14 Vic., cap.

And with respect to the Writs for the commencement of personal actions in the said Courts, against Defendants, whether in or out of the jurisdiction of the Courts; Be it enacted as follows:

Writs for commencement of personal actions.

XVI. (*f*) All personal actions (*g*) brought in the said Courts where the Defendant is residing or supposed to reside within the jurisdiction thereof, (*h*) [except in cases where it is

Mode of commencing personal actions where Defendant resides

con Stat of U.C. ch 22 § 2.

63, s. 1. The words used in the latter enactment, are substantially the same as the words used in English Stat. 1 & 2 Vic., cap. 100, s. 18. Under the Eng. Stat. it has been recently held that an heir takes a beneficial interest in such of the descended lands of the ancestor only as are required for the payment of the debts of the ancestor, and that the beneficial interest only of the heir in descended lands is affected by a judgment entered up against him, whether before or after the death of the ancestor. (*Kinderley* v. *Jarvis*, 27, L. T. Rep. 245.)

It would seem to have been held, before these Statutes, (though the point was long doubtful) that an unregistered judgment was no lien upon lands. The land formerly was only bound from the delivery of the execution to the Sheriff: (*Doe d. McIntosh* v. *McDonell*, 4, O. S. 195—a leading case upon the point, afterwards confirmed by *Doe Auldjo* v. *Hollister*, 5 O. S. 739.) To remove all doubts, the Legislature have recently made an express declaration of the law upon the subject. "No judgment of any Court of Record in Upper Canada, shall create a lien or charge upon any lands, tenements, or hereditaments within the same, or upon any interests in lands that are now or may at any time hereafter be liable to seizure or sale, on any execution against lands—(See 12 Vic., cap. 71, ss. 5, 13, as amended by 14 & 15 Vic., cap. 7, s. 5)—until such judgment shall be registered in the manner now required by law for registering judgment in the Registry Office of the County or Union of Counties in which such lands are situate:" (Stat. 18 Vic., cap. 127, s. 1.)

(*f*) Taken from Eng. Stat. 15 & 16 Vic., 76, s. 2.—Applied to County Courts.—Founded upon 1st Rep. of C. L. Commissioners. (As to Writs of Summons, see Report ss. 1—14, inclusive).

(*g*) *Personal Actions* (one of the three classes—real, personal and mixed—into which actions have been divided) may be taken to mean those actions which are brought for the specific recovery of goods and chattels or wrongs done to the person or property. The Stat. U. C. 4 Wm. IV., cap. 1, s. 39, abolished all real and mixed actions, except three—writ of Dower—writ of Dower *unde nihil habet*—and Ejectment. The distinction between the two former has been practically removed by the Act 13 & 14 Vic., cap. 58. Our enactment of 4 Wm. IV. cap. 1, s. 39, is adopted from Eng. Stat. 3 & 4 Wm. IV., cap. 27, s. 36. The Eng. act saves a fourth action which has never been in use in Upper Canada. (*Quare Impedit*) As to procedure in Dower, see Stat. 13 & 14 Vic., cap. 58. As to Ejectment see s. ccxx. *et seq.*

see add p. 820

(*h*) The territorial jurisdiction of the Common Law Courts both of superior and inferior jurisdiction may not be inaptly mentioned here. The Common Law Courts of superior jurisdiction are two—the Queen's Bench and the Common Pleas. The former was the first Court established in Upper Canada, with power to hold plea "in all and all manner of actions, causes, or suits, as well criminal as civil, real, personal and mixed, *arising, happening or being in the Province*," (*Upper Canada*;) (Stat. 34 Geo. III., cap. 2, s. 1.) Therefore, territorially con-

within the jurisdiction. intended to hold the Defendant to special bail, (*i*)] shall be commenced by Writ of Summons according to the form contained in the Schedule (A) to this Act annexed, marked No. 1, (*j*) and in every such Writ and copy thereof, the place and county (*k*) of the residence or supposed residence of the party

Eng. C. L. P. A. 1852. s. 2. (App. Co. C.)

sidered, this Court received jurisdiction extending over the whole of Upper Canada—Lower Canada then being a separate Province. The jurisdiction exercised or enjoyed by the Court of Queen's Bench, is exercised and enjoyed by the Common Pleas. (See 12 Vic., cap. 63, s. 8.) Both Courts in this respect at least have clearly a co-ordinate jurisdiction. The only class of Inferior Courts having Common Law jurisdiction is County Courts. As the name signifies, each such Court is circumscribed in jurisdiction to the County or Union of Counties in which it is situate. (Stat. 8 Vic., cap. 13, s. 2, in connexion with Stat. 12. Vic., cap. 78, s. 4.) Then with respect to navigable and other waters not included in the boundaries or limits of any surveyed county, it is enacted "that the Lakes, Rivers, and other waters of this Province which are not comprehended within the defined limits of any Town, Township or County, shall be taken to be parts of the Districts [Counties] respectively, within the extra side lines of which any such lake, river, or other water would be, and be if such exterior side lines were produced in that direction to the utmost limits of the Province" (Upper Canada): (2 Wm. IV., cap. 2, s. 1.) On the North the Province is bounded by the Hudson's Bay Territory. But even over that Territory and over every other part of North America not within the existing British Colonies, and not subject to the civil government of the United States our Superior Courts of Common Law have civil jurisdiction. (See stat. 1 & 2 Geo. IV., cap. 66.) Beyond these limits our Courts have no *complete* jurisdiction. A peculiar and necessarily partial jurisdiction has been conferred upon them in regard to persons resident in foreign parts, by ss. xxxv., xxxvi. of this Act.

(*i*) The words in brackets are not in the English Act. Defendants in Upper Canada may be held to special bail by a writ of capias, which writ is for all purposes the commencement of the action (s. xxii.)

(*j*) A reference to this Schedule, and a comparison of it with Schedule A of 12 Vic., cap. 63, will disclose in what respect our old practice is superseded. The time for appearance is ten days—formerly it was *eight*. The office in which appearance to be entered, ("by filing your appearance, &c.") is omitted in new form. Form of action ("in an action on promises, &c.") omitted. Writ to be in force six months, (s. xxviii.)—*four* formerly: these are the principal changes in the form of the writ. Then there are certain endorsements as to which, see ss. xxi., xxvi. and xli. The omission of the memorandum.—"This writ is to be served within six calendar months," &c., is an irregularity: (*Patterson* v. *Busby*, 5 M. & W., 521.)

(*k*) The expression, "Place *and* County," means more than County only. The word "place" is of doubtful meaning, as applied to Upper Canada. Stat. 12 Vic., cap. 63, s. 22, required "the City, Town or Township *and* County," to be mentioned. The question will be whether "place" in the new Act, will be construed to mean City, Town or Township, or a more specific description, as Street and number of House. In England, the descriptions are usually very precise. But it may be mentioned, that the words "place and county," were used in Eng. Stat. 2, Wm. IV., cap. 39, s. 1, and that our Prov. Stat. 12 Vic., cap. 63, s. 22, was copied from the latter Act; but the Legislature omitted the words "place and county."

Defendant, or wherein the Defendant shall be or shall be supposed to be, shall be mentioned. (*l*)

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substituting "City, Town or Township, and County." Even in this Act there seems to be a Legislative exposition of the word "place." It is provided by s. xxi. that if the plaintiff sue out a summons in person, the name of the *City, Town, Incorporated* or *other Village*, or *Township* within which he resides, shall be indorsed on the writ. Referring to English authorities, as regards "place and county," we meet with the following: "Tufton Street, in the County of Middlesex," sufficient without naming the parish: (*Cooper* v. *Wheale*, 4 Dowl. P. C. 281.) "Kent Street, in the County of Surrey," sufficient: (*Webb* v. *Lawrence*, 1 C. & M. 806; 3 Tyr. 906, 2 Dowl. P. C. 81.) "A. B. of the City of London," without specifying any place or street therein, insufficient: (*Cotton* v. *Sawyer*, 2 Dowl. N. S. 310.) In this case it was observed by the Court, that "*it would be sufficient to describe a person as of an ordinary town in a particular County, but London is an exception.*" It is presumed, therefore, that in Canada, where all our cities and towns, compared with London, are "ordinary towns," a description as of a township, town, city, &c., would be a sufficient compliance with the Act. The point, however, must ere long be decided by the proper tribunal, "Parliament Street, in the City of Westminster," not naming the County, insufficient: (*Ross* v. *Gandell*, 7 C. B. 766.) The place stated must be within the County mentioned in the writ: (*King* v. *Hopkins*, 13 M. & W. 685; *Balman* v. *Sharpe*, 16 M. & W. 93) "Township of Toronto—*in the County of York*"—insufficient, that Township being in Peel: (*Hutchinson* v. *Street et al*, 1 U. C. Prac. R. 367.) Where an objection is made to the writ, that defendant's residence is improperly described as being in one County instead of another, which adjoins the affidavit, ought to be positive as to the fact, and ought to aver that there is no dispute about boundaries: (*Lewis* v. *Newton*, 4 Dowl. P. C. 355; see *Jelks* v. *Fry*, 3 Dowl. P. C. 37.) Judicial notice cannot be taken that a particular place is situate in a known County: (*Rippon* v. *Dawson*, 7 Dowl. P. C. 247. *Sed qu*—see remarks of Robinson, C. J. in *Hutchinson* v. *Street et al*, 1 U. C. Prac. R. 367.) The omission to insert the County of the defendant's residence, is a mere irregularity that should be taken advantage of within a reasonable time: (*Ross* v. *Gandell*, 7 C. B. 766.) Amendment of same when allowed: (s. xxxvii.)

(*l*) This applies to two states of facts: *First*—where the defendant's residence, or supposed residence, is known, and he is known or supposed to be residing there. *Second*—where he has left his place of residence, and is known or supposed to be in some other place: (per *Coleridge, J.*, in *Downes* v. *Garbett*, 2 D. & L. 944.) It would seem useless for defendant to deny that he resides at the place mentioned in the writ, so long as plaintiff is prepared to assert that his supposition that he did reside there: (See *Windham* v. *Fenwick*, 2 Dowl. N. S. 783; *Balman et al* v. *Sharpe*, 16 M. & W. 93; *Jelkes* v. *Fry*, 3 Dowl. P. C. 37; *Rippon* v. *Dawson*, 5 Bing. N. C. 206.) Meaning of the words "supposed to be," see *Hesketh* v. *Flemming*, 30 L. & Eq. 260 Coleridge J. Defendant may be supposed to reside anywhere if there be a reason for the supposition, but his supposed residence must be described correctly. (See *King* v. *Hopkins*, Alderson B., 2 Dowl. P. C., p. 639.) Although a *correct* description of a *supposed* residence will satisfy the statute, yet it is clear an *incorrect* description of an *actual* residence, is open to objection. (See *Ib.* per Pollock, C.B. p. 638.) The defendant may be described as of his late abode: (*Norman* v. *Winter*, 5 Bing. N. C. 279, 7 Dowl. P. C. 304; *Betteyes* v. *Thompson*, 7 Dowl. P. C. 322; also see *Cotton* v.

see add p. 820

Form of action need not be mentioned. Eng. C. L. P. A. 1852. s. 3. (App. Co. C.)

XVII. It shall not be necessary to mention any form or cause of action in any Writ of Summons, or in any notice of Writ of Summons issued under the authority of this Act. (*m*)

XVIII. (*n*) Every Writ of Summons (*o*) shall contain the

Sawyer, 2 Dowl. N. S. 310; *Simpson* v. *Ramsay*, 5 Q. B. 371.) But he should not be described as "now or late of, &c.:" (*Pilbrow* v. *Pilbrow's Atmospheric Railway Co.*, 8 C. B. 730.) It will be sufficient to describe a Corporation or Public Company, as of the place where their functions are exercised: (See *Norman* v. *Winter*, 5 Bing. N. C. 279; *Launceston & Victoria Railway Co.* v. *Brennan*, 3 Jur. 196; *Cotton* v. *Sawyer*, 2 Dowl. N. S. 310.) The defendant's addition need not be inserted: (*Morris* v. *Smith*, 2 C. M. & R. 120.) The residence of plaintiff need not be stated: (See form No. 1, in Sch.) Neither is it necessary to state whether the parties are suing or being sued in a representative capacity: (1 Dowl. P. C. 97 n.) Nor is it necessary to state whether defendant has privilege of Parliament, &c.: (See *Cantwell* v. *Earl of Sterling*, 8 Bing. 174.) In actions upon bills or notes, defendants may be described in the process or declaration by the initials or contraction used by them in such instruments: (Stat. U. C. 7 Wm. IV., cap. 3, s. 9.) The "form" of the writ is given, but the omission to insert or endorse in or upon the writ the matters made necessary by the act, does not make it a nullity: it is only an irregularity that may be set aside or amended. (Sec. xxxvii..) Writ of Summons generally:—(See Chit. Arch. 8 Edn. 142; Tidds N. P. 65; Bag. Prac. 71 As to concurrent writs, see s. xxvii.

(*m*) Taken from Eng. St. 15 & 16 Vic., cap. 76, s. 3—Applied to County Courts—Founded on 1st Rep. of C. L. Comrs., (s 2). The Commissioners reported that the statement of the form or cause of action "was utterly useless and lead to captions objections, and to much fruitless delay and expense." They recommended one general form of writ for every action. This recommendation has been followed by the Legislature. It is no longer necessary "to mention any form or cause of action in any writ of summons, &c." But if mentioned, the writ will neither be a nullity, nor be liable to be set aside. *Qu.* Is it now necessary to state in notices of action required to be given under particular statutes, the form of action which plaintiff intends to bring? As it is unnecessary to mention the form of action in the writ, it may be thought useless to require its insertion in a notice of action. Notwithstanding the enactment contained in the section under consideration, it cannot be well said that forms of action have been abolished. True it is that the same nicety in choosing a form of action, or in stating it when chosen, is not now as formerly required. But for many purposes, such as Stats. of Limitations, and some other statutes in which particular forms of action are mentioned, the existing forms must still be preserved. Causes of action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same writ: (See s. lxxv. and notes thereto.)

(*n*) Taken from Eng. Stat. 15 & 16 Vic., cap. 76, s. 4—Applied to County Courts. This section also corresponds with our rule, 1 H. T. 13 Vic., (Dra. Rule 73,) which appears to have been copied from Eng. Rule M. T. 3 Wm. IV., No. 1, (Jervis N. R. 84,) and is remedial of the old practice. It may be noticed that the English rule extends to "writs of capias and detainer" which ours does not. Formerly it was held that no more than four defendants could be included in one writ; and that four separate causes of action, against four separate defendants, might be

names of all the Defendants, (*p*) and shall not contain the name or names of any Defendant or Defendants in more actions than one. (*q*)

Names of Defendants must be. Eng. C. L. P. A. 1852, s. 4. (*App. Co. C.*)

joined in the same writ. In both respects the practice is now and for some time past has been altered.

(*o*) *Qu.* And Capias? See s. xix., n. (*s*) and s. xxi., n. (*y*.) In England, the Summons is the only writ for commencing all personal actions; but in Upper Canada, a capias may be used for that purpose in certain cases: s. xxii.

(*p*) Christian and surname of defendant ought to be correctly stated: (*Williams* v. *Bryant*, 5 M. & W. 446.) Defendant may be addressed by the name which he bears by reputation: (*Ib.*) In actions "upon bills of exchange, promissory notes, or other written instruments," when defendant signs by initial letter of his christian name, designation by such initial letter in process, &c., is sufficient: (Stat. U. C. 7 Wm. IV., cap. 3, s. 9, copied from Eng. Stat. 3 & 4 Wm. IV., cap. 42, s. 12.) With reference to the latter, see the following cases: *Sargent* v. *Gordon*, 7 D. & R. 258; *Rolph* v. *Peckham*, 6 B. & C. 164, 4 D. & R. 214; *Summer* v. *Batson*, 11 Moore 39; *Rust* v. *Kennedy*, 4 M. & W. 586, 7 Dowl. P. C. 199. It is sufficient to describe a defendant by the name which usage has given to him, both as regards his christian and surname: (*Williams* v. *Bryant*, 5 M. & W. 447.) If the action be against a Corporation, they must be sued by their corporate name. (1 Tidd 121; also see *Woolf* v. *City Steamboat Co.*, 7 C. B. 103; *Attorney General* v. *the Corporation of Worcester*, 15 L. J. Ch. 398.)

(*q*) This section is a copy of the English Rule 1 of M. T., 3 Wm. IV., (Jervis N. R. 94) with the exception: the original rule extends to "writs of Capias and Detainer." Our rule of H. T. 18 Vic. No. 1, was also derived from same source. If too many defendants are joined, some may be now struck out under s. lxx. If too few, after plea in abatement for non joinder, plaintiff may amend under s. lxxi. It was decided under the old practice, that the Court could not amend the writ by adding a defendant: (*Goodchild* v. *Leadham*, 5 D. & L. 383.) *Qu.* Has the Court the power, before plea in abatement, to do so now under s. xxxvii.?

A plaintiff may issue several writs of summons for the same cause of action of the same date, and upon the same *præcipe*, if all the defendants be named in each writ: (*Angus* v. *Coppard*, 3 M. & W. 57; *Crow* v. *Crow*, 1 D. & L. 709, and see s. xxvii.) The term "you" in the writ, when there are several defendants, is taken to apply distributively: (*Engleheart* v. *Eyre et al*, 2 Dowl. P. C. 145.) Plaintiff can neither declare against a defendant not named in the writ, nor declare separately against defendants named in the same writ: (*Pepper* v. *Whalley*, 1 N. C. 71, 2 Dowl. P. C. 821.) But he may declare against some only: (*Caldwell* v. *Blake*, 2 C. M. & R. 249, 5 Tyr. 618; *Knowles* v. *Johnson*, 2 Dowl. P. C. 653; *Evans* v. *Whitehead*, 2 M. & R. 367; *Stables et al* v. *Ashley et al.* 1 B. & P. 49.) The defendants, however, who have appeared may sign judgment for their costs: (*Roe* v. *Cock*, 2 T. R. 257.) And plaintiff declaring against some cannot afterwards declare against the others in a separate action: (*Caldwell* v. *Blake*, 2 C. M. & R. 249.) On a joint contract by three, all must be sued, if within the jurisdiction of the Court. If one is without, the remaining two must be sued. One alone cannot be sued, if there be two remaining within the jurisdiction: (*Corbett* v. *Calvin*, 4 U. C. R. 123.) It was held that between bailable and non-bailable process there was a difference—in the former it being necessary for plaintiff to declare against all the defendants named in the writ: (*Carson* v. *Dowding*, 4 Dowl. P. C. 297; *Woodcock* v. *Kilby*, 4 Dowl. P.

Date of Writ. Eng. C. L. P. A. 1852, s. 5. (App. Co. C.)

Teste.

XIX. (*r*) Every Writ of Summons [(*q*) or Capias] (*s*) issued under the authority of this Act, shall bear date on the day on which the same shall be issued, (*t*) and 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. (*u*) (*v*)

C. 730.) *Qu.* Does the distinction still exist? S. lxvi. appears to be restricted to cases of non-bailable process.

(*r*) Taken from Eng. Stat. 15 & 16 Vic., c. 76, s. 5.—Applied to County Courts: originally copied from the first part of Eng. Stat. 2 Wm. IV., cap. 39, s. 12; and as regards writs of summons and capias, substantially a re-enactment of Prov. Stat. 16 Vic., cap. 175, s. 6.

(*s*) Not in English Act.

(*t*) Not to be issued unless cause of action complete: (*Alston* v. *Underhill*, 1 C. & M. 492; *Thompson* v. *Dicas*, 1 C. & M. 768, 2 Dowl. P. C. 93; *Castrique* v. *Bernabo*, 6 Q. B., 499.) The date may be either in figures or words at length:—*Gogan* v. *Lee*, 6 Taunt. 651, overruled.—(*Eyre* v. *Walsh*, 6 Taunt, 333; *Butler* v. *Cohen*, 4 M. & S. 335; *Solomon* v. *Nainby*, 7 Dowl. P. C. 459.) If writ dated on day other than that on which issued, it is irregular: (*Kirk* v. *Dolby*, 8 Dowl. P. C. 766, 6 M. & W. 636.) If dated on a Sunday, it is void: (*Hanson* v. *Shackleton*, 4 Dowl. P. C. 48, 1 H. & W. 342; *Kenworthy* v. *Peppiat*, 4 B. & Al. 288.) If no date, it is irregular, not void: (See *Ball* v. *Hamlet*, 3 Dowl. P. C. 188.) Agreed by the Judges of the Queen's Bench, Common Pleas, and Exchequer, that a writ of Summons may be amended, so as to render it conformable to the precipe on which it is founded: (*Kirk* v. *Dolby*, 8 Dowl. P. C. 766, per Parke B.) Amendment allowed by striking out "23rd February, 1824, in the fourth year of our reign," and inserting in lieu thereof, "31st January, in the fifth year of our reign:" (*Myers* v. *Rathburn*, Tay U. C. R. 159.) It will not be safe to rely too much upon this case, as the report is very unsatisfactory. For the law as to amendments generally, both as regards omissions and mistakes, see ss. xxxiv. and ccxci. of this Act. Although the act gives ample powers for amendment, still it is presumed that the Judges will, in the exercise of their discretion, be governed by cases already decided, so far as applicable. If a defective writ be resealed, it ought to be dated on the day of resealing: (*Knight* v. *Warren*, 7 Dowl. P. C. 663.) A mistake in the year in the teste of a copy of a Summons, the writ itself being right, is a mere irregularity which is waived, if the defendant does not come to the Court before the time for appearance has elapsed: (*Edwards* v. *Collins*, 5 Dowl. P. C. 227.) An offer by defendant, after having been served with the Summons, to pay half the debt and costs, is a waiver of a mistake in the teste of the Summons copy: (*Briggs* v. *Bernard*, 6 Law J., C. P. 216.)

(*u*) The latter part of this section is not new in Upper Canada: (See *Case* v. *McVeigh*, T. T., 3 & 4 Vic., *MS.* R. & H. Dig., "Capias ad Respondendum" 2, and see 12 Vic. cap. 63, s. 27.) Unless there is a "*vacancy* in the office," the writ must be tested in the name of the Chief Justice. His absence from the Province does not make it improper to teste writs in his name: (*Brett* v. *Smith*, 1 U. C. Prac. Rep. 309, Richards, J.) In County Courts, if there should be but one Judge, of course writs will be tested in his name. If there should be for

Office whence issued to be marked on writ. (App. Co. C.)

XX. The Clerk or Deputy Clerk of the Crown and Pleas who shall issue any Writ, (*v*) shall mark in the margin a memorandum, stating from what office and in what County such Writ was issued, and shall subscribe his name to such memorandum. (*w*)

Name of Attorney or person suing out writ to appear on it.

XXI. (*x*) Every Writ of Summons (or of Capias) shall be indorsed with the name and place of abode of the Attorney actually suing out the same, (*y*) and when the Attorney actually suing any Writ, shall sue out the same as agent for any other Attorney, the name and place of abode of such other Attorney shall also be indorsed upon the said Writ, (*z*) and in case no Attorney shall be employed to issue the Writ, then it

Further particulars if Plaintiff sue in person.

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any one County, both a Senior and a Junior Judge, writs should be tested in the name of the Senior Judge: (See stat. 16 Vic., cap. 20.)

(*v*) *i. e.* The Clerk of Process at Toronto, or Deputy Clerks of the Crown in outer Counties: (s. iv.)

(*w*) This is a re-enactment of our old practice. See form of Summons and Capias Schd. to 12 Vic., cap. 63; also see old Rule 1, H.T., 13 Vic.: "Every writ of Summons or Capias shall state in the margin the 'city, town or place,' at which the same was issued." As to the words "city, town or place," see remarks of *Draper, J., in Chamberlain et al* v. *Wood et al*, 1 U. C. Prac. R. 199. The city, town, or place of issue is now unnecessary, if the office and county be stated. It was held under Stat. 12 Vic., cap 63, that the writ was sufficiently signed, if signed in the margin by the officer who issued it: (*Smith* v. *Russell, Smith* v. *Reid*, 1 U. C. Cham. R. 193. *Leach* v. *Jarvis: Ib.* 264. But see old Rule 11 H.T. 13 Vic.) It should be observed here, that under the present practice, it is necessary not only that the writ should be sealed, but signed by the Process Clerk: (s. iv.) The mem. in the margin made necessary by s. xx., is therefore additional. The result is, that the writ must be signed by the Process Clerk in all cases, and signed in the margin by Deputies, when issued by them. It is not required that the date of issue should be written in the margin. The teste of the writ is the proper evidence of date of issue: (s. xix.)

(*x*) Taken from Eng. Stat. 15 & 16 Vic., cap. 76, sec. 6—Applied to County Courts—substantially a re-enactment of Eng. Stat. 2 Wm. iv., cap. 39, sec. 12; and Eng. Rule, M. T., 3 Wm. IV., No. 9, from which the latter part of our Prov. Stat. 12 Vic., cap. 63, sec. 27, was copied. The origin of the practice seems to have been Eng. Stat. 2 Geo. ii., cap, 23, sec. 22.

(*y*) *i. e.* The individual attorney, or the name of the firm: (*Hartley* v. *Radenhurst*, 4 Dowl. P.C. 748; *Engleheart* v. *Eyre et al*, 2 Dowl. P.C. 145; *Pickman* v. *Collis*, 3 Dowl. P. C. 429; *Form* of indorsement, see Sch. A. No. 1. The name and address of the attorney is required in order to inform defendant where he may settle the action: (*Dawes* v. *Solimenson*, 6 Scott, 596.) The form is given for the purpose of illustration: (*Hannah* v. *Wyman*, 3 Dowl. P.C. 673.)

(*z*) Same as old Rule 9, H. T., 13 Vic. An Indorsement thus:—"This writ was issued by C. F. & S. of No. 1 B. R., London, agents for Mr. J. T. of Exeter, in the County of D., the plaintiff within named," was held to be bad, inasmuch as it neither showed that the writ was issued by the Attorney for the plaintiff, nor by the plaintiff in person: (*Toby* v. *Hancock*, 4 D. & L. 385.) Where the

Eng. C. L. P. A., 1852, s. 6. (App. Co. C.)

shall be indorsed with a memorandum expressing that the same has been sued out by the Plaintiff in person, (*a*) mentioning the City, Town, incorporated or other Village or Township within which such Plaintiff resides.[2] (*b*)

Commencement of actions where it is intended to hold Defendant to special bail.

XXII. (*c*) In all such actions wherein it shall be intended to arrest and hold any person to special bail, the process shall be by a Writ of Capias, according to the form contained in

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writ was issued out by a London agent, the description "*agent* for plaintiff in *person*," was held to be insufficient, although the plaintiff was himself an attorney: (*Loyd* v. *Jones*, 1 M. & W. 549.) Any such irregularity would now be amendable either under s. xxxvii. or s. cxxci. of this Act. Where the process was indorsed only with the name of the agent and not of the attorney immediately employed, the Court held this irregular, and set aside the process: (*Shephard* v. *Shum*, 2 C. & J. 632; 2 Tyr. 742 S. C.) Indorsement, "M. G. & Co., agents for S.," without specifying christian names, is sufficient: (*Pickman* v. *Collis*, 3 Dowl. P. C. 429.) If writ issued by plaintiff in person, actual residence must be given: (*Lewis* v. *Davison*, 1 C. M. & R. 655; 5 Tyr. 198, 3 Dowl. P. C. 272.) The object of these indorsements is to direct defendant where to call for the particulars mentioned in s. xxv. of this act. And it is ordered "that if the plaintiff or his attorney, shall omit to insert in or indorse on any writ or copy thereof, any of the matters required by the said act, (12 Vic., cap. 63) or by any rule of Court, to be by him inserted therein, or indorsed thereon, such writ or a copy thereof, shall not on that account be held void, but the writ or the service thereof, may be set aside as irregular, upon application made to the Court out of which the same shall issue, or to any Judge:" (Rule 10 H. T. 13 Vic.) It is ordered that no application to set aside process or proceedings for irregularity, shall be allowed, unless made within a reasonable time; nor after the party applying has taken a fresh step after the irregularity:" (Rule 22 H. T. 13 Vic.) These two Rules have been annulled by virtue of the New Rules of T. T. 1856. But s. xxxvii. of this Act is identically the same as the first. And the second, though annulled, is too beneficial in practice to be neglected.

(*a*) When plaintiff in person sues out the writ, his description should be very clear, full, and precise. Non-professional men are not so easily found out as Attorneys of the Courts, whose offices are generally well-known.

(*b*) The English Act proceeds, "and also the name of the hamlet, street, and number of the house of such plaintiff's residence, if any such there be." The designed omission of these words should be borne in mind when examining English authorities. The Judge in Chambers is to exercise his discretion in determining whether the description is sufficient or not. If he decide the question, the Court will rarely review his decision: (*Tadman* v. *Wood*, 4 A. & E. 1011.)

(*c*) This section is substantially a re-enactment of the repealed Act, 12 Vic., cap. 63, s. 24. The only variation being the insertion of the words between brackets. It may be well here to point out in what respect the Capias in Upper Canada differs from the Capias in England. The Summons in England is the only writ wherewith to commence personal actions: (Eng. Stat. 1 & 2 Vic., cap. 110, s. 2.) A Capias may be issued, but only as collateral to the main proceedings: (*Ib.* s. 3.) The Summons must first issue, and then if necessary and allowable, the Capias. Whereas in Upper Canada, the Capias so far from being an auxilliary writ may, in cases

schedule (A) to this Act annexed, and marked No. 2, (*d*) and may be directed to the Sheriff of any County or Union of Counties in Upper Canada, (*e*) and so many copies of such process, together with every memorandum or notice subscribed thereto, and all indorsements thereon, (*f*) as there may be persons intended to be arrested thereon or served therewith, shall be delivered with the original Writ, to the Sheriff or other officer who may have the execution or return thereof,

to special bail. (*App. Co. C.*) (*c*) § 3.

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where it is intended to hold the defendant to bail, be the first and only process: (See *Tyson* v. *McLean*, 1 U. C. Prac. R. 339.) After special bail has been put in, plaintiff may proceed with his action "in like manner as if the action had been commenced by writ of Summons, and the defendant had appeared thereto:" (s. xxiv.) This will explain why our Legislature, in adopting many of the English provisions, have, after the word "Summons," generally added "or Writ of Capias." Both writs in Upper Canada, as regards the commencement of action, being upon an equal footing. The one to be used in non-bailable, the other in bailable actions.

(*d*) The form in the Schedule (which see) follows very closely the form given in No. 2 Sch. to 12 Vic., cap. 63. It is worthy of notice that even the form of action, ("in an action on promises, or debt, &c.,") though unnecessary in a Summons, (s. vii.) is retained in the Capias: (See Schedule A No. 2.) But it must be recollected that these forms are given as much for illustration as any other purpose. The retention of the words "on promises," &c., shows that as a general rule a Capias now can only be sued out as of right for a money demand or "debt," in the popular sense of that word. Between the form given to this Act, and the one in 12 Vic., cap. 63, the following may be mentioned as the particulars in which they differ. The time for special bail is "*ten* days"—not eight, as under 12 Vic. This agrees with the time for defendant's appearance to non-bailable process: (Sch. A, No. 1.) Defendant, instead of being called upon to put in "bail to the action," is required to put in bail "according to the warning hereunder written or indorsed." This is more a difference of form than of substance. Writ to be returned immediately after the execution thereof; or if the same remain unexecuted, (and shall not be renewed according to law,) then to be returned, &c. The words in parenthesis are new, and evidently relate to s. xxviii. of this Act., which prescribes the time and mode of renewal. Writ, if unexecuted, to be returned at the expiration of six calendar months—*four* under 12 Vic. Here, too, a resemblance to writs of Summons is preserved: (See Sch. A, No. 1.)

(*e*) Writs of Summons may be served in any County of Upper Canada: (s. xxxi.) *Testatum* writs are abolished. So as regards executions; they may be directed to the Sheriff of any County without reference to the County in which the venue is laid. *Pro forma* or Ground Writs are abolished: (s. clxxxvi.)

(*f*) The original writ, with every memorandum or notice subscribed thereto or indorsed thereon, and copies with like memoranda subscribed and indorsements, shall be delivered to the Sheriff, &c. *Qu.*—If matter required to be subscribed on an original writ is indorsed, or *vice versa*, would the writ be bad? (See *Chamberlain et al* v. *Wood et al*, I U. C. Prac. Rep. 199, Draper J.) It would seem as regards a copy, that if it have at the *foot* a

Execution of process.

Indorsement thereof on writ.

(a) § 28, 28 & 29

(3) See § 194 277.

(g) and who shall upon or immediately after the execution of such process, cause one such copy to be delivered to every person upon whom such process shall be executed by him, whether by service or arrest,(h) and shall indorse on such Writ the true day of the execution thereof, whether by service or arrest; [within three days at furthest after such service or arrest,] (i) and if any defendant be taken or charged in custody upon any such process, and imprisoned for want of sureties for his appearance thereto, the Plaintiff in such process

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copy of the *indorsement* on the original writ, there would be no irregularity: (*Ib.*) see add. p. 820.

(*g*) *Sheriff or other Officer, &c.*—The process may be delivered to the Coroner, if there should be any just exception to the Sheriff: (Jervis Cor. 50.) Upon the death of the Sheriff the Deputy is entitled to act until the appointment of a successor: (Stat. U.C. 3 Wm. IV., cap. 8, s. 23.) Process when intended for the Sheriff should, properly speaking, be delivered to him at his office. "The Sheriff of each County or United Counties in Upper Canada, shall keep his office open each day, except Sunday, Cristmas Day, Good Friday, and the Birth-day of the Sovereign, from ten o'clock in the forenoon until four o'clock in the afternoon, and during all that time the said Sheriff, his Deputy, or some Clerk competent to do business for him, shall be present to transact the business of the office:" (St. 16 Vic., cap. 175, s. 14.) This act does not except "Easter Monday," and "any day appointed by Royal Proclamation for a general fast or thanksgiving," as in the case of Deputy Clerks of the Crown: (*s.* xiii.)

(*h*) It is sufficient to serve a copy of the writ *immediately after* the arrest: (*McNider* v. *Martin*, 1 U.C.Prac.R.205.) If a party when arrested, refuse to receive a copy of the writ offered to him, he will not be allowed afterwards to urge as a ground for his discharge, that a copy of the writ was not left for him: (*Hetherington* v. *Whelan et al*, 1 U. C. Cham. R. 158; *McNider* v. *Martin*, 1 U.C. Prac. R. 205.) It has been the practice, simply to serve a copy of the Capias on defendants who are not intended to be held to bail. The practice is retained by this Act. (See last proviso to this section.) With respect to the time, place, and mode of service of writs of summons, see ss. xxxi. and xxxiv. of this Act, with notes thereto.

(*i*) Comfirmatory of old R. 3, H. T. 13 Vic. "The Sheriff, or other officer to whom any writ of Capias shall be directed, or who shall have the execution or return thereof, shall, within three days after the execution thereof, whether by service or arrest, indorse on such writ the true day of the execution thereof, *and in default thereof, shall be liable in a summary way to make compensation for any damage which may result from his neglect, as the Court or a Judge shall direct.*" The words in italics, though to be found in the Rule quoted, are not, it will be perceived, copied by this Act. The Courts no doubt would punish a Sheriff for such misconduct, compel him to make the necessary indorsement, and pay the costs of application. Besides, at common law it is clear that a party damified by the misconduct would be entitled to claim from the Sheriff, full compensation in an action on the case. There is also the statutory remedy against him and his sureties under their covenant: (St. 3 Wm. IV., cap. 8, s. 2.) It was in one case held that the omission to put the indorsement upon the writ, as directed

may, (*j*) before the end of next term after the arrest of such Defendant, declare (*k*) against such Defendant and proceed thereon, in the manner and according to the directions contained in the third and fourth rules of the Court of Queen's Bench, made in Easter Term, in the fifth year of Her Majesty's Reign: (*l*) Provided always, that it shall be lawful for the Plaintiff or his Attorney, to order the Sheriff or other officer to whom such Writ shall be directed, to arrest one or more of the Defendants therein named, and to serve a copy thereof on one or more of the others, which order shall be duly obeyed

Declaration when to be made, when Defendant is imprisoned for want of bail.

Proviso:

Some Defendants may be arrested, and others not.

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by this rule of Court, was no ground for setting aside the arrest: (*McNider* v. *Martin*, 1 U. C. Prac. Rep. 205.) *Qu.* Whether the bailiff who makes the service is the proper party to indorse the writ? He is not the person who has the execution and return of the writ: (*Ib.*) If there be several defendants upon whom process has been served or executed on different days, the indorsement should conform to the facts. See as to similar endorsement required on writs of Summons: (s. xxxii. and notes thereto.)

(*j*) "*May*," construed "shall:"—(See *Tyson* v. *McLean*, 1 U. C. Prac. Rep. 339.) This construction is owing to the reference, subsequently (note *l*) made to Rules of Court that make it *imperative* to declare before the end of the term next after the arrest: (*Ib.*) And this rule in its turn accords with the leaning of the Courts in favor of the liberty of the subject.

(*k*) Merely filing the Declaration is not "Declaring," within the meaning of this section. It must be served: (See *Tyson* v. *McLean*, *ante* P. C., Richards, J., page 344.)

(*l*) RULE 3.—"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."

RULE 4.—"A copy of every declaration and subsequent pleading, shall be served on the opposite party, whether the case be bailable or non-bailable, and whether the action be against any person having privilege or otherwise, and as well when the plaintiff has appeared for the defendant under the Statute, as when the defendant has appeared in person or by Attorney."

See the history of these Rules:—(*Tyson* v. *McLean*, *ante* P. C., Richards, J., page 342.) The object of Rule 3, is to hasten proceedings against prisoners in *gaol*. Therefore if defendant be on bail, plaintiff is not bound to serve his declaration "before the end of the next term after the arrest." He, in such case, would be entitled to the usual time for that purpose: (*Glenn* v. *Box*, 3 U. C. R. 182.) The first part of Rule 3 applies only to the cases of persons who having been previously in custody are "detained" in prison upon a writ subsequently issued. The next clause applies to the cases of persons arrested on a writ of Capias, and who go to prison for want of bail: (*Ib.*) If de-

Effect of service as to those not arrested.

by such Sheriff or other officer,(5)(m) and such service shall be of the same force and effect as the service of the Writ of Summons hereinbefore mentioned, and no other.(6)(n)

(5) § 29

(6) § 30

Affidavit for

XXIII. (o) It shall not be lawful to issue or sue out any

fendant be supersedable because a declaration has not been delivered to him in due time, subsequent offers of settlement will not prevent him from being discharged: (*Tyson* v. *McLean, ante.*)

(*m*) If it be not imperative under this section that the order here mentioned should be in *writing*, sheriffs will, for obvious reasons, expect that the direction should not rest on a mere *verbal* communication. The written order may be conveniently indorsed on the capias and should be signed by the plaintiff or his attorney. Where, under the old practice, the action was commenced against several defendants by Summons, and after commencement of action, plaintiff desired to arrest one of the defendants: Held that he might do so by Capias, without serving more than the defendant to be arrested: (*Chamberlain et al* v. *Wood et al*, 1 U. C. Prac. R. 199.)

(*n*) Ss. lx., lxvi., cxlii., etc.

(*o*) Amendment and consolidation of repealed Stat. 2 Geo. IV., cap. 1, s. 8, and 8 Vic., cap. 48, s. 44—Applied to County Courts.

It shall not be lawful to issue or sue out, &c. "Issue" probably refers to the Clerk. "Sue out," to the plaintiff or his attorney.

And that the amount thereof, &c.—*i. e.* of the cause of action. This expression is not strictly correct. It will it is presumed be taken to mean *the amount due in respect to the cause of action.* Plaintiff though he may have a cause of action for an amount ever so large, is bound before suing out a capias, to give credit to defendant for set offs and other like credits: (As to which *infra.*)

Being in no case less than ten pounds, &c. Qu. Is a plaintiff suing for £10, who commences his suit by capias, in either the Superior Courts, as of right entitled to full costs? Division Courts have no jurisdiction to hold to bail. But it is different with County Courts. They may hold to bail "in all cases within their jurisdiction:" (Stat. 8 Vic. cap. 13, s. 14.) They have jurisdiction "of all *personal actions* where the *debt* or *damages claimed* is not more than £50; and of all *causes* or *suits* relating to *debt, covenant,* or *contract,* where the amount is liquidated or ascertained by the act of the parties or the signature of the defendant to £100." (Co. C. P. Act, s. 20.) Then it is enacted, that in any suit brought in a Superior Court, of the proper competence of the County Courts, "no more costs shall be taxed against the defendant than would have been incurred in the District (County) Court in carrying on the same action," unless the Judge who presides shall certify, &c.: (8 Vic., cap, 13, s. 59.) There never has been a doubt but that this enactment applied to bailable as well as non-bailable actions. It could not have been the intention of the Legislature by *inference* to repeal, supersede, or in any way affect an enactment so important and so well established. The difficulty above suggested, however, must be set at rest by legal adjudication. Plaintiff at all events should take good care not to arrest for a larger sum than is actually due to him, after giving to defendant all necessary credits. It is enacted by Stat. U. C. 49, Geo. III. cap. 4, s. 1: "That in all actions to be brought in Upper Canada, from and after the passing of this Act, wherein the defendant or defendants shall be arrested or held to bail, and wherein the plaintiff or plaintiffs shall not recover the amount of the sum for which the defendant or defendants in such action shall have been so arrested and held to special bail, such defendant or defendants shall be entitled to costs of

~~such writ of capias, unless an affidavit be first made by such~~ for suing out capias.

suit, to be taxed according to the custom of the Court in which such action shall have been brought, provided it shall be made to appear to the satisfaction of the Court in which such action is brought, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff or plaintiffs in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested, and held to special bail in such amount as aforesaid; and provided that such Court shall thereupon, by rule or order of the same Court, direct that such costs shall be allowed to the defendant or defendants, and the plaintiff or plaintiffs shall, upon such rule or order being made as aforesaid, be disabled from taking out any execution for the sum recovered in any such action, unless the same shall exceed, and then in such sum only, as the same shall exceed the amount of the taxed costs of the defendant or defendants in such action; and in case the sum recovered in any such action shall be less than the amount of the costs of the defendant or defendants to be taxed as aforesaid, that then the defendant or defendants shall be entitled, after deducting the sum of money recovered by the plaintiff or plaintiffs in such action, from the amount of his, her or their costs to be taxed as aforesaid, to take out execution for such costs, in like manner as a defendant or defendants may now by law have costs in other cases."

For the decisions under this Stat., see R. & H. Dig., p. 135. Costs IV. (1.) The section itself is copied from Eng. Stat. 43 Geo. III. cap. 46, s. 3.—Although the English Stat. has, in England, since the passing of Stat. 1 & 2 Vic., cap. 110, become practically inoperative: (*Ricketts et al* v. *Noble*, 3 Ex. 521,) yet, the decisions upon it will be useful in Upper Canada.

"*That in all actions, &c., where the defendant or defendants shall be arrested and held to special bail,*"—there must be an arrest, as well as holding to bail: (*Pates* v. *Pilling*, 2 C. & M. 374 4 Tyr. 231; *Amor* v. *Blofield*, 9 Bing. 91, 1 Dowl. P. C. 277; *James* v. *Askew*, 8 A. & E. 351; *Robinson* v. *Powell*, 5 M. & W. 479.) Where defendant was arrested and imprisoned, held that this was an arrest and holding to bail, within the meaning of the Statute: (*Preedy* v. *McFarlane*, 1 C. M. & R. 819; 5 Tyr. 355; *Ricketts et al* v. *Noble*, 3 Ex. 521, *Acc. U. C. McGregor* v. *Scott*, Tay. U. C. R. 66.) See addl. 820

"*Or wherein the plaintiff or plaintiffs shall not recover.*"—The recovery must be by judgment, and therefore, when defendant paid into Court a less sum than the sum sworn to, which plaintiff accepted, held that the Statute did not apply: (*Brooks* v. *Rigby*, 2 A. & E. 21; *Butler* v *Brown*, 1 B. & B. 66; *Rowe* v. *Rhodes*, 2 C. & M. 379.) It might be different if plaintiff replied damages *ultra*, and obtained a verdict less than the sum sworn to: (See *Taylor* v. *Rolfe*, 18 L. J. Q. B. 89.) The Statutes do not apply where a compromise is made: (*Linthwaite* v. *Balling*, 2 Sm. 677.) Or where there is a voluntary reference to arbitration: (*Keene* v. *Deeble*, 3 B. & C. 491; *Payne* v. *Acton*, 1 B. & B. 278; *Sherwood* v. *Tayler*, 6 Bing, 280.) *Contra.*—If a verdict be taken subject to a reference: (*Turner* v. *Prince*, 5 Bing. 191; *Jones* v. *Jehu*, 5 Dowl. P. C. 130; *Acc.* U. C. *Kendrew* v. *Allen*, T. T., 4 & 5 Vic., *MS.* R. & H. Dig. Costs IV. (1) 4: *Nicholson* v. *Allen*, M. T., 5 Vic. *MS. Ib.* Case 5: *McMiking* v. *Spencer*, H. T., 6 Vic. *MS. Ib.* Case 6.) Or if the arbitrator having power, order judgment to be entered: (*Holden* v. *Raith*, 4 N. & M. 466.) But if the submission stipulate that the costs shall abide the event, then the Statute will not apply: (*Thompson* v. *Atkinson*, 6 B. & C. 193.) And if the arbitrator having the power, does not make any award as to costs, the Court will not assist either party under this Statute: (*Greenwood* v. *Johnson*, 8 Dowl. P. C. 606.)

Plaintiff, his servant or agent, of the Plaintiff's cause of action,

"Provided that it shall be made to appear to the satisfaction of the Court in which such action is brought." —Defendant must apply to the Court in which the action was commenced: (*Costello* v. *Corlett*, 4 Bing. 474; *Handley* v. *Levy*, 8 B. & C. 637.) And before taxation of costs: (*Rennie* v. *Foreton*, 8 Dowl. P. C. 326.) If the action be commenced in an inferior Court, and afterwards removed into a superior, the latter Court will not interfere under the Statute: (*Costello* v. *Corlett*, 4 Bing. 474; *Handley* v. *Levy*, 8 B. & C. 637; *James* v. *Dawson*, 1 Dowl. P. C. 841; *Connel* v. *Watson*, 2 Dowl. P. C. 139.)

"And upon hearing the parties by affidavit."—The affidavit must state that defendant was arrested without reasonable or probable cause: (U.C. *McIntosh* v. *White*, Tay U. C. R. 67,) and must show for what sum Plaintiff recovered his verdict: (U. C. *Powell* v. *Gott*, 1 U. C. R. 415.) But affidavits will not be received to impeach the verdict: (*Tipton* v. *Gardner*, 4 A. & E. 317; *Twiss* v. *Osborne*, 4 Dowl. P. C. 107.) Reference may be made to the Judge's notes: (*Van Nyvel* v. *Hunter*, 3 A. & E. 248.)

"That the plaintiff in such action had not any reasonable or probable cause for causing the defendant or defendants to be arrested, and held to special bail."—The *onus* is on defendant to show that plaintiff had not reasonable ground for arresting for the amount sworn to: (*Edwards* v. *Jones*, 2 M. & W. 414; *White* v. *Prickett*, 3 Dowl., P. C. 445; *Day* v. *Clarke*, 5 Bing. N. C. 117.) If plaintiff acted on a conscientious persuasion that the sum sworn to was due, defendant will not recover his costs of defence: (*Clarke* v. *Cooke*, 4 Bing. N. C. 269; *Spooner* v. *Danks*, 7 Bing. 772; *Mantell* v. *Southall*, 2 Bing. N. C. 74.) Defendant is only entitled to costs where the plaintiff arrests him for a sum materially larger than the amount due: (*Sherwood* v. *Tayler*, 6 Bing. 280; *Roper* v. *Sheasby*, 1 C. & M. 496.) The effect of the Statutes of Set Off, is to make the balance really due, the debt for which plaintiff ought to arrest: (*Dronefield.* v. *Archer*, 5 B. & A. 518; *Austin* v. *Debnam*, 3 B. & C. 139; *Ashton* v. *Naull*, 2 Dowl. P. C, 727; *Sims* v. *Jacquest*, *Ib.* 800; *Beare* v. *Pinkus*, 4 N. & M. 846; *Forster* v. *Weston*, 6 Bing. 527.) The cases following may be referred to upon the subject of reasonable or probable cause: *Day* v. *Pieton*, 10 B. & C. 120; *Russell* v. *Atkinson*, 2 N. & M. 667; *Gomperts* v. *Denton*, 1 Dowl.P.C. 628; *Lord Huntingtower* v. *Heeley*, 7 D. & R. 369; *Robinson* v. *Elsam*, 5 B. & A. 661; *Griffithe* v. *Pointon*, 2 N. & M. 675; *Linley* v. *Bates*, 2 C. & J. 659; *Stovin* v. *Taylor*, 1 Dowl P. C. 697 (*n*); *Presdy* v. *McFarlane*, 1 C. M. & R. 819; *White* v. *Prickett*, 4 Bing. N. C. 287; *Shatwell* v. *Barlow*, 8 Dowl. P. C.709; *Ballantyne* v. *Tayler*, 5 A. & E. 792. And with respect to the subject generally, see the following cases: *Talbot* v. *Hodson*, 2 Marsh 527; *Cammack* v. *Gregery*, 10 East. 525; *James* v. *Frances*, 5 Price 1; *Glenville* v. *Hutchins*, 1 B. & C. 91; *Tipton* v. *Gardner*, 4 A. & E. 317.

The words of the enactment here annotated are the same as stat. 8 Vic., cap. 48, s. 44, upon which numerous decisions have been delivered by our Courts. It is proposed to group these decisions and others taken from the English books, under the following distinct heads:—

1. *Right to arrest, and liability to be arrested.*—Residents of Upper Canada are clearly entitled to arrest their debtors, and are as clearly liable to be themselves arrested. But the propriety of extending either the privilege or the liability to foreigners, has been much questioned. The legality of an arrest by a foreigner, or of a foreigner on civil process, has been much doubted. Where an affidavit to hold to bail was made while the debtor was in the United States, and was left in this Province in readiness in case

and that the amount thereof (being in no case less than ten

he should come over, the Court set the arrest aside: (*Cozens* v. *Ritchie*, Dra. Rep. 176.) To make an affidavit of belief that the defendant will leave the Province, when he is already *out* of it, and has been so for a length of time; and when that affidavit is evidently made in the hope and expectation that he will return to it, is contrary to the Spirit of the Laws of this Province, and an evident abuse of the process of the Court: (*Per. Cur. Ib.*) Where both the plaintiff and defendant were inhabitants of a foreign country, and had come together into this Province, with the intention of remaining only a few hours, and during their stay here, plaintiff made the usual affidavit, and arrested defendant; the arrest was held to be regular: (*Rayner* v. *Hamilton*, M. T., 2 Vic., *MS.* R. & H. Dig., "Arrest" IV. 2.) Subsequent authorities have much doubted this case. To allow an arrest under such circumstances, would now be considered a fraud upon our laws. "Our law for the arrest of debtors, ought not to be extended to the cases of one foreigner following another to this country for the purpose of making the arrest:" (Per *Burns J. in Frear* v. *Ferguson*, 2 U. C. Cham. R. 144.) The learned Judge in this case mentioned that Robinson C.J., Draper, J., and Sullivan, J., concurred with him in a previous case, where the rule was laid down in similar terms. Although it is now established law that one of two foreigners cannot arrest the other, who happens to be here on some temporary business, intending clearly to return to his own country; the rule was held not to apply to the case of plaintiff, a resident of Upper Canada, arresting defendant, a resident of England, who came here for a temporary purpose: (*Brett* v. *Smith*, 1 U.C.Prac.R.309; Richards, J.) There was besides in this case reason to believe that defendant had absconded from England, to avoid proceedings commenced against him there, for the same cause of action: (*Ib.*) Neither the circumstances under which the debt was contracted, nor the conduct of the debtor upon his liability after it was contracted, can be i seems tried upon affidavit: (*Frear* v. *Ferguson*, 2 U. C. Cham. R. 144.) The practice is now different in England: (*Pegler et al* v. *Hislop*, 1 Ex. 437.)

2. *Affidavit—Title.*—Title of Court need not be inserted in affidavit at the time of the making thereof; may be added when suing out the process: (See last proviso to section under consideration). Where an affidavit was intituled "In the District Court" instead of "In the Queen's Bench;" held under old practice to be irregular, not void: (*Sanderson* v. *Cummings*, M. T. 3 Wm. IV., *MS.* R. & H. Dig., "Arrest" I. 24.) Where there is a cause pending, as under s. xlii., the affidavit to issue a capias must be intituled in that cause: (See *Brown* v. *Palmer*, 3 U. C. R. 110.) The title should, it seems, contain the christian and surnames of all the parties to the action: (see *Anderson* v. *Baker*, 3 Dowl.P.C. 107; *Cohen* v. *Williams*, 8 Dowl.P.C. 418; *Doe d. Pryme* v. *Roe*, 8 Dowl. P. C. 340.) Initials or contractions as a general rule, are not sufficient. An exception is created by Statute, in action upon bills of exchange, promissory notes, or other written instruments, any of the parties to which are designated by an initial, letter, or letters, or some contraction of the christian or first name or names, as used in the instrument: (Stat. U. C. 7 Wm. IV., cap. 3, s. 9.) In these cases it shall be sufficient to designate such persons in the affidavit, by the same initial letter or letters, or contraction of the christian or first name or names, as used in the instrument. (*Ib.*) The affidavit properly speaking should show that such initials have been so used in the instrument, &c.: (*Hilbert* v. *Wilkins*, 8 Dowl. P. C. 139.)

3. *Deponent.*—The true abode and addition of deponent should be stated in an affidavit: (*Cobbett* v. *Oldfield*, 16 M.

pounds) is justly and truly due to the Plaintiff; and also

& W. 469; *Hall* v. *Brush*, T. T., 3 & 4 Vic., *MS.* R. & H. Dig., "Arrest" I. 31.) Under our rules, of T. T., 3 & 4 Wm. IV., and E. T. 4 Wm. IV., it is not necessary in affidavits made after action brought to state either the deponent's abode or degree. The affidavit ought to be entitled in the cause, and deponent described as "Plaintiff," or "Defendant" in such case. (*Ewing et al* v. *Lockhart*, 3 U. C. R. 248; see also *Angel* v. *Ihler*, 5 M.& W. 163; *Lyman* v. *Brethron*, 1 U.C. Cham. R. 108.) The rules in question are as follow: "It is ordered that every affidavit shall contain the christian name or names and surname of the defendant, written at length, (with his place of abode and addition.") (T. T. 3 & 4 Wm. IV.) "It is ordered that the rule of this Court of T. T., 3 & 4 Wm. IV., which requires that every affidavit shall contain the christian name or names and surname of the defandant, written at length, (with his place of abode and addition, be rescinded, so far as respects the place of abode and addition of the defendant:" E. T. 4 Wm. IV.) The first of these rules is the same in effect, though not exactly in words, as that of M. T. 15 Car. II. in the King's Bench, England. The only object in contemplation by the Court when framing these rules, was to identify the deponent: (*Ewing et al* v. *Lockhart*, 3 U. C. R. 248.) The rules only apply to a case when there is a "plaintiff" and "defendant"; but as there cannot, strictly speaking, be either until after the issue of first process, which is the commencement of an action, the case of an affidavit made upon which to issue first process, (Capias) would not seem to be affected. The affidavit should set forth deponent's name in words at length: (*Richardson* v. *Northrop*, Tay. U. C. R. 452.) It should contain all the christian names of deponent in full: (*Westover* v. *Burnham*, T. T., 3 & 4 Vic., *MS.* R. &. H. Dig., "Arrest" I. 29.) An affidavit described the deponent as "Edward Charles Pownall," but the signature to it was "Charles Edward Pownall," sufficient: (*Hands* v. *Clements*, 11 M. & W. 816.) If affidavit be made by a person not a party to the cause, it is clear that both his residence and addition or degree should be stated. This holds good, equally if deponent be the "servant or agent" of the plaintiff. Cases as to the sufficiency of statement, addition, or degree, have arisen in England—"Merchant," "Manufacturer," &c., sufficient: (*Vassier* v. *Alderson*, 3 M. & S. 165.) So "late Clerk to, &c.:" (*Simpson* v. *Drummond*, 2 Dowl. P.C.473.) So "Agent of the Plaintiff in this cause:" (*Luxford* v. *Groombridge*, 2 Dowl. N. S. 332.) So "R. J., late of the City of W., Victualler, but now of, &c.:" (*Angel* v. *Ihler*, 5 M. & W. 163.) "Assessor," insufficient: (*Nathan* v. *Cohen*, 3 Dowl.P.C.370.) "Acting as Managing Clerk, &c." or "Articled Clerk, &c.," if not stated to whom, or in what profession,insufficient: (*Regan* v. *Reeve*, 4 Q. B. 211.) If so stated, sufficient: (*Alexander* v. *Milton*, 2 C. & J. 24.) An affidavit to ground a capias may be made by the "plaintiff, his servant, or agent." Doubtful whether it should show that deponent is or is not the servant or agent of plaintiff. In England it is sufficient that a positive indebtedness should be sworn to by some person without showing his connexion with the plaintiff. But none of the English Acts declare as ours does that the affidavit shall be made by the plaintiff, "his servant or agent:" (See *Chamberlain et al* v. *Wood et al*, 1 U.C.Prac. R. 195, Burns J.) Where it was averred in the declaration against the defendant for a malicious arrest, that by virtue of the affidavit of the defendant, he the defendant maliciously caused a writ of *Ca. Sa.* to be sued out, and arrested the plaintiff, when he had no probable cause for believing that the plaintiff had made any fraudulent assignment of his property; and that he further maliciously caused the

that such Plaintiff, his servant or agent, hath good reason to

writ to be endorsed and delivered to the Sheriff, &c.; held that these facts if found by the jury, constituted in themselves the agency of the defendant: (*Davis* v. *Fortune*, 6 U. C. R. 597.) An agent, though he do no more than make the affidavit, if maliciously done, is liable to an action on the case, for causing the writ to be sued out, and to be endorsed and delivered to the Sheriff, and the defendant arrested thereon, &c.: (*Davis* v. *Fortune*, 6 U. C. R. 281.) But where an action for malicious arrest, is brought against the agent who made the affidavit, the mere production of the affidavit is not sufficient evidence. It must be proved that he made the affidavit, and that he was plaintiff's agent, unless such agency be alleged in the affidavit made by him. (*McLaren* v. *Blacklock*, 14 U. C. R. 24.) Such an action cannot be maintained against a principal for an arrest made upon his agent's affidavit, alleging his own apprehension that the defendant would leave the Province, &c., if the affidavit and arrest both were made without the principal's knowledge, privity, or procurement: (*Smith* v. *Thompson*, E. T., 5 Vic., *MS.* R. & H. Dig., "Malicious Arrest" 18; *Cameron* v. *Playter, et al*, 8 U. C. R. 138.)

4. *Description of Defendant.*—It is almost needless to say that great accuracy must be observed in describing a defendant. The nature of the proceeding necessitates correctness. The law favors the liberty of the subject. An error in defendant's name may be fatal: thus, where defendant, whose name was "Patrick," was called "Peter" in the affidavit, the arrest was set aside: (*Botsford* v. *Stewart*, E. T., 11 Geo. IV. *MS.* R. & H. Dig. "Arrest" I. 17.) All his Christian names must be inserted: (*Westover* v. *Burnham*, T. T., 3 & 4 Vic., *MS.* R. & H. Dig. "Arrest," I. 29; *Waters* v. *Joyce*, 1 D. & R., 150.)

But it is ordered that "where the defendant is described in the process or affidavit to hold to bail, by initials or by a wrong name, the defendant shall not be discharged out of custody, or the bail bond delivered up to be cancelled on motion for that purpose, if it shall appear to the Court that due diligence have been used to obtain knowledge of the proper name:" Rule T. T., 3 & 4 Wm. IV. Nearly the same as English Rule, K. B. No. 32, H. T. 2 Wm. IV. As to what is "due diligence," see *Hicks* v. *Marreco*, 1 C. & M. 84, 3 Tyr. 216; *Ladbrook* v. *Phillips*, 1 H. & W. 109. And see *Rosset* v. *Hartley*, 5 N. & M. 415; 1 H & W. 581. See also *Chit. Archd.* 8 *Edn.* 672.

5. *Cause of action.*—The affidavit must clearly disclose the grounds of the defendant's liability. It should be so explicitly done that perjury can be assigned upon the affidavit, if it turn out to be false. The defendant can have no opportunity to deny the truth of the statement, and, therefore, nothing should be left to intendment. The affidavit must be direct and positive as to the cause of action. It should not be argumentative or by way of inference or reference to books, accounts, notes, or bills of exchange, or "as deponent verily believes:" (per Campbell C. J., in *Ferguson* v. *Murphy*, Tay. U. C. R. 273.) When from the nature of things, as in the case of executors, it is impossible to swear positively, knowledge and belief is sufficient. (*Ib.*) An affidavit that the defendant is indebted to the plaintiff upon a certain bond or obligation is insufficient. It should state that the sum sought to be recovered upon the bond is due and payable: (*Prior* v. *Nelson*, Tay. U. C. R. 230; *Smith* v. *Kendal*, 7 D. & R. 232.) It should also show to whom the bond was made: (*Case* v. *McVeigh*, T. T., 3 & 4 Vic., *M.S.* R. & H. Dig. "Arrest" I. 28.) An affidavit that "the defendant was indebted to the plaintiff in the sum of £50 for the use and occupation of a certain tenement," held sufficient, though not stated that the tenement was let by the plaintiff to defendant: (*Ferguson* v. *Murphy*, Tay. U. C. R.,

believe and verily doth believe that the Defendant is imme-

271.) An affidavit stating defendant to be indebted to the plaintiff in respect of a certain "sale" of land in possession of defendant, insufficient, unless further stated that the premises were conveyed: (*Sykes* v. *Ross*, 2 Y. & J. 2; *Young* v. *Dowlman*, 2 Y. & J. 31.) In a case where the affidavit stated the debt to be "for principal and interest due on a bond," without stating the bond to be conditioned for the payment of money, affidavit held sufficient: (*Byland* v. *King*, 7 Taunt. 275.) So where defendant was stated to be indebted to deponent under a deed, by which the defendant covenanted to pay money at a time now past, &c.: (*Lambert* v. *Wray*, 3 Dowl. P. C. 169; 1 C. M. & R. 576.) Also where defendant was stated to be indebted to the plaintiff in £500, "upon a certain indenture of mortgage by which the defendant covenanted to pay the said sum of money to the plaintiff, at a day now past: (*Masters* v. *Billing*, 3 Dowl. P. C. 751.) Affidavit sufficient in both these cases. An affidavit on an award should state the submission, the making of the award, and that the money was payable forthwith, or due at a day past: (*Anon.* 1 Dowl. P. C. 5.) If the award direct the money to be paid by defendant to plaintiff on demand, a demand should be stated: (*Driver* v. *Hood*, 7 B. & C. 494.) An affidavit that the defendant was indebted for damages awarded and for costs taxed, has been held sufficient: (*Jenkins* v. *Law*, 1 B. & P. 365.)

If on a promissory note, the note must be stated to be "payable:" (*Smith* v. *Sullivan*, Tay. U. C. R, 678; *Andrews* v *Ritchie*, Dra. Rep. 5.) Such an affidavit must show the amount for which the note was drawn: (*Norten* v. *Latham*, M. T., 3 Vic., *MS.*, R. & H. Dig. "Arrest," I. 43.) If against the indorser of a promissory note or drawer of a bill of exchange the affidavit must state the default of the maker or acceptor: (*Ross et al* v. *Balfour et al*, M. T., 2 Vic., *MS.*, R. & H. Dig. "Arrest" I. 22; *Crosby* v. *Clarke*, 1 M. & W., 296; *Buckworth v. Levi*, 1 Dowl. P. C. 211; *Cross* v. *Morgan*, *Ib.* 122; *Bunting* v. *Jadis*, *Ib.* 445. But see *Weeden* v. *Medley*, 2 Dowl. P. C. 689; *Irving* v. *Heaton*, 4 Dowl. P. C. 638.) In these two last cases there were distinct and positive allegations that the bills sued upon became *due* and were *unpaid*. An affidavit, that the defendant was indebted to plaintiff in a certain sum due "before the commencement of this suit," insufficient: (Robinson, C.J., *dissentiente*.) The affidavit was made several days before the writ issued: (*Clarke* v. *Clarke*, 1 U. C. R. 395.) If made for goods sold and delivered, the affidavit must show a request: (*Watkins et al* v. *Liebshitz*, H. T. 7 Wm. IV. *MS.*, R. & H. Dig. Arest. I. 11; held otherwise in *Ogilvie et al* v. *Kelly*, 4 U. C. R. 393.) An express request, therefore, seems to be unnecessary: (*Ib.*) But it must be shewn that the goods were sold and delivered by the plaintiff to the defendant: (*Young* v. *Gatien*, 2 M. & S. 603.) An affidavit that the goods, the subject of the action, were "made and manufactured for," but not stating that they were delivered to defendant, insufficient: (*Pontifex* v. *De Maltzoff*, 1 Ex. 436.)—*Semble*.—The request must be stated in an action for money paid: (*Ogilvie et al* v. *Kelly*, 4 U. C. R. 393.) Need not be stated in action for money lent: (*Ib.*) An affidavit for money had and received on account of the plaintiff, ought to state it to have been received by the defendant to plaintiff's use; (*Kelly* v. *Curzon*, 4 A. & E. 622.) It is not necessary in an affidavit of debt for money lent, paid, and an account stated, to mention the sum due on each account: (*Tannahill* v. *Mosier*, 2 O. S. 449; *Black* v. *Adams*, E. T., 3 Vic., *MS.* R. & H. Dig., "Arrest" I. 25.) But an affidavit on a promissory note for £80, and also for goods sold, not specifying the sum due on each account, nor whether the goods

diately about to leave Upper Canada, with intent and design (*App. Ch. C.*)

sold formed the consideration of the note, is bad: (*McKenzie* v. *Reid*, 1 U. C. R 396.) An affidavit for work and labor without stating request, is defective: (*Hall* v. *Brush*, T. T. 3 & 4 Vic., *MS.* R. & H. Dig., "Arrest." I. 31.) Word *malicious* spelt with a "t" instead of a "c," no defect: (*Gardner* v. *Morrison*, H. T., 4 Vic., *MS.* R. & H. Dig., "Arrest." I. 32.) An affidavit stating defendant to be indebted to plaintiff, "on an account stated between them," sufficient: (*Balmanno* v. *May*, 6 Dowl. P. C. 306.) If on several different promissory notes, the affidavit need not state the aggregate sum, but the amount of each note must be mentioned: (*Ross* v. *Hurd*, 1 U. C. Prac. R. 158.) The dates of the notes should be set out in words, but the use of figures will not make the affidavit defective: (*Ib.*) It need not be stated that the note is due at the time of making the affidavit, if the dates given show this to be the case: (*Ib.*) When some of the demands are well and others badly stated, the affidavit is not bad as to all: (*Ib.* Also see *Caunce* v. *Rigby*, 3 M. & W., per Alderson B. p. 67; see also *Baker* v. *Wills*, 1 C. & M. 238.) But the defendant will be released on putting in bail for the sum properly sworn to: (*Ross* v. *Hurd*, 1 U. C. Prac. R. 158.) If made by the indorsee of a note the affidavit must state that it was indorsed to the plaintiff and by whom: (*Glass* v. *Baby*, 1 U. C. Prac. R. 274.) Where stated that defendant was indebted to plaintiff in £500 of sterling money on a bill of exchange drawn, &c., for the payment of £560, not saying of what money, still affidavit held sufficient: (*Pawson et al* v. *Hall*, 1 U. C. Prac. R. 294.) The affidavit stated the bill to be "payable at a day now past," and that it was presented on the day when it became due, and then, after stating the several sums for which it was intended to hold to bail, the affidavit concluded "and that the said several sums of money are now justly due and payable as aforesaid." Held that it sufficiently appeared that the bill was unpaid at the time of the making of the affidavit: (*Ib.*) The defendant was stated to be indebted in the amount of the bill, and in £5. 19s. 8d. sterling money aforesaid, "for interest thereupon, being for principal money and interest, the sum of £565. 19s. 8d. of sterling money aforesaid:" (*Ib.*) Where the affidavit stated the amount in sterling, adding, to wit, the sum of £704. 6s. 7d. currency, "or thereabouts" of lawful money of Canada—statement in currency bad, it not being precise and positive: (*Ib.*) But the insufficient statement was held not to vitiate the affidavit, as it is sufficient to state a debt due to the plaintiff in England in sterling money only: (*Ib.*) The amount for which bail should be taken was ordered to be reduced to the true sum in currency, as it appeared that the amount stated in the affidavit was excessive: (*Ib.*) In the affidavit it was held sufficient to describe a promissory note as being "for the payment to," instead of "payable to" the plaintiffs: (*Ib.*) Where it was stated that defendant was indebted to deponent in £1217. 16s. 5d. "upon and on account" of a bill of exchange for £1000 sterling, (describing the bill;) that neither the defendant nor any other person had paid the said bill or any part thereof, and that the sum of 19s. was paid by deponent for notarial charges in protesting the same." Held that the amount due for the bill was sufficiently distinguishable from the notarial charges, which ought not to have been included: (*Brett* v. *Smith*, 1 U. C. Prac. R. 309.) Plaintiff need not state expressly that he is the holder of the bill at the time of making the affidavit: (*Ib.*) An affidavit by endorsee against the drawer of a bill not averring presentment to and default by the acceptor —insufficient: (*Hopkinson* v. *Salembier*, 7 Dowl. P. C. 493.) So a statement that defendant was indebted in a bill of exchange for principal money and interest, without showing that the interest was made payable under a con-

Proviso: to defraud the Plaintiff of the said debt: Provided always,

tract: (*Neale* v. *Snoulten*, 2 C. B., 820.) The current of authorities on this subject seems to show, that either the deponent should disclose a contract for the payment of interest, or state a debt to an adequate amount, exclusive of the claim to interest: (*Ib.* per Tindal, C. J.) If interest only be sought to be recovered as a debt, the affidavit must show an express contract: (*Harrison* v. *Turner*, 4 Dowl. P. C. 72.) It need not state the amount of the principal, nor the time when it began to run: (*White* v. *Sowerby*, 3 Dowl. P. C. 584.) With respect to bills and notes generally, the following authorities may be noticed:—When the debt arises on bills or notes, they should be stated to be unpaid: (*Kirk* v. *Almond*, 1 Dowl. P. C. 818.) If a note be payable by instalments, it should be shown what instalments are due and unpaid: (*Hart* v. *McGervis*, 3 Tyr. 238.) It should appear how the defendant is liable whether as acceptor, drawer, or endorser: (*Humphries* v. *Windsor*, 6 Taunt. 581.) It should also, it seems, shew in what character the plaintiff claims, whether as endorsee, bearer, or payee: (Chit. Arch. 8 Edn. 659; *Ib.* 9 Ed. 695,) If on a bill, it need not expressly state that the bill was dishonored: (*Phillips* v. *Turner*, 1 C. M. & R. 597.) An affidavit for principal and interest on a bill "drawn upon and accepted by defendant" is sufficient, without stating who is the drawer: (*Harrison* v. *Rigby*, 3 M. & W. 66.) But held that an affidavit for a sum due to the plaintiff as endorsee of a bill of exchange must state by whom the bill is endorsed. Stating that it was "duly endorsed" to the plaintiff, is insufficient: (*Lewis* v. *Gompertz*, 2 C. & J. 352.) Further, see cases as to the "cause of action" collected in Chit. Archd., 8 Edn. 652, *et seq.* *Ib.* 9 Edn. 688. *et seq.*

6. *Conclusion.*—"Hath good reason to believe, and verily doth believe, that the defendant is immediately about to leave Upper Canada, with intent and design to defraud the plaintiff of the said debt." The words of the Act must be closely followed. If the Court allowed parties to depart from the words prescribed in an Act of Parliament as proper to be used in an affidavit to hold to bail, there would be no knowing where to stop: (See *Choate* v. *Stevens*, Sherwood J., Tay. U. C. R. 622.) An affidavit concluding with an expression of belief that "the defendant would leave the Province of Canada," instead of "Upper Canada," is insufficient: (*Brown et al* v. *Parr*, 2 U. C. R. 98.) An affidavit stating that plaintiff "had reason to believe," &c., instead of "hath good reason," &c., bad: (*Meyers* v. *Campbell*, 1 U.C.Cham. R. 31.) Held unnecessary, since the passing of 8 Vic. cap. 48, sec. 44, of which the present section is a re-enactment, to negative any vexatious or malicious motive required by the Stat. 2 Geo. IV., cap. 1, s. 8: (See *Lee et al* v. *McClure*, 3 U. C. R. 89.) When more than one debt is mentioned in the affidavit, and the debts are not combined, and the aggregate stated, the affidavit must clearly express the plaintiff's belief that the defendant is immediately about to leave Upper Canada with intent and design to defraud the plaintiff of the several debts: (*Brown* v. *Palmer* 8 U. C. R. 110.) Where three distinct causes of action were alleged, viz.:—1st. £613 currency for lands, &c.; 2d. £613 currency on a bill of exchange for £613 sterling; and 3d. on an account stated, and the plaintiff concluded "that the said sum of £613 is still due and owing to deponent," &c., affidavit bad: (*Barry* v. *Eccles*, 2 U. C. R. 383.) It was considered that a creditor might arrest his debtor if he be going to leave Upper Canada, whatever might be the cause of absence, or however probable it was that he would return: (*Perrin* v. *Joyce*, H. T., 5 Vic. *M.S.*; *McBean* v. *Campbell*, H. T., 6 Vic., *M.S.* R. & H. Dig. "Malicious arrest" 1.) It is necessary to caution practitioners that in Upper Canada there have been several Statutes on the subject of arrest. Cases therefore, may appear

that where the cause of action is other than a debt certain, a Where the cause of ac-

to be inconsistent or otherwise conflicting. To prevent mistake it should be mentioned that each case should be received more especially with reference to the Statute under which it was decided, or the arrest made. The following Statutes may be referred to: 2 Geo. IV., cap. 1, ss. 8, 10, 14; 10 Geo. IV., cap. 2; 7 Wm. IV., cap. 3, s. 9; 8 Vic., cap. 48, s. 44. The mere fact that deponent was told by one or two persons that they thought he would be justified in arresting defendant, otherwise he would lose his debt, does not thereby relieve him from all responsibility, and all obligation to enquire for himself: (*Thorne* v. *Mason*, 8 U. C. R. 286.) If plaintiff did in fact receive information of defendant's movements and probable departure, the jury in an action for malicious arrest, are not at liberty to surmise that the deponent did not believe what he was told, and what he swears he believed, when there is really nothing in the evidence to show that he acted otherwise than sincerely, and when in the conduct of the debtor as proved at the trial, there was everything to create suspicion: (per Robinson, C.J.; *Smith* v. *Mackay*, 10 U. C. R. 412.) It is of the utmost importance that parties should be protected to a fair extent in pursuing their civil remedies, as well as in prosecuting for offences committed, or which they believe to have been committed against them: (per Robinson, C. J., S. C.; 10 U. C. R. p. 615.) But where there had been three new trials in a cause, each of which resulted improperly against the creditor, the Court refused to interfere any further: (S. C. 11 U. C. R. 111.) In an action for malicious arrest or prosecution, the question of probable cause is one for the decision of the Judge and not the Jury: (S. C. 10 U. C. R. 615.—Also see Tay Ev. 2d Edn. p. 35, and cases collected in note to s. 26 of that work.)

7. *Commissioner.*—The affidavit may in Superior Courts be sworn before any Judge of the Court, or a commissioner for taking affidavits. In County Courts it may be sworn before the County Judge, or any of the said commissioners. It is not necessary that a commissioner should put his initials opposite interlineations in the affidavit: (*Lyster* v. *Boulton*, 5 U. C. R. 632.) Signature of commissioner sufficient without words showing him to be such: (*Henderson* v. *Harper*, 2 U. C. R. 97, and see cases noted under sub. div. "Jurat." *post.*) *Qu.* Does this rule of practice apply to affidavits to hold to bail? The Court, in *Howard Brown*, 4 Bing. 398, cancelled a bail bond, on the ground that the jurat of the affidavit to hold to bail did not state the person before whom it was sworn to be a commissioner; also see *R.* v. *Hare*, 13 East. 189; then see *Pawson et al* v. *Hall*, and *Bligh* v. *Hall*, 1 U. C. Prac. R. 294. An affidavit to hold to bail before action commenced, may be sworn before the plaintiff's attorney: (*Brett* v. *Smith*, 1 U. C. Prac. R. 309.) Where the commissioner had not attached his signature to the affidavit at the time of the arrest, held that he was too late to do so after arrest, and motion made to set aside the proceedings for irregularity: (*Black* v. *Halliday*, T. T., 5 & 6 Vic., *MS.* R. & H. Dig., "Arrest." I. 35.) If the person who administer the oath is not duly qualified, defendant will be discharged: (*Hughes* v. *Jones*, 1 B. & Ad. 388.) In England the point was raised whether an affidavit to hold to bail could be properly made before a British Counsel in a foreign country, but as the Court was equally divided, no opinion was given: (*Pickardo* v. *Machado*, 4 B. & C. 836, see also s. xl. of this act.)

8. *Signature of Deponent.*—If deponent be able to write, the affidavit should be signed by him; if not, his mark will be sufficient. The signature may be in a foreign character: (*Nathan* v. *Cohen*, 3 Dowl. P. C. 870.) The usual signature should be appended though it differs from the names given to deponent in the affidavit: (*Hands*

tion is other writ of capias may be issued and sued out to arrest and hold

v. *Clements*, 1 D. & L. 379.) An Affidavit without deponent's signature, made in a foreign country, was admitted, it appearing that such was the practice in the foreign country: (*Re Eady*, 6 Dowl. P. C. 615.) If an affidavit be re-sworn, it need not be signed a second time: (*Liffin* v. *Pitcher*, 1 Dowl. N. S. 767.)

9. *Jurat.*—Where an affidavit was sworn by an illiterate person, an omission of the statement in the Jurat that deponent appeared to understand it, was held to be fatal: (*Moore* v. *James*, Dra. Rep. 245; *Haynes* v. *Powell*, 8 Dowl. P. C. 599; *Kerr* v. *Sheriff of Middlesex*, 4 Dowl. P. C. 765.) When deponent makes his mark, it should appear from the jurat that the mark was made. (*Wilson* v. *Blakey*, 9 Dowl. P. C. 362.) An affidavit made by two persons, not stating distinctly in the jurat that both were sworn, cannot be read: (*Nicholson d. Spafford* v. *Rea*, 3 O. S. 8.) See Rule in 7 T. R. 82; see also *Pardoe* v. *Terret*, 12 L. J., C. P. 143; 5 M. & G, 291, S. C.; *Lackington* v. *Atherton*, 2 Dowl. P. C., N. S. 904.) In a case where a motion was made to set aside an attachment, because of a defect similar to the last in the affidavit, the Court allowed an amendment by the insertion of both names in the Jurat: (*Fisher* v. *Thayer*, 5 O. S. 518.) An affidavit not considered insufficient, because the place of taking it was omitted in the Jurat: (*McLean* v. *Cumming*, Tay. U. C. R. 240; *Symmers* v. *Wason*, 1 B. & P. 105; *Fairbrass* v. *Pettit*, 12 M. & W. 453; but see *Boyd* v. *Stadar*, 7 Price 662; *Kerr* v. *Cockshaw*, 2 N. & M. 278; *Case* v. *Case*, 1 D. & L. 698.) The date of swearing must be stated: (*Blackwell* v. *Allen*, 7 M. & W. 146.) Jurat sufficient if it contain the signature of Commissioner, without the addition of any words showing him to be a Commissioner: (*Henderson* v. *Harper*, 2 U. C. R. 97; *Brown et al* v. *Parr*, 2 U. C. R. 98; *Murphy* v. *Boulton*, 3 U. C. R. 177; upheld in *Pawson et al* v. *Hall*, and *Bligh* v. *Hall*, 1 U. C. Prac. Rep. 294; confirmed in *Brett* v. *Smith*, 1 U. C. Prac. Rep., 316.) Omission of the words "before me," fatal: (*R.* v. *Norbury*, 6 Q. B. 534, n. (*a.*) Where the words "before me" were struck out and the words "By the Court," inserted in lieu thereof held no objection: (*Austin* v. *Grange*, 4 Dowl. P. C. 576.) An alteration in the jurat or other parts of an affidavit after it is sworn, will nullify the affidavit: (*Wright* v. *Skinner*, 5 Dowl. P. C. 92.) No erasure or interlineation is permitted in the jurat, by rule M.T. 37, Geo. III. (7 T. R. 82.) A line drawn through two words in the jurat, leaving them perfectly legible, is an erasure within the rule: (*Williams* v. *Clough*, 1 A. & E. 376; *The Queen* v. *Blackwell R. R. Co.*, 9 Dowl. P. C. 558.) But striking out a figure in the jurat, and inserting another over it, will not vitiate: (*Jacob* v. *Hungate*, 8 Dowl. P. C. 456.) The first page of an affidavit not being capable of containing the whole of the jurat, the words "a Commissioner for taking affidavits in this Court," were erased from it, and were, together with the rest of the jurat, placed on the other page—held that the erasure did not vitiate: (*Wills* v. *Dawson*, 2 Dowl. N. S, 465.) An erasure over, but not in the jurat, is not within the rule: (*Atkinson* v. *Thompson*, 2 Chit. R. 19.) Interlineations in the affidavit itself, need not be noticed in the jurat: (*Lyster* v. *Boulton*, 5 U. C. R. 632.) An affidavit sworn at a Judge's Chambers, need not state in the jurat that it was sworn "before" the Judge: (*Empey* v. *King*, 13 M. & W. 519) Further see Chit. Arch. 8 Edn. 1452.

10. *Irregularities—how taken advantage of.*—Where the original affidavit to hold to bail was transmitted to the Deputy Clerk of the Crown, in Chambers, at the request of defendant's attorney; held that such original might be acted upon in moving to set aside the arrest, instead of filing a verified copy: (*Chamberlain et al* v. *Wood*, 1

the Defendant to special bail, a Judge's order having been first obtained for that purpose, in such cases and in such manner as has heretofore been the practice; (*s*) Provided also, that

than a debt certain.

U. C. Prac. R. 195.) But the original should not have been transmitted at the request of an attorney. If it were necessary to have it in Chambers, the Deputy Clerk should have waited for a Judge's order: (*Ib.*) Where after an arrest on process, issued from a District Court, the proceedings were moved into the Queen's Bench, by *habeas corpus*, and a motion then made to set aside the writ, and arrest for a manifest defect in the affidavit, the rule was made absolute, though it was shown in the return of the writ, that a similar motion was pending in the Court below, on which no judgment had been given: (*English* v. *Everitt*, 1 U. C. R. 336.) A defendant does not waive a defect in the affidavit by applying for particulars: (*Hodgson* v. *Dowell*, 3 M. & W. 284.) An undertaking to put in special bail, is not a waiver of an irregularity in the writ: (*Glass* v. *Baby*, 1 U.C.Prac.R.274) And it was held that when defendant had put in special bail, that he was not thereby prevented from objecting to any irregularity in the arrest: (*Ross et al* v. *Balfour et al*, 5 O. S. 683.) It is ordered by N.R. 106, T.T. 20 Vic., as follows: "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." Where a defendant moved to set aside an arrest, on the ground that the debt was paid, and the rule was refused, the plaintiff denying payment on affidavit; he was afterwards prevented from moving for a defect in the affidavit of debt: (*Smith* v. *Ross*, T. T., 3 & 4 Vic., *MS.* R. & H. Dig., "Arrest" 1. 40.) An action for malicious arrest, is not a waiver of objections to the affidavit on which the arrest was made: (*Pawson et al* v. *Hall*, 1 U. C. Prac. R. 294) The Court will not set aside an arrest upon the ground of irregularity in the affidavit, after the prisoner has escaped: (*Keefer* v. *Merrill et al*, Tay. U. C. R. 675.) See further Chit. Arch. 8 Edn. 1271; and also s. xxxvii. of this Act, with notes thereto.

(*r*) Though substantially the same as Stat. U.C. 2, Geo. IV. cap. 1, s. 10, it is to be observed that the latter statute is not repealed. The reference made to former practice, in the words "in such cases and in such manner as has heretofore been the practice," may be taken to relate to the old provision. It is as follows—"And be it enacted, &c., that in all cases in which the cause of action shall be other than a debt certain, of which affidavits may be made as hereinbefore mentioned, (s. 8 of same statute, now repealed,) it shall and may be lawful to hold the defendant or defendants to bail, a Judge's order having been first obtained for that purpose, in such cases and in such manner as is provided by the law and practice of the Court of Queen's Bench in England:" (17th January, 1822.) Arrests in civil actions may be made in two cases:—*First*, where the cause of action is a "debt certain" (as to which see note *f* s. xxvi.) in which case a capias may be issued upon affidavit, as of course, and the affidavit cannot be contradicted before the arrest; *second*, where the cause of action is "other than a debt certain," in which case an order is necessary. Stat. 2, Geo. IV., cap. 1, formerly regulated the practice in both these cases. Section 8, which applied to the first case is repealed. Sec. 10, which applied to the second, is in force. Then with regard to the latter, (holding to bail when the cause of action is other than a debt certain,) s. xxiii. of this Act refers to the practice heretofore in use, which causes us to fall back upon sec. 10 of 2 Geo. IV., cap. 1, and it we find refers us to

Proviso: nothing in this Act contained, shall subject any person to arrest who by reason of any privilege, usage, or otherwise, may now

the practice of the Court of Queen's Bench in England on or before 17th January, 1822. Ours is built upon the English practice that existed anterior to that date. It is necessary to make this distinction, since of late the English practice has undergone very great changes.

Where a defendant had been arrested on a Judge's order, made pursuant to sec. 10 of 2 Geo. IV., cap. 1, the Court did not think it necessary for the creditor to make use in his affidavit of the precise words pointed out by sec. 8 of the same statute which prescribes the contents of an affidavit to hold to bail: (*Barden* v. *Cawdell*, Tay. U. C. R. 669.) The exact form in cases of debts due cannot be followed in an action for seduction where it is sought to hold defendant to bail: (*Neven* v. *Butchart*, 6 U. C. R. 196.) As there must be some departure from it, it is for the Judge to whom the application is made, to exercise his discretion in determining that the law of arrest has been complied with according to its spirit: (*Ib.* per Robinson, C.J.) The Legislature did not intend by the section above set forth to encourage arrests, but left it to the discretion of the Judge to decide whether the case, as disclosed before him, warranted such a proceding: (*Ingraham* v. *Cunningham* per Macaulay, J., Dra. Rep., p. 117.) Where the creditor, a Quaker resident in New York, made an affirmation of his claim before the Recorder of that city, and his agent in this country, also a Quaker, made another affidavit proving the handwriting of both the plaintiff and the Recorder, and further proving that the plaintiff was a Quaker, and that the person styling himself Recorder was such and had authority to take such affirmation, and alleging that he was apprehensive defendant would leave the Province, &c., the Court granted an order to hold to bail: (*Smith* v. *Lawrence*, 3 O. S. 18.) The form prescribed by Stat. 8 Vic. cap. 48, s. 44 (of which the first part of section here annotated is a re-enactment) is of the affidavit on which the creditor himself may sue out a capias as of right: (per Robinson C. J., in *Nevens* v. *Butchart*, 6 U, C. R. 196.) But the affidavit for an order to hold to bail must, it would seem, contain the ordinary conclusion that defendant is immediately about to leave, &c.: (See *Wiltsee* v. *Bloor*, E.T. 2 Vic., *MS.*, R. H. & Dig. Arrest I. 23.) *Semble*—That the belief of a departure from Upper Canada should even be more strongly asserted, than in an action of *assumpsit*, (See *Ingraham* v. *Cunningham*, 1 Dra. Rep. per Macaulay, J. p. 118.) In trespass *de bonis asportatis* an affidavit that "the defendant broke into plaintiff's dwelling-house, and by force expelled him therefrom, and took possession of the plaintiff's goods, to the value of £100, and still keeps possession thereof," sufficient: (*Ib.*) Arrests in actions of trespass are very rare. If the taking possession of the goods were not sworn to in the above case, and the matter depended upon the trespass to the person, a more special affidavit would be necessary: (*Ib.*, per Robinson, C.J.) By the form used in England in the year 1830, it would appear that in an action of trover, no special statement was required: (*Ib.*) There is no material difference in this particular between trover and trespass *de bonis asportatis*: (*Ib.*) An order to arrest was refused in actions for malicious arrest and libel: (*O'Connor* v. *Anon.*; *Dorcus* v. *Hull*, T. T., 2 & 3 Vic. *M.S.* R. & H. Dig. Arrest IV. 4.)

(*s*) If a party to a suit, his counsel, or witness, be arrested by process of the Court, while going to, attending on, or returning from a Court of Justice, he is entitled to be discharged: (*Per cur* in *Mittleberger et al* v. *Clark*, 5 O. S. 718.) Not so privileged as against the service of non-bailable process: (See s. xxxiv., later part of n(*t*).) The reason for the exemption is that the possession

by law be exempt therefrom; (s) Provided also, that it

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of liberty by the party in question, is necessary for his attendance about business depending in the Courts: (*Michie* v. *Allen*, per Robinson, C. J., 7 U. C. R. 482.) In the House of Lords it has been lately held that a party whose cause is set down, or about to be set down in the paper for hearing, is privileged from arrest while *bona-fide* going to attend such hearing: (*Perrse* v. *Perrse*, 27 Law T. Rep. House of Lords cases 224.) But such party during the hearing of the cause, is not at liberty to go "when and where he likes:" (*Ib.* per Lord St. Leonards.) It has been held that a suitor attending a Court of Requests, was privileged from arrest: (*Baldwin et al* v. *Slicer*, 4 O. S. 131.) The Court give this privilege a large and liberal construction, and it is not confined to Courts of Record: (*Per cur. Ib.*) It extends to witnesses before arbitrators: (s. lxxxvii note *f.*) An attorney coming to Court in term time, on business which has been disposed of, is not privileged from arrest on final process: (*Stroubridge* v. *Davis*, M. T. 2 Vic., *MS.* R. & H. Dig., "Arrest" II. 2.) The manuscript report of this case is not to be found, so that as to the precise ground of the decision, the Editor is ignorant. A person who attended as a grand juror at a Court which adjourned for a few days, went into an adjoining District on private business, was held not to be privileged from arrest there during such adjournment: (*Mittleberger et al* v. *Clark*, 5 O. S. 718.) It was held that an officer of the Court while employed in executing the process of the Court, is privileged from arrest: (*Welby* v. *Beard*, Tay. U. C. R. 415.) This would seem to hold good more especially if the officer be a *sole* officer, such as Clerk of the Process. If such an officer were arrested, the machinery of the Court might be completely stopped. Clerks of Division Courts may be fairly included within the same category. As to these latter, there have been no cases decided. A barrister is exempt from arrest on mesne process: (*Adams* v. *Ackland*, 7 U. C. R. 211.) In the case of a barrister who is Judge of a County Court, the public interests require that the protection should be carried further. He cannot be arrested either on mesne or final process: (*Ib.*) The Judge of the Surrogate Court also is, on grounds of public policy, exempt from imprisonment for debt: (*Michie* v. *Allen*, 7 U. C. R. 482.) A member of the Provincial Parliament is also privileged during the sitting of Parliament, and for a "reasonable period" before and after the sitting: (*Wadsworth et al* v. *Boulton*, 2 U. C. Cham. R. 76; the *Queen* v. *Gamble & Boulton*, 9 U. C. R. 546.) The privilege exists 40 days before, and 40 days after the meeting of Parliament, and the rule of privilege is the same in all cases of dissolution or of prorogation: (*Goudy* v. *Dunçombe*, 1 Ex. 430.) This privilege extends in effect as long as Parliament exists, for it is seldom prorogued longer than four score days: (1 Black Com. 165.) Where defendant was arrested on a day more than 40 days after a dissolution of Parliament, but within 40 days before the return of the writ of election under which he was re-elected; the arrest was set aside: (*R.* v. *Gamble & Boulton*, 9 U. C. R. 546.) The fact of the member being an attorney of the Court, and attached for disobedience to a rule of Court ordering him to pay over money to his client, makes no difference in this respect: (*Ib.* per Draper J., at p 553.) This last was a case in which nearly all the authorities bearing upon the subject, were cited either by counsel or the Court, and ably reviewed by the latter. It is now a leading case as regards the privilege of members of the Provincial Parliament. Clergymen also are privileged in going to or returning from church, or when performing divine service: (Prov. Stat. 4 & 5 Vic., cap. 27, s. 23, taken from Eng. Stat. 9 Geo. IV., cap. 31, s. 23; see also *Goddard* v. *Harris*, 7 Bing. 320.) Married women are pri-

Act not to subject to arrest persons now exempted. Proviso; as to entitling the affidavit.

shall not be necessary that any such affidavit shall be at the time of the making thereof, entitled of or in any Court, but that the style and title of the Court may be added at the time of suing out the process, and shall be that of the Court out of which the process is issued, and that such style and title when so added, shall be for all purposes and in all proceedings whether civil or criminal, taken and adjudged to have been part of the affidavit *ab initio*. (*t*)

(*App. Co. C.*) XXIV. (*u*) Special bail may be put in and perfected accord-

vileged: (*Foley* v. *White et ux*, 2 U. C. Cham. R. 51, in which case there is a great collection of authorities.) Married women are privileged, though living separate from their husbands, and having allowances from them: (*Rennett et ux* v. *Woods*, 11 U.C.R.29.) But arresting a married woman under such circumstances, is not a trespass: (*Ib.*) Militia pensioners while enrolled in a local Police Force, are exempt from arrest for any sum under £30: (14 & 15 Vic., cap. 77, s. 4.) Every person is privileged from arrest on Sunday, except in cases of treason, felony, or breach of the peace: (Tidd. Prac. 9 Ed. 219.) And in his own house at all times, as against civil process, provided the outer door be shut: (*Ib.* 219.) And in any place where the Queen's Justices are actually sitting: (*Ib.*)

(*t*) The object of this enactment is to prevent delays that might otherwise occur in the issue of writs of capias by the Clerk or Deputy Clerk, under s. iv. He is bound to issue them alternately, one from each of the Superior Courts of Common Law. It might be that an affidavit to hold to bail when produced to the Clerk would be intitled in one Court, while the Clerk was bound to issue the writ in the other; in which event, in the absence of some such provision as the above, plaintiff would be necessarily delayed. The practice as to intituling affidavits to hold to bail, used to be otherwise both in England and Upper Canada. In England it was first relaxed by R. G., H. T., 2 Wm. IV. No. 1, which was to the effect "that an affidavit sworn before a Judge of any of the Courts of King's Bench, Common Pleas, or Exchequer, shall be received in the Court to which such Judge belongs, though not entitled of that Court" It has been held in Upper Canada, that where no cause was pending, an affidavit, though not intitled in any Court, will be sufficient if it appear to have been sworn before a Commissioner of the Court in which it is used: (*Frazer* v. *M. C., of Stormont, Dundas, and Glengary*, 10 U. C. R. 286; see also *Perse* v. *Browning*, 1 M. & W. 361; Tyr. & Gr. 864.)

(*u*) "*According to the practice now in force, &c.*"—The Statutes in force regulating the practice of special bail, are:—

In the Queen's Bench—2 Geo. IV., cap. 1, ss. 11, 12, 13, 40, 41, 42, and 4 Wm. IV., cap. 5.

In the Common Pleas—Same as above (12 Vic., cap. 63, s. 8.)

In County Courts—8 Vic., cap. 13, ss. 20, 26, 27, and 50, as explained by 12 Vic., cap. 66, s. 7.

It is not possible in a note of this description, to set forth all these provisions in words at length. For the major part, the practitioner must be referred to the Statute book. A consolidation of the Acts would be a great convenience to the legal profession and to suitors. It is not too much to expect that the day is not far hence, when it will be effected. There is no proceeding more intricate than that

ing to the practice now in force; and after special bail is so put Declaration

of "putting in bail," owing in a great measure to the manner in which information is scattered through various books.

1. *Bail—what.* The writ of capias commands the Sheriff to take defendant and him safely keep until he shall have given him (the Sheriff) bail or until he shall by other lawful means be discharged from his custody. The capias upon which arrests are made originally issued for injuries, *vi et armis*, and in such cases only were arrests at the Common Law allowable. (3 Bl. Com. 281.) Various early statutes permitted arrests to be made in other cases but the power to arrest appears to have been much abused. And although it seems the Sheriff had power at common law to admit to bail, (2 Saund. 60, note 8; Tidd's Pr. 9 Edn. 221,) yet *he was under no obligation to do so.* Prisoners were therefore compelled to resort to the tedious and expensive proceeding "*de homine replegiando*" to recover their liberty, by which writ, if obtained, they were literally replevied by their friends. To remedy this state of the law, Stat. 23 Hen. VI., cap. 9, was passed.

This Statute which extends only to persons arrested on *mesne* process, (*Rogers* v. *Reeves*, per Buller. J., 1 T. R. 421) directs Sheriffs to let out of prison all manner of persons by them arrested, or being in their custody, in any action personal, upon *reasonable sureties of sufficient persons*, to keep their days in such place as the writ doth require.

This, however, was but a partial correction of the evil for the *amount* of the reasonable surety to be taken by the Sheriff, was not defined, nor could it well be ascertained, as the process communicated no further information than the form of action; and even that might be and was almost always fictitious. This occasioned the passing of the 13 Car. II. Stat. 2, cap. 2, which required the true cause of action to be expressed in the writ, otherwise no greater security should be taken than £40. Also see 12 Geo. I. cap. 29, s. 2.

Under the joint operation of these Statutes, the Sheriff is now obliged to admit to bail persons arrested on *mesne* process; provided good and sufficient sureties are tendered to him, but not otherwise. The bail when taken is known as Sheriff's bail, or bail *below*; and is an undertaking by the sureties "to *keep their day when the writ doth require.*" The writ at present in use, requires defendant to put in special bail—that is bail to action, or bail *above*, as it is technically called, within ten days after the execution of it upon him. It is in the power of defendant at any time within these ten days, to avail himself of the Stat. 23, Hen. VI., cap. 9, by tendering bail to the Sheriff. The bond to be taken by the Sheriff, recites the writ and arrest, and is conditioned to be void "if defendant do put in *special bail* to the said action, as required by the said writ."

By special bail, or bail *above*, is meant the procuring of two or more persons to acknowledge a recognizance of bail in the sum sworn to, and mentioned on the face of the bail-piece. It may be remarked that the English practice differed in the several Courts. In the Queen's Bench, the bail acknowledged a sum certain, being double the sum sworn to in the affidavit; while in the Common Pleas no specific sum was stated. The practice of the Common Pleas in this respect, seems to have been adopted in Upper Canada. But in any event, the liability of the bail is the same in all Courts; that is to say, the amount sworn to and costs: (Petersdorff, Bail, 350, 351, N.R. No. 89.) The condition of the recognizance must follow our Statute, which enacts that "if the defendant or defendants shall be condemned in the action at the suit of the plaintiff or plaintiffs, he, she, or they will satisfy the costs and con-

and further in, the plaintiff may proceed by filing a declaration or otherwise

demnation money, or render himself, herself, or themselves to the custody of the Sheriff of the District (County) in which such action shall be brought, or that the cognizees shall do so for such defendant or defendants": (2 Geo. IV., cap. 1, s. 11.)

It would also appear that the Sheriff is empowered, at any time to take from defendant, confined in gaol, either upon *mesne* or *final* process, a bond to the *limits*; upon the giving of which defendant would be entitled to be released from custody, but to abide within the limits of the gaol, which now embrace the whole of the County in which the gaol is situate: (See s. cccii. of this Act.)

Notwithstanding these several Statutes, authorizing the Sheriff at his option to take either bail *below*, or bail to the *limits*, it seems that the Sheriff will be equally liable, as before the Statutes, to be called upon by the plaintiff, to bring in the body of defendant; or in default thereof, to be attached. The conclusion, therefore, appears to be this—that the Sheriff, though he *may* either, under 23 Hen. VI., cap. 9, or s. cccii. of this Act, take bail, yet such bail in either case is at his peril, and only for *his security:* (See *Wolfe* v. *Collingwood*, Wils. 262; Sellon Pr. I. 136.) Plaintiff after breach of the condition, may if he see fit so to do, instead of attaching the sheriff, take an assignment of either bond, and in his own name sue the Sureties therein mentioned: (Chit. Arch. 8 Edn. 721; also s. cccv. of this Act.)

If defendant cannot find bail to the Sheriff, or to the limits, or to the action, he must remain in custody.—Though in England defendants are permitted under Statute 43 Geo. III., cap. 46, instead of giving bail, to deposit the sum endorsed upon the writ and £10 more, this practice does not prevail in Upper Canada, there being no statutory or other provision to warrant it. Bail to the Sheriff, and to the limits, and to the action, must as a general rule consist of two persons at least. (See N. R. No. 75.) If defendant will not or cannot put in special bail as directed by the writ, the plaintiff, nevertheless, may proceed with his action: (*R.* v. *Sheriff of Hastings*, 1 U. C. Cham. R. 230.)

2. *Bail—how put in.*—Bail is "put in" by acknowledging before the Court or a Judge, or a Commissioner for taking bail, an instrument called a bail piece: (See a form Chit. Forms, 6 Edn., p. 239.) The bail piece usually states that the defendant having been arrested, is delivered to bail on a *capi corpus*, to (naming his bail) and the amount for which the arrest was made. When taken before the Court, or a Judge in Chambers or elsewhere, (12 Vic., cap. 63, s. 9) or before a Commissioner, and filed, (2 Geo. IV., cap. 1, s. 40) the bail-piece becomes a binding recognizance. The condition, when set out, must follow the words of 2 Geo. IV. cap. 1, s. 11, already mentioned, unless modified with reference to the 4 Wm. IV. cap. 5, by adding "or of the County in which the defendant may be resident or found." The Editor is not aware that in practice there has been any deviation from the original form under 2 Geo. IV., s. 11. A bail-piece conditioned to render the defendant to a Sheriff of a District, in which venue is not laid, is not void: (*Billings et al* v. *Barry et al*, E. T., 2 Vic., *MS.* R. & H. Dig., Bail III. 8.) *Qu*—How far is this case affected by ss. vii., viii., and ix. of this Act? When acknowledged out of Court, it is signed by the Judge or officer who takes the acknowledgment, and may be afterwards enrolled according to the practice of the Court: (Petersdorff Bail 360, 1.) The officer who takes the acknowledgment is an officer of the Court, and when filed, the bail-piece is as if taken in Court: (2 Geo. IV., cap. 1, s. 40.) It must state in the margin the County from which the process issued: (*Ward*

to judgment, in like manner as if the action had been com- proceedings.

v. *Skinner*, 3 O. S. 163.) Where there were two plaintiffs with the same surname, "Michael and Robert Meighan"—the non-repetition of the surname after the christian name of each, was held to be only an irregularity: (*Meighan et al* v. *Brown*, Dra. Rep. 175.) A bail piece may be amended in the names of either the plaintiff or defendant, with the consent of the bail: (*Daniell* v. *James*, H. T., 4 Vic., *MS.* R. & H. Dig., "Bail" III., 3.) The liberal powers of amendment conferred upon the Court or a Judge, by ss. xxxvii. and ccxci. of this Act, may include bailable cases. So much for the form of bail piece. Next as to the mode of puting in and justifying bail. The 2 Geo. IV., cap. 1, s. 13, is as follows:—"That if any defendant or defendants shall be taken or detained in custody in any District of this Province, on mesne process, issuing out of any Court of Record in this Province, at the suit of the plaintiff or the plaintiffs, *and shall be detained or imprisoned thereon, after the return of such process*, it shall and may be lawful for such defendant or defendants, except in term time, within the Home District of this Province, or District (County) where the Court shall be holden, and upon due notice thereof given to the attorney or attorneys of the plaintiff or plaintiffs in such process, to put in and justify bail, &c." Some doubt has been entertained upon the reading of this enactment, as to whether when it is intended that bail should be put in before a Commissioner, and forthwith justify by *affidavit*, it is necessary that a *previous notice* of such intention should be given. It is apprehended that the notice mentioned in this section, (see forms thereof Chit. F. 6 Edn. 242, 248) is only material, when it is intended to put in bail, and forthwith justify before Court or a Judge, having power to examine into their sufficiency, and to grant an order for the allowance of such bail. A Commissioner for taking bail has no authority to inquire into the sufficiency of the bail, either for the purpose of allowing or disallowing such bail: (See and compare 2 Geo. IV., cap. 1, s. 13, which is taken from Eng. Stat. 43 Geo. III., cap. 46, s. 6, with 2 Geo. IV., cap. 1, s. 41, which is taken from Eng. Stat. 4 Wm. & M., cap. 4, s. 2.) A defendant may, under 4 Wm., cap. 5, s. 2, put in bail in vacation, whether he *is or is not* in actual custody. Then as to County Courts, it is enacted, "That every prisoner arrested upon process, issued out of any of the said District (County) Courts, whether detained by the Sheriff or other officer, upon the original arrest, or upon the surrender by his bail, shall and may be admitted to bail in term-time and vacation, upon the same terms and in the same manner as if he were a prisoner under the like circumstances in the said Court of Queen's Bench:" (8 Vic., cap. 13, s. 26.) In fact the practice in both Superior and Inferior Courts, is uniform. It is enacted that "in any case not expressly provided for by law, the practice and proceedings in the several County Courts in Upper Canada, shall be regulated by and shall conform to the practice of the Superior Courts of Common Law at Toronto, &c.:" (Co. C. P. A. s. 19.) The recognizance of bail, when taken before a Commissioner "shall be filed in the office of the Clerk of the Crown, in the District (County) where the same shall be taken, together with an affidavit of the due taking the recognizance of such bail or bail piece, by some credible person present at the taking thereof; (See Form Chit. F. 6 Edn. 254) which recognizance of bail or bail piece so taken and filed, shall be of the like effect as if the same were taken in open Court:" Provided, "that nothing herein contained shall extend to preclude any party from excepting to the bail, in the manner and within the time prescribed by law:" (2 Geo.

menced by writ of summons and the defendant had appeared

IV., cap. 1, s. 40.) Such bail-piece is not perfect as a recognizance till *filed*: (*Gillespie et al* v. *Grant*, 3 U.C.R. 400) And it is a rule that "bail is no bail until notice:" (Petersdorff on Bail 292, 293.) The next thing, therefore, to be done, after "putting in bail," is to give notice to the attorney of the plaintiff: (s. 13 of 2 Geo. IV. cap. 1. N.R. No. 81. Forms—Chit. F. 6 Edn. 241, 254, 256.) The design of the notice is to give to plaintiff the means of inquiry as to the sufficiency of the bail. It is proper for the notice to state the names of the bail, their degrees, their residences, and whether house-keepers or free-holders: (Sellon Pr. I. 148; Petersdorff on Bail, 268, 273, 292, 340.)

Plaintiff must, by note in writing (See Form Chit. F. 6 Edn. 255) and due notice thereof, (See Chit. Form F. 6 Edn. 244) "except," that is, object to the bail or else if the bail be put in within the proper time, they become absolute: (Sellon Pr. I. 150; also N R. Nos. 82, 83.) If regularly excepted to, they are obliged to "justify," that is, to prove their sufficiency. In practice, however, it is usual in Upper Canada for the bail to make an affidavit of justification at the time they become bail: (See N. R. Nos. 80, 81 and 84.—Form of affidavit, N. R. 81.) This prevents future trouble, expense and loss of time, in the event of exceptions. The time within which bail *must* justify, seems to depend upon the English practice: (Arch. N. P. 186; Chit. Arch. 8 Edn. 755; N. R. No. 86.) If the defendant be in close custody, or if he allow the time for putting in bail to elapse, the bail must justify, and a rule or order for their allowance must be obtained although not excepted to. The persons before whom bail may justify, are as follows:—They may personally justify before the Court, out of which process shall have issued, or before any Justice thereof, or before the Judge presiding in Chambers, or by affidavit, duly sworn before a Commissioner for taking affidavits, appointed by either of the Superior Courts: (2 Geo. IV., cap. 1, ss. 13 and 41; 4 Wm. IV., cap. 5, s. 2; 12 Vic., cap. 63, ss. 9 and 43; Petersdorff on Bail, 335, —6.) The second of these acts empowers the Courts "to make such rules or orders as to them may seem fit, respecting the manner of justifying and perfecting bail as aforesaid, and respecting the notices to be given previous thereto, the attendance of bail before a Commissioner or before a Judge, and the affidavits or examinations to be required, &c." See N. R. T. T. 20 Vic. Nos. 66–91, inclusive, all of which relate to these subjects. 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 affidavit, made at the time of the acknowledgment, though an exception to them be afterwards entered, where nothing is shown to repel such affidavit, or to impeach their solvency: (*Duggan* v. *Derrich*, H. T., 6 Wm. IV. 5 O. S. 75.) Bail, after due notice of exception by plaintiff, or of justification by defendant, may justify in Court, or before a Judge, and the affidavit just mentioned will be sufficient, if no new matter be shewn: (*Ib.*) Bail excepted to in vacation, must justify in vacation, and have not till the following term for that purpose: (*McKenzie* v. *McNab*, E. T. 2 Vic., *MS.* R. & H. Dig., "Bail" I. 3.)

3. *Bail—before whom put in.*—Bail may be, during term, put in before the Court, whence process issued: (1 Sellons, Pr. 138.) In vacation, before any Judge of such Court: (s. 13, 2 Geo. IV., cap. 1.) Or the Judge in Chambers for the time being, no matter to which Court he may belong: (12 Vic., cap. 63, s. 9.) Any Judge of assize on his circuit may take recognizances of bail, which being transmitted, shall be received without oath: (2 Geo. IV., cap. 1, s. 42.) Judges and Clerks of County Courts are empowered to take bail in proceedings had in these Courts: (8 Vic.,

thereto.

cap. 13, s. 20.) The common mode both in Superior and County Courts, is before a Commissioner appointed by either of the Superior Courts: (2 Geo. IV., cap. 1. s. 40; 12 Vic., cap. 63, s 48.) These commissions were issued "for all and every the several Districts of this Province." Districts have been abolished, and Counties substituted: (12 Vic., cap. 78, s. 1.) But all laws applicable to Districts, or the Courts, Officers, or other institutions thereof, shall be applied to, and have the same operation and effect upon the said Counties, and their respective Courts, officers and other institutions, as Counties: (*Ib* s. 3.) Many of the Districts were sub-divided into senior and junior Counties; the former being the County in which the Court House, &c., was situate. The Gore District, for instance, consisted of the County of Brant and other Counties, of which Brant was the junior County. It has been held that a Commissioner appointed for the Gore District before the division, had no power afterwards to act as a Commissioner for Brant; (*Carter* v. *Sullivan et al*, 4 U. C. C. P. 298.)

The various steps thus enumerated and noticed, explain the manner in which bail may be "put in." One thing more remains to be done. The act says bail may be put in and "perfected," according to the practice now in force. A rule of Court or the order of a Judge for the "allowance of bail," must be obtained: (See Forms Chit. F. 6 Edn. 251, 257.) In the Home County, if bail be put in during term, the rule may be obtained from the Practice Court. If bail be put in during vacation, before a Justice of either of the Superior Courts, or before a Commissioner, such Justice or the Judge presiding in Chambers, may, "if he think fit, order a rule to issue for the allowance of such bail, and may further order such defendant or defendants to be discharged out of custody, by Writ of *Supersedeas*, in like manner as may be done in termtime:" (Stat. 2 Geo. IV., cap. 1, s. 13; 12 Vic., cap. 63, s. 9.) In Country cases, the following rule applies: "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 such Deputy Clerk to produce the same:" (Rule T. T. 20 Vic. No. 80.) This rule is substantially a re-enactment of old rule of T.T. 3 & 4 Wm. IV., which by the New Rules is annulled. It was provided by the old rule that the bail piece, after being transmitted, should be filed in the office of the Clerk of the Crown and Pleas at Toronto. If bail be put in and justified before a Commissioner, any Justice of the Court from which process issued, or of either of the said Superior Courts, in Chambers, (12 Vic., cap. 63, s. 9) "upon receipt of the said bail-piece and recognizance from such Commissioner, may, if he shall think fit, [after proof of due notice of justification, or upon cause shown,] order a rule to issue for the allowance of such bail, &c.:" (latter part of s. 13, 2 Geo. IV., cap. 1.) If a rule or order for allowance be obtained, it should be served on the attorney of the opposite part, in which event the bail is considered perfected, and the bail below discharged, or the defendant, if still in close custody, entitled to be liberated upon a Writ of *Supersedeas*: (See Form Chit. F. 6 Edn. 258.) The rule of allowance having been served, everything has been done on the part of the bail, which is required by the practice of the Court; and the bail are, therefore, said to be "perfected:" (Sellon Pr. I. 164.)

4. *Bail—Surrender of Principal—*

(App. Co. C.)

Attorney whose name is indorsed on the writ to declare whether he sued it out, and if so, Plaintiff's name, &c., if so ordered.

XXV. (*v*) Every Attorney whose name shall be endorsed (*w*) on any writ issued for the commencement of any action (*x*) shall, on demand in writing made by or on behalf of any Defendant (*y*), declare forthwith whether such writ has been issued by him or with his authority or privity, and if he shall answer in the affirmative (*z*), then he shall also, in case the Court or a Judge shall so order and direct, declare in writing, within a time to be limited by such Court or Judge, the profession or occupation and place of abode of the Plaintiff (*a*), on pain of being guilty of a contempt of the Court from which

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See Stats. 2 Geo. IV., cap. 1, s. 12; 4 Wm. IV., cap. 5, ss. 1 & 3. As regards County Courts, see 8 Vic., cap. 13, s. 27. Also see R. & H. Dig., "Bail" I., cases 4, 5, 6, 7, 8, 9, 10, 11 & 12; and N. R. 87, 88.

5. *Proceedings against Bail.*—In Superior Courts, see R. & H. Dig., Bail II. In County Courts, see Stat. 8 Vic., cap. 13, s. 50, as explained by 12 Vic., cap. 66, s. 7. Also N. R. 67, 68, 69, 71, 72, 89.

6. *Bail generally.*—See Chit. Archd 8 Edn., 734 et seq; 9 Edn. 768 et seq; Forms—Chit. Forms, 6 Edn., 239 et seq; 7 Edn., 398 *et seq.*

(*v*) Taken from Eng. St. 15 & 16 Vic., cap. 76, s. 7. Applied to County Courts. Much resembles repealed Stat. 12 Vic. cap. 63, s. 31, which was a transcript of Eng. Stat. 2 Wm. IV., cap. 39, s. 17. The object of this and s. xxi. is to give the defendant full information as to the place where he may go, in order to settle the action: (See *Dawes* v. *Solimenson*, 6 Scott 596.)

(*w*) As to which see s. xxi. of this Act and notes.

(*x*) Applies equally to writs of capias and summons: (see *Gilson* v. *Carr*, 4 Dowl. P. C., 618.)

(*y*) No time is mentioned within which the demand must be made. It would be clearly too late after verdict: (See *Hooper* v. *Harcourt*, 1 H. B. 534.) It should be made at least soon after the circumstances which render it necessary have come to defendant's knowledge. In this there would be an analogy to the well-settled practice regulating applications for security for cost: (Chit. Archd. 8 Edn. 1234; *Forms of demand*, Chit. Forms 6 Edn. 12, 7 Edn. 68.)

(*z*) If the attorney answer in the affirmative, and defendant insist upon knowing the plaintiff's profession, abode, &c., defendant should take out a summons for the purpose. Plaintiffs attorney is only bound to deliver such particulars "in case the Court or a Judge shall so order and direct." In one case an order was refused where it appeared that the object of the application was to arrest plaintiff on a criminal charge: (*Harris* v. *Holler*, 7 D. & L. 319.)

(*a*) A temporary abode at a coffee house is insufficient: Defendant entitled to ask for a better residence: (*Hodson* v. *Gamble*, 3 Dowl. P.C. 174; *Gilson* v. *Carr*, 4 Dowl. P.C. 618.) If the information given be insufficient, a summons should be taken out for better particulars: (*Smith* v. *Bond*, 2 D. & L. 460.) If the information be false, the parties who give it are punishable for contempt: (*Ib.*) In a case where the particulars were false, an application to stay the proceedings made after trial was refused, as it did not appear that the defendant had sustained any real prejudice from the fraud practised upon him: (*Ib.*) The liability to costs of an attorney who brings an action without knowing or being able to give the address of his clients, was much discussed in a recent case. No decision was come to; for the case went off upon other points: (See *Collins* v. *Johnson*, 16 C. B. 588.)

such writ shall appear to have been issued (*b*); and if such Attorney shall declare that such writ was not issued by him or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereon without leave of the Court or a Judge. (*c*)

Proceedings stayed if he declares he did not sue it out.

Eng.C.L.P.A. 1852, s. 7.

XXVI. (*d*) Upon the writ and copy (*e*) of any writ served

(*b*) Where an attorney received instructions by a letter dated at "Bridport," and afterwards received from the plaintiff another dated at "Lynn," and an order having been obtained he gave "Bridport" as the place of residence; it afterwards appeared that the plaintiff had left Bridport before the action was commenced, and a second order was obtained, upon which the attorney gave "Lynn." This, too, turned out to be incorrect. The Court, upon motion for an attachment against the attorney, ordered him to pay the cost of the inquiry and of the motion, and stayed proceedings until such time as a true address could be given: (*Neal* v. *Holden*, 3 Dowl, P. C. 493.) Under the old practice, when an attorney refused to comply with the Judge's order, the Court allowed defendant to *non.pros.* plaintiff, and ordered the attorney to pay the costs: (*Gynn* v. *Kirby*, 1 Str. 402.)

(*c*) These latter words, "all proceedings upon the same shall be stayed," &c., were not used either in 12 Vic. cap. 63, s. 31, or in the English act 2 Wm. IV. cap. 39, s. 17, whence it was taken. The provision is a new one founded upon Eng. Rule, No. 14 of M. T., 3 Wm. IV: (Jervis N. R. 4 Edn. p. 98, from which our Rule, H. T. 13 Vic. No. 12 was copied.) It is not clear but that the Court, independently of this enactment, has the powers therein conferred. In *Oppenham* v. *Harrison*, Burr. 20, proceedings were set aside on the ground of an attorney's name having been used without his authority. See also *Hopwood* v. *Adams*, Bur. 2660, where a judgment was set aside under like circumstances. The attorney, besides, is an officer of the Court, and as such bound to obey orders of the Court in reference to actions by him conducted. The general jurisdiction of the Court gives it power to control its own process, and prevent that process from being abused: (See *Johnson* v. *Birley*, 5 B. & A. 540; *Worten* v. *Smith*, 5 B. & A., 543 note *a*; *Braceby* v. *Dalton*, 2 Str. 705) An attorney cannot be compelled to disclose his client's residence after verdict: (*Hooper* v. *Harcourt*, 1 H. B., 534; *Shinder* v. *Roberts*, Barnes, 126.)

(*d*) Taken from Eng. St. 15 & 16 Vic., cap. 76, s. 8. Applied to County Courts. The provisions of this section are such as were formerly required by Rule of our Courts, T. T., 3 & 4 Wm. IV., No. 3, which was rescinded by Rule of H. T., 13 Vic., No. 4. The old Rule of T. T., 3 & 4 Wm IV., No. 3, was taken from the Eng. Rule of H. T., 2 Wm. IV., No. II.: (Jervis N. R. 90.) A nominal compliance with it by plaintiffs, and inattention to it by defendants, was said to be the cause of its rescission. Indorsements of sums far exceeding the true debt and costs, were commonly made in total disregard of the rule.

(*e*) "Upon the writ and copy of *any* writ served or *executed*," is manifestly intended to include both bailable process and serviceable process. A true copy of non-bailable must be served on defendant: (*Scott et al* v. *Hefferman*, 5 O. S. 821, R. & H. Dig., "Process" 3.) In the absence of proof to the contrary, defendant may assume that the copy served is a true copy, and that if the copy be defective, so also is the writ: (*Chapman* v. *Becke*, 3 D. & L. 350.) The omission of the letters "L. S.," or any mark to denote a seal to the copy of

Amount of debt and costs of writ to be stated on it, &c.

or executed for the payment of any debt, (*f*) the amount of the debt shall be stated, (*g*) and the amount of what the Plaintiff's Attorney claims for the costs of such writ, copy and service, and attendance to receive debt and costs, (*h*) and it shall be further stated, that upon payment thereof within

And a certain notice.

eight days, (*i*) to the Plaintiff or his Attorney, (*j*) further

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a writ, is not an irregularity: (*Cameron* v. *Wheeler*, 6 U. C. R. 355.)

(*f*) This section applies only to debts—that is, to sums certain, or money demands that can be estimated: (See *Perry* v. *Patchett*, 2 Dowl. P. C. 667; *Curwin* v. *Mosely*, 1 Dowl. P. C. 432.) It would therefore seem unnecessary, if not improper, to put the indorsement on a writ claiming for any other cause of action: (See *Edwards* v. *Dignam*, 2 Dowl. P. C. 240.) The section does not apply to a *qui tam* action: (See *Davies* v. *Lloyd*, 6 Dowl. P. C. 173; *Hobbs* v. *Young*, 2 D. & L. 474.) Nor to an action on a bail bond: (See *Smart* v. *Lovick*, 3 Dowl. P. C. 34.) Nor to a replevin bond: (See *Rowland* v. *Daykeyne*, 2 Dowl. P. C. 832; but see *Robinson* v. *Hawkins*, 1 Jur. 843.) Nor to any case where the party claims unliquidated damages, as well as a debt: (*Perry* v. *Patchett*, 2 Dowl. P. C., 667, and *Mansfield* v. *Breary*, 1 A. & E. 347; *Jacquot* v. *Boura*, 5 M. & W. 155. See also *Rogers* v. *Hunt*, 10 Ex. 474, decided under s. xli. of this Act.) Where the writ, under the old practice was in trespass on the case, and the endorsement for a debt, it was held to be bad: (*Richards* v. *Stuart*, 10 Bing. 319; see also notes to s. cxlii.) *Qu.*—What would be the practice if the plaintiff bring one action for several causes of action, some of which are liquidated demands and others not? (s. lxxv.) If defendant seek to take advantage of the omission to indorse process as above required, he must show distinctly by affidavit, that the cause of action is a debt: (*Legatt* v. *Marmontt*, E. T. 3 Vic., *MS.* R. & H. Dig., "Indorsement," I. 9; *Curwin* v. *Mosely*, 1 Dowl. P. C. 432.) Where the omission of the indorsement on a bailable writ, was supplied within two hours after the arrest, before bail was put in, and before application to set aside proceedings, the old Rule 3 T. T. 3 & 4 Wm. IV., was held to be sufficiently complied with: (*Smith* v. *Smith*, 4 O. S. 10; Sed. *Contra*. *Gibbs* v. *Kimble*, 1 U. C. R. 408.)

(*g*) Not directory, but compulsory: (*Ryley* v. *Boissomas*, 1 Dowl. P. C. 383.) If a larger sum than is due be indorsed, proceedings will be stayed, upon payment of the real debt with costs of the Writ only: (*Elliston* v. *Robinson*, 2 Dowl. P.C. 241; *Young* v. *Crompton*, 2 D. & L. 557; see also *Watson* v. *Coleman*, 7 M. & G. 422.) For this purpose a summons should be taken out in the usual manner.

(*h*) Plaintiff may abandon his costs if he prefer to do so. If such be his intention, he should not serve such process upon defendant as to leave him in doubt: (*Truslove* v. *Whitechurch et al*, 8 Dowl. P. C. 837.) For instance, "the plaintiff claims £85 8s. 6d. for debt, and £———for costs"—this is irregular: (*Ib.*; see *Humber* v. *Russell*, 6 Scott, 1.; *Young* v. *Crompton*, 2 D. & L. 557.)

(*i*) *Within eight days, &c., i. e.* from the service of the writ—both first and last days it seems inclusive. See N.R.166. "*Four* days" in English Act from which this section is taken. So it was in the old Rule of 3 & 4 Wm. IV.

(*j*) The rescinded Rule 3 & 4 Wm. IV., made some distinction in this particular, between writs issued by attorney and by plaintiff in person; "and that upon payment thereof, within four days, to the plaintiff's attorney, *or* to the plaintiff when the writ shall have been issued by the plaintiff in

proceedings will be stayed, (*i*) which indorsement shall be written or printed in the following form, or to the like effect: (*j*) "The Plaintiff claims £———for debt and £———for "costs; and if the amount thereof be paid to the Plaintiff or "his Attorney within eight days from the service (*k*) hereof, Defendant may have costs taxed.

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person:" (Rule 3, T. T., 3 & 4 Wm. IV., Cam. Rules, p. 11, "Process" 2.) It may be that the words "Plaintiff *or* his Attorney," as used in the sec. here annotated, mean the same thing.

(*i*) The object of the indorsement is to show the defendant, in express terms, what the plaintiff is contented to take, in order that the former may tender it, together with the costs, within eight days: (*Chapman* v. *Becke* 3 D. & L. 352, per Patterson, J.) Indorsement held to be unnecessary on a proceeding by bill, against an attorney. (*Llewellen* v. *Norton*, 1 Dowl. P. C. 416; *Long* v. *Wordsworth*, 4 B. & Ad. 467.) Since held to be necessary as proceeding by bill is abolished: (*Tompkins* v. *Chilcote*, 2 Dowl. P. C. 187.) It is apprehended that if the debt be understated, plaintiff, if tendered the amount indorsed, would be bound to accept it, and thereby lose the difference between the sum stated and the sum due, unless in the case of very special circumstances. If the plaintiff refuse the amount tendered, whether the sum endorsed or less, such refusal may be noted by the Judge on a summons, and if after such proceeding plaintiff recover no more than the sum tendered, he will, it would seem, be liable to pay defendant's costs: (See *Watson* v. *Coleman*, 7 M. & G. 424.) The sum tendered, if refused, should be paid into Court: (*Clerk* v. *Dann*, 2 D. & L. 513.) If defendant do not within the time limited pay the debt and costs, he cannot afterwards do so as a matter of right: (*Bowditch* v. *Slaney*, 4 Dowl. P. C. 140.) Plaintiff may in his declaration insist upon an increased sum: (*Ib.*) And defendant will be liable to any additional costs which the Master may allow: (*Ib.*) It is otherwise if plaintiff's attorney receive and retain the money after the expiration of the eight days: (*Hodding* v. *Sturchfield*, 7 M. & G. 957. See also *Wyllie* v. *Phillips*, 3 Bing. N.C. 776; *Covington* v. *Hogarth*, 2 D. & L. 619.)

(*j*) This is substantially the same indorsement as that prescribed by the old Rule of 3 & 4 Wm. IV.

(*k*) The word "execution," substituted for "service," has in England been held to be an irregularity even in bailable actions: (*Shirley* v. *Jacobs*, 1 Scott 67; *Urquhart* v. *Dick*, 3 Dowl, P. C. 17; *Boddington* v. *Woodley*, 1 Jur. 960, W. W. & D. 581.) *Sed. Qu.* In Upper Canada? The words of the section under consideration are, "Upon the writ and copy of any writ served or *executed*." The objection, if good in Upper Canada as in England, would not be such as to warrant the discharge of defendant out of custody. An amendment of the indorsement would be allowed to plaintiff, upon payment of costs. (*Urquhart* v. *Dick*, Littledale, J., 3 Dowl. P. C. 17.) Where the indorsement required the defendant to pay the debt within four days from the "*arrest or* service" thereof, held to be sufficient, as the words "arrest or" might be rejected as surplusage: (*Sutton* v. *Burgess*, 1 C. M. & R. 770.) "Defendant must know the time he was served, and that he had four days from the service of the copy, within which to pay the debt and costs, to avoid any further expense": (*Ib.*) Where the indorsement was to pay the amount within four days from the "*arrest hereon*," held to be a fatal irregularity: (*Cooper* v. *Waller*, *Tabram* v. *Thomas*, 3 Dowl. P. C 167.) An amendment of the indorsement, by altering the amount of the debt mentioned in it, was refused: (*Trotter* v. *Bass*, 3 Dowl. P. C. 407.) It might now possibly be allowed under s. ccxci. of this Act.

15 & 16 Vic. cap. 76, s. 8.

"further proceedings will be stayed;" (*l*) But the Defendant shall be at liberty, notwithstanding such payment, to have the costs taxed, and if more than one-sixth be disallowed, the Plaintiff's Attorney shall pay the costs of taxation. (*m*)

(*l*) The writ must be so indorsed that an unlettered person may at once be informed what is demanded of him: (*Truslove* v. *Whitechurch*, 8 Dowl. P.C. 837.) It must state clearly what is claimed for debt and what for costs: (*Ib.*) If interest be claimed, the amount must be stated, or the period from which it is reckoned: (*Chapman* v. *Becke*, 3 D. & L. 350; *Fryer* v. *Smith*, 5 M. & G. 605; *Bardell* v. *Miller*, 7 C. B. 753.) "The plaintiff claims £20 debt, with interest from 10th March last" is sufficient: (*Copello* v. *Brown*, 3 Dowl. P. C. 166; *Sealy* v. *Hearne*, 3 Dowl. P. C. 196.) It will be intended that the interest claimed is legal interest: *Allen* v. *Bussey*, 4 D. & L. 430.) The following additional cases may be consulted as to when this enactment is or is not sufficiently complied with—*Evans* v. *Bidgood*, 4 Bing. 63; *Patterson* v. *Hakeshaw*, 1 Hod. 316; *Fitzgerald* v. *Evans*, 5 M. & G. 207. The want of the indorsement would be an irregularity: (*Truslove* v. *Whitechurch*, 8 Dowl. P. C. 837.) Amendable probably under s. xxxvii. of this Act. As to special indorsements see s. xli.

(*m*) Defendant may have the costs taxed, though he pay less than the sum indorsed, and though plaintiff's attorney accept the same: (*Hunter* v. *Russel*, 5 M. & G. 601; but see *Young* v. *Crampton*, 2 D. & L. 557; also see *ex parte Woollett*, 1 D. &. L. 593.) If defendant desire to have costs referred to taxation, notwithstanding payment, he should take out a summons to show cause "why the bill of costs indorsed on the writ of summons paid by him, should not be referred to the master for taxation," and "why if more than a sixth be taken off, he should not refund the surplus, and pay the costs of taxation." The enactment here annotated, and Prov. Stat. 16 Vic., cap. 175, s. 20, are *pari materiæ*, though the latter enactment appears to relate only to costs as between attorney and client. The material part of it is in these words:—"And if such bill when taxed, be less by a sixth part, then the bill delivered, &c., then such attorney, &c., shall pay such costs, (the costs of reference.) And if such bill when taxed shall not be *less* by a sixth part than the bill delivered, &c., *then the party chargeable with such bill, making such application, or so attending, shall pay such costs.*" This provision proceeds further than the Eng. Stat. 2 Geo. II., cap. 23, s. 23. In the latter Statute, the words used are much the same as the words of s. xxvi., under consideration. "If the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of taxation; but if it shall not be *less, the Court in their discretion shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bills.*" In reference to this enactment, Baron Park said: "It has been held by the Court of Common of Pleas, that the Statute directing the payment of costs, is not correlative: (*Elwood* v. *Pearce*, 8 Bing. 83.) It does not necessarily follow that the defendant is to pay the costs of taxation, though *less* than one sixth be taken off; although if *more* be disallowed, the plaintiff's attorney is bound to pay these costs. The Court have a discretion which they may exercise according to the reasonableness or unreasonableness of the charges in the bill, whether they will make the defendant pay the costs or not. I have always understood that where an attorney wilfully inserts any item of charge, even one shilling which he must know ought not to be charged, he is not

XXVII. (*n*) The Plaintiff in any action may, at any time during six months from the issuing of the original Writ of Summons [or of capias] (*o*) issue from the office whence the original Writ issued, one or more concurrent Writ or Writs of the same kind (*p*) to be tested of the same day as the original (*App. Co. C.*)

Plaintiff may obtain concurrent writs.

entitled to the costs of taxation:" (*Holderness* v. *Barkworth et al*, 8 M. & W. 341.) Defendant should pay, within the eight days, the costs indorsed on the writ. If he pay more, he does so of his own fault: (*Ward* v. *Gregg*, 5 Dowl. P. C. 729) Where therefore, in addition to the costs indorsed on the writ, defendant paid a sum of 5s., demanded of him by plaintiff's attorney, and afterwards on taxation a sum was taken off, which, with the 5s., was more than one-sixth, but without it, less than one-sixth of the bill; it was held that the attorney was not bound to pay the costs of reference: (*Ib.*)

(*n*) Taken from Eng. Stat. 15 & 16 Vic., cap. 75, s. 9—Applied to County Courts. The practice was first allowed by the Courts as being necessary and convenient: (Chit. Arch. 8 Edn., 158.) Being such it is continued by the C. L. P. Act: (See 1st Rep. of Commissioners, s. 5.) Original writ in force only for six months: (s. xvi. note *j*.)

(*o*) Suppose original writ to be renewed under the next following section, (xxviii.) would the time for issuing concurrent writs be thereby extended? Would there be six months allowed from the date of the renewal, for the issue of a concurrent writ? What is the meaning of the expression, "original writ." Does it mean original writ as contra-distinguished to "Renewed" writ? These questions have recently been judicially considered. It has been held—1. That a concurrent writ can only be issued within six months and no longer *from the first commencement of the action by the "original writ."* 2. That if a writ, issued before the act came into operation, be renewed under the act, becomes, by such *first* renewal *quasi*, the "original writ," on which a concurrent writ may be issued within six months from such renewal. 3. Where therefore, a writ of summons, issued before the first Eng. C. L. P. A. came into force, was renewed from time to time under that act, and within six months after the last renewal, *but more than six months from the first renewal*, the plaintiff issued, for the first time, a concurrent writ for service abroad, that writ was set aside as irregular: (*Coles* v. *Sherrard*, 26 L. T. Rep. 138; 33 L. & Eq. 464.)

(*p*) These writs are issued when it is desirable to proceed against a defendant without delay, and it is doubtful in which County he resides, or if known it is anticipated that he is about to flee from one County to another. Under the old practice a defendant was described in the writ as of "Middlesex;" but it being afterwards discovered that he resided in "Surrey." The writ was altered by plaintiff's attorney, by substituting the latter County for the former. The writ not having been re-sealed, the Court set the proceedings aside: (*Siggers* v. *Sansom*, 2 Dowl. P.C. 745.) To obviate the trouble and difficulty which may arise in cases of this nature, it is enacted that concurrent writs may be issued. Besides it is now enacted, "that the writ of summons may be served in *any* County: (s. xxxi.)—Concurrent writs are in fact original writs, describing defendant as residing in different Counties. One writ only is necessary for the commencement of an action: (s. xvi.) If several be issued, defendant is only liable to the costs of the writ served upon him: (*Dunn* v. *Harding*, 2 Dowl. P. C. 803.) Even of concurrent writs of capias, defendant cannot complain, as he can be arrested only once: (*Ib.*) It was therefore held, that concurrent writs

Their date, &c.

Writ, (*q*) and to be marked by the Clerk or Deputy Clerk issuing the same, with the word "*concurrent*" in the margin, with the memorandum required by the twentieth Section of this Act; (*r*) Provided that such concurrent Writ or Writs shall only be in force for the period during which the original Writ in such action shall be in force. (*s*)

Proviso.

Eng. C. L. P. A. 1852, s. 9.

Within what time Writs

XXVIII. (*t*) No original Writ of Summons (or capias) (*u*) shall be in force for more than six months (*v*) from the day of

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of capias might issue into different Counties: (*Rodwell* v. *Chapman*, 1 C. & M. 70; *Angus* v. *Coppard*, 3 M. & W. 57; *Angus* v. *Medwin*, 7 L. J. Ex. 10.) Concurrent writs of Summons, where there is only one defendant, may not, under the C. L. P. Act, be as necessary as formerly. It is sufficient in the Summons to state the residence or "supposed residence" of the party defendant: (s. xvi. and note *l* thereto.) And the writ when issued, may be served upon defendant in any County in which he may be found: (s. xxxi.) The main object of this enactment is to meet the case of several defendants residing in different Counties. And a concurrent writ for service, within the jurisdiction, may be marked as concurrent with one for service without the jurisdiction, and *vice versa*: (s. xxxix.) Concurrent writs will therefore be a great convenience where there are several defendants resident in different parts, and it is desired to proceed against all without delay. They cannot be an inconvenience to any one defendant, for he would be liable only to the costs of the writ served upon him individually: (*Angus* v. *Coppard et al* 3 M. & W. 57; *Crow* v. *Crow*, 1 D. & L. 709.)

(*q*) Though tested on the same day as the original writ, it must be remembered that the concurrent writ need not be issued on that day. It may be issued at any time "during six months from the issuing of the original writ."

(*r*) Memorandum stating "from what office and in what County such writ was issued."

(*s*) Original may be renewed and continued in force for a period longer than six months: (s. xxviii.) The difference between a concurrent writ under this Act, and an alias writ under the old practice, appears to be this:—A concurrent writ must be issued while the original writ is in force; an alias was only resorted to when the exigency of the original writ had been spent.

(*t*) Taken from 15 & 16 Vic., cap. 79, s. 11—Applied to County Courts. The Commissioners were not in favor of the Writ of Summons having an indefinite duration. They recommended that "it should have a limit, but that it might be renewed, and if renewed, should for all purposes be renewed in the same manner." The object being to provide for cases where plaintiffs may be really unable to serve the writ within the period limited by the original writ: (See 1st Report, ss. 6 and 7.) The Legislature have in this provision followed their suggestions. The effect of the section will be, *first*—to prevent the necessity for *alias* and *pluries* writs; and, *secondly*, in cases where the Statute of Limitations is pleaded to prevent the trouble and expense of making up and proving the roll on which the writs and continuances were formerly entered. The Stat. 12 Vic., cap. 63, s. 25, which authorized the issue of *alias* and *pluries* writs has been repealed: (s. cccxviii.)

(*u*) Words in brackets not in English Act.

(*v*) *i. e.* Calendar months: (see Interpretation Act 12 Vic., cap. 10, s. 5 sub s. 1.) The old practice was

the date thereof, including the day of such date; (*w*) but if any Defendant therein named, may not have been served therewith, (*x*) the original or concurrent (*y*) Writ of Summons (or capias) may be renewed at any time before the expiration, for six months from the date of such renewal, (*z*) and so from time to time, (*a*) during the currency of the renewed

must be served, &c. Renewing writs.

(*App. Co. C.*)

Eng. C. L. P. A., 1852, s. 11.

"four months:" (12 Vic., cap. 63, s. 25.)

(*w*) The original writ is to be in force for six months from its date, "including the day of such date." *i. e.* A writ issued on 1st January, would expire on 30th June: (*Black* v. *Green*, per *Maule J.*; 29 L. & Eq. 262 S. C., 15 C. B. 262.) A defendant who has been served with a writ, after its exigency has expired, should not treat it as a nullity, but apply to set the service aside: (*Kemp* v. *Warren*, 2 Dowl. N. S. 758.) And where a writ under these circumstances was served at defendant's request, in order to save expense, the service was held good: (*Coates* v. *Sandy*, 2 M. & G. 313.) It was held not to be a waiver by defendant, but an agreement to accept service after the time for service had expired: (*Ib.*) As to the course to be taken by parties, served by mistake: (see *Walker* v. *Medland*, 1 D. & L. 159; *Richards* v. *Hanley*, 10 Jur. 1056; *Stevenson* v. *Thorne*, 13 M. & W. 149.) It is not necessary for a party so served to state in his affidavit when applying to set aside the copy and service of the writ, that he is the defendant in the cause. (*Stevenson* v. *Thorne*, per Pollock, C. B. 13 M. & W. 150.)

(*x*) Service on a wrong person, is the same as no service at all: (See *Clark* v. *Johnson*, 2 B. & C. 95.)

(*y*) See s. xxvii.

(*z*) Original writ issued on 1st January. Renewed 30th June following. Is not the renewed writ to be in force until 30th December, and no longer? The difficulty arises from the fact that the original writ is declared to be in force "from the day of the date thereof, *including* the day of such date," and may be renewed at any time before its expiration "for six months *from* the date of such renewal." Maule, J., inferred that it was the intention of the Legislature that the two periods should be computed in the same way. The question is undecided, and it is this—whether the six months for which a renewal writ is to be available are to be reckoned inclusively or exclusively of the date of renewal? In two cases in which the point arose, the Courts directed the officer to renew the writs *nunc pro tunc*. No opinion having been given as to how the cause of action would be affected by such renewal: (*Black* v. *Green*, 15 C. B. 262, twice reported in L. & Eq. Repts.; 23 L. & Eq. 337, as "Anonymous;" 29 L. & Eq. 260, under the proper style.) It is doubtful whether or not our 2 Geo. IV. cap. 1, s. 22, will aid in the solution of the difficulty. It is in these words, "The first and last days of all periods of time limited by this (Act K. B. Act,) or hereafter to be limited by any rules or orders of Court for the regulation of practice, be inclusive." See also N. R. No. 166. The common law construction is that the first day be exclusive and the last day inclusive. Under the Eng. Act 2 Wm. IV. c. 39, it was held that in order to renew an original writ by the issue of an *alias*, when the original writ would expire on 7th May, the subsequent process should be entered of record no later than 6th June: (*McKellar* v. *Reddie*, 4 M. & G. 769.)

(*a*) It is to be understood that a writ once renewed may be again and again renewed, if necessary. The renewal of the first to be effected within six months from the date of the original

Effect of renewal as to Statute of Limitations.

Writ, by being marked in the margin, with a memorandum to the effect following: (*b*) "Renewed for six months from the " day of ," signed by the Clerk or Deputy Clerk who issued such Writ, or his successor in office, upon delivery to him by the Plaintiff or his Attorney, of a *præcipe*, in such form as has heretofore been required to be delivered upon the obtaining of an *alias* Writ; (*c*) and a Writ of Summons, (or capias) so renewed, shall remain in force and be available to prevent the operation of any Statute whereby the time for the commencement of the action may be limited, and for all other purposes from the date of the issuing the original Writ. (*d*)

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writ, including such date. The second and subsequent renewals to be effected within six months from the date of the first renewal. When a writ has been once renewed, the time does not run from the date of the original writ, but from the time of the renewal:—(*Anon. Crompton J.*, 28 L. & Eq. 224.) If the time expire on Sunday 5th, the writ ought to be renewed on Saturday 4th. Plaintiff has not till the following Monday. (*Ib.*) The method of renewal here provided is intended as substitutionary for the issue of *alias* and *pluries* writs. The cases decided under the latter practice were the following—An indorsement on an *alias* or *pluries* writ must contain the date of the first writ and return thereto: *Williams* v. *Williams*, 2 Dowl.N.S.209.) But an amendment in this particular was permitted: (*Ib.*) And see *Mavor* v. *Spalding*, 1 D.& L.878.) Where an *alias* had not issued in due time, the Court refused to amend the date of the preceding writ, in order to admit of its issue: (*Campbell* v. *Smart*, 5 C. B. 196; 5 D. & L. 335.) An *alias* was amended by inserting the date of the first writ: (*Culverwell* v. *Nugee*, 4 D. & L. 30.)

(*b*) Eng. act. "*By being marked with a seal*," &c.

(*c*) The *præcipe* for an *alias* writ only differed from the ordinary *præcipe* by the insertion of the word "*alias*." The form now will be, "Renewal writ of———for A. B. against C. D., of———in the county of———."

(*d*) The production of the writ, with a mem. purporting to be signed as above required, and showing such writ to have been renewed, is sufficient evidence of renewal: (s. xxx.) The question of renewal arises on an issue joined on a plea of the Statute of Limitations: (see *Higgs* v. *Mortimer*, 5 D. & L. 757.) Where the writ issued within six months after the cause of action accrued and was not duly continued, pursuant to Eng. Stat. 2 Wm. IV. cap. 39, s. 10, it was held that the defendant was not bound to plead such non-continuance specially, but might take advantage of it, under the general plea that "the cause of action did not accrue within six years next after the commencement of the suit: (*Pratt* v. *Hawkins*, 15 M. & W. 399.) For this purpose the last writ served was held to be the commencement of the suit: (*Ib.*) Where the original *alias* and *pluries* writs of *ca. re.* had been sued out and the last writ served, it was held that the plaintiff, in order to acquire the advantage of having the action considered as commenced by the first writ, with reference to a plea of payment or the Statute of Limitations, should show at the trial that the first writ was returned: (*McLean* v. *Knox*, 4 U. C. R. 52.)

Eng. C. L. P. A. 1852, s. 12.

Renewing and returning writs issued before the commencement of this Act, &c.

As to writs issued in continuance of preceding writs under the Act.

XXIX. (*e*) When any Writ of Summons [or Capias] in any such action shall have been issued before, and shall be in force at the commencement of this Act, such writ may, at any time before the expiration thereof, be renewed under the provisions of, and in the manner directed by this Act; (*f*) and where any writ, issued in continuation of a preceding Writ, according to the provisions of the Act passed in the twelfth year of Her Majesty's Reign, intituled, *An Act to make further provision for the administration of Justice, by the establishment of an addditional Superior Court of Common Law, and also a Court of Error and Appeal in Upper Cunada, and for other purposes,* (*g*) shall be in force and unexpired, or where one month next after the expiration thereof, shall not have elapsed at the commencement of this Act, (*h*) such continuing Writ may, without being returned *non est inventus*, or entered of record according to the provisions of the said Act, be filed in the proper office of the Court, within one month next after the expiration of such Writ, or within twenty days after the commencement of this Act, (*i*) and the original Writ of Summons or capias in such action may thereupon, but within the same period of one month next after the expiration

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(*e*) Taken from Eng. Act 15 & 16 Vic., cap. 76, s. 12—Not applied to County Courts. But see a similar provision as regards these Courts: (Co. C. P. A. s. 8.)

(*f*) See preceding s. (xxviii.)

(*g*) Stat. 12 Vic., cap. 63, s. 25, which was copied from Eng. Stat. 2 Wm. IV., cap. 39, s. 10.

(*h*) In this section provision is made for three several cases:—

1. Where an "original writ," issued before 21st August, 1856, was unexpired on that date.

2. Where a "writ, issued in continuance of a preceding writ," issued before 21st August, 1856, was unexpired on that date; and

3. Where "one month next after the expiration thereof," had not elapsed before 21st August, 1856.

In a case where an original writ of summons had expired before the day fixed for the 1st Eng. C. L. P. Act to take effect, the Court in order to save the Statute of Limitations directed an *alias* writ to issue, under the Uniformity of Process Act (2 Wm. IV., cap. 39) then repealed: (*Gapp* v. *Robinson*, 12 C. B. 828; 14 L. & Eq. 253.) The Court refused to alter a writ of summons by striking out a true date and inserting a false one, in order to enable plaintiff to proceed with an action, to which otherwise the Statute of Limitations was a bar: (*Campbell* v. *Smart*, 5 C. B. 196. 5 D. & L. 335.) Every writ of summons or capias, issued under the authority of our C. L. P. Act, "shall bear date on the day on which the same shall be issued:" (s. xix.) As to the issue of concurrent writs, founded on renewed writs, see note o, to s. xxvii.

(*i*) *i. e.* 21st August, 1856, (s. i.)

of the continuing Writ, or within twenty days after the commencement of this Act, be renewed under the provisions of, and in the manner directed by this Act; and every such Writ shall, after such renewal, have the same duration and effect for all purposes, and shall be, if necessary, subsequently renewed in the same manner as if it had originally issued under the authority of this Act. (*j*)

(App. Ch. C.)

Eng. C.L.P.A. 1852, s. 13.

Proof of such renewal of writs.

XXX. (*k*) The production of a Writ of Summons or Capias with the memorandum signed as required in the foregoing Section, (*l*) shewing such writ to have been renewed according to this Act, (*m*) shall be sufficient evidence of its having been so renewed, and of the commencement of the action, (*n*) as of the first date of such renewed Writ, for all purposes. (*o*)

(*j*) Under the old practice (before Eng. Act 2 Wm. IV., cap. 39,) it was held that where a suit had been actually commenced within six years after the cause of action, continuance might have been entered *at any time*, for the purpose of avoiding a plea of the Statute of Limitations: (*Beardmore* v. *Rattenburg*, 5 B. & A. 452; *Taylor* v. *Gregory*, 2 B. & Ad. 257; 2 *Wms. Saunders*, 63, and notes; *McLean* v. *Knox*, 4 U. C. R. 52.)

(*k* Taken from Eng. Act 15 & 16 Vic., cap. 76, s. 13—Applied to County Courts.

(*l*) *i. e.* s. xxviii. The mere production of the writ with the necessary memorandum, purporting to be signed, &c., is all that is required. No extrinsic proof as to the genuineness of the officer's signature, seems to be necessary. It will be assumed *prima facie* to be his. It has been held that the production of first process, with the minute of the Deputy Clerk of the Crown, "issued 5th Aug., 1843, W. D. M.—D. C. C.," was *prima facie* proof of the fact and date of issue: (*Upper* v. *McFarland et al*, 5 U. C. R. 101.) The Court observed that it has long been the practice so to treat the writ at *Nisi Prius*, and as the practice is convenient and saves expense to the parties, it ought to be upheld: (per Robinson, C. J., *Ib.* 103.) The new practice only makes it necessary to state in the marginal mem. the office whence the writ issued: (s. xx.) The writ must bear date on the day when issued: (s. xix.) The date of issue will therefore appear from the teste, and not necessarily from the marginal note, as formerly.

(*m*) *i. e.* Under ss. xxviii. or xxix.

(*n*) See note *d* to s. xxviii.

(*o*) It may be a question whether the writ so produced, can be looked upon as a Record of the Court. If a record, then parol evidence would not be admissible to contradict it. It might be argued that as the new method of renewing writs, by signing a mem. in the margin, is to have the effect of an *alias* or *pluries* writ; so by analogy the production of a writ thus renewed, would be the same in effect as the production of a continuance roll under the old practice. A continuance roll from the proper custody, has been held to be a Record of the Court, and as such not to be contradicted by parol testimony: (*Prentice* v. *Hamilton*, Dra. Rep. 410.) The objection to the renewed writ being so considered if left in the possession of plaintiff, would perhaps be that it did not come from the "proper custody." The point has not yet been raised for decision. But

XXXI. (*p*) The Writ of Summons in any action may be served in any County in Upper Canada. (*q*) (*App. Co. C.*) Eng. C. L. P. A. 1852, s.10. Service in any County.

XXXII. (*r*) The person serving (*s*) the Writ of Summons (*App. Co. C.*)

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it is a general rule that no part of a written instrument (in the absence of fraud) can, as between parties privy thereto, be directly contradicted by parol evidence: (Tay. Ev., 2 Edn., ss. 1035, 1038.)

(*p*) Taken from Eng. Stat. 15 & 16 Vic., cap. 76, s. 14—Applied to County Courts—Founded on 1st Rep. C. L. Comrs., s. 8.

(*q*) The old practice required the writ to be served within the County "therein mentioned, or within two hundred yards of the border thereof, and not elsewhere:" (12 Vic., cap. 63, s. 22, copied from Eng. Act 2 Wm. IV., cap. 39, s. 1; also see *Simpson* v. *Ramsay*, 5 Q. B. 371) Formerly if it were discovered that defendant had removed to a County other than that "in the writ mentioned," it became necessary to issue an *alias* or *pluries* writ, describing defendant as being "late of the County of, &c.:" (Old R.5 H.T. 13 Vic.) This mode of proceeding caused both delay and expense, and was besides wholly unnecessary, inasmuch as the writ was directed to the defendant, and not to the Sheriff of any particular County. The Commissioners unable to see "any advantage whatever arising from the restriction," advised its removal.

(*r*) Adopted from Eng. Act 15 & 16 Vic., cap. 76, s. 15—Applied to County Courts—Substantially the same as our old Rule 3 H. T. 13 Vic., which was copied from Eng. R. G. M. T. 3 Wm. IV., No. 6: (Jervis N. R., p. 95.) The origin of the rule is Eng. Stat. 2 Wm. IV., cap. 39, s. 1, from which our 12 Vic., cap. 63, s. 22, was taken.

(*s*) Who is the proper person to serve a writ of summons? Under the old practice, the service of a non-bailable writ of *ca. re.*, the process then in use for the commencement of non-bailable actions, could only be effected by the Sheriff, his Deputy, or Bailiff: (Stat. 2 Geo. IV., cap. 1, s. 4, now repealed by s. cccxviii.; also see *Whitehead* v. *Forthergill*, Dra. Rep. 210; and *Landrigan* v. *Callaber*, M. T. 1 Vic. *MS.*) This was held to be the law even in a case where the deputy was a party to the suit: (*Ruttan* v. *Ashford*, 3 O. S. 302.) The direction of the Stat. 2 Geo. IV., cap. 1, s. 4, was positive. Though this Statute was so construed, it was thought that the spirit of the act had a contrary leaning: (Dra. Rep. 210.) Before non-bailable writs of *ca. re.* were adopted, writs of summons were in use. When the *ca. re.* was substituted for summons, (2 Geo. IV., cap. 1, s. 4) it became necessary to enact that the Sheriff should serve it, for he could not otherwise have been bound to serve a copy of process which on the face of it *required the defendant to be arrested.* Hence when non-bailable writs of *ca. re.* were abolished, and writs of summons restored, under 12 Vic., cap. 63, it was held by Macaulay J. that service by a person other than a Sheriff, his Deputy, or Bailiff, was not irregular: (*Leach* v. *Jarvis*, 1 U.C. Cham. R. 264.) Plaintiff's right to tax costs for such services, was doubted by the learned Judge: (*Ib.*) Subsequently Stat. 16 Vic., cap. 175, s. 13, (now repealed, see s. cccxviii.) was passed, which enacted that "no fees shall be allowed for the service or mileage of writs of summons or other mesne process, unless served by the Sheriff, his Deputy, or Bailiff, &c." For a review of our Statutes bearing upon the subject, anterior to 16 Vic., cap. 175, see 1 U. C. Cham. Rep. 269. Since the latter Stat. has been repealed, it must be taken that the law is the same as if it had never been enacted. Then the law would be that laid down in *Leach* v. *Jarvis*, by Macaulay, J. Service by any person other than the Sheriff, his Deputy,

Eng. C. L. P. A., 1852, s. 15.

Indorsement of the day of service on the writ.

shall, (*t*) and is hereby required within three days at furthest after such service, to indorse on such Writ, (*u*) the day of the month and week of the service thereof, (*v*) otherwise the Plaintiff shall not be at liberty in case of non-appearance to proceed under this Act; (*w*) and every affidavit of service of such

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or Bailiff, is not irregular. Such is the law in England at the present time. "The writ may be served by the attorney or his clerk, or in fact by any person who can read and write, so as to be able to swear that he served a true copy of the writ, &c.:" (Chit. Arch. 8 Edn. p. 155.) There is no Legislative declaration to the contrary now in force in Upper Canada. With respect to the costs of service when the writ is served by any other than the Sheriff, the law is as follows: "Service of each copy of writ, *if not done by the Sheriff or an officer employed by him*, when taxable to the Attorney—2s. 6d." (N. R. Schd. B.)

(*t*) It is not clear whether the summons here meant, is the ordinary summons under s. xvi. and no other. Provision is made by this Act, for the issue of two other forms of summons, one to be served on British Subjects, resident abroad (s. xxxv.); and the other on foreigners, also abroad, (s. xxxvi.) Since writs of summons on foreigners are not to be served but, only a *notice* thereof, it may be presumed that the section under consideraton will not apply: (s. xxxvi.) Until a decision to the contrary, it will be advisable to indorse the time of service of writs served on *British subjects* abroad, as prescribed by this section: (Chit. Arch. 9 Edn. 175.) It would seem that s. xxxvii., as to amendment is not applicable to an omission of the kind in question.

(*u*) The indorsement may be made by a marksman, if able to read writing or printing: (*Baker* v. *Caghlan*, 7 C. B. 131.) The rule is sufficiently complied with when all but the handwriting is either printed, or in the handwriting of a stranger. The party putting his mark to it, thereby becomes responsible for the whole: (Per Wilde, C. J., *Ib.*) Computation of time, see note *k* to s. li., and N.R. 166.

(*v*) The object of the rule is "to pin the party to a precise date of service:" (Maule, J., *Ib.*) The form may be thus:—"This writ was served by me, X. Y., on C. D., on————the————day of————18——, X. Y.:"

(*w*) The penalty for neglect under the old rule, was that the plaintiff should not be at liberty to enter an appearance for the defendant. This was almost in effect to prevent plaintiff from going on with his suit, if defendant did not voluntarily appear. and the consequences of such neglect seem to be still the same. The indorsement shall be made, "otherwise the plaintiff shall not be at liberty in case of non-appearance, to proceed under this Act." Appearances per Stat. are virtually abolished: (s. lix.) Where defendant snatched the original writ out of the hands of the person serving him and kept it, and the party who served the writ was in consequence unable to make the indorsement on "such writ," the Court granted a rule to show cause why the defendant should not return the writ or why in default of his so doing plaintiff should not be allowed to enter an appearance for him without indorsement, *i. e.*, "to proceed with his suit:" (*Brook* v. *Eddridge*, 2 Dowl P. C., 647.) But when the original writ was sent by plaintiff to defendant at his request, and he kept it and did not appear, the Court refused to allow the plaintiff to enter an appearance for defendant without the indorsement: (*Atkinson* v. *Howell*, 7 M. & W., 213.) Plaintiff in this case brought himself into the difficulty by not following the usual course. No doubt, as a man of honor, defendant was bound to appear; but in point of

Writ, shall mention the day on which such indorsement was made. (*x*)

(*App. Ch. C*) Eng. C. L. P. Act, 1852, s. 16 Writs against Corporations how served.

XXXIII. (*y*) Every such Writ of Summons issued against a Corporation aggregate, (*z*) may be served on the Mayor, (Warden, Reeve,) President, or other head Officer, (*a*) or on the Township, Town, City, or County Clerk, Clerk, (*b*) Cashier, Manager, Treasurer, or Secretary, (or Agent of such Corporation,) or of any branch or agency thereof in Upper Canada; (*c*) and

Who shall be deemed agents of

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law if he did not choose to do so, the Court was not bound to assist plaintiff: (*Ib. Per. Cur.*) Where the "three days" for making the indorsement had been allowed to elapse owing to the falsehood of defendant in denying herself to be the party named in the writ, the indorsement was allowed to be made: (*Burrows* v. *Gabriel*, 4 D. & L. 107.) Where a person who made the service died within the "three days," a Judge at Chambers allowed the substitution of an affidavit by plaintiff's attorney of the facts, and his belief of the service: (*MS.* Lush. Prac. 261.)

(*x*) The affidavit should show that the writ and indorsement were regular: (*Wakely* v. *Teesdale*, 2 L. M. & P. 85.) It should be made by the person who served the writ. If an officer of the Court, he might be compelled to make the affidavit: (*R.* v. *Rudge*, 1 W. B. 432.) Compulsion may be used under s. clxxiv., which see. Form of affidavit—Chit. Forms, 6 Edn. 17. As to affidavits generally, see N.R. 109 *et seq;* also s. xxiii., note divs. 3, 7, 8, 9, headed "Deponent," "Commissioner," "Signature of Deponent," and "Jurat," p. 41 of this work..

(*y*) First part of this section taken from Eng. Stat. 15 & 16 Vic., cap. 76, s. 16—whole section applied to County Courts.

(*z*) A corporation sale must be personally served. The old mode of proceeding against Corporations aggregate, is pointed out in Tidd N. P. 81, *et seq.* See also Ang. & Ames Corp'ns 575.

(*a*) *Semble*—A Summons directed to the Commissioners of the Admiralty, must be served upon each: (*Williams* v. *The Lords Commissioners of the Admiralty*, 11 C. B. 420.) It was intimated that defendants were not a Corporation: (*Ib.*)

(*b*) "*Clerk*"—Some principal Officer is meant, not a mere Clerk for instance in the office of the Secretary to the corporation: (See *Walton* v. *The Universal Salvage Co.*, 16 M. & W. 438.)

(*c*) Substantially a re-enactment of Stat. 12 Vic., cap. 63, s. 28. The words in brackets have been added to the repealed provision, and the whole re-enacted. The words of the Eng. C. L. P. Act, "Mayor or other Head Officer, or on the Town Clerk, Clerk, Treasurer, or Secretary of such Corporation," are the very words made use of in Eng. Stat. 2 Wm. IV., cap. 39, s. 13. It may be observed that our Stat. 3 Wm. IV., cap. 7, has not been repealed by the C. L. P. Act. It provides "that all writs and process at law hereafter to be issued against any body or bodies corporate, in the commencement of any action; and all papers and proceedings before final judgment in any such action, may be served on the President, Presiding Officer, Cashier, Secretary, or Treasurer thereof, in the same manner as upon any individual defendant in his natural capacity, *or on such other person, or in such other manner as the Court in which the action shall be brought, may direct.*" The officers named are all included in our C. L. P. Act; but if it be held that this Act is not superseded by the C. L. P. Act, it is important to notice the wide discretionary power vested in the Courts by the sentence itali-

Corporations in certain cases.

every person who shall, within Upper Canada, transact or carry on any of the business of, or any business for any Corporation whose chief place of business shall be without the limits of Upper Canada, shall, for the purpose of being served with a Writ of Summons issued against such Corporation, be deemed the agent thereof. (*d*)

(*App. Co. C.*) Eng. C. L. P. A., 1852, s. 17.

XXXIV. (*e*) The service of the Writ of Summons wherever it may be practicable, shall, as heretofore, be personal; (*f*)

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cised A service on any one, *other than the officers named in the Statute*, should at all events be made upon some person who represents the interests of the Corporation: (*Sherwood et al* v. *The Board of Works*, Hagerman, J., 1 U. C. R. 517.) It was held that where the Corporation—the Board of Works—were in Lower Canada, but had work under contract in Upper Canada; process could not be served on the engineer in charge of the works in Upper Canada, as there was nothing to show that he had any share in making the contracts, or that he had authority to bind or represent the Corporation: and the Court refused to direct that a copy of the process put up in the Crown Office, should be deemed valid service on defendants: (*Ib.*) Before taking proceedings against a Corporation, created by or in pursuance of an Act of Parliament, it will be advisable to consult the particular Act, as it may prescribe a mode of procedure differing from that laid down in this Act, and may be obligatory on the parties to pursue its special provision. It would seem that the form of process against Corporations, prescribed by Rule T. T. 2 Geo. IV., (Cam. R. 4) is superseded.

(*d*) The latter part of this section appears to be an entirely new enactment. It authorizes proceedings against a foreign Corporation, provided such Corporation have an agent in Upper Canada for the transaction of the business of the Corporation. This provision in cases of contract, can only apply either where the contract has been entered into in Upper Canada, or entered into abroad, to be executed in Upper Canada. In connexion with this note, two English decisions may be mentioned, though each of them turned it is conceived upon the particular circumstances of the case. 1. (*Wilson* v. *The Caledonian R.R.C.*, 5 Ex. 822.)—Where the principal office was in Scotland, service on the Secretary while in London on temporary business, was held good. 2. (*Evans* v. *Dublin & Drogheda R. Co.* 2 D. & L. 865.)—Where the principal office was in Ireland, and there was no office in England, service upon one of the Directors of the Company in London, was held to be null and void.

(*e*) Adopted from Eng. Act 15 & 16 Vic., cap. 76, s. 17—Applied to County Courts.

(*f*) Before this enactment, the Judges in England came to a determination that as a general rule the service should be personal in all cases: (*Goggs* v. *Huntingtower*, 1 D. & L. 599; *Christmas* v. *Eicke*, 6 D. & L. 156.) There was no proper equivalent: (*Grand Junction Water Works Co.* v. *Rey*, 16 L. J. C. P. 200; *Russell* v. *Rowe*, 2 Dowl. N. S. 233.) Notwithstanding an undertaking, though verbal, by an attorney to appear, was and is enforceable by attachment: (*Anon.* 2 Chit. R. 36; *Sweet* v. *Magnay*, 12 L. J. Q. B. 93; also see N. R. 3.) If defendant avoided service, then plaintiff was driven to a writ of distringas: (Chit. Arch. 8 Edn. 174.) Service wherever "practicable," must still, as heretofore, be personal Personal service means serving the de-

but it shall be lawful for the Plaintiff to apply from time to

Service to be personal.

fendant with a copy of the process, and showing him the original if he desire it: (*Goggs* v. *Huntingtower*, per Alderson, B., 1 D. & L. 599.) The copy of the writ must be left with and not merely shown to defendant: (*Worley* v. *Glover*, 2 Str. 877.) Though defendant refuse to take the copy, if the person serving it bring it away with him, the service will be defective: (*Pigeon* v. *Bruce*, 8 Taunt. 410.) A Sheriff's officer takes a writ really for one person to another person of the same name. He is informed by defendant of his error, and takes back the writ saying that he will go to this other party, the defendant having agreed that if he were wrong in his supposition, he would consider the service good if the writ were left for him at the house of a third party named. The officer neither served the other party nor left the writ for defendant as directed. The plaintiffs, nevertheless, proceeded against defendant. The service and all subsequent proceedings were set aside for irregularity: (*Erwin* v. *Powley*, 2 U. C. R. 270.) The original writ need not be shown, unless defendant at or within a reasonable time after service, make a demand to see it: (*Petit* v. *Ambrose*, 6 M. & S. 274.; *Thomas* v. *Pearce*, 2 B. & C. 761.) A quarter of an hour held to be a reasonable time: (*Westley* v. *Jones*, 5 Moore 162.) Where, at the time of service, an inspection of the original was demanded and refused, the service was set aside with costs: (*Weller* v. *Wallace et al*, M. T. 1 Vic. *M.S.* R. & H. Dig. "Process" 4.) "Personal service" has never been defined by the Legislature. Each case is left to depend on its own particular circumstances. The Courts have not held it necessary to put process into the actual *corporal* possession of the defendant to constitute a personal service; but have looked more to the object of the service—timely notice to defendant of an action commenced against him: (See *Sheehy* v. *The Prof. Life Ins. Co.*, 13 C. B. 787.) Whether under the particular circumstances of each case this object has been accomplished is a question for the Court or a Judge. Various cases under the old practice shew that the expression "personal service," is not to be understood in the strict sense of that term—thus:—Where a writ was put through the crevice of a door to defendant, who had locked himself within, the service was held to be sufficient: (*Smith* v. *Wintle*, Barnes 405.) So where the writ had been enclosed in a letter to defendant, which he received, and out of which he had taken the copy: (See *Boswell* v. *Roberts*, Barnes 422; *Aldred* v. *Hicks*, 5 Taunt. 186.) Service upon a wife, agent, or servant, is not personal service: (See *Frith* v. *Donegal*, 2 Dowl. P. C. 527; *Davies* v. *Morgan*, 2 C. & J. 237; *Goggs* v. *Huntingtower*, 1 D. & L. 599; *Christmas* v. *Eicke*, 6 D. & L. 156.) Where the officer on seeing the defendant at his window, told him in a loud tone, that he had a writ against him, at the plaintiff's suit, and holding out the copy, threw it down and left it in the garden, in defendant's presence; held not a sufficient personal service: (*Heath* v. *White* 2 D. & L. 40.) In a case where service was denied by the defendant, but the officer swore positively to its service personally on defendant, an application to set aside proceedings was refused: (*Coates* v. *Hornby*, 1 U. C. Cham. R. 135.) If there be more defendants than one, each should be served as if he were sued alone, except in the case of husband and wife, when service on the husband for both, will be sufficient: (*Buncombe* v. *Love*, 1 Barn 293; *Collins* v. *Shapland*, *Ib.* 103.) In case of misjoinder, &c. plaintiff may afterwards apply to strike out the name of one or more defendants: (s. lxx.) It is irregular to serve process on a witness while attending a Court of *Nisi Prius*, under subpœna: (*Thompson* v. *Calder*, 1 U. C. R. 403.)

Exception:

Service may be dispensed with by the Court or a Judge, on affidavit of certain facts.

time, on affidavit, (*g*) to the Court out of which the Writ of Summons issued, or to a Judge, and in case it shall appear to such Court or Judge, (*h*) that reasonable efforts have been made to effect personal service, and either that the Writ has come to the knowledge of the Defendant, or that he wilfully evades service of the same, (*i*) and has not appeared there-

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Service upon a defendant while attending the Assizes, as plaintiff in a civil action pending and entered for trial, held good:—*Thompson* v. *Calder*, doubted—*City of Kingston* v. *Brown*, 4 U. C. R. 117; see also *Poole* v. *Gould*, 27 Law T. R. 110.) It does not resemble the case of an arrest under similar circumstances, in which event defendant would be privileged: (*Ib.*) As to which see s. xxiii, note *s*.

(*g*) As to affidavits generally see N. B. 109, *et seq*; also s. xxiii., note sub-divs. 3, 7, 8, 9, intitled "Deponent," "Commissioner," "Signature of Deponent," and "Jurat," p. 41 of this work.

(*h*) *i. e.* Court in term time—Judge in vacation—(*Wyatt* v. *Genny*, 22 Law T. 92; *Todd* v. *Edwards*, 22 Law J. 105.) The practice as to the Sittings of the Judges, is regulated by Prov. St. 13 & 14 Vic., cap. 51. S. 1—Practice Court. S. 2—Clerk of such Court. S. 3—Judge in Chambers.

(*i*) This provision is a new one, substituted in lieu of the practice, by distringas to compel an appearance. The distringas is superseded, because there is no longer any necessity for it. Wherever, under the old practice, a distringas could have been obtained, it may be laid down as a general rule that an application made under this section will succeed. Of course there may be exceptions. That of a lunatic defendant noticed below is one. As to the distringas, see Chit. Arch. 8 Edn. 1. Two cases are contemplated by this enactment. 1. Where the writ has come to the knowledge of defendant. 2. Or where he wilfully evades service of the same. In support of the application, it is very clear under this section, that the affidavit must shew—1. That reasonable efforts have been made to effect personal service. The efforts should be disclosed so as to raise a presumption. 2. That the writ has come to the knowledge of the defendant. 3. Or that he wilfully evades service of the same. 1. *As to what will be considered reasonable efforts, &c.*, see *Gale* v. *Winkes*, 3 Bing. N. C. 294; *Croft* v. *Brown*, 14 L. J. Q. B. 282; *Russell* v. *Knowles*, 2 D. & L. 595; *Cross* v. *Wilkins*, 4 Dowl. P. C. 279; *Rock* v. *Adam*, 15 L. J. C. P. 192; *Greenwood* v. *Selden*, 9 Dowl. P. C. 72; *Norman* v. *Winter*, 4 Bing. N. C. 637; *Baker* v. *Coe*, 1 Ex. 158; Anon 2 D. & L. 1001; *Johnson* v. *Rowse*, 1 Dowl. P. C. 641; *Moody* v. *Morgan*, 7 Dowl. P. C. 144; *Newman* v. *Hickman*, 9 Dowl. P. C. 546; *Hill* v. *Meule*, 2 Dowl. P. C. 10; *Fisher* v. *Goodwin*, 2 C. & J. 94; *Wakeley* v. *Teesdale*, 2 L. M. & P. 85; *Dubois* v. *Lowther*, 4 C. B. 228; *Gorringe* v. *Terrewest*, 2 L. M. & P. 12. 2. *As to the writ coming to defendant's knowledge*, see *Thomas* v. *Pearce*, 4 D. & R. 817; *Goggs* v. *Lord Huntingtower*, 1 D. & L. 599; *Russell* v. *Knowles*, 2 D. & L. 595; *Heath* v. *White*, 2 D. & L. 40; *Christmas* v. *Eicke*, 6 D. & L. 156. 3. *As to defendant's keeping out of the way to avoid service*, see *Houghton* v. *Hawworth*, 4 Dowl. P. C. 749; *Channing* v. *Cross*, 9 Dowl. P. C. 118; *Wilkins* v. *Jones*, 15 L. J. C. 226; *Gorringe* v. *Terrewest*, 2 L. & M. 12. Though an attempt has been here made to separate cases, it will be evident that the two latter states of circumstances must be more or less blended. If defendant wilfully evade service of the writ, it must be presumed that it has come to his knowledge. If it has come to knowledge, and he cannot, after repeated efforts, be personally

to; (*j*) it shall be lawful for such Court or Judge to order (*k*) that the Plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the Court or Judge may seem fit. (*l*)

XXXV. (*m*) In case any Defendant being a British sub- (App. Ch. C.)

Con Stat of U.C. ch 22 § 43 44

served, it may be presumed that he wilfully evades service of the same. The presumption must appear to the Court or a Judge upon facts to be disclosed upon affidavit. The plaintiff should detail the attempts at service, and then show why service has not been effected. The case of a lunatic defendant does not seem to be sufficiently provided for by the Legislature. The Court refused to supply the omission in a case before them, and refused to grant an application made under this section, where defendant was a lunatic, and it was not shown that the writ had come to his knowledge, or that he wilfully evaded service of the same: (*Holmes* v. *Service*, 15 C. B. 293; 28 L. & Eq. 855.) Under the old practice, a distringas would have been granted in this case: (See *Rawson* v. *Move*, 8 Dowl. 412; *Jones* v. *Evans*, 6 8 Dowl. P. C. 425; *Blake* v. *Cooper*, 11 C. B. 680; *Wilkins* v. *Jones*, 8 D. & L. 747; *Sheppard* v. *Williams*, 11 C. B. 682; *Banfield* v. *Darell*, 13 L. J. Q. B. 202.)

(*j*) The affidavit must, in addition to the above, shew the fact that no appearance has been entered: (See *McAlpin* v. *Gregory*, 1 C. B. 299; *Drage* v. *Bird*, 5 D. & L. 617.) The search for appearance should be as recent as possible before making application: (See *Hooker* v. *Townsend*, 1 Hodg. 204.) If possible, on the same day that application is made: (*Spence* v. *Barker*, 8 Dowl. P. C. 296.) The affidavit must show when the search was made: (*McClaine* v. *Abrahams*, 3 Scott, N. R. 474; 10 L. J. C. P. 318; *Penney* v. *Thoms*, 6 L. J. C. P. 65.) The day of search must be shown to be after the expiration of the time limited by the writ for defendant to appear: (*Brian* v. *Stretton*, 1 C. & M. 74, 1 Dowl. 642.) The service of the writ must be shown to have been regular: (*Wakley* v. *Teesdale*, 2 L. M. & P. 5; *Fitzgerald* v. *Evans*, 5 M. & G. 207, 6 Scott N. R. 220.) If the affidavit be amended, and delay thereby ensue, a fresh search must be made: (*McClaine* v. *Abrahams*, 3 Scott N. R. 474.) The old practice also made it necessary for the affidavit to state the place of defendant's residence, or else explain that efforts to find the same were unavailing: (*Crofts* v. *Brown*, 2 D. & L. 935, 7 Q. B. 284; *Halton* v. *White*, 2 M. & G. 295; *Bowser* v. *Austen*, 2 C. & J. 45; *Bradbee* v. *Gustard*, 1 Dowl. N. S. 295; *Russell* v. *Knowles*, 7 M. & G. 1001.)

(*k*) Order in general absolute in first instance, and need not be served: (*Barringer* v. *Handley*, 12 C. B. 720, 14 L. & Eq. 254.) An order so obtained was set aside upon an affidavit made on the part of defendant "that at the time of the issuing of the writ and down to the time of the swearing the affidavit, the defendant was *out of the jurisdiction*:" (*Hesketh* v. *Flemming*, 30 L. & Eq. 259.) An application to rescind the order may, it seems, be made upon affidavits, contradicting those upon which the order was obtained: (*Hall* v. *Scotson*, 9 Ex. 238, 24 L. & Eq. 478.)

(*l*) The application, though it cannot be made until the expiration of the time limited for defendant to appear, should not be delayed for an unreasonable time thereafter: (See *Bromage* v. *Ray*, 9 Dowl. P. C. 559.) Two months have not been considered an unreasonable time: (See *Peyton* v. *Wood*, 15 L. J. Ex. 347.)

(*m*) Taken from Eng. Stat. 15 & 16 Vic., cap. 76, s. 18—Founded upon 1st Rep. C. L. Comrs., ss. 11, 12,

Eng. C. L. P. A., 1852, s. 18.

Summons to a party being British subject residing out of the jurisdiction of the said Courts.

Service thereof, &c.

ject, is residing out of the Jurisdiction of the said Superior Courts, (*n*) it shall be lawful for the Plaintiff to issue a Writ of Summons in the form contained in the Schedule (A) to this Act annexed, marked No. 3, (*o*) which Writ shall bear the indorsement contained in the said form, purporting that such Writ is for service out of the Jurisdiction of the said Superior Courts, and the time for appearance by the Defendant shall be regulated by the distance from Upper Canada of the place where the Defendant is residing, having due regard to the means of, and necessary time for postal or other communication; (*p*) and it shall be lawful for the Court or Judge, upon

13.—Applied to County Courts. Proceedings to out-lawry have been done away with, and the present enactment is substituted therefor.

(*n*) *Residing out of jurisdiction, &c.*—See Story's Conf. Laws, ss. 41-43. See also note *i* to s. xliii. of this Act. The Eng. Act adds: "In any place except in Scotland or Ireland." This omission is here noticed because the practitioner may find decisions in England to him otherwise unaccountable. As to the Jurisdiction of the Courts of Common Law in Upper Canada, see note *h* to s. xvi. of this Act.

(*o*) One point of difference between this and the ordinary writ (xvi) is, that this writ does not specify the time for appearance, (note *p. infra*;) but as a general rule the law already explained with respect to the contents of a summons, ss. xvi., xvii., xviii., xix.—the issuing of a summons, (s. xx.)—the indorsements, (s. xxi., xxv., xxvi.)—and the renewal of a summons, (s. xxviii., xxix., xxx.) will apply to writs issued under this section. The indorsement of the "debt" and costs under s. xxvi, when the summons is issued for the recovery of a "debt," differs from the indorsement made necessary by this section in one particular. Under s. xxvi., the time allowed for payment of the debt and costs, is "eight days." Under this section it is "two days less than the time limited for appearance: (See Sch. A, No. 3.) In effect, however, both provisions coincide as the time limited for appearance in the ordinary writ, is 10 days (s. xvii.) It is uncertain whether the indorsement required by s. xxxii. applies to this writ. It would appear that the special indorsement required by s. xli. does not apply.

(*p*) From what has been already mentioned, it will be observed that provision is made by this Act for two forms of writs of Summons. The first (s. xvi.) contemplates the case of a person, who either is or is supposed to be residing *within the jurisdiction*, and in such case the time for appearance is fixed in all cases at ten days, and certain proceedings may be taken in case personal service cannot be effected (s. xxxiv.) The second form of writ, that given by this section, (s. xxxv.) provides for those cases where the defendant, being a British subject, is resident *out of the jurisdiction*, and in this case the time for entering an appearance is to be regulated by the distance the defendant resides from Upper Canada. Two different cases are separately contemplated. Where, therefore, defendant, being a British subject, resident *without the jurisdiction* was proceeded against under s. 2 of 1st Eng. C. L. P. Act (s. xvi. of ours), which provides for the case of defendants within the jurisdiction, an order obtained under s. 17 of the same Act (s. xxxiv. of ours) allowing plaintiff to proceed, as if personal service had been

being satisfied, (*q*) that there is a cause of action which arose within the Jurisdiction, or in respect of the breach of a contract made within the Jurisdiction, (*r*) and that the Writ was personally served upon the Defendant, or that reasonable efforts were made to effect personal service thereof upon the Defendant, and that it came to his knowledge, and either that the Defendant wilfully neglects to appear to such Writ, or that he is living out of the Jurisdiction of the said Courts, in order to defeat or delay his creditors, to direct from time to time, that the Plaintiff shall be at liberty to proceed in the action, (*s*) in such manner, and subject to such conditions as to such Court or Judge may seem fit, having regard to the time allowed to the Defendant to appear being reasonable, and to the other circumstances of the case: (*t*) Provided always, that the

If Service cannot be made.

Order in such case by the Court or a Judge, on Affidavit.

effected, was set aside: (*Hesketh* v. *Flemming*, 30 L. & Eq. 529.)

(*q*) "*By affidavit*" in English Act. It is not known whether the omission of these words by our Legislature was intended or accidental. Whether or not, the usual mode of satisfying the Court in cases like the present is "by affidavit." It may be stated that the only mode of *satisfying* a judicial tribunal is by legal evidence—either written or oral,—and that the clause under consideration must be read consistently with the common law principles. An affidavit, if used, should contain averments of—1. The cause of action; 2. The residence of defendant; 3. Service or attempted service. (See note *t*, *infra*.) In preparing such an affidavit, plaintiff's attorney cannot do wrong in following the form of affidavits to hold to bail so far as applicable. (See s. xxiii. note p. 41.) An irregularity in the affidavit may be waived by attending before the Master: (*Harrison* v. *Williams*, 24 L. T. Rep. 143.)

(*r*) A writ of summons having been served on the defendant in France, he appeared by attorney, and the declaration having been delivered, he obtained an order to inspect, and inspected the promissory notes on which the action was brought. He then applied to set aside the writ and subsequent proceedings, on the ground that the action was brought for a breach of contract made *beyond the jurisdiction*. Held that he was estopped: (*Forbes* v. *Smith*, 29 L. & Eq. 415.) There is such a thing as attornment to the jurisdiction. Where the Secretary of a Legation otherwise privileged by virtue of his office appeared and pleaded to an action commenced against him: Held that by voluntarily attorning to the jurisdiction he was estopped from applying to the Court to strike out his name, or to stay proceedings on the ground of his privilege: (*Taylor* v. *Best et al*, 14 C. B. 487, 25 L. & Eq. 383.)

(*s*) *i.e.* "As if personal service had been effected," (s. xxxiv.) Proceedings to be taken by plaintiff should be under s. lxi.

(*t*) Before being entitled to proceed under this section, it is necessary for plaintiff to satisfy the Court upon one or more of these heads:—1. That there is a cause of action which arose within the jurisdiction, &c. (As to which see p. 43, s. xxiii, note div. 5, intitled "cause of action.") 2. That the writ was personally served on defendant, or that reasonable efforts were made to effect personal service, *and* that it came to his knowledge. (As to "personal service," see s. xxxiv. note *f*; "reasonable efforts, &c.," see same sec. note *i*;

Proviso: Plaintiff must prove his case.

Plaintiff shall be and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a Jury on an assessment in the usual mode, (*u*) or by reference to compute in the manner hereinafter provided, (*v*) according to the nature of the case, as such Court or Judge may direct, and the making such proof shall be a condition precedent to his obtaining Judgment. (*w*)

(*App. Co. C.*)

Eng. C. L. P. A. 1852, s. 19.

If the defendant be not

XXXVI. (*x*) In any action against a person residing out of the jurisdiction of the said Courts, and not being a British subject, the like proceedings may be taken as against a British subject resident out of the Jurisdiction, (*y*) except that

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"writ coming to defendant's knowledge," see same note.) 3. That defendant either neglects to appear to the writ, or is living out of the jurisdiction in order to defeat or delay his creditors. "Wilful neglect to appear," or "living out of jurisdiction to defeat, &c.," these can seldom be sworn to as positive facts. They must arise as presumptions from the facts disclosed to the Court. To prove simply that defendant has not appeared, from which the presumption arises that he has neglected to appear, it will undoubtedly be necessary to show that no appearance has in fact been entered. (As to which see s. xxxiv. note *j*.)

A. B., who had contracted a debt in England, went to Melbourne, in Australia. He was there sued by his creditor, who issued a writ under the section in the English Act, which corresponds with the one under consideration. He was required by the writ to appear within five months. Having been personally served, and no appearance having been entered, application was made by plaintiff for liberty to proceed, without giving any notice of declaration. An order was thereupon made by a Judge in Chambers, "that the plaintiff should be at liberty to proceed in the action by filing a declaration against the defendant, requiring him to plead thereto in eight days, and by sticking up a notice of such declaration in the Master's office, and that in default of the defendant pleading within the said eight days, it be referred to one of the Masters to examine into and see that the plaintiff's case is proved by affidavit or otherwise, as the Master shall see fit, and that the plaintiff shall be at liberty to sign final judgment, for the amount found due by the Master:" (*Firmin* v. *Perry*, 27 L. T. Rep. 72.)

(*u*) As to which see Chit. Archd. 8 Edn. 443.

(*v*) In s. cxliii. of this Act.

(*w*) It is apprehended that judgment once obtained will carry with it the incidents of any ordinary judgment. The fruit of the judgment is of course the execution. It may be issued in the usual mode, and perhaps issued forthwith. (See ss. clxxxii-ccv. of this Act.) There does not seem to be any good reason against holding that certificates of judgment may be obtained and registered as in other cases. (See s. xv.)

(*x*) Taken from Eng. Act, 15 & 16 Vic. c. 76, s. 19.—Founded upon 1st Rep. C. L. Com. (ss. 11, 12, 13, 14.) Applied to County Courts. This is also a substitution for the tedious, expensive, and unmeaning process of outlawry, which has been abolished.

(*y*) In a former note (s. xxxv. note *p*) writs of summons were said to be of two classes—those issued against defendants *within* the jurisdiction; and those against defendants *without* the jurisdiction. It is now necessary to subdivide the latter class into—1. Those against British subjects; 2. Those against persons *not be-*

the Plaintiff shall, instead of a Summons mentioned in the next preceding Section, issue a Writ of Summons according to the form contained in the said Schedule (A,) marked No. 4, and shall in manner aforesaid serve a notice of such last-mentioned Writ upon the Defendant, which notice shall be in the form contained in the said Schedule, also marked No. 4, (*z*,) and

a British Subject.

ing British subjects, resident abroad. For this latter description of defendants the present section provides. It will seldom happen that proceedings will be taken against defendants resident abroad, unless such defendants have property liable to execution in Upper Canada. Proceedings under any other circumstances would be, in most cases, comparatively useless. The Common Law Courts may by their process, act upon property within their jurisdiction; but in no case can they affect the person of a defendant without their jurisdiction: (See *Buchanan* v. *Rucker*, 9 East 191.) In the case of a defendant resident abroad there can be no *complete* remedy against him, unless by suing him in the courts of the country where he resides. The rule is, that those who seek redress from a foreigner or others resident abroad, must resort to the *forum* of the defendant. The enactments here annotated attempt to make such a defendant in a manner amenable to our Courts.

It is sought to accomplish this end by acting upon the property of defendant, and thereby notifying him of its danger, in order that he may, if so disposed, satisfy the claim against him. The C.L. Commissioners very justly observed that wherever property was situate within the jurisdiction, the probabilities were that some means of communication with the owner would be found to exist. Defendants being foreigners, without the jurisdiction, may be considered as of two descriptions: 1. Such as were at one time resident in Upper Canada, but have gone abroad; 2. Such as are and always have been foreigners, never having been in Upper Canada. With respect to these, the Act does not seem to make any distinction. True it is that the notice given in the schedule is addressed to "C. D., *late* of the city of Hamilton in Upper Canada," but it continues "*or* (now residing at Buffalo, in the State of New York):" (No. 4, Sch.) The word "or" seems to place matters in the alternative, *i.e.*, defendant may be addressed as "late of, &c., *or* now residing, &c." This must be the meaning, for it never could have been the intention of the Legislature that the remedies prescribed by this section should be confined to the case of parties at one time resident in Upper Canada. As regards these latter, a further remark may be made. If a defendant having been a resident in Upper Canada, and having acquired property therein, and contracted debts subsequently, depart from the Province, leaving the property behind him, it may be that he can be proceeded against as an absconding debtor: (See ss. xliii. to lviii. of this Act.) One distinction would appear to be this:—Proceedings against an absconding debtor are commenced by a writ of attachment sued out *shortly* after his departure. Proceedings against a resident abroad may be had at any distance of time after his departure from the Province, provided the Statutes of Limitations do not interfere. Besides a comparison of the sections here annotated, with those relative to absconding debtors will show that there are other cases in which a plaintiff's remedy must be exclusively under the sections here annotated.

(*z*) The only material difference between the forms here given and those under s. xxxv. is in the notice and its service. A notice, the form of which

such service or reasonable efforts to effect the same, (*a*) shall be of the same force and effect as the service or reasonable efforts to effect the service of a Writ of Summons in any action against a British subject resident abroad (*b*), and by leave of the Court or a Judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon. (*c*)

Consol Stat. C. Ch 22 § 48.

(App. Co. C.) Eng. C. L. P. A., 1852, s. 20. Amendment

XXXVII. (*d*) If the Plaintiff or his Attorney shall omit (*e*) to insert in or indorse (*f*) on any Writ or copy thereof, (*g*) any of the matters required by this Act to be inserted therein

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is given in the Schedule addressed to defendant, and informing him that a writ has been issued, must be served on defendant in lieu of a copy of the writ. This is to prevent a difficulty which occurred to the C. L. Commissioners in the service of the process of one Court within the jurisdiction of another, on a foreigner resident within the latter. Instead of serving the writ itself, it is thought that the difficulty will be obviated by serving the notice made necessary by this section. In other respects, the proceedings made necessary by this section resemble proceedings against British subjects residents abroad: (see s. xxxv.)

(*a*) Reasonable efforts—what. See s. xxxv. note *i*.

(*b*) As to such see s. xxxv., and notes thereto generally.

(*c*) The C. L. Comrs. in their suggestions for the enactment of the practice set forth in this section, had before them the example of France. Reference was made by them to *Le Code Civil*, Art. 14, which, translated, is as follows: "A foreigner non-resident in France can be cited before the French tribunals for the enforcement of obligations contracted by him in France with a Frenchman. He can also be summoned before the French courts for obligations contracted by him in a foreign country with a Frenchman: (See Code Napoleon, "By a Barrister," Story's Conflict of Laws, 452.)

(*d*) Taken from Eng. Act, 15 & 16 Vic. c. 76, s. 20.—Applied to County Courts. Also a *verbatim* copy of our old Rule, 10 H. T. 13 Vic., which was taken from Eng. R. G. 10, M. T. 3 Wm. IV.: (Jervis N. R. 96; 9 Bing. 445.)

(*e*) "*Shall omit*," &c. This section seems to apply only to omissions in writs or indorsements. *Mistakes* are provided for by s. ccxci. If this be the true construction, applications under this section will be much narrowed down. The word "omit," as used here, has not yet received a judicial interpretation. (See note *k*, *infra*.)

(*f*) The expression "*Insert or indorse*" applies as well to the contents of the writ as to its indorsements. If the forms in schedule A, Nos. 1, 2, 3, 4, 5, and 6 be not strictly followed, this section will apply.

(*g*) The Court always had power to amend the writ, which was the act of the court; but not the copy, which was the act of the party: (see *Byfield* v. *Street*, 2 Dowl. P. C. 739; *Eccles* v. *Cole*, 8 M. & W. 537; *Lyman* v. *Brethron*, 2 U. C. Cham. R. 108: *Nicoll* v. *Boyne*, 2 Dowl. P.C. 761.) An amendment, therefore, when made of the original writ, but not of the copy served, often caused a variance which placed the party affected in a worse position than before amendment. The powers formerly vested in the Courts as regards original writs is by this section extended to the *copy* also. Still it remains a question whether a copy can be amended after service, so as to

or endorsed thereon, such Writ or copy thereof shall not on that account be held void; (*h*) but it may be set aside (*i*) as irregular, (*k*) or amended, (*l*) upon application to be made to

If the plaintiff omits any thing in the indorsement on, or in the writ.

make such service good. The copy under such circumstances, instead of being under the control of plaintiff is in the hands of defendant: (See Macmara on Nullities, 192; *Byfield* v. *Street*, *ante*; also see *Crow* v. *Field*, 8 Dowl. P.C. 231; *Hall* v. *Redington*, 5 M. & W. 605.) Even if defendant were directed to produce the copy served for the purpose of amendment, the Court by ordering the amendment would be ordering a fiction by making it appear that defendant had been served with the amended copy: (see *Cornish* v. *Hockin*, 1 El. & Bl. 602.) Amendment allowed on terms of re-service: (*Davis* v. *Carruthers*, Chambers, Sept. 22, 1856, Burns, J.) Where after arrest made on a de[illegible] capias, the writ was amended; but defendant discharged, the Judge refused to impose the condition that defendant should be again arrested on the writ as amended: (*Lyman* v. *Brethron*, 2 U.C.Cham.R. 108.) Where a Judge in Chambers improperly ordered a *writ* and service to be set aside, the Court above amended his order by setting aside only the copy and service: (*Tadman* v. *Wood*, 4 A. & E. 1011.)

(*h*) An irregular proceeding is good for many purposes. It remains in force until set aside. A nullity has no effect whatever. A nullity is therefore incapable of being amended: (Macnamara on Nullities, 24.)

(*i*) "*May be set aside*," &c. This of course intends an application to be made by the party adverse to the party whose proceeding is defective. But it is apprehended that the party in fault may, if he be the first to perceive the irregularity himself, apply to have it amended: (Lush. Pr. 2 Edn. 750)

(*k*) An irregularity is defined to be the want of adherence to some prescribed rule or mode of proceeding. It consists either in omitting to do something that is necessary for the due and orderly conduct of a suit, or doing it in an improper manner: (See Tidd N.P. 261.) By the former is meant "omissions," by the latter "mistakes."

(*l*) An amendment has been generally allowed where the situation of the parties was not changed by it, and where otherwise there would have been a failure of justice: (*Plock* v. *Pacheo*, Alderson, J., 1 Dowl. N.S. 383; see also *Goodchild* v. *Leadham*, 5 D. & L. 383; Macnamara on Nullities, 48.) Where an irregular proceeding was amendable, as of course the Court refused to set it aside: (See *Popkins* v. *Smith*, 7 Bing. 434.) Since the Uniformity of Process Act in England, it has been unusual for the Judges to amend the forms of Process prescribed by that Act, except where the Statute of Limitations would otherwise be a bar to the action, or where the irregularity was a mere clerical error: (See *Lakin* v. *Watson*, 2 Dowl. P. C. 633; *Mills* v. *Gossett*, 1 Scott 313; *Partridge* v. *Wellbank*, 5 Dowl. P. C. 93; *Brown* v. *Fullerton*, 13 M. & W. 556; *Christie* v. *Bell*, 16 M. & W. 669: *Carne* v. *Mallins*, 20 L. J. Ex. 434; *Green* v. *Kettleby*, 8 Dowl. P. C. 783.) The following cases, though not strictly examples of "omissions," may be referred to in illustration of these remarks:

(1.) *Name of Plaintiff—Moody* v. *Aslatt*, 3 Dowl. P.C. 486; *Carne et al.* v. *Malins et al.* 2 L. M. & P. 498.

(2.) *Name of Defendant—Carr* v. *Shaw*, 7 T. R. 299; *Rutherford* v. *Mein*, 2 Smith, 392; *Wood* v. *Hume*, 4 D. & L. 136; *Goodchild* v. *Leadham*, 5 D. & L. 383; see also *Sale* v. *Crompton*, 2 Str. 1209.

(3.) *Date of Writ—Kirk* v. *Dalby*, 8 Dowl. 766; *Williams* v. *Williams*, 10 M. & W. 476; *Mavor* v. *Spalding*, 1 D. & L. 878; *Culverwell* v. *Nugee*, 4 D. & L. 30; *Campbell* v. *Smart*, 5 C. B. 196.

(4.) *Teste of Writ—Wakeling* v. *Watson*, 1 C. & J. 467; *Edwards* v. *Collins*,

the Court out of which the same shall issue, or to a Judge; (*m*)

5 Dowl. P. C. 227; *Corroll* v. *Faulkes*, 5 D. & L. 590; *Myers* v. *Rathburn*, Tay. U. C. R. 159.

All important cases with respect to the amendment of process, decided since the Uniformity of Process Act will be found collected in a note to *Wood* v, *Hume*, 4 D. & L. 139 *a*.

The reluctance of the Court to amend the writ when not in strict compliance with the Uniformity of Process Act did not extend to *indorsements* upon the writ. A distinction was made between non-compliance with the terms of an Act of Parliament and of a Rule of Court: (See *Cooper* v. *Waller; Tabram* v. *Thomes*, 3 Dowl. P. C. 167.) The forms of the writ were prescribed by the Eng. St. 3 & 4 Wm. IV. c. 39. The indorsements were made necessary by Rules H. T. 2 Wm. IV. R. II. and M. T. 3 Wm. IV. No. 5. The following cases in refcrence to amendment of indorsements may be useful:—

(1.) *Indorsement required by s.* xxvi. *of our C. L. P. Act as to debt and costs* —See *Urquhart* v. *Dick*, 3 Dowl. P. C. 17; *Shirley* v. *Jacobs*, 3 Dowl. P. C. 101; *Cooper* v. *Waller*, 3 Dowl. P. C. 167; *Trotter* v. *Bass*, 3 Dowl. P.C. 407.

(2.) *Indorsement on pluries writ*, of date of issue of former writ—*Medlicott* v. *Hunter*, 5 Ex. 34.)

The writ and indorsements as regards amendment must now be deemed upon an equal footing. The C. L. P. Act makes no distinction. An enactment similar to the one here annotated has been introduced into the recent Bills of Exchange Act in England. Where a writ issued under that Act omitted the name of the maker of the note sued upon, the Court allowed the indorsement to be amended: (*Knight* v. *Pocock*, 17 C. B. 177.)

(*m*) 1—*Generally as to proceedings by Summons and Order.* Unless a distinction is made in a Statute between the powers of a Judge in Chambers and those of the Court, the Judge has the same powers as the Court: (*Smeeton* v. *Collier*, per Parke B. 1 Ex. 459.) And where a Judge exercises the duties which belong to the Court, it is to be taken that he is to exercise them in the same manner as the Court itself, unless there is something in the context of the Statute which leads to a different construction: (*Ib.* p. 463.) If the Judge to whom an application is made, having in the matter before him concurrent jurisdiction with the full Court, refuse the order applied for, an appeal as a general rule will lie to the full Court: (See *Chapman* v. *King*, 16 L. J. Ex. 15; *Teggin* v. *Langford*, 10 M. & W. 556; *Stokes* v. *Grissell*, 2 N. C. L. Rep. 730.) A Judge in Chambers has the same jurisdiction in respect of the costs of a summons as the Court whom he represents has over the costs of a rule: (*Doe d. Prescott* v. *Roe*, 9 Bing. 104; In re *Bridge and Wright*, 2 A. & E. 48; *Sheriff* v. *Gresley*, 1 H. & W. 588; *Davy* v. *Brown*, 1 Bing. N. C. 460; *Wilson* v. *Northorp*, 4 Dowl. P. C. 441.) The practice formerly was otherwise: (See *Spicer* v. *Todd*, 2 C. & J. 165; *Read* v. *Lee*, 2 B. & Ad. 415.) The Judge who makes an order may, if so disposed, fix the amount of costs: (*Collins* v. *Aron*, 4 Bing. N. C. 233.) If the Judge in any matter before him exceed his jurisdiction, it is the duty of the party affected by his order, to apply to the Court to vary or rescind it, on the ground that it is not the result of a correct exercise of discretion. It is said that there is no inflexible rule as to the period at which such application should be made; but the party must at least apply within a reasonable time. Two years is an unreasonable time: (*Griffin et al* v. *Bradley*, 6 C. B. 722.) Reasonable time means at all events before next step taken: (*Meredith* v. *Gillars*, 22 L. J. Q. B. 373.) If an order appear to have been made "by consent," the Court cannot presume that it is incorrect. A party to the order cannot move the Court to set aside an order made with his own consent. If the words "by consent" were improperly

and such amendment may be made upon any application to set

inserted, then application should be made to the Judge to set the order aside: (*Hall* v. *West*, 1 D. & L. 412.) Under the Interpleader Acts, an order by consent disposing of the property in dispute, though bad for not stating the consent on the face of it, was held to be a good award between the parties who had consented: (*Harrison* v. *Wright*, 13 M. & W. 816.) The Court cannot take notice of a consent on a summons unless followed in due time by an order drawn up and served: (*Wood* v. *Harding*, per Maule J. 3 C. B. 969.) And generally an order is of no force till served: (See *Belcher* v. *Goodered*, 4 C. B. 472.) If a party lie by for an unreasonable time after an order has been made and served, and after that order has been made a rule of Court, he cannot move the Court to set it aside: (*Clement* v. *Weaver*, Tindal C. J. 3 M. & G. 555.) When the order has once been made a rule of Court, the application should be to set aside the rule of Court in which the Judge's order is merged: (*Ib.* 553; see also *Cassidy* v. *Steuart*, 2 M. & G. 439, n. *a*.) On a motion in Court to rescind a Judge's order, the affidavits on which such order was obtained should be before the Court: (*Needham* v. *Bristowe*, 4 M. & G. 262; *Pocock* v. *Pickering*, 21 L. J. Q. B. 365.) The rule, if obtained, should be drawn up on reading the affidavits filed in Chambers: (See *Edwards* v. *Martin*, 21 L. J. Q. B. 87 n; *Grissell* v. *Stokes*, 2 N. C. L. Rep. 730, and notes thereto.) As to Rules, Summonses, and Orders, see N. Rs. 119-160 inclusive.

2—*Particularly as to applications under this enactment.*

In ordinary cases the application should be made in Chambers. If the irregularity happen during vacation the application should always be made in Chambers: (*Cox* v. *Tullock*, 2 Dowl. P. C. 47; *Hinton* v. *Stevens*, 4 Dowl. P. C. 283, Bag. Cham. Pr. 96.) If the party applying be dissatisfied with the decision of the Judge and an appeal to the full Court be intended, the motion should be made as early as possible during the following term: (See *Sugars* v. *Concanen*, 5 M. & W. 30; *Collins* v. *Johnson*, 16 C. B. 588.) When notice of intention to move necessary: (See *Dougall* v. *Maclean*, Dra. Rep. 330; and *Ferrie* v. *Tannahill*, *Ib.* 340.) If the question before the Judge in Chambers be whether the application to set aside process for irregularity, is made in sufficient time, it is a question for his discretion, and it would seem that the Court will not review his decision: (See *Tadman* v. *Wood*, 4 A. & E. 1011.) The Court will very seldom entertain an appeal against the decision of a Judge in Chambers, declining to give effect to a motion for irregularity: (*Gilmour et al.* v. *Wilson et al.*, 4 U. C. R. 154.) *Semble* although the Judge himself might entertain the application a second time, yet he is not bound to do so upon a mere irregularity: (*Ib.* per Robinson, C. J.) A Judge in Chambers has authority to open again an order granted by himself, or even to rescind it before it has been carried into effect, upon his discovering that that he has made it inadvertently, or that he has been surprised into making it by any perversion or concealment of facts: (*Shaw et al.* v. *Nickerson*, and *Gillespie et al.* v. *Nickerson*, per Robinson, C. J. 7 U. C. R. 543.) The motion should be either that the writ be set aside or amended at the costs of the plaintiff. All such applications, whether to the Court or a Judge, should be promptly made—as a general rule—within the time allowed by the writ for appearance: (*Tiling* v. *Hodgson*, 13 M. & W. 638; *Tyler* v. *Green*, 3 Dowl. P. C. 437; *Herbert* v. *Darley*, 4 Dowl. P. C. 726; *Edwards* v. *Collins*, 5 Dowl. P. C. 227; *Davis* v. *Skerlock*, 7 Dowl. P. C. 530; *Child* v. *Marsh*, 3 M. & W. 433.) It must be borne in mind, when referring to English authorities, that the time limited for appearance in ordinary cases used to be, there as here, only *eight* days. It is now *ten* days in both countries. Cases, therefore, under the old.

aside the Writ, upon such terms as to the Court or Judge may seem fit. (*n*)

practice deciding that applications made eight, nine, or ten days after knowledge of the irregularity were too late, cannot be received as positive authority under the new practice. By rule of Court "It is ordered that 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 the knowledge of the irregularity": (N. R. 106 T.T. 20 Vic.) This rule must not be rigidly construed as applying to persons in close custody: (*Barry* v. *Eccles*, 2 U. C. R. 383, P. C. Hagerman J.) *Sed qu.* "We cannot admit the argument advanced on behalf of the defendant, that because she is a prisoner, she is entitled to greater favor than any other person": (*Claridge* v. *McKenzie*, Tindal, C. J., 2 Dowl. N. S. 898. Also see Chit. Arch. 8 Edn. 1271, and cases cited in note *n*.) The rule applies to the representatives of the party as well as to the party himself: (Chit. Arch. 8 Edn. 1271.) But it applies to the party's own acts only, and not to acts done by the opposite party for him: (*Ib.*)

1. "*Reasonable time,*" *as applied to the setting aside of mesne process*—five days reasonable: (*Firley* v. *Rallett*, 2 Dowl. P. C. 708.) Six days reasonable: (*Smith* v. *Pennell*, 2 Dowl. P. C. 654.) Twenty-three days not so: (*Fownes* v. *Stokes*, 4 Dowl. P. C. 125.) From 4th June till following M.T. too late: (*Lewis* v. *Davison*, 3 Dowl. P. C. 272.) Arrest 28th August, application 6th November following, too late: (*Parker* v. *Bayley*, 5 D. & L. 296; also see Chit. Arch. 8 Edn. 1271.) The time begins to run from the time when the party complaining had the *means of knowledge*, though in fact he did not *know* of the irregularity till afterwards: (*Lewis* v. *Davison*, 1. C. M. & R. 655; *Seymour* v. *Maddox*, 1 L. M. & P. 543.)

2. "*Fresh step*" *after knowledge of the irregularity as applied to process*—Too late after appearance: (*Fox* v. *Money*, 1 B. & P. 250; *Hompay* v. *Kenning*, 2 Chit. 236; see also *Steele* v. *Morgan*, 8 D. & R. 450.) Too late after justification of bail: (*Jones* v. *Prince*, 1 East. 81.) Too late after bail perfected: (*Chapman* v. *Snow*, 1 B. & P. 132.) For this purpose the affidavit to hold to bail is part of the process: (*D'Argent* v. *Vivant*, otherwise *Taylor*, 1 East. 330.)

The following have been held to be "fresh steps" so as to estop defendant objecting to previous irregularities. An undertaking to appear: (*Anon.* 1 Chit. 129; *Holliday* v. *Lawes*, 3 Bing. N. C. 541.) Payment of part of debt and costs: (*Monday* v. *Sear*, 11 Price 122.) Admission of the debt with a request for time: (*Rawes* v. *Knight*, 1 Bing. 132.) Demand of declaration not a fresh step: (*Hodgson* v. *Dowell*, 3 M. & W. 284.) A defendant having appeared and examined evidence on an assessment of damages which had been carried down by a writ of trial issued from the Queen's Bench, under our St. 8 Vic. c. 13 s. 54, was held by such conduct to have waived irregularities in the proceedings before then had in the Queen's Bench: (*Small* v. *Beasely*, 3 U. C. R. 141.) If defendant lie by and allow plaintiff to take several steps he thereby waives all previous irregularities in his proceedings: (*Arnold* v. *Fish*, 5 O. S. 140; *Proctor* v. *Young*, H. T. 4 Vic. *M.S.* R. & H. Dig. "Irregularity" 15.) If he move a Judge in Chambers, he must state all the irregularities he relies upon, and cannot afterwards in term resort to other irregularities, which, though existing at the time of the application in Chambers, were then passed over without objection: (*Arnold* v. *Fish*, 5 O.S.140.) The summons should state the several objections intended to be insisted on: (See N. R. 107.)

(*n*) It is thought that the Court will impose costs upon the plaintiff only in cases of irregular proceedings, such as before the act would have been set aside. (Lush. Pr. 250.) Formerly it was not

XXXVIII. (*o*) If either of the forms of Writ of Summons contained in the Schedule (A) to this Act annexed, and marked respectively Nos. 1, 3, and 4, shall by mistake or inadvertence be substituted for any other of them, (*p*) such mistake or inadvertence shall not be an objection to the Writ or any other proceeding in such action; (*q*) but the Writ may, upon an *ex parte* application to a Judge (*r*) either before or after any application to set aside such Writ or any proceeding thereon, and whether the same or notice thereof shall have been served or not, be amended by such Judge, without costs. (*s*)

(*App. Co. C.*) Eng. C. L. P. A., 1852, s. 21.

Amendment if one form of writ be substituted by error for another.

usual to set aside process where there was a substantial compliance with the Act, or Rules regulating the same: (See *Yardley* v. *Jones*, 4 Dowl. P. C. 45; *Lewis* v. *Davison*, 5 Tyr. 198; *Pickman* v. *Collis*, 3 Dowl. P. C. 429; *Englehart* v. *Eyre*, 2 Dowl. P. C. 145; *Youlton* v. *Hall*, 7 Dowl. P. C. 175; *Arden* v. *Jones*, 4 Dowl. P. C. 120; *Rust* v. *Chine*, 3 Dowl. P. C. 565; *King* v. *Monkhouse*, 2 Dowl. P. C. 221.) These cases are noted not so much as authorities applicable to the state of our laws, as proofs that it was not usual for the court to set aside process *when there was a substantial compliance with the governing Statute or Rule of Court.* Each case must rest upon its particular circumstances. The discretion of a Judge in Chambers in such matters when exercised by him will be seldom reviewed by the Court above: (*Tudman* v. *Wood*, 4 A. & E. 1011.) In the first place, it appears that application under this section will in general be made by an adverse party. It will, in most cases, be by a defendant seeking to set aside proceedings for irregularity, or to have them amended by the plaintiff. In many cases if the application succeed, it may be held that plaintiff ought of right to pay the costs, inasmuch as his error occasioned the application: (See *Urquhart* v. *Dick*, 3 Dowl. P. C. 17; *Turner* v. *Gill*, 3 Dowl. P. C. 30; *Shirley* v. *Jacobs*, 3 Dowl. P. C. 101; *Cooper* v. *Waller*, 3 Dowl. P. C 167.) If the rule or order be moved with costs, and be afterwards discharged without any special directions as to costs, it will be understood as with costs: (See N. R. 108.)

(*o*) Adopted from Eng. St. 15 & 16 Vic. c. 76, s. 21.—Applied to County Courts.

(*p*) The preceding section (xxxvii.) applies to omissions in process generally. The present section applies only to the erroneous substitution of one of the three forms of writs given in the Schedule for any other of them.

(*q*) Where the form No. 1 to be used when the defendant resides within the jurisdiction was substituted for form No. 3, the defendant being resident without the jurisdiction, the Court, though they did not set aside the writ, set aside an order obtained by plaintiff allowing him to proceed as if personal service had been effected: (*Hasketh* v. *Flemming*, 30 L. & Eq. 259.) But independently of this enactment, the Court, it seems, has the power to order all amendments to be made necessary for determining the real question in controversy between the parties: (See s. ccxci. of this Act, and *Cornish* v. *Hockin*, 1 El. & B. 602.)

(*r*) This is an enabling clause, and it is the plaintiff who is to avail himself of it: (per Coleridge, J. in *Hasketh* v. *Flemming*, 30 L. & Eq., p. 261.)

(*s*) The difference between this and the preceding section (xxxvii.) with respect to costs, should be noticed.

(App. Co. C.) Eng. C. L. P. A., 1852, s. 22.

Certain writs may be made concurrent.

XXXIX. (*t*) A Writ for service within the Jurisdiction may be issued and marked as a concurrent Writ with one for service out of the Jurisdiction, and a Writ for service out of the Jurisdiction may be issued and marked as a concurrent Writ with one for service within the Jurisdiction. (*u*)

(App. Co. C.) Eng. C. L. P. A., 1852, s. 23.

Affidavits for enabling proceedings to be taken against a party out of the jurisdiction, before whom to be made.

XL. (*v*) Any affidavit (*w*) for the purpose of enabling the Court or a Judge to direct proceedings to be taken against a Defendant residing out of the Jurisdiction of the said Courts, (*x*) may be sworn (*y*) [before the Chief Justice or Judge of any Court of Superior Jurisdiction in the country wherein such Defendant shall reside or be served, or before the Mayor or Chief Magistrate of any City, Town, or place wherein the Defendant shall reside or be served, or] before any Consul General, Consul, Vice-Consul, or Consular Agent for the time being, appointed by Her Majesty, (*z*) at any foreign port or place [at or near which the Defendant shall reside or be served, (*a*)] and every affidavit so sworn by virtue of this Act,

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Amendments under this section shall be made without costs. Amendments under the preceding section shall be upon such terms as to the Court or the Judge may seem fit.

(*t*) Adopted from Eng. Act 15 & 16 Vic. c. 76 s. 22.—Applied to County Courts.

(*u*) This will assist plaintiff when in doubt as to whether defendant is resident within or without the jurisdiction of the Court, as he may issue concurrent writs of different forms at one and the same time, so as without delay to proceed against defendant in either event. Or if after the issue of an original writ plaintiff discover that he has been mistaken as to the residence of defendant, it only remains for him to issue a concurrent writ of a different form and so to rectify his error, while continuing his proceedings. In the case of several defendants, some resident within and some without the jurisdiction of the Court, the practice will be no less convenient. Though not so enacted, it must be intended that concurrent writs issued under this section should bear the same date as the original writ, and be in force only during the period when such original writ shall be in force: (see s. xxvii. and notes.)

(*v*) Taken from Eng. St. 15 & 16 Vic. c. 76 s. 23.—Applied to County Courts. There are some variations between this and the English section, which will be noticed presently.

(*w*) As to affidavit generally, see p. 41 *ante* s. xxiii. note divs 3, 7, 8, 9, intitled "*Deponent*," "*Commissioner*," "*Signature of Deponent*," and "*Jurat*." See also N. Rs. 109, et seq.

(*x*) *i. e.*, the proceedings mentioned in or referred to in ss. xxxv. and xxxvi.

(*y*) Words in brackets throughout this Section are not in the English Act.

(*z*) "*Appointed by her Majesty*," &c. From these words it would appear that deputies or other consular officers not so appointed have not the power to act under this Act. It may be that if the affidavit purport to be sworn before a consular officer, the Courts will presume an appointment by the Crown till the contrary appear.

(*a*) It seems, according to the current of authority in England, that nei-

may be used and shall be admitted in evidence, saving all just exceptions, (*b*) providing it purport to be sworn (*c*) before [such Chief Justice, Judge, Mayor, or Chief Magistrate], Consul General, Consul, Vice-Consul, or Consular Agent : (*d*)

ther a British Consul nor a British Minister is entitled, by virtue of his office, to administer affidavits: (*Williams* v. *Welch et al.* 3 D. & L. 357; *Le Veux* v. *Berkeley*, 2 D. & L. 31; In re *Baroness Dunsany*, 7 C. B. 119. See also *Picardo* v. *Machado*, 4 B.& C. 886, where the point which arose upon an affidavit to hold to bail taken abroad was discussed but not decided. The Court was equally divided. See also *Ex parte Hutchinson*, 4 Bing. 606.) The power, especially as regards proceedings to be had in a Court of Justice seems to be a statutable one, and only exercisable when the statute is express. The powers conferred by this Act upon certain public officers named does not authorise them to administer *all* affidavits of *either* party to a cause. It is restricted to "any affidavit for the purpose of enabling the Court or a Judge to direct proceedings to be taken *against a defendant* residing out of the jurisdiction of the said Courts," that is, to affidavits made by or on behalf of a *plaintiff*, who is desirous of proceeding with his cause. A general Act (6 Geo IV. c. 87, s. 20,) was passed in England to enable Consuls General and Consuls to administer affidavits and oaths; but the powers thereby given only place these officers upon the same footing as notaries public: (*Ex parte Barber*, 2 Scott, 436.) It has been held that even under that Act neither a Consul General nor a Consul is empowered to take an affidavit in a cause pending in England: (*Le Veux* v. *Berkeley*, 2 D. & L. 31; *Williams* v. *Welch*, 3 D. & L. 357.) Though not entitled to administer any such affidavit himself, the Consul may certify as to the handwriting and authority of the party before whom it is sworn: (*Ex parte Barber*, *ante*.) An affidavit in one case taken in Madeira before a British Consul who in the jurat described himself as "authorised by the *laws of Madeira* to administer oaths in the Island of Madeira," which fact having been certified by a notary public the affidavit was received and filed by the Court: (*Ex parte Hutchinson*, 5 C. B. 499.) The only general Act upon the subject in Upper Canada is that of 12 Vic. cap. 77, and if applicable at all, it can only apply where the defendant is resident *in Lower Canada*. The Courts in Upper Canada are authorised by that Act to appoint resident Commissioners in Lower Canada "to take and receive all and every such affidavit and affidavits as any person or persons shall be willing and desirous to make before any of the persons so empowered in or concerning any cause, matter, or thing depending or hereafter to be depending, *or in anywise concerning any of the proceedings to be had in the said Court of Queen's Bench, or in any other Court of Record in Upper Canada*." Though not strictly applicable to the section under consideration, a reference may be here made to Eng. St. 5 Geo. II. cap. 7 s. 1 as to affidavits to be made in England in proof of debts sued for in this Province. In connexion therewith read *Gordon* v. *Fuller* 5 O. S. 174.

(*b*) *i. e.*, the affidavit if not conformable to our Statutes and Rules of Court so far as they can be justly held to apply, will be open to "exception."

(*c*) "Signed by" are the words used in Eng.C.L.P. Act. The official seal of office does not seem to be made necessary either by this or the English Act.

(*d*) The Eng. C. L. P. Act continues "upon proof of the official character and signature of the person appearing to have signed the same." The omission of this proviso by our Legislature is not without significance. It will throw upon the sentence "provided it (the affidavit) *purport* to be sworn,&c,." the burthen of elucidating how and

Proviso. Punishment for forging signatures, &c.

Provided always, that if any person shall forge any signature (*e*) to any such affidavit, or shall use or tender in evidence any such affidavit with any false, [forged,] or counterfeit signature thereto, knowing the same to be false, forged, or counterfeit, he (*f*) shall be guilty of felony, [and shall, upon conviction, be liable, at the discretion of the Court, to be kept confined at hard labour in the Public Penitentiary of this Province, for a term not less than four years nor more than ten years,] (*g*) and every person who shall be charged with committing any felony under this Act, may be dealt with, indicted, tried, and if convicted, sentenced, and his offence may be laid and charged to have been committed, in the county or place in which he shall be apprehended or be in custody; (*h*) and every accessory before or after the fact to any such offence, may be dealt with, indicted, tried, and if convicted, sentenced, and his offence may be laid and charged to have been committed, in any county or place in which the principal offender may be tried; (*i*) Provided also, that if any person shall wilfully and corruptly make a false affidavit before such [Chief Justice, Judge, Mayor, Chief Magistrate,] Consul General, Consul, Vice-Consul, or Consular Agent, every person so offending shall be deemed and

Accessories.

Proviso: Trial, punishment, &c., for taking false

in what manner an affidavit so sworn shall be receivable—whether purporting to be signed by a person having authority, it shall be *prima facie* taken to have been so in fact; or whether, before being received, it will be necessary to prove *dehors* the affidavit both the official character and the signature of the party who signed, &c. These doubts must be left to the Courts for decision.

(*e*) This may apply either to the signature of the party who administered the affidavit, or of the deponent who signed the same. Probably to both; but certainly to the former.

(*f*) Two descriptions of offenders are here contemplated, 1. Persons who shall forge, &c.; 2. Persons who shall tender in evidence any forged affidavit knowing the same to be forged, &c.

(*g*) Substantially the same as St. 16 Vic. cap. 19 s. 11 (first part,) but the latter act proceeds further, and provides that the Court may direct that the forged document shall be impounded. The punishment for forgery under the general Act 10 & 11 Vic. c. 9 s. 14 is "Hard labour in the Public Penitentiary of this Province for any term not less than three years nor more than seven years," &c.

(*h*) *Any felony under this Act. Qu.* Is it intended that this provision should have a general bearing upon all offences made felony under this Act, and *all felonious* offences committed against the Act? The provision itself as to the crime of forgery, is much the same as the latter part of s. 11 of Stat. 16 Vic., cap. 19, and 10 & 11 Vic. c. 9 s. 17. Both these Statutes have been taken from Eng. St. 1 Wm. IV. c. 66 s. 24: (Russell Cr. 7th Am. Edn. II, 388, 410.) The place in which the offence was committed and language in which the document was written, are equally im-

taken to be guilty of perjury, (*i*) in like manner as if such false affidavit had been made [in Upper Canada] before competent authority, (*j*) and may be dealt with, indicted, tried, and if convicted, sentenced, and his offence may be laid and charged to have been committed, in that county or place where he shall have been apprehended or be in custody. (*k*) (*i*) affidavits out of U. C.

XLI. (*l*) In all cases where the Defendant resides within the Jurisdiction of the Court, (*m*) and the claim is for a debt (*n*) or liquidated demand in money, (*o*) with or without interest, (*p*) arising upon a contract express or implied, (*q*) as for instance, Eng. C. L. P. Act, 1852, s. 25.

material where the offence comes under St. 10 & 11 Vic. c. 9: (See 15th sec.)

(*i*) Same as statutes last mentioned.

(*j*) Substantially the same as St. 12 Vic. c. 77 s. 4.

(*k*) The Eng. C. L. P. Act continues "as if his offence had actually been committed in that county or place."

(*l*) Adopted from Eng. St. 15 & 16 Vic. c. 76 s. 25.—Applied to County Courts. Founded upon first report C. L. Comrs., s. 56. The object of this enactment is to prevent the expense of a declaration: (*Rodway* v. *Lucas*, per Pollock C. B., 10 Ex. 667, 29 L. & Eq. 398.) The very great majority of cases in which actions are brought are "debts," or "money demands," to which there is no defence. It has been considered extremely desirable that in such cases the parties should be put to the least possible expense: (Per Martin B. same case.)

(*m*) This section does not apply to proceedings taken either under ss. xxxv. or xxxvi., for in each of those cases defendant is supposed to be "without the jurisdiction of the Court."

(*n*) "Debt"—meaning thereof: see s. xxvi. note *f*.

(*o*) It should appear upon the face of the indorsement that the claim is for a liquidated demand: (*Rogers* v. *Hunt*, per Parke B. 10 Ex. 474, 28 L. & Eq. 469.) Where in an action on a bill of exchange, the indorsement on the writ was £31 8s 9d, being balance of principal, interest, *and expenses of noting*," &c.: Held that the latter item was not a liquidated demand: (*Ib.*) The endorsement consequently was treated as a nullity, and plaintiff held bound to declare in the ordinary manner: (*Ib.*)

(*p*) The indorsement applies solely to claims which are liquidated, and do not depend on the finding of a jury: (*Rodway* v. *Lucas*, per Parke B. 10 Ex. 667, 29 L. & Eq. 398.) The Court in a later case said, "We wish that it should be distinctly understood by the profession, that in all cases except bills of exchange and promissory notes (as to which it is the usual practice of the Court to allow interest as a matter of course when the jury give a verdict for the plaintiff), if we find that any party not entitled to interest under an express or implied contract shall nevertheless claim it by special indorsement on the writ, in order to gain an improper advantage, and in default of appearance sign judgment for a larger sum than he is really entitled to, we will not only set aside such judgment, but visit the attorney with the consequences of his abuse of the law, by making him pay the costs": (*Rodway* v. *Lucas*, Pollock C. B. 10 Ex. p. 674, 29 L. & Eq. p. 401.) As to interest allowable on protested bills of exchange see Stat. 12 Vic. cap. 76. Same as to "all debts or sums certain payable at a certain time or otherwise," see Stat. 7 Wm. IV. cap. 3 s. 20. And as to interest in the nature of damages over and above the value of goods sued for in actions of trover or trespass *de bonis asportatis*, see same Stat. s. 21.

(*q*) Where the claim is for a debt, &c., "*with or without interest*,

In demands for liquidated sums, certain particulars may be indorsed on the writ.

on a Bill of Exchange, Promissory Note, or Cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, (*r*) or in the nature of a debt or on a guarantee, whether under seal or not, where the claim against the principal is in respect of such debt or liquidated demand, bill, note, or cheque, the Plaintiff shall be at liberty to make upon the Writ of Summons and copy thereof, a special indorsement (*s*) of the particulars of his claim, in the form contained in Schedule (A) to this Act annexed, marked No. 5, or to the like effect; (*t*) and

No further particulars need be given unless on order.

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arising upon a contract express or implied," &c., means with or without *interest arising upon a contract express or implied*, and does not apply to any case where it is optional with the jury to give interest as they may be advised according to the justice of the case: (*Rodway* v. *Lucas*, per Parke B. 10 Ex. p. 672, 29 L. & Eq. p, 400.)

(*r*) *Qui tam* actions included: (See *Hall* v. *Scotson*, 9 Ex. 288.) See also p. 521

(*s*) The indorsement necessary under s. xxvi. is compulsory. This indorsement is discretionary. Plaintiff, if he omit it, must declare in the usual manner, and deliver his bill of particulars according to N. R. 20. Provided that if the case be proper for a special indorsement and the same be omitted, then plaintiff shall not be entitled to the costs of the declaration, &c.: (s. lxi.) Nearly all the indorsements necessary or proper to be made on writs of summons have been noticed in the preceding sections. Two more at least remain to be noticed. If plaintiff intend to claim either a writ of mandamus or of injunction, he must indorse his writ of summons accordingly: (ss. cclxxv. cclxxxiv.)

(*t*) A reference to the form given in the Schedule, by way of example, will show that plaintiff may in his indorsement give credit, as has been commonly done in particulars of demand under the old practice. Where in *assumpsit* for goods, the particulars contained an item of payment "Cr. by bills, £1500": Held that it was to be taken as payment by the defendant to plaintiff: (*Smethurst* v. *Taylor*, 12 M. & W. 545.) If a plaintiff give credit in his particulars of demand for a sum paid by defendant, such payment is held to be upon the same footing as if there had been a plea of payment: (*Goatley* v. *Herring*, 12 Law J. C. P. 82.) But it cannot be taken as an admission as against defendant with respect to any particular items in the account: (*Ib.*) The Court held in one case that they could not compel plaintiff to state the items or sums of money for which he voluntarily gave credit in his particulars: (*Myatt* v. *Green*, 13 M. & W. 337.) It was also held that plaintiff was not precluded from explaining admissions in the particulars of payments made to him by the defendant, and of showing on what account such payments were made: (*Mercy* v. *Galot*, 3 Ex. 851.) It is not necessary for a defendant in Upper Canada to plead payment of any sums credited in the particulars. The following are the rules upon the subject: "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

when a Writ of Summons has been indorsed in the special form hereinbefore mentioned, the indorsement shall be considered as particulars of demand, and no further or other particulars need be delivered, unless ordered by the Court or a Judge. (*u*)

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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": (N.R. Pl. 13.) 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."—(N. R. Pl. 14.) It will be proper to remark that these rules do not come into force until Easter Term, 1857. And that in the meantime the old rules, orders and regulations, (made in pursuance of the Act of Upper Canada, 7 Wm. IV., cap. 3,) shall remain in force. The N. Rs. 13 and 14 are substantially a re-enactment of our old Rule 15 of E. T. 5 Vic. And the latter was copied from the Eng. Rule 19 of T. T. 1 Vic. The Eng. rule was made to settle doubts which arose in the cases of *Ernest* v. *Brown*, 3 Bing. N.C. 674; *Nicholl* v. *Williams*, 2 M. & W. 758; *Kenyon* v. *Wakes*, 2 M. & W. 764; *Coates* v. *Stevens*, 2 C. M. & R. 118; *Booth* v. *Howard*, 5 Dowl. P. C. 438. Since the English rule 19 of T. T. 1 Vic., where, to an action of debt for £44. 8s., the defendant pleaded payment of £15 in satisfaction, the plea was held to be good: (*Turner* v. *Collins*, 2 L. M. & P. 99.) The reason being that since credits given in the particulars of demand *need not now be pleaded*, a less sum than the debt in the declaration might, with credits so given, be equal to such debt: (*Ib.*) Our *old* rule does not apply to set off: (*Rowland* v. *Blaksley et al.*, 1 Q. B. 403; *Townson* v. *Jackson*, 14 L. J. Ex. 57.) Further as to credit in particulars of demand, see *Morris* v. *Jones et al.*, 1 Q. B. 397; *Lamb* v. *Micklethwait*, *Ib.* 400; *Keesar* v. *Empey et al.*, 4 U. C. R. 47; *Eastwick* v. *Harman*, 6 M. & W. 13; *Nosotti* v. *Poye*, 20 Law J. C. P. 81; *Harris* v. *Montgomery*, *Ib.* 221.

(*u*) *Qu.*—Can a defendant, who has indorsed his writ under this section, subsequently deliver fresh particulars with his declaration and proceed thereon? The words "need be" rather argue that plaintiff may deliver other particulars if he chooses: (*Fromont* v. *Ashley et al.*, per Campbell C. J. 1 El. & B. 724, 18 L. & Eq. 217.) If plaintiff have not the right to do so and notwithstanding deliver fresh particulars, such a step will be irregular only and the irregularity waived if defendant plead over: (*Ib.*) Before the C. L. P. Acts, in a case where there was no waiver by defendant, it was held that plaintiff was concluded by the particulars he first delivered, and was also held to be unable to cure any defects therein by delivering fresh particulars: (*Brown* v. *Watts*, 1 Taunt 353.) Further as to particulars of demand generally, see Chit. Arch. 8 Ed. 1251; Tidd N. P. 301; Bag. Prac. 113; *Butler* v. *Richardson*, 3 O. S. 605; *Wilson* v. *Wilson*, 3 O. S. 297; *Church* v. *Barnhart*, Dra. Rep. 223; *Washburn* v. *Fothergill*, Dra. Rep. 489; *Shaver* v. *Currey*, H. T. 3 Vic. *M.S.* R. & H. Dig. "Particulars of Demand," 4; *Shore et ux.* v. *Bradley et al*, T. T. 4 & 5 Vic. *M.S.* R. & H. Dig. "Judgment of Non Pros." 1; *Barney* v. *Simpson*, 6 O. S. 96; *Ib.*; *Street* v. *Cameron*, H. T. 2 Vic. *M.S.* R & H. Dig. "Particulars of Demand, 6, 7; *Bigelow* v. *Spragge*, H. T. 6 Wm. IV. *M.S. Ib.* "Non-suit" 10; *Nevills* v. *Hervey*, T. T. 3 & 4 Vic. *M. S. Ib.* "Particulars of Demand," 8; *Drummond* v. *Bradley*, Dra. Rep. 254; *Ives* v. *Calvin*, 1 U. C. Cham. R. 8; and a number of cases there noted by Macaulay C. J. C. P.

(App. Co. C.) Plaintiff may obtain *capias* in certain cases after commencing the suit by writ of summons. Affidavit required.

XLII. (*v*) It shall be lawful for the Plaintiff, after the commencement of any action by Writ of Summons, but before Judgment in such action, upon making and filing an affidavit conformably to the provisions of the twenty-third section of this Act, (*w*) or on obtaining a Judge's order for that purpose, (*x*) to sue out of the office whence such Summons was issued a Writ of *Capias*, and one or more concurrent Writs, (*y*) and to renew such Writs in manner directed by this Act (*z*)—which Writ of *Capias* in every such case shall be in the form contained in Schedule (A) to this Act annexed, and marked No.

(*v*) The first part of this section is substantially a re-enactment of Prov. Stats. 16 Vic. c. 175 s. 3, and 2 Geo. IV. c. 1, s. 14. The whole section is applied to County Courts. There is no such provision in either of the Eng. C. L. P. Acts. The object of it is to allow plaintiff, if he see cause for so doing, to arrest defendant on mesne process during the progress of an action.

(*w*) As to the requisites of the affidavit see notes to s. xxiii. p. 41. The affidavit under this section must be, it is apprehended, intitled in the Court and cause: (See *Brown* v. *Palmer*, 3 U. C. R. 110; *Glass* v. *Colcleugh*, E.T. 3 Vic. *M.S.* R. & H. Dig. "Arrest," III. 9.) No cause can be said to have commenced until after the issue of the first process, be it summons or *Capias*. Under this section it is taken for granted that a summons has issued, and consequently that the action is pending. In this, consists the difference which exists between the section under consideration and ss. xxii., xxiii. Under the latter no cause is in existence until after affidavit made and writ issued thereon, the affidavit being in such case necessary before the action can be said to be commenced.

(*x*) As to arrest under Judge's order see note *r* to s. xxiii. p. 49. The intention of the Legislature appears to be to keep up the distinction between actions where the cause is a "debt certain" and actions where the cause is "other than a debt certain." In the former no Judge's order is necessary to warrant an arrest. In the latter no bailable writ can be issued or arrest made without such order. This distinction was overlooked by the Legislature when framing the old St. 2 Geo. IV. c. 1, s. 14, allowing plaintiff, after commencing his action by non-bailable process upon affidavit, to issue an al. bailable Ca. Re. Nothing was therein enacted concerning cases in which a Judge's order was necessary. And the Court subsequently held that in such cases no arrest could be made under an al. Ca. Re. pursuant to that statute: (*Brown* v. *Yielding et al*, M. T. 2 Wm. IV. *M.S.* R. & H. Dig. "Arrest" III. 11.) It was afterwards held that the enactment only applied to cases where the cause of action was a debt: (*Ross* v. *Urquhart*, M. T. 7 Vic. *M.S.* R. & H. Dig. same title, case 10.)

(*y*) See s. xxvii. as to the issue of concurrent writs.

(*z*) See ss. xxviii. and xxix. as to the renewal of writs.

(*a*) The form of Capias here given resembles that given to s. xxii., where the writ of capias is made the commencement of the action. The dissimilarities are just such as might be expected and such as are necessary, owing to the difference in the practice. The writ here given sets forth a statement that the action has been already commenced: "V. R. To the Sheriff, &c. We command you that you take C. D., &c., and him safely keep, until he shall have given you bail in the action, &c., which A. B. *has com-*

6, (*a*) and may be directed (*b*) to the Sheriff of any county or union of counties in Upper Canada, and so many copies of such Writ, with every memorandum or notice subscribed thereto, and all endorsements thereon, as there may be persons intended to be arrested thereon, shall be delivered with such Writ to the Sheriff or other officer who may have the execution or return thereof, and who shall immediately, upon or after the execution thereof, cause one such copy to be delivered to every person upon whom such process shall be executed by him, and shall indorse upon such Writ the true day of the execution thereof, within three days at farthest after such execution; and the proceedings in any such action may be carried on to Judgment without regard to the issuing of such *Capias*, or to any proceedings arising from or dependent thereon (*c*)—and on entering Judgment, the Plaintiff shall be entitled to tax the costs of such Writ or Writs of *Capias* and the proceedings thereon, in like manner as if the suit had been commenced by *Capias*, (*d*) together with the other costs incurred and taxable in the

Form of writ.

To whom directed.

Copies.

One copy to be delivered to each person on whom the writ shall be executed.

Costs.

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menced against him, and which action is now pending, &c." The clauses requiring defendant to put in special bail within ten days, though transposed in the two writs, are verbatim the same in each. The indorsements of necessity a little vary.

(*b*) The clause of this section beginning with the words "may be directed, &c.," and ending with the words, "within three days at furthest after such execution," is a verbatim copy of a portion of s. xxii. The notes *f*, *g*, *h*, and *i*, to that section apply equally to this.

(*c*) It is declared by this section that the capias may be issued at any time after the commencement of an action by writ of summons, but before judgment in such action. No matter at what stage of the cause it be issued the progress of the suit will not be thereby affected. The suit is to proceed in the same manner step by step as if no such capias had issued. In short the capias to be issued under this section is not so much a step in the suit as something collateral to it. The capias intended is in the nature of mesne process. Being such, the reasons for enacting that it must be issued *before* judgment are obvious.

(*d*) In so far as relates to the taxation of costs, the costs of the "capias and the proceedings thereon," shall be allowed "in like manner as if the suit had been originally commenced by capias." This may raise a doubt as to plaintiff's right to tax the costs of the summons. If the capias is to be taken for the purposes of taxation as a substitution for the summons, then the costs of the summons should not be allowed. But if the enactment as to capias is to be taken cumulatively, then plaintiff would be entitled to the costs of both writs. The latter construction would be the more just of the two, and will probably be held to be the true one, if ever made a question for judicial decision. The sentence if read as follows would remove all doubts —"the plaintiff shall be entitled to tax the costs of such writ or writs of capias and the proceedings thereon (*from the issue of such capias*) in like manner as

Proviso: Writ to issue from the same Court as the original writ.

cause: (*e*) Provided always, that notwithstanding anything contained in the fourth section of this Act, such Writ shall be issued in the Court out of which the original Writ in the cause was sued out. (*f*)

Absconding debtors.

And as regards proceedings against absconding debtors who shall have real or personal property, credits, or effects in Upper Canada; Be it enacted as follows: (*g*)

Consol. Stat. C. Ch. 25 s. 1, 5, 6. (App. Co. C.)

XLIII. (*h*) If any resident in Upper Canada, indebted (*i*)

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if the suit had been commenced by capias."

(*e*) "Together with the *other* costs taxable and *incurred* in the cause," &c. This favors the idea that the costs of the summons should be included and taxed as costs in the cause.

(*f*) Sec. iv. provides for the alternate issue of writs, one from each Court. No delay can occur where the suit is commenced by capias for it is expressly provided that the affidavit need not be intitled of any Court, so that in such case the writ may be issued from either Court: (s. xxiii.) But under this section the writ of capias must be issued from a particular Court—the one from which the original writ in the cause was sued out, and to prevent delay and difficulty, an exception is made to the alternate system, in respect to the capias in suits commenced by summons.

(*g*) Secs. xliii. to lviii. inclusive of this Act consolidate and amend the provisions of our laws concerning absconding debtors. The old provisions scattered over the Statute books, crude in arrangement and in several places inconsistent with each other, have been repealed, (s. cccxviii.) and all the really useful provisions re-enacted. The whole subject matter has been rearranged, and the several sections now present the subject in logical order. The law respecting "absconding debtors" has at last been rendered clear and complete in itself by the admirable consolidation which this Act effects. Departures from the old law and other amendments will be noticed under the sections in which they occur. The laws as to absconding debtors have for a long time been peculiar to Upper Canada, and the provisions are original, not having been directly copied from the statute book of any foreign state. In Upper Canada the lead has been taken even of England. The first Eng. Act upon the subject was 14 & 15 Vic. c. 22, passed 1st August 1851. It falls far short of the completeness of ours. The object of these laws is to secure the property and effects of an absconding debtor, and indirectly to force him to put in special bail. The law of arrest is designed to attain the same end by different means. In cases of arrest the body of the defendant and not his estate is taken into the custody of the law. The points of similitude between the two modes of procedure, in matters of practice, is very great. It should be mentioned that the enactments in the Div. Court Act 13 & 14 Vic. c. 53, allowing proceedings to be taken against absconding debtors for amounts within their jurisdiction are neither repealed nor superseded by this Act. For a very full and interesting review of all our laws upon the subject of absconding debtors, and a comparison of remedies given in Division Courts with those in the Superior Courts, see *Francis* v. *Brown et al*, 11 U.C.R. 558.

(*h*) This section in some respects resembles the repealed enactments 2 Wm. IV. c. 5 s. 1, and 14 & 15 Vic. c. 10 s. 1.

(*i*) "*If any resident*," &c. The repealed Act 2 Wm. IV. c. 5, s. 1, did not thus describe defendant. It was simply as follows, "If any person being indebted, &c., shall, &c." And there

to any person, (*j*) shall depart from Upper Canada with intent to defraud his creditors, and shall at the time of his so departing, be possessed (*k*) to his own use and benefit, of any real or

Form of writ against absconding Debtors, &c.

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was much difference of opinion as to whether the Legislature really did not intend to restrict the Act to defendants absconding who had been formerly residents. The several opinions of Robinson C.J., Sherwood J., and Macaulay J. upon this question will be found in *Ford* v. *Lusher*, 3 O. S. 428. The Absent Defendants' Act, 14 & 15 Vic. c. 10 s. 1, was express upon the point, so far as concerned proceedings taken under that statute, *i. e.*, "Proceedings may be commenced, &c., against any person *who, having resided* in Upper Canada, is absent therefrom," &c. What is the scope of the term "resident," as here used, and under what circumstances can a defendant be said to be a resident? Persons whose usual and accustomed home is in a foreign country but who come to Canada occasionally on business, cannot by any latitude of construction be described as residents of Canada. See *Ford* v. *Lusher*, 3 O. S. 428, and *Taylor* v. *Nicholl*, 1 U. C. R. 416. (As to when arrests can or cannot be made under similar circumstances see notes to s. xxiii, p. 40.) Further as to what constitutes residence, see note *d* to s. lxxiii. of this Act. If a defendant seek to set aside an attachment issued against him as an absconding debtor, on the ground that "he never lived or was in Upper Canada for such time or purpose as to bring him within the meaning of this Act," he must show these facts clearly to the Court: (*The Niagara H. & D. Co.* v. *Smith*, M.T. 7 Vic. *M.S.* R. & H. Dig. "Absconding Debtor," 22.) The Court discharged a rule to set aside an attachment where these facts were not distinctly made out, and where the party applying had not described himself as defendant in the suit: (*Ib.*) Where a person usually residing in Scotland came to Upper Canada to settle some affairs, and while here referred disputes concerning them to arbitration, upon which an award was made against him, but not payable for two years. Before the expiration of the two years he left the Province. Held that he was neither a "debtor" nor an "absconding debtor" within the meaning of the 2 Wm. IV. c. 5: (*Taylor* v. *Nicholl*, 1 U. C. R. 416.) As to "debt" and "indebted" see note *f* to s. xxvi. The word "indebted" as used in this section would seem to exclude the presumption that an attachment can be granted for an unliquidated demand, unless the demand be of such a nature that plaintiff can make oath to the amount thereof as in ordinary affidavits to hold to bail. Such, for example, as demands for work and labor—goods sold and delivered, &c., where no specific price has been agreed upon and the amount of indebtedness depends upon a *quantum meruit* or *quantum valebat*: (See *Clark* v. *Ashfield*, E.T. 7 Wm. IV. *M.S.* R. & H. Dig. "Absconding Debtor," 17.)

(*j*) The old restriction as to the party being indebted to "an inhabitant of this Province," (2 Wm. IV. c. 5 s. 1) in order to warrant proceedings has been abandoned. Indeed, it was repealed as early as 5 Wm. IV. c. 5 s. 5 of that year and reign. Where defendant being sued as an absconding debtor under the old practice, moved to set aside the attachment and subsequent proceedings several months after the last proceeding was had, on the ground that plaintiff was not an inhabitant of Upper Canada, but did not in his affidavit negative indebtedness to *some* inhabitant of Upper Canada, his application was refused: (*Fisher et al.* v. *Beach*, 4 O. S. 118.)

(*k*) *Possessed. Qu.* What is the meaning of this word.—Is it to be construed liberally, or restrained to its strict import? The exact meaning of the word becomes important, for pos-

personal property, credits, or effects in Upper Canada, he shall be deemed an absconding debtor; (*l*) and his property, credits, and effects aforesaid, may be seized and taken for the satisfying of his debts by a Writ of Attachment, (*m*) which shall also contain a Summons to the absconding debtor, and shall be in the form in the Schedule (A) to this Act annexed, marked No. 7, (*n*) and such Writ shall be dated on the day on which it is sued out, (*o*) and shall be in force for six months from its date, (*p*) and may be renewed for the purpose of effecting service on the Defendant, in like manner as a Writ of Summons issued under the authority of this Act. (*q*)

Duration of writ. Renewal.

XLIV. (*r*) Upon affidavit (*s*) made by any Plaintiff, his

(*l*) As to the ordinary proceedings against defendants, whether British subjects or foreigners, out of the jurisdiction of the Court: See ss. xxxv., xxxvi.

(*m*) If plaintiff desire to have the property of the absconding debtor taken into the custody of the law, so as to prevent him or others from making away with it, proceedings under this section by attachment is the best if not the only remedy. It is preferable to proceedings under ss. xxxv. and xxxvi., even when proceedings can be safely taken under those sections, because under them there is no power to seize the property until after judgment.

(*n*) The attachment under the old law did not contain any form of summons to the absconding debtor: (See form in *Meighan et al.* v. *Pinder*, 2 O. S. 292.) It merely directed the Sheriff to "seize and safely keep" all defendant's "estate, real as well as personal." It was a proceeding incidental to the suit, and did not interfere with the summons or other ordinary steps in the cause. The form given to this section requires the absconding debtor to put in special bail, and informs him of the seizure of his property. The writ of attachment is now the commencement of the action. Consult the form in Schedule, as to the indorsements necessary.

(*o*) *i. e.* in conformity with the practice enacted as to writs of summons and capias: (see s. xix.)

(*p*) Also in conformity with writs of summons and capias: (see Schedule A, Nos. 1 and 2.)

(*q*) *i.e.* Under ss. xxviii. and xxix., which see, together with notes thereto.

(*r*) Much resembles St. U. C. 2 Wm. IV. c. 5 s. 1.—Applied to County Courts.

(*s*) The safest rule in framing these affidavits will be to follow as closely as possible those relating to common affidavits of debt: (*Anon.*, per Robinson C.J. 2 O. S. 292.) The same certainty must be observed in affidavits for suing out attachments as in affidavits to hold to bail. The debt to be as certainly sworn to in the one case as in the other: (*Mackenzie* v. *Russell*, per Robinson C. J. 3 O. S. 345.) To allow any unlimited degree of uncertainty in them would of course lead to abuse. An affidavit for an attachment in which the debt was sworn to as being for money lent and advanced to the defendant, without saying by whom, was held to be defective: (*Ib.*) As to affidavits to hold to bail, see notes to s. xxiii. p. 41, in which all the principal cases decided in Eng-

servant, or agent, (*t*) that any such person so departing is indebted to such Plaintiff in a sum exceeding twenty-five pounds, (*u*) and stating the causes of action, (*v*) and that the Deponent hath good reason to believe and doth verily believe such person hath departed from Upper Canada, and hath gone to (stating some place to which the absconding Debtor is believed to have fled, or that the Deponent is unable to obtain any information as to what place he hath fled,) (*w*) with intent to defraud the Plaintiff of his just dues, (*x*) or to avoid being arrested or served with process, (*y*) which affidavit shall be accompanied by the affidavit of two other credible persons, (*z*) that they are well acquainted with the Debtor mentioned in the first-named affidavit, and have good reason to believe and do believe (*a*) that such Debtor hath departed from Upper Canada with intent to defraud the said Plaintiff, or to avoid being arrested or served with process, (*b*) it shall be lawful for either or the said Courts or a Judge, or for the Judge of any

Proceedings upon affidavit that the Defendant hath departed, &c., from Upper Canada, for the purpose of avoiding payment or service of process.

Further Affidavit in confirmation of the former.

land and in Canada have been brought together. *See add'l. s. 21.*

(*t*) As to the necessity for showing on the face of the affidavit a connexion between the person who makes it and the plaintiff, see s. xxiii., note sub-div. 3, intitled "Deponent," p. 41 of this work.

(*u*) The former minimum limit was five pounds: (2 Wm. IV. c. 5 s. 1.) The minimum is here stated to be £25, obviously with reference to the Div. Courts Act, which gives a remedy by attachment in those Courts for any sum not exceeding twenty-five pounds nor less than twenty shillings:" (13 & 14 Vic. c. 53 s. 64.) At the time when the former Acts were passed, fixing the minimum at £5, the inferior Courts had not the jurisdiction just mentioned.

(*v*) As to the proper statement of the cause of action in affidavit, see s. xxiii. note sub-div. 5, intitled "Cause of action," p. 43 of this work.

(*w*) "Hath departed this Province, or is concealed within the same," were the material words of the old Act: (2 Wm. IV. c. 5 s. 1.)

(*x*) As to when there is a debt of which plaintiff can be defrauded under this sec., see note *i* to s. xliii. of this Act.

(*y*) These words are substantially and in some parts exactly the same as those used in repealed stat. 2 Wm. IV. c. 5 s. 1.

(*z*) *Qu.* Are witnesses "credible" if pecuniarily interested? No person can now be excluded by reason of crime or *interest* from giving evidence either in person or by deposition on the trial of a cause, &c.: (St. 16 Vic. c. 19 s. 1.) Under this section the affidavit of plaintiff himself is admissible.

(*a*) The persons deposing as to the absconding of a debtor should state the grounds of their belief where they live at a considerable distance from the debtor's late residence: (*Bank of Upper Canada* v. *Spafford*, 2 O. S. 373.) Where the debtor resided at Brockville, and the persons making the affidavit in the town of York (now Toronto), an attachment was refused, the grounds of belief not having been stated: (*Ib.*)

(*b*) For sufficiency of statement by two credible witnesses under the old

Writ of Attachment to issue.

County Court, by rule or order, to direct that a Writ of Attachment shall issue (c) (to be in the "Inferior Jurisdiction," if the case be within the Jurisdiction of the County Court, and to be marked and the costs to be allowed accordingly,) (d) and to appoint in such rule or order the time for the Defendants putting in Special Bail, which time shall be regulated by the distance from Upper Canada of the place to which the absconding Debtor is supposed to have fled, having due regard to the means of and necessary time for postal or other communication; (e) and such Writ of Attachment shall issue in duplicate, and shall be so marked by the officer issuing the same (the costs of suing out the same being allowed only as if a single Writ issued), and one Writ shall be delivered to the Sheriff, to

Writ of Attachment to be in duplicate.

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law, see *Totten* v. *Fletcher*, T. T. 2 & 3 Vic. *M.S.* R. & H. Dig. "Absconding Debtor," 20.

(c) Under the Act of 2 Wm. IV. c. 5, it was held (Macaulay J. *dissentiente*) that an attachment could be regularly issued against an absconding debtor, though he had been previously held to bail for the same cause of action and the bail discharged by a reference to arbitration: (*Mosier* v. *McCan*, 3 O. S. 77.)

(d) This enactment, though allowing Judges of County Courts to order attachments, might have been held to deprive County Courts of all jurisdiction in cases of absconding debtors, but for the provisions of Co. C. P. A., 19 & 20 Vic. cap. 90. By sec. 2 of that Act, however, the sections of the C. L. P. Act relating to absconding debtors, with many others are extended to County Courts "in the same manner as if repeated at length" in the County C. P. Act. And all the powers under sections so extended "exercisable by the Courts of Queen's Bench or of Common Pleas, or by any one of the Judges thereof, shall and may in like manner be exercised by the Judges of County Courts respectively." And these as well as the other sections adopted, are also subject to "such modifications as may be necessary to give *full and beneficial effect* to the several sections in their extension and application to County Courts, and all actions and proceedings therein within the jurisdiction of the same Courts respectively:" (*Ib.*s.2.) The effect of both enactments appears to be this: In all cases to be commenced in the Superior Courts, whether upon a cause of action only cognizable therein or upon a cause of action within the jurisdiction of a County Court, but entered in the "Inferior jurisdiction" of the Superior Court, that any judge of the Superior Courts or any County Court judge (acting within his local jurisdiction) may direct the issue of an Attachment. And that where the debt is for an amount within the jurisdiction of a County Court and the creditor proceed in a particular County Court, the judge of such Court acting within his own jurisdiction will have all such and the same powers in respect to proceedings against absconding debtors as are possessed by the judges of the Superior Courts in cases instituted in the Court Queen's Bench or Common Pleas. Thus leaving the law of attachment as respects jurisdiction on very much the same footing as it stood before the passing of the C. L. P. and Co. C. P. Acts.

(e) The same words as used in s. xxxv., allowing service of process on defendants without the jurisdiction

whom the same shall be directed, and the other shall be used for the purpose of effecting service on the Defendant. (*f*)

XLV. (*g*) Upon its appearing on affidavit (*h*) to the Court or a Judge, that a copy of the Writ was personally served on the Defendant, (*i*) or that reasonable efforts were made to effect personal service thereof on him, and that such Writ came to his knowledge, (*j*) or that the Defendant hath absconded in such a manner, that after diligent inquiry, no information can be obtained as to the place he hath fled to, (*k*) it shall be lawful for such Court or Judge, if the Defendant has not put in Special Bail, either to require some further attempt to effect service or to appoint some act to be done which shall be deemed good service, (*l*) and thereupon, or on the first application, if it shall so seem fit to the Court or a Judge, to direct that the Plaintiff may proceed in the action in such manner and subject to such

(*App. Co. C.*) Further proceedings after service or attempted service.

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of the Courts. The form of attachment given in Schedule A. No. 7 contains a blank to be filled up in accordance with this enactment.

(*f*) This intends a personal service on defendant, if the same can be effected. It is a new provision, now enacted for the first time. Under the old law the attachment was issued for the guidance of the Sheriff only. Process was served "by leaving a copy thereof at the last place of abode of of such person within this Province," &c.: (2 Wm. IV. c. 1 s. 6.)

(*g*) A new provision.—Applied to County Courts.

(*h*) *Qu.* Can the affidavit in any case be legally sworn before the Chief Justice of any Court of superior jurisdiction or other officer named in s. xl. and residing in the country to which defendant has fled? The officers empowered by that section may administer "any affidavit for the purpose of enabling a Judge to direct proceedings to be taken against a defendant residing out of the jurisdiction" of the superior courts of Common Law in Upper Canada. As to affidavits generally see s. xxiii. note sub-divs. 3,7,8,9, intitled "Deponent," "Commissioner," "Signature of Deponent," and "Jurat," p. 41 of this work.

(*i*) As to what constitutes "personal service," see note *f* to s. xxxiv.

(*j*) As to "reasonable efforts" and "writ coming to defendant's knowledge," see note *i* to same section.

(*k*) To make application under this s. to the Court or a Judge, it must be shown on affidavit, either (1) that the writ was personally served on defendant, *or* (2) that reasonable efforts were made to effect the same, *and* that the writ came to defendant's knowledge; *or* (3) that defendant absconded in such a manner that after diligent inquiry no information can be obtained as to the place to which he fled; *and* (4) that no special bail has been put in for him. see add p. 821.

(*l*) "*Or to appoint some act to be dons which shall be deemed good service.*" Words of similar import are used in St. U. C. 3 Wm. IV. c. 7, which is the old law regulating the service of process on corporations. In a case under that Act against a corporation resident in Lower Canada, application was made "that service by affixing a copy of process in the Crown office should be deemed good service on de-

§ 8. conditions as the Court or Judge may direct or impose; (*m*)

Proviso: Plaintiff must prove his claim.

Provided always, that the Plaintiff shall prove the amount of the debt or damages claimed by him in such action, (*n*) either before a Jury on an assessment, or by reference, to compute in the manner provided by this Act, (*o*) according to the nature of the case, and the making such proof shall be a condition precedent to his obtaining Judgment, and no execution shall issue until the Plaintiff, his Attorney, or Agent, shall make oath of the sum justly due by the absconding Debtor to the Plaintiff, after giving him credit for all payments and claims which might be set off or lawfully claimed by the Debtor at the time of making such last mentioned affidavit, (*p*) and the execution

Further affidavit required before execution shall issue.

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fendants:" Hagerman J. "As to directing that the copy of process put up in the Crown office should be deemed a valid service, I think no such order can be made in this case more than in any other case. When a party has been duly served with the first process issued in a suit, it is competent, unless under particular circumstances, to direct that putting up copies of subsequent proceedings shall be deemed good service, but I apprehend in no other instance": (*Sherwood et al.* v. *Board of Works*, I U. C. R. 517, P. C.) Where before this Act came into force a writ of attachment had been sued out and executed, and notice of the attachment inserted in the *Gazette* according to the old practice, and upon application by plaintiff, after this Act came in force, to be allowed to proceed with the service of his declaration under the old practice, the following order was made: "That the plaintiff be allowed to proceed in this action by filing the declaration and notice to plead in the office of the Deputy Clerk of the Crown at H., and that such filing shall be deemed good service," also "that filing notice of assessment to the defendant shall be good service according to the practice in force before the Common Law Procedure Act, 1856." (*Ex Kendall et al* v. *McKrimmon*, Chambers, Sept. 13th, 1856. Burns, J.)

(*m*) The repealed enactment 2 Wm. IV. c. 5 s. 5 made it necessary for plaintiff to wait three months after notice of the attachment published in the *Gazette* before taking further proceedings. The advertisement in the *Gazette* is no longer required. Nor is it requisite that plaintiff should await the expiration of three months before proceeding with his suit. Proceedings by attachment are much assimilated to proceedings against defendants "resident abroad:" (ss. xxxv. xxxvi.)

(*n*) The St. 2 Wm. IV. c. 5, s. 7, made it incumbent on plaintiff "to prove his *cause of action* in the same manner as if the general issue had been pleaded," &c. Under the C. L. P. Act it would seem that when the defendant does not appear, the cause of action, whether sounding in debt or damages, is taken *pro confesso* against him, rendering it only necessary to prove the *amount* of such debt or damages: (See *Robertson* v. *Ross*, 2 U. C. C. P. 193; also see Prov. St. 16 Vic. cap. 19 s. 2.) The Court under the old practice felt themselves bound in an action against an absconding debtor to see that sufficient was stated and proved to warrant a recovery against him: (*Sifton* v. *Anderson et al.* 5 U.C. R. 305.)

(*o*) Rules to compute are abolished: (s. cxli.) but other proceedings are substituted therefor: (s. cxliii.)

(*p*) Substantially the same as repealed enactment 5 Wm. IV. c. 5 s. 7.

shall be endorsed to levy the sum so sworn to, with the taxed costs of suit or the amount of the Judgment, including the costs, whichever shall be the smaller sum of the two. (q)

XLVI. (r) The Plaintiff may at any time within six months from the date of the original Writ of Attachment, (s) without further order from the Court or a Judge, issue from the office whence the original Writ issued, one or more Concurrent Writ or Writs of Attachment, to bear teste on the same day as the original Writ, (t) and to be marked by the Officer issuing the same, with the word "Concurrent" in the margin, (u) which Concurrent Writ or Writs of Attachment may be directed to any Sheriff other than the Sheriff to whom the original Writ was issued, (v) and need not be sued out in duplicate or be served on the Defendant, (w) but shall operate merely for the attachment of his real or personal property, credits, or effects in aid of the original Writ. (x)

Plaintiff may obtain concurrent writs to other Sheriffs.

They shall be used merely for attaching property.

(q) Plaintiff is not called upon to swear now as formerly "that the sum allowed to him by the jury is justly and truly due to him by the defendant." He is to make oath of the sum justly due to him by the defendant, irrespective of any verdict, and after having allowed to defendant all necessary and legal credits. If the sum so sworn to, with costs of suit, be less than the verdict rendered by the jury, together with costs, or *vice versa*, then the execution must be indorsed for the lesser of these two sums.

(r) A new provision, prepared in conformity with the enactment of s. xxvii.—Applied to County Courts.

(s) As to computation of time, &c., see note *o* to s. xxvii.

(t) The concurrent writs *may* issue at any time within six months from the date of the original, but *must* be tested on the same day as that writ. No provision has been made for the renewal of writs of attachment, as has been done with respect to writs of summons: (ss. xxviii. xxix. xxx.)

(u) A further mem. as to the *place of issue* required by s. xx. has been expressly made necessary in the case of concurrent writs of summons issued under s. xxvii. No such express declaration is here made as regards concurrent writs of attachment; but s. xx. enacts that "the Clerk or Deputy Clerk of the Crown and Pleas, who shall issue *any writ*, shall mark in the margin a memorandum stating from what office and in what county such writ was issued, and shall subscribe his name to such memorandum." It will be prudent, though not expressly required by this section, for the clerk issuing a concurrent writ of attachment, to mark this memorandum in the margin, more especially as the section under consideration enacts that such writ shall "issue from the office whence the original writ issued."

(v) The object of this provision is to enable plaintiff to attach property of the debtor discovered to be in a county other than that to which the first writ of attachment was sent.

(w) Both of which requirements are made necessary with respect to the original writ issuable under s. xliv.

(x) And will, it is presumed, be in force only for the period during which

(App. Ch. C.) Court may let in Defendant to put in Special Bail. Affidavit required.

XLVII. (*y*) The Court or a Judge may at any time before or after final Judgment, (*z*) but before execution executed, (*a*) in their discretion, (*b*) and having regard to the time of the application (*c*) and other circumstances, let in the Defendant to put in Special Bail, and to defend the action, (*d*) upon an application supported upon satisfactory affidavits, (*e*) accounting for Defendant's delay and default, and disclosing a [good] defence on the merits. (*f*)

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the original writ shall be in force, viz. six months from the date thereof: (see s. xxvii.) As the concurrent writ must bear teste on the same day as the original writ, it must, if this assumption be correct, expire at the same time as the original.

(*y*) In principle a re-enactment of t. 2 Wm. IV. c. 5 s. 14.—Applied to County Courts.

(*z*) Old practice, "at any time within one year after the rendering of judgment."

(*a*) *Qu.* When shall execution be said to be "executed?" Probably after but not before the sale of defendant's effects. A writ however may be technically said to be executed where a levy or seizure has been made.

(*b*) Defendant formerly was allowed a re-hearing as a matter of right: (*Robertson et al.* v. *Burk*, 60. S. 75.)

(*c*) Defendant formerly was bound to apply "within one year after the rendering of judgment: (St. 2 Wm. IV. c. 5 s. 14.)

(*d*) Before he was allowed this privilege under the old practice, he was required to give security for costs.

(*e*) As to affidavits generally, see s. xxiii., note sub-divs. 3, 7, 8, 9, intitled "Deponent," "Commissioners," "Signature of Deponent," and "Jurat," p. 41. Also see N. R 109, *et seq.*

(*f*) The latter part of this section, with the exception of the words in brackets, corresponds *verbatim et literatim* with the concluding portion of s. lx. of this Act. The meaning of the expression "disclosing a defence upon the merits" has been lately much discussed in the English Court of Exchequer. Finally it was held per Parke B. and Platt B. (Pollock C.B. *hesitante* and Martin B. *dissentiente*) that an ordinary "affidavit of merits" was a sufficient compliance with the Act: (See *Warrington* v. *Lake*. 33 L. & Eq. 420.) Held also, per Pollock C. B. and Platt B., that an affidavit in reply ought not to be received. Forms of affidavits of merits—see Chit. Form 6 Edn. 235-237. The affidavit must express that defendant has a good defence upon the merits: (*Lane* v. *Isaacs*, 3 Dowl. P. C. 652.) An affidavit that the defendant had a good and sufficient defence on the merits without words applying it to the particular action, held to be insufficient: (*Tate* v. *Bodfield*, 3 Dowl. P. C. 218.) It is not sufficient to say that deponent believes the defendant has "a defence on the merits," he should say "a good defence": (*Kenney* v. *Hutchinson*, 4 Jur. Ex. 106.) Where judgment was signed for want of a plea, an affidavit of the defendant's attorney, which stated that "considering he had a good defence on the merits," was held insufficient: (*Pope* v. *Mann*, 2 M. & W. 881.) An affidavit of merits by a clerk of defendant's attorney, "that he is apprised and believes that the defendant has good grounds of defence upon the merits," insufficient: (*Bromley* v. *Gerish*, 1 D. & L. 768.) An affidavit by a clerk under similar circumstances, in which he swore that he had the conduct and management of the defence, and that defendant had been advised by counsel that he had a good defence to the action on the merits, was held

Property of Defendant to be restored on his putting in Special Bail;

XLVIII. (*g*) Upon the Defendant's putting in and perfecting Special Bail to the action in like manner as if he had been arrested on a Writ of Capias, (*h*) for the amount sworn to on obtaining the attachment, (*i*) either within the time limited by the Writ, or within such time as shall be specified by the Court or a Judge on letting in the Defendant to defend as aforesaid, (*j*) all his property, credits, and effects which have been attached in that suit, excepting any which may have been disposed of as perishable, (*k*) and then the net proceeds of the goods so disposed of, shall be restored and paid to him, unless there be some other lawful ground for the Sheriff to withhold or detain them; (*l*) and after Special Bail shall be so put in and perfected, the Defendant shall be let in to plead, and the action shall proceed as in ordinary cases begun by Writ of Capias; (*m*) Provided always, that after obtaining Judgment it shall not be necessary for the Plaintiff to make or file any other or further affidavit than that on which the Writ of Attachment was ordered, in order to sue out a Writ of *capias ad satisfaci-*

Or proceeds if sold.

Proviso: as to *ca. sa.*

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to be insufficient: (*Nash* v. *Swinburne*, 1 Dowl. N. S. 190.) The affidavit if sworn by the managing clerk of defendant's attorney, must state that he had the management of the particular cause: (*Doe d. Fish* v. *Macdonnell*, 8 Dowl. P. C. 501.) It must appear to be made either by the defendant, his attorney, or agent, or some person who has been concerned in the cause, in such a way as to make him acquainted with its merits: (*Rowbotham* v. *Dupree*, 5 Dowl. P. C. 557.) An affidavit by defendant's attorney as to his belief, from instructions received, insufficient, where the defendant himself might make the affidavit: (*Brown* v. *Austin*, 4 Dowl. P. C. 161.)

(*g*) Compiled chiefly from the old law of Upper Canada.—Applied to County Courts.

(*h*) As to which see s. xxiv. and note *u* thereto, p. 52 of this work.

(*i*) *i.e.* pursuant to s. xliv. of this Act.

(*j*) Under s. xlvii.

(*k*) *i.e.* Under s. l.

(*l*) Substantially a re-enactment of 2 Wm. IV. c. 5 s. 4, in so far as concerns the restoration of defendant's property. That sec., taken in connection with s. 3 of 5 Wm. IV. c. 5, made it necessary for defendant to enter into certain bonds, upon the delivery of which it was enacted "that all and singular the property which may have been attached shall be restored."

(*m*) It is enacted that in actions commenced by capias after special bail has been put in and perfected, "plaintiff may proceed by filing a declaration or otherwise to judgment, in like manner as if the action had been commenced by writ of summons and the defendant had appeared thereto": (s. xxiv.) The enactments of the C. L. P. Act generally have reference to proceedings in a suit commenced by writ of summons. An action so commenced may therefore be taken as the action *par excellence*—that form of action or mode of procedure to which others are assimilated as much as possible. The effect of the section under consideration may be

(t) s.

endum ;(t) (n) And provided also, that if it shall appear at any time before execution issued, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, (o) that the Defendant was not an absconding Debtor within the true meaning of this Act, at the time of the suing out of the Writ of Attachment against him, such Defendant shall recover his costs of defence, (p) and the Plaintiff shall, by rule of Court, be disabled from taking out any Writ of Execution for the amount of the verdict rendered or ascertained upon reference to compute or otherwise recovered in such action, unless the same shall exceed, and then for such sum only as the same shall exceed the amount of the taxed costs of the Defendant, and in case the sum so recovered shall be less than the amount of the taxed costs of the Defendant, then the Defendant shall be entitled, after deducting the amount of the sum recovered as aforesaid from the amount of such Defendant's taxed costs, to take out execution for the balance in like manner as a Defendant may now by law have execution for costs in ordinary cases.(?) (q)

Proviso: if the Defendant prove that he was not an absconding Debtor when the original writ issued.

Costs, and remedy of Defendant or them.

(t) s. 20.

Con. Stat. U.C. (App. Cap. C.) ch. 25 s. 14.

XLIX. (r) The Sheriff to whom any Writ of Attachment shall be directed, (s) shall forthwith take into his charge or keeping all the property, credits, and effects, (t) including all rights or shares in any Association or Corporation (which shall

Sheriff to attach all the property and credits of Defendant.

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stated to be that after defendant has put in and perfected special bail to an attachment issued under this Act, he shall be considered as having appeared to the writ as required by him, and all subsequent proceedings shall be had and taken in the same manner as if the action had been commenced by writ of summons.

(n) The provision here enacted has long been the settled practice of Upper Canada in bailable actions: (see St. U. C. 2 Geo. IV. c. 1 s. 15, and *Hamilton* v. *Mingay*, 1 U. C. R. 22.)

(o) As to affidavits generally see N. R. 109, *et seq* ; also s. xxiii. note sub divs. 3, 7, 8, 9, intitled "Deponent," "Commissioner," "Signature of Deponent," and "Jurat," at p. 41 of this work.

(p) A re-enactment of the latter part of s. 4 of 2 Wm. IV. c. 5. See also the first part of s. 1 of 49 Geo. III. c. 4.

(q) The precise words used in the latter part of s. 1 49 Geo. III. c. 4. See that Statute and notes thereto, p. 38 *et seq.* of this work. Some of the notes there written will apply equally to this provision.

(r) Substantially a re-enactment of the old law—Applied to County Courts.

(s) *i. e.* original writ under s. xliv., or concurrent writ under s. xlvi.

(t) A re-enactment of st. U. C. 2 Wm. IV. c. 5 s. 3. It was held under that Act that where real estate was attached, the Sheriff must enter and keep possession, to give operation to the attachment as against strangers:

be attached in the same manner as they might be seized in execution under the provisions of an Act of the Parliament of this Province, passed in the twelfth year of Her Majesty's reign, intituled, *An Act to provide for the seizure and sale of shares in the Capital Stock of Incorporated Companies*,) (*u*) of the absconding Debtor, as set forth in such Writ, (*v*) and shall be allowed all necessary disbursements for keeping the same; (*w*) and he shall immediately call to his assistance two substantial freeholders of his County, and with their aid he shall make a just and true inventory of all the personal property, credits, and effects, evidences of title or debt, books of account, vouchers and papers that he shall attach, and shall return such inventory, after it shall have been signed by himself and the said freeholders, together with the Writ of Attachment. (*x*)

12 Vic. c. 23.

Inventory to be made of property seized.

(*Doe d. Crew* v. *Clarke*, M. T. 4 Vic. *MS.* R. & H. Dig. "Absconding Debtor," 21.)

(*u*) St. 12 Vic. c. 23. It was said that bailiffs of Division Courts had power under 13 & 14 Vic. c. 53 s. 64 to attach bank stock or shares in the capital stock of incorporated companies: (*Francis* v. *Brown et al*, per Draper, J., 11 U.C.R. p. 564. Besides St. 12 Vic. c. 23, see St. 2 Wm. IV. c. 6.)

(*v*) The writ directs the Sheriff as follows: "That you attach, seize, and safely keep *all the real and personal property, credits, and effects*, together with *all evidences of title or debts, books of account, vouchers and papers* belonging thereto, of C. D., &c." There is no power in a Division Court to attach *real estate*: (see 13 & 15 Vic. c. 53 s. 64.)

(*w*) These are the precise words of repealed enactment 2 Wm. IV. c. 5 s. 3.

(*x*) An inventory was not expressly declared to be necessary under the former Absconding Debtors Acts; though subsequently made necessary in the case of attachments issued from Division Courts: (13 & 14 Vic. c. 63 s. 64.) To the word "inventory" the idea of an appraisement does not necessarily attach. But referring to the Div. Court Act the inventory would, under that Act, seem to be incomplete without appraisement: (*Ib.* s. 64.) So as to perishable goods under this Act, (see next section.) The present enactment is an improvement upon the old law. The inventory when made is to be returned by the Sheriff, together with the writ of attachment. Such a return will be useful information not only for all creditors of the absconding debtor desirous of prosecting their claims, but even for the absconding debtor himself. Should he apply pursuant to s. xlviii. for a restoration of his property and effects, he will be the better able to ascertain with certainty what has in fact been attached and seized. The practice is, in one respect at least, much like that of a distress for rent. An inventory in the case of a distress is necessary, because "it is proper that the tenant should know what goods the landlord intends to comprise within the distress, *and that he may know what he will be obliged to replevy*": (Bradby on Distress, 2 Edn. 151.) The form of inventory may be *mutatis mutandis*, that commonly used where a distress is made: (See Bradby on Distress, 151; Archd. Landlord and Tenant, 2 Edn. 128.)

(App. Co. C.)

How perishable goods shall be dealt with.

LI. (*y*) In case any horses, cattle, sheep, pigs, or any perishable goods or chattels, or such as from their nature (as timber or staves) cannot be safely kept or conveniently taken care of, shall be taken under any Writ of Attachment, (*z*) it shall be the duty of the Sheriff who has attached the same to have them appraised and valued, on oath, by two competent persons; (*a*) and in case the Plaintiff suing out the Attachment shall desire it, and shall deposit with the Sheriff (*b*) a Bond to the Defendant, executed by two freeholders, whose sufficiency shall be approved by the Sheriff (*c*) in double the amount of the appraised value of such articles, (*d*) conditioned for the payment of such

Sale of all such goods if Plaintiff give security to restore appraised value, if he fail.

(*y*) Substantially a re-enactment of 2 Wm. IV. c. 5 s. 8.—Applied to County Courts.

(*z*) The old enactment was to the effect that when the Sheriff should seize any perishable goods or chattels, &c., it should be lawful for him, &c. No attempt was made to define the goods. The express language here used will be a great relief to the Sheriff in the discharge of his duties under this section; still there is a wide discretion vested in that officer. It is for him to decide what are "perishable goods or chattels," or what from their nature (as timber or staves) cannot be conveniently kept.

When framing this section, it would appear that the Legislature had in view three kinds of property:

First.—Live chattels, such as horses, &c., that might in a short time "eat up themselves."

Second—Goods properly called perishable, such as butter, pork, &c.

Third—Property that could not be safely kept or conveniently taken care of, such as timber, staves, cordwood and the like—perhaps also growing crops.

The plain object of the Legislature is to convert into money all property liable to be deteriorated in value by being kept, or of which the keep and care would cause considerable expense. The Sheriff should therefore in every case consider whether it would be more to the advantage of the creditors as well as the debtor to sell "forthwith," or to wait for the execution and act so as to make the most of the property in his hands.

Formerly it was not compulsory upon Sheriffs either to "*seize* or sell" perishable goods until the giving of a certain bond: (2 Wm. IV. c. 5 s. 8.) That enactment having been repealed, and no corresponding enactment having been substituted, it is open to inference that the Sheriff must now seize perishable in the same manner as any other goods belonging to the debtor.

(*a*) The valuation "*upon oath*" is a new feature introduced into this Act for the first time.—*Qu.* Who is to administer the oath?

(*b*) There was no provision as to deposit of the bond in the old law.

(*c*) The approval of sureties by the Sheriff is also a new feature of this Act. In a case under the old law, where the sufficiency of sureties was a question for the Court, it was held that sureties resident in Lower Canada were not "sufficient sureties": (*Bradbury* v. *Lowry*, 3 O. S. 439.) In order to form an opinion as to the sufficiency of the sureties the Sheriff might reasonably require that they should justify by affidavit whenever he himself is not personally cognizant of their ability.

(*d*) The very words of St. U. C. 2 Wm. IV. c. 5 s. 8. Upon a provision where the words used were that a bond should be given "in double the amount

appraised value to the Defendant, his executors or administrators, together with all costs and damages that may have been incurred by the seizure and sale thereof, in case Judgment shall not be obtained by the Plaintiff against the Defendant, (*e*) then the Sheriff shall proceed to sell all or any such enumerated articles at public auction, to the highest bidder, giving not less than six days' notice of such sale, (*f*) unless any of the articles are of such a nature as not to allow of that delay, in which case the Sheriff may sell such articles last mentioned forthwith; (*g*) and the Sheriff shall hold the proceeds of such sale for the same purposes as he would hold any property seized under the attachment.

Sheriff to hold proceeds.

LI. (*h*) If the Plaintiff in any Writ of Attachment, after notice to himself or his Attorney, of the seizure of any such articles as enumerated, (*i*) shall neglect or refuse to deposit any

(*App. Co. C.*)

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claimed," a difficulty arose upon the construction of these words, where there were several claimants: (*Heather et al.* v. *Wallace*, 4 O. S. 131.) This applied to a bond to be given by defendant. No such difficulty can arise under this section; for the bond here mentioned is to be given by plaintiff. The penal sum must be "double the amount of the *appraised* value of such articles."

(*e*) This is a condition similar to that formerly required: (2 Wm. IV. c. 5, s. 8.)

(*f*) *Not less than six days' notice of such sale*, &c., *i. e.*, six clear days at least. The first and last days must apparently be excluded: (See *R.* v. *Justices of Shropshire*, 8 A. & E. 173; *Mitchell* v. *Foster*, 9 Dowl. P. C. 527; *Liffin* v. *Pitcher*, 1 Dowl. N. S. 767.) If notice be given on Monday, the sale may take place on the Monday following. The notice formerly was at least "*eight* days' notice:" (2 Wm. IV. c. 5 s. 8.)

(*g*) When formerly the articles were not of such a nature as to admit of at least eight days' notice of sale, the Sheriff was empowered to sell the same "at such time as in his discretion may seem meet." Now it is "forthwith." Ordinary prudence may suggest the propriety of the Sheriff in his discretion even under the present practice giving *some* notice of sale. If he cannot give six days' notice, he should give as long a notice as the circumstances of the case will admit. The word "forthwith," as used in this Statute is not to receive a strict construction like the word "immediate," so that whatever follows *must* be done immediately after that which has been done before: (See *R.* v. *Justices of Worcester*, per Coleridge J. 7 Dowl. P. C. p. 790.) As to the word "immediately" see *R.* v. *Justices of Huntingdonshire*, 5 D. & R. 588, and *R.* v. *Aston*, 1 L. M. & P. 491. Also see *Gillet* v. *Green*, Parke B. 7 M. & W., 348; *Spain* v. *Cadell*, Alderson B. 8 M. & W. 131; *Thompson* v. *Gibson et al*, Alderson B. *Ib.* 286; *Page* v. *Pearce*, Alderson B. *Ib.* 678; *Christie* v. *Richardson*, 10 M. & W. 688.

(*h*) A new provision.—Applied to County Courts.

(*i*) *i. e.* enumerated under the preceding section. The word "enumerated" cannot be taken literally. The design of the enactment is to embrace all things coming within the meaning of the previous section as "perishable

Such goods to be restored if plaintiff fail to give sufficient security.

such Bond, or shall only offer a Bond of sureties insufficient in the judgment of the Sheriff, (*j*) then after the lapse of four days next after such notice, (*k*) the Sheriff shall be relieved from all liability to such Plaintiff in respect to the articles so

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property." Since the Sheriff is now bound to seize perishable, in the same manner as any other goods, he ought immediately after the seizure to notify the plaintiff or his attorney of such seizure. He will then be in a position to avail himself of the provision in this section contained.

(*j*) There seems to be every reasonable latitude given to the Sheriff, who, in the exercise of a sound discretion, ought either to take or refuse the Bond offered. The word "judgment," as here used, cannot mean that the Sheriff may exercise an *arbitrary* judgment. The word in itself implies a *fair* examination by the Sheriff into the facts laid before him and a *proper* decision thereon. The "judgment" meant must therefore be a reasonable judgment. The sureties need not necessarily be residents in his county.

(*k*) From this it would appear that the plaintiff or his attorney, when notified by the Sheriff, should within four days, tender to the Sheriff the requisite bond. If no bond be deposited with the Sheriff within that time, or if the bond tendered is in his judgment insufficient, then "*after the lapse of four days next after such notice*" the Sheriff shall be relieved, &c. The chief point for consideration is the computation of time. It may be a question whether in computing the four days, the day on which the notice was given should be included or excluded. It is apprehended that the latter would be the correct mode. The Sheriff is to be relieved after the lapse of four days next after the notice. The day of notice is not to be included, because the Courts, as a rule, never take the fraction of a day into account without a clear necessity for so doing. The authorities are not by any means consistent, and until lately have been fluctuating. The old rule, now exploded, was that when time was to be reckoned from an *act done* and not from the *time thereof*, the day on which the act was done, was taken to be inclusive: (Com. Dig. 464; *Castle et al.* v. *Burdet et al.* 3 T. R. 623; *Boulton* v. *Ruttan*, 2 O. S. 362.) If the time mentioned were *one* day *after* an act done, would it not be absurd to hold that such day expired during the evening of the very day on which the act was done? Such a construction would be a contradiction in terms. When the question was in this light put before the Courts, they reversed the practice.—*Castle et al.* v. *Burdet et al.*, and other like cases have been in consequence deliberately overruled—(*Robinson* v. *Waddington*, 13 Q. B. 753.) The words of the section under consideration resemble those of 2 W. & M. stat. 1 cap. 5, s. 2. The latter enacts, that where any goods shall be distrained for rent, &c., and the tenant or owner of the goods next after such distress taken, &c.," so distrained shall not within "five days replevy the same, the person distraining shall proceed to appraise and sell such goods. Here the days are to be reckoned from an act done, viz., "distress taken." Held that as the rule now stands, the days must be counted exclusively of the day of taking: (*Robinson* v. *Waddington*, *ubi supra.*) The practice since this case should be taken to be settled. The decision was given after the hearing of elaborate arguments by counsel. All the cases *pro* and *con* were cited and commented upon during the course of argument. The authorities overruling *Castle et al* v. *Burdet et al*, were ably pressed upon the Court, and Denman, C. J., "Very reluctantly we are obliged to yield to the later authorities which have introduced a revolution in the law on this point." Paterson J.

seized, which the said Sheriff is thenceforth authorised and directed (*l*) to restore to the person from whose possession he took the same. (*m*)

LII. (*n*) If any person who is indebted to (*o*) or has the custody or possession of any property or effects of an abscond-

"It is unnecessary to express any opinion on the other points, for on the last the modern authorities seem uniform." Coleridge J., and Erle J., concurred. The true construction of s. li. therefore appears to be to read it as if expressed in the following words: "Then after the lapse of four days next after [the day of] such notice."

(*l*) "Authorised *and* directed." This expression does more than invest the Sheriff with power to restore the goods. It *commands* him to do so in the event of no bond, or one insufficient, being given within the time limited.

(*m*) Some goods described as perishable by this Act, such as "horses, cattle, sheep, pigs," &c., will require to be at least fed while in the custody of the Sheriff. Who is to pay the expense of feeding them? The Sheriff is bound under the attachment to take into his charge or keeping all the property of the absconding debtor: (s. xlix.,) and it is declared that "he shall be allowed all necessary expenses for keeping the same": (*Ib.*) But who is to reimburse him or advance to him these "necessary expenses," if the property be restored to the person from whose possession it was taken? By s. liv. it is enacted "that the costs of the Sheriff for seizing and *taking charge* of property," &c., shall "be paid in the first instance by the plaintiff in the writ of attachment." The expression "first instance," is used in contradistinction to the determination of the suit. It is probable that the Sheriff would be entitled to receive if not to demand from plaintiff in advance the costs of keeping perishable property as well as any other seized. If plaintiff of his own wrong—that is, neglect or refusal to give the necessary security, compel the Sheriff to abandon the property seized, it may be proper that the loss of money expended upon it while in custody should fall upon him. In any event, the Sheriff as against him would have a good right to retain the money, if advanced, and disbursed *bona fide* for the keep of the property restored. If the Sheriff, having a right to demand the costs from plaintiff "in the first instance," neglect to do so, he is, it seems, still entitled to have them taxed and sue plaintiff for them in any Court of Upper Canada having jurisdiction for the amount: (s. liv.)

(*n*) Substantially a re-enactment of St. U. C. 2 Wm. IV. cap. 5 s. 9.—Applied to County Courts.

(*o*) "Indebted," it is believed, should not be here taken to mean only a demand for a liquidated sum of money; but appears to be used in a more general sense. If in construing the word as used in this section we call to our aid another part of the statute (s. liii.) it would seem that the words include demands other than debts certain. Sec. liii. and the one under consideration are *in pari materia*. The former enacts that the Sheriff may sue for and recover from any person "*indebted* to such absconding debtor" the "*debt, claim, property, or right of action*" attachable under this Act. It is perfectly legitimate to call in this section to aid in the construction of the one under consideration. When we do so we find that the word indebted may extend to "claims, or rights of action." The word is unquestionably used in its largest sense: (see cases under the Bankruptcy Acts, 1 Eden. on Bankrupt Law, 129 *et seq.* See also note *r* to this section.)

Liability of debtors, &c., of the defendant and paying him after notice of the seizure, &c.

ing Debtor, (*p*) shall, after notice in writing of the Writ of Attachment duly served upon him (*q*) by the Sheriff or by or on behalf of the Plaintiff in such Writ, pay any debt or demand, (*r*) or deliver any such property or effects to such absconding Debtor, or to any person for the individual use and

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(*p*) In a case decided under the old law, the Court granted a rule against a party who had property of the debtor in his possession, ordering him to deliver it up to the Sheriff: (*Mullens* v. *Armstrong*, M. T. 2 Vic. *M.S.* R. & H. Dig. "Absconding Debtor," 18.) Also where a debtor who had absconded from the Province, before his departure gave his cognovit for £700 to a person to whom he was not indebted, on which judgment was entered, execution issued, and some money made by the Sheriff, and some paid to plaintiff's attorney, the Court ordered the attorney to pay to the Sheriff the money he had received, and the Sheriff to divide all the money between the attaching creditors who had executions in his hands: (*Bergin* v. *Pindar*, 3 O. S. 574. See also *Thompson* v. *Farr*, 6 U. C R. 387.)

(*q*) "*Duly served*" does not necessarily mean personally served. There does not appear to have been any necessity for personal service under the repealed Acts. The point was never raised for express adjudication; but in one case where the service was upon an agent, no objection was made: (*Clarke* v. *Proudfoot et al.* 9 U. C. R. 290.)

(*r*) "Debt or *demand*." *Qu.* Does the word demand include a claim for unliquidated damages? It will not be safe, in deciding the question, to follow the English decisions upon analogous enactments too closely. If we were to do so, we should at once and without doubt arrive at the conclusion that "debt or demand" meant only a claim for money certain in amount. Most of the English cases decided upon the construction of these words have arisen under Eng. st. 3 & 4 Wm. IV. cap. 42 s. 17. It enacts "that in any action depending in any of the Superior Courts for *any* debt or *demand* in which the *sum* sought to be recovered *and endorsed on the writ of summons*, shall not exceed £20," the Court or a Judge may refer the case for trial to the Sheriff, &c. The cases clearly restrict the words "debt and demand" to a demand of a liquidated nature: (*Jacquet* v. *Boura*, 7 Dowl. P.C. 331; *Roffey* v. *Shoobridge*, 9 Dowl. P. C. 957; *Price* v. *Morgan*, 2 M. & W. 53; *Allen* v. *Pink*, 4 M. & W. 140; *Watson* v. *Abbott*, 2 Dowl. P. C. 215; *Smith* v. *Brown*, 2 M. & W. 851; *Lawrence* v. *Wilcock*, 8 Dowl. P. C. 681; *Collis* v. *Groom*, 1 Dowl. N. S. 496; *Leamon* v. *Beal*, 566; *Hatton* v. *Macready*, 2 D. & L. 5; *Walther* v. *Mess*, 7 Q. B. 189.) It is unsafe to rely too much upon these cases, because the true meaning of "debt and demand," wherever placed in a sentence, must depend much upon the context. What is the context in the above statute? That the debt or demand shall be "a sum indorsed on the writ or summons," by which is meant a sum that may be properly computed and then indorsed. The meaning of the word "demand" is thereby made specific. But are there in the section here annotated any words that can as a context be taken as narrowing the meaning of the word "demand?" The word itself, if alone, has a very comprehensive meaning. If not curtailed or restricted by the context, it is presumed that it will retain its general meaning. The object of this enactment is not to place simple issues before a Sheriff for trial, but to make available for the payment of the debts of an absconding debtor his property and his claims for property or money as against others. If the word "demand" does not include claims for unliquidated damages, it must at least have a wider meaning as here used than

benefit of such absconding Debtor, (*s*) the person paying such debt or demand, or delivering such property or effects, shall be deemed to have done so fraudulently, and is hereby made liable for the amount of such debt or demand, (*t*) or for such property and effects or the value thereof, to the Plaintiff in such Writ of Attachment, provided such Plaintiff recover Judgment against the absconding Debtor, and if the property and effects actually seized by the Sheriff are insufficient to satisfy such Judgment; and if any person indebted to any absconding Debtor, or having custody of his property as aforesaid, shall be sued for such debt, demand, or property after notice as aforesaid of the Writ of Attachment, by the absconding Debtor, or by any person to whom the absconding Debtor may have assigned such debt or property after the date of the Writ of Attachment, (*u*) he may, on affidavit, apply to the Court or a Judge, to stay proceedings in the action against himself, until it shall be known whether the property and effects so seized by the Sheriff, shall be sufficient to discharge the sum or sums recovered against the absconding Debtor, (*v*) and it shall be lawful for the Court or a Judge to make such rule or order in the matter as they may think fit, and if necessary, to direct an issue to try any disputed question of fact. (*w*)

Proviso: Defendant's debtor sued by him after the seizure may obtain stay of proceedings.

Court or Judge may make a rule, &c.

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in the English statute just mentioned. If the claim be one *ejusdem generis* with a debt, it is apprehended that the Act will apply: see *Walker* v. *Needham*, 1 Dowl. N. S. 220. As to the distinction between liquidated and unliquidated demands: see *Hatton* v. *Macready*, 2 D. & L. 5.

(*s*) Where the debtor before he absconded and before attachment issued, made an assignment to A. B., of all his (the debtor's) interest in a building contract and all moneys due or to grow due thereon: Held that the old Act did not apply so as to justify the party liable to pay the money in withholding it from A. B.: (*Clarke* v. *Proudfoot et al.* 9 U. C. R. 290.)

(*t*) *i. e.* the debt or demand of the absconding debtor against him, not the demand of plaintiff against the absconding debtor.

(*u*) The date of the writ of attachment must be the day on which it was issued: (s. xliii.)

(*v*) Under the old law a defendant thus circumstanced was allowed to plead the general issue and give the special matter in evidence. The provision of this Act is much to be preferred, because it prevents the necessity of conducting two suits to issue. One will be stayed till the other is determined.

(*w*) See Interpleader Act, 7 Vic. cap. 30, which is taken from Eng. St. 1 & 2 Wm. IV. cap. 58. The cases decided upon the Eng. St. may be found collected in Chit. Archd. 8 Edn. 1211. The decisions upon our own Act are collected in R. & H. Dig. title "Interpleader."

Con. Stat. U.C. ch. 25 §§ 25, 26, 27, 28,

(App. Co. C.)

Debtor of Defendant may be sued if Defendant's property seized be not sufficient to satisfy Plaintiff.

LIII. (*x*) If the real and personal property, credits, and effects of any absconding Debtor attached by any Writ of Attachment as aforesaid, shall prove insufficient to satisfy the executions obtained in the suit thereon against such absconding Debtor, (*y*) the Sheriff having the execution thereof may by rule or order of the Court or a Judge to be granted on the application of the Plaintiff, in any such case, sue for and recover from any person indebted to such absconding Debtor, the debt, claim, property, or right of action attachable under this Act, (*a*) and owing to or recoverable by such absconding Debtor, with costs of suit, (*b*) in which suit the Defendant

(*x*) Substantially a re-enactment of 2 Wm. IV. cap. 5 s. 12.—Applied to County Courts.

(*y*) *Shall prove insufficient to satisfy the execution*, &c. Before proceedings can be had under this section, it will be necessary for the creditors to have entered judgment and issued execution. Should there be several executions, it is for the Sheriff to calculate the gross amount of the claims. If the property and effects seized prove insufficient to satisfy the executions, this enactment will come to his aid. The repealed section was clear upon this point. The commencement of it was as follows—"If *after* judgment *and* execution by any plaintiff," &c.

(*a*) *The debt, claim, property, or right of action*, &c. These words embrace much more than the termed used in the old Act, "the amount of the *debt* so *owing*." The Sheriff is now empowered to sue not only for debts owing, but for claims property and rights of action attachable under this Act. and "recoverable" by the absconding debtor. Clearly more is meant than simple debts or claims for ascertained amounts. "Rights of action" may possibly extend to an agreement by defendant to convey land to the debtor, or to many other such demands of an unliquidated nature. The intention of the Legislature is, in the absence of the debtor, to attach his property (including his available rights) for the satisfaction of his debts. See also note *e in fra*. As between an ordinary judgment creditor and persons indebted to the judgment debtor a provision similar in principle but more summary in practice has been enacted. (See s. cxciv. of this Act.)

(*b*) The Sheriff, it is presumed, must bring his suit within the proper jurisdiction, or be liable to the same consequences as other suitors. If he bring an action in the Queen's Bench for a cause of action within the jurisdiction of an inferior Court and properly cognisable therein, he would be restricted to Inferior Court costs: (St. 9 Vic. cap. 13, s. 59, and 13 & 14 Vic., cap. 53, s. 78.) It may be doubtful whether the extra costs of defendant in such a case might be set off against plaintiff's verdict. The verdict of the Sheriff is not his verdict. The amount recovered is not his money, but the money belonging to the estate of the absconding debtor. If a deduction were allowed from the Sheriff's verdict, the loss would be that of the creditors and not of the Sheriff. The estate in the Sheriff's hands, which he is in duty bound to protect and make available for payment of the executions, would be by his misconduct diminished. This the law will never suffer. On the other hand, it may be argued that if this be the true construction, then defendant, who was improperly sued into the Superior Courts, will be the loser. Such a construction, it may be said, would perhaps be just towards the es-

shall be allowed to set up any defence which would have availed him against the absconding Debtor at the date of the Writ of Attachment, (*c*) and a recovery in such suit by the Sheriff shall operate as a discharge as against such absconding Debtor; (*d*) and such Sheriff shall hold the moneys recovered by him as part of the assets of such absconding Debtor, and shall apply them accordingly; provided that the declaration in such action shall contain an introductory averment to the effect following:—"A. B., Sheriff of, (&c.) who sues under the provisions of the law respecting absconding Debtors, in order to recover from C. D., Debtor to E. F., an absconding Debtor, the debt due (or other claim according to the facts) (*e*) by the

Money recovered to be held as part of assets of absconding debtor. *cf* § 25

Proviso: averment to be inserted in Sheriff's declaration.

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tate, but would be most unjust towards the innocent defendant. To this objection it can only be replied, that the defendant, though bound, perhaps, to defend the suit instead of compromising it, need not necessarily be the loser. The Sheriff, it must be borne in mind, is an officer of the Courts. If he act improperly, whether wilfully or not, in the conduct of his office, so as to prejudice the rights of suitors, he is amenable to the Courts. Besides, whether his misconduct be designed or inadvertent, if suitors are thereby in fact made to suffer, there is in general a remedy by action against him and his sureties: (St. U. C. 3 Wm. IV. cap. 8, s. 2.) Whether such remedy would extend to the case supposed, has not yet been decided.

(*c*) Where the action was upon a promissory note made to the absconding debtor before he fled from the Province, and defendant filed several pleas which at best only set up a partial failure of consideration, the Court seemed to think that the defence was not a good one: (*Thompson* v. *Farr*, 6 U. C. R. 387.) The teste is this—Would the defence now set up by defendant as against the Sheriff, avail defendant if he were sued by the absconding debtor himself? In the case above mentioned, it is clear that in the absence of fraud, the defence set up could not have been maintained as against the absconding debtor, if he were plaintiff: see *Dalton* v. *Lake*, M. T. 6 Wm. IV. *M. S.* R. & H. Dig. "Bills of Exchange, &c," vi. 13; and *Trickey* v. *Larne*, 6 M. & W. 278; *Dixon* v. *Paul et al*, 4 O. S. 327.—Mere partial failure of consideration when the *quantum* to be deducted is matter not of definite computation but of unliquidated damages, is not a good defence to an action on a promissory note: (*Kellogg* v. *Hyatt et al*, 1 U. C. R. 445; *Coulter* v. *Lee*, 5 U. C. C. P. 350.) If the suit were in a Division Court where equitable considerations are allowed to prevail, it might probably be otherwise.

(*d*) Defendant if afterwards sued may set up the *jus tertii* by pleading the right of the Sheriff to recover against him under this section. The plea, it seems, should be special, as there is no provision made to the effect that defendant may plead the general issue and give this Act in evidence.

(*e*) This is similar to that contained in the repealed enactment s. 12 of 2 Wm. IV. cap. 5. But as one might expect to find, the Legislature have, in the form here given carried out the extended meaning of the words "debt" and "indebted." The old form was prefaced with a recital that the plaintiff sued "in order to recover such *sum* as C. D. (the defendant) may *owe* to the said E. F., an absconding debtor." In the new form, "in order to recover the *debt* due (*or other claim ac-*

Proviso: Sheriff not bound to sue until creditor give bond to indemnify him.

"said C. D., to the said E. F., complains, &c.;" (f) Provided also, that no Sheriff shall be bound to sue any party as aforesaid until the attaching Creditor shall give his bond with two sufficient sureties (g) payable to such Sheriff by his name of office, (h) in double the amount or value of the debt or property sued for conditioned to indemnify him from all costs, losses, and expenses to be incurred in the prosecution of such action, or to which he

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cording to the facts.") From this comparison of the old with the new provisions the intention of the Legislature to enlarge the meaning of the word "debt" is manifest.

(f) If the declaration give, by way of introduction to the action, the explanation which the Statute makes necessary, the Court has no authority to exact more. In doing so it would be contravening the statute: (*Thompson* v. *Farr*, per Robinson C. J. 6 U. C. R. 390.) For a form of a declaration on a promissory note, disclosing, in the opinion of the Court, as much as was necessary to entitle plaintiff to sue on the note, see *Ib.* p. 387. The old practice permitted each individual creditor to sue for himself in his own name. He was declared to be entitled to recover the amount owing by defendant to the absconding debtor, "or so much thereof as may be necessary to satisfy his claim." Where plaintiff was entitled to £50 19s 3d only, but sued defendant for £140, being the whole amount due by defendant to the absconding debtor, the declaration was under this enactment held to be clearly wrong: (*Ib.*) *Qu.* Is the Sheriff, who now sues on behalf of all creditors, restricted in the same manner as each plaintiff was formerly? The Sheriff can only sue where there is a deficiency in the ordinary estate or assets of the absconding debtor, but is not, it is presumed, bound to restrict himself to the amount coming to the creditors if the defendant really owe the absconding debtor a larger sum. There is nothing in the enactment to the contrary, and the law disavows multiplicity of suits, and the splitting up of claims. The Legislature must be presumed to have had before them the old Acts when framing the C. L. P. Act. Indeed, they have repealed, re-enacted, and amended as re-enacted all the old provisions; but they have dropped that provision which formerly restricted plaintiff, suing debtors of an absconding debtor to the actual claims of such plaintiff, against the debtor himself. The words of the old provision have been omitted, and it must be inferred that the omission was intentional and made for some good reason—a reason which it is only possible to conjecture. Supposing this conclusion to be right, it does not follow, the Sheriff being plaintiff, that any bad consequence can arise. Should he sue for and recover a greater sum than is required to satisfy executions in his hands, he is nevertheless obliged to hand over the balance, after satisfying these executions, to the absconding debtor or his agent: (see s. lviii.)

(g) *Qu.* Who is to judge of the sufficiency of the sureties? The bond directed to be given to the Sheriff for his protection under sec. l. is left to the approval of himself. Probably the Legislature intended the same with respect to the bond here directed to be given. Both sections are *in pari materia*, and may, according to a well-known rule, be brought to bear the one upon the other to aid in the construction of either. See note *e* to s. l.

(h) The Sheriff of a county is made a *quasi* corporation sole. His successor in office may sue upon the bond to be given under this section. If the action have commenced in the name of the Sheriff in office for the time being, and he afterwards die or otherwise vacate the office, the action

may become liable in consequence thereof; (i) Provided lastly, that in the event of the death, resignation, or removal from office of any Sheriff after such action brought, the action shall not abate, but may be continued in the name of his successor to whom the benefit of the bond so given shall enure as if he had been named therein, and a suggestion of the necessary facts as to the change of the Sheriff as Plaintiff shall be entered of record. (j)

Proviso: Sheriff's successor may continue the action.

LIV. (k) The costs of the Sheriff for seizing and taking charge of property, credits, and effects under a Writ of Attachment, including the sums paid to any persons for assisting in taking an inventory, (l) and for appraising (m) (which shall be paid for at the rate of *five shillings* for each day actually required for and occupied in making such inventory or appraisement), (n) shall be paid in the first instance by the Plaintiff in the Writ of Attachment, and may, after having been taxed, be recovered by the Sheriff by action in any Court in Upper Canada, having jurisdiction for the amount, (o) and such costs

(App. Ob. C.) Costs in such cases, and how paid.

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does not in consequence abate. It may be continued by his successor in office.

(i) Evidently refers to suits which may arise out of the action to be prosecuted pursuant to this section. The indemnity must be not only for costs, but for "losses and expenses,"—words of very general signification. *Qu.* Would the latter word include costs as between attorney and client?

(j) The conclusion of this section is the same in principle as the general enactment, s. ccviii., "the death of a plaintiff or defendant shall not cause the action to abate," and s. cox. "In the case of the death of a sole plaintiff . . the legal representative of such plaintiff . . may enter a suggestion of the death, . . and the action shall thereupon proceed."

(k) Substantially a re-enactment of St. U. C. 2 Wm. IV. cap. 5, s. 10.—Applied to County Courts.

(l) The inventory made necessary by s. xlix.

(m) Appraisements made necessary by s. l.

(n) Five shillings *per diem* was the remuneration allowed to appraisers by 2 Wm. IV. cap. 5 s. 11. Its sufficiency as a compensation for services performed at the present day is very questionable.

(o) Actions for any amount, great or small, may be brought in the Superior Courts: (see 2 Inst. 548.) Their jurisdiction cannot be taken away unless by express enactment or necessary implication: (*King* v. *Rochdale Company*, per Parke, B., 14 Q. B. 136.) If the Legislature confer upon an inferior Court *exclusive* jurisdiction over a subject matter of complaint, then the Superior Courts are ousted by necessary implication. It may be observed that theoretically our County and Division Courts have not ousted the Superior Courts of any jurisdiction; but for all practical purposes, the contrary is the case: (as to County Courts see St. 8 Vic. cap. 13, s. 5, and 19 & 20 Vic. cap. 90, s. 20; as to Division Courts see Stat. 13 & 14 Vic. cap. 53, s. 23, 16 Vic. cap. 177, ss. 8 and 9, and 18 Vic. cap.

shall be taxed to the party who pays the same, as part of the disbursements in the suit against the absconding Debtor, and be so recovered from him;(p) Provided always, that the Sheriff having made an inventory and appraisement on the first Writ of Attachment against any absconding Debtor, shall not be required to make any new inventory and appraisement on a subsequent Writ of Attachment coming into his hands, nor shall he be allowed any charge for any inventory or appraisement except upon the first Writ.(q)

Proviso: New writ not to make new Inventory requisite.

(App. Co. C.)

LV. (r) Any person who shall have commenced a suit in any Court of Record of Upper Canada, the process wherein

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125, s. 1.) The Inferior Courts have a limited jurisdiction both as to subject matter and amount, and if a suit within the cognizance of an Inferior Court be brought in either of the Superior Courts, as a general rule only inferior Court costs will be allowed, though plaintiff may have disbursed Superior Court costs: (as to County Courts see 8 Vic. cap. 13, s. 59, and 19 & 20 Vic. cap. 90; as to Division Courts see 13 & 14 Vic. cap. 53, s. 78, 16 Vic. cap. 177, 18 Vic. cap. 125.) These enactments have practically the effect of ousting the Superior Courts of jurisdiction over causes of action, cognizable in any of the inferior Courts. And there is no reason for holding that an action by a Sheriff under this section should be an exception to the general rule. Besides, it may be mentioned that the Superior Courts in England have more than once stayed proceedings where actions were brought therein for trifling sums—*ex. gr.* 20*s.* or 40*s.*: (see *Kennard* v. *Jones*, 4 T. R. 495; *Wellington* v. *Arters*, 5 T. R. 64; *Oulton* v. *Perry*, 3 Bur. 1592; *Melton* v. *Garment*, 2 N.R.84; see further *Lowe* v. *Lowe*, 1 Bing.270; *Dowling* v. *Powell*, 2 Dowl. N.S. 1025; *Stutton* v. *Bament*, 6 D. & L. 632.) From the foregoing considerations it seems clear that a Sheriff in proceeding under this section must, as in the case of ordinary suitors, sue in an Inferior Court if the amount sought to be recovered be for an amount within its jurisdiction.

(p) *Qu.* If the money disbursed has been expended in the keeping of live stock, which through the neglect or default of plaintiff, is restored by the Sheriff, would plaintiff be entitled to charge the money so disbursed against the absconding debtor? (see s. li., note *m.*)

(q) This provision is analogous to that doctrine of law which holds that where goods are already in the custody of the law an execution at once attaches upon them without an actual seizure: (see *Beekman* v. *Jarvis*, 3 U. C. R. 280.) Goods when attached, enumerated, and appraised, continue to be so as much under each subsequent attachment as under the first. So one attaching creditor, where there are several, is not entitled to priority over the others; all share ratably: (See s. lvii.) The property of an absconding debtor when taken into custody by the Sheriff under an attachment, is not to be looked upon so much as taken into custody for the satisfaction of the claim of the first attaching creditor as for safe-keeping, and for the benefit of all creditors who shall come in within six months from the first attachment: (see s. lvii.)

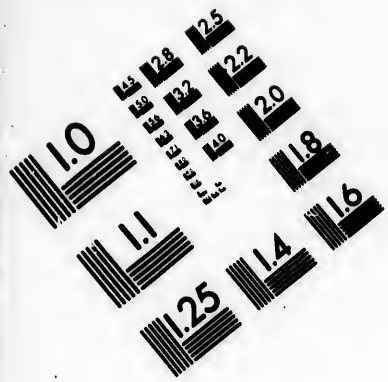
(r) Almost verbatim a re-enactment of 5 Wm. IV. cap. 5 s. 4.—Applied to County Courts. This section is confined in its operation to Courts of "Record," and as Division Courts are not Courts of Record, (13 & 14 Vic., cap. 53, s. 23,) no suitor in a Division

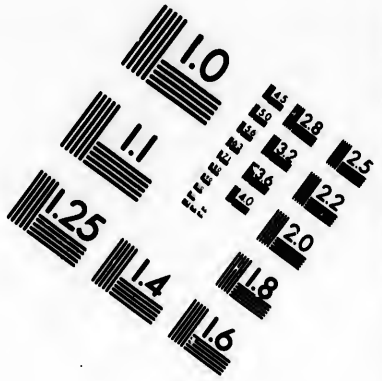
shall have been served or executed before the suing out a Writ of Attachment against the same Defendant as an absconding Debtor, shall, notwithstanding the suing out of the Writ of Attachment, be entitled to proceed to Judgment and execution in his suit in the usual manner; and if he shall obtain execution before the Plaintiff in any such Writ of Attachment, he shall have the full advantage of his priority of execution, in the same manner as if the property and effects of such absconding Debtor still remained in his own hands and possession, (a) subject to the prior satisfaction of all costs of suing out and executing the

Persons having previously commenced suits against the same defendant may proceed to judgment, &c.

Court can be entitled to the privileges by this enactment conferred upon suitors who have *bona fide* sued out and served or executed a summons or *capias* before attachment.

(*s*) The general principle is that goods which are *in custodia legis* are not the subject of execution: (*Humphrey* v. *Barns*, Cro. Eliz. 691; *Gamble et al.* v. *Jarvis*, 5 O. S., 272.) The provision here enacted, which is a re-enactment of 5 Wm. IV. cap. 5, s. 4, shows that the Legislature, when they passed the latter Statute, considered it illegal to take goods in execution which had been previously attached: (*Gamble et al.* v. *Jarvis*, Robinson C.J. 5 O. S. p. 274.) A debtor absconded on 19th May. Various executions were about that time issued against his property, real and personal. On 2d March, 1843, sometime before he absconded, he executed a warrant to confess judgment in favour of A.B.: but A. B. neither entered up judgment nor issued execution on this warrant till 15th June 1843, at which time the debtor had absconded, and writs of attachment were in the Sheriff's hands. It will be noticed that as no process was issued by A. B. before the execution of the warrant, none could have been "received before the suing out of the attachments." On 25th March, 1843, after the giving of the warrant, but before the debtor had absconded, and therefore before attachment issued the debtor was served with process at the suit of C.D. Judgment was entered and execution issued in this suit on 16th July, 1843—sometime, it will be seen, after the execution of A. B. Held that C. D. having sued out process and served it on the debtor before he absconded, was entitled to proceed before the attaching creditors. If the only question were one as between A. B. and C. D., clearly as the former obtained judgment and issued execution first, he would have a claim to be first satisfied. But as between A. B. and the attaching creditors, he not having sued out and served process upon the debtor before he absconded, could not be satisfied until after the attaching creditors. This repugnancy to reason therefore appears to arise—C. D. has a prior right over all attaching creditors, and yet has not priority over A. B., who is postponed till after the attaching creditors. Held that as between A. B. and C. D. no decision ought to take place until such time as the suits against the absconding debtors were carried to judgment: (*Bank B. N. A.* v. *Jarvis*, 1 U. C. R. 182.) From this case it would appear that the most speedy is not always the most available proceeding, and that in one case at least the maxim "*Qui prior est in tempore, potior est in jure*," is reversed. It is clear law that creditors having commenced proceedings against an absconding debtor, *but not having served process upon him* before he absconded, are not privileged as against attaching creditors. Wherever cognovits or warrants of attorney are taken without





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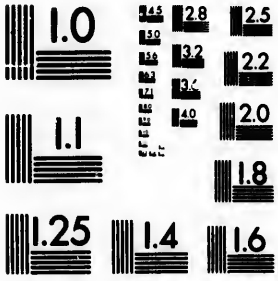

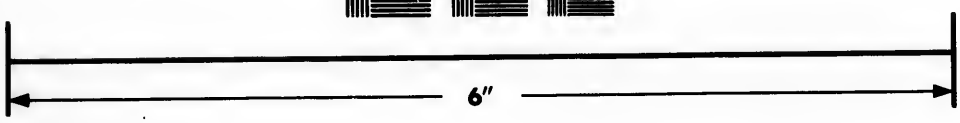

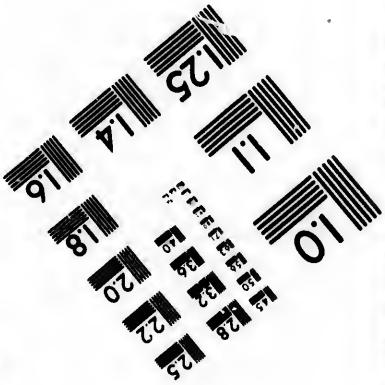

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Proviso: if such suit be fraudulent or collusive.

Attachment if the Court or a Judge shall so order; (t) Provided always, that nothing herein contained shall prevent the Court in which such action is brought or a Judge from setting aside any such judgment and execution, or staying proceedings therein on the application of the Plaintiff on any Writ of Attachment, if such Judgment shall appear to be fraudulent, or such action has been brought in collusion with the absconding Debtor, or for the fraudulent purpose of defeating the just claims of other Creditors of such absconding Debtor. (u)

(App. Co. C.)

If the Sheriff find property in the hands of a Bailiff, or Clerk of a Division Court.

LVI. (v) If any Sheriff to whom a Writ of Attachment is delivered for execution, shall find any property or effects, or the proceeds of any property or effects which have been sold as perishable belonging to the absconding Debtor named in such Writ of Attachment, in the hands, custody, and keeping of any Constable, or of any Bailiff or Clerk of a Division Court, by virtue of any warrant of attachment issued under the provisions of the Act of the Parliament of this Province, passed in the Session held in the thirteenth and fourteenth years of Her Majesty's Reign, intituled, *An Act to consolidate and amend the several Acts now in force regulating the practice of Division Courts in Upper Canada, and to extend the Jurisdiction of the same,* (w) it shall be the duty of such Sheriff to demand and to take from such Constable, Bailiff, or Clerk, all such property or effects, or the proceeds of any part thereof as aforesaid, and it shall be the duty of such Constable, Bailiff, or Clerk, on demand by such Sheriff and notice of the Writ of Attachment, forthwith to deliver all such property, effects, and proceeds as aforesaid to the Sheriff, upon penalty of forfeiting double the

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the issue of process, this law will apply.

(t) This is an equitable provision, which has existed ever since the passing of the first Absconding Debtor's Act: (2 Wm. IV. cap. 5.) A discretion is vested in the Judge, and is to be exercised by him in reference to the circumstance of each particular case that may be before him.

(u) In a case where the debtor before he absconded gave a confession to a person to whom he was not indebted, and that person entered up judgment and issued execution, the Court ordered the Sheriff to retain the proceeds and divide them amongst all the attaching creditors who had executions in his hands: (*Bergin* v. *Pindar*, 3 O.S. 574.)

(v) An entirely new provision.—Applied to County Courts. The object of this enactment is to supply an omission in the former laws: (see *Francis* v. *Brown et al.*, 11 U. C. R. 558.)

(w) 18 & 14 Vic. cap. 53 (ss. 64–71 inclusive, and see s. 102.)

value or the amount thereof, to be recovered by such Sheriff, with costs of suit (which Sheriff shall, after deducting his own costs, hold and account for such penalty as part of the property and effects of the absconding Debtor); (*x*) Provided always, that the Creditor who has sued out such Warrant of Attachment may proceed to judgment against the absconding Debtor in the Division Court, and on obtaining Judgment, and serving a memorandum of the amount thereof, and of his costs to be certified under the hand of the Clerk of the Division Court, he shall be entitled to satisfaction in like manner as and in ratable proportion with the other Creditors of the absconding Debtor, who shall obtain judgment as hereinafter mentioned. (*y*)

Proviso: Creditor in Division Court may proceed to judgment, &c.

(*x*) This section so far is confirmatory of the law as laid down by all of the Judges of the Queen's Bench in *Francis* v. *Brown et al.*, *ubi supra;* but the most important part of this section is the proviso. *Qu.* Can the Sheriff step in and take property under this Act out of the custody of any constable, bailiff or clerk, of a Division Court when the attaching creditor in the Division Court has obtained judgment and issued execution? It is enacted that when the Sheriff shall find any property or the proceeds of any property or effects which have been sold as perishable in the hands of an officer of the inferior Court *under a warrant of attachment*, &c. But after judgment and execution the property and effects would be considered in the hands of the officer by virtue of the warrant of execution. Clearly after *sale* under execution, the Sheriff has no right to demand the proceeds, though not paid over to the execution creditor. He is only entitled to the proceeds of goods sold as perishable, which must be taken to mean goods sold from necessity shortly after seizure under warrant of attachment, and before execution. Besides the latter part of this section seems to contemplate a demand by the Sheriff *before* judgment, for it provides that the creditor who has sued out such writ of attachment, may, notwithstanding the demand by the Sheriff, proceed to judgment against the absconding debtor, &c. The marked difference between proceedings against absconding debtors in a Court of Record and in a Division Court is, that in the former the property is attached with the primary object of compelling the debtor to submit his person to the jurisdiction of the Court. In the latter Court the property is attached in order to subject it to execution as fast as judgment can be obtained: (*Francis* v. *Brown et al.* per Draper J. 11 U. C. R. p. 566.) From these considerations it is conceived that after judgment and execution in a Division Court at the suit of an attaching creditor against an absconding debtor, the Sheriff has no power to make the demand authorised by this section.

(*y*) This is both a just and a necessary provision. It places attaching creditors in Division Courts upon an equal footing with the creditors in the Superior Courts, provided the proceedings of both sets of creditors are directed against the same defendant. The Sheriff is intended to be the caretaker for the Creditors of both Superior and Inferior Courts. And he is in duty bound to distribute the common fund amongst all the creditors in ratable proportion to their respective claims: (see s. lvii.)

Con stat. for U.C. ch 25 § 29, 30, 31

(App. Co. C.) Proceedings if several persons take out writs against the same absconding Debtor.

LVII. (z) When several persons shall sue out Writs of Attachment against any absconding Debtor, the proceeds of the property and effects attached and in the Sheriff's hands, shall be ratably distributed among such of the Plaintiffs in such Writs as shall obtain Judgments and issue execution, in proportion to the sums actually due upon such Judgments, (a) and the Court or a Judge may, in their discretion, delay the distribution, in order to give reasonable time for the obtaining of Judgment against such absconding Debtor; (b) and every Creditor who shall produced a certified memorandum from the Clerk of any Division Court, of his Judgment as aforesaid, shall be considered a Plaintiff in a Writ of Attachment who has obtained Judgment and issued execution, and shall be entitled to share accordingly; (c) Provided always, that when the property and effects of the absconding Debtor shall be insufficient to satisfy the sums due to such Plaintiff, none shall be allowed to share, unless their Writs of Attachment were issued and placed in the hands of the Sheriff for execution within six months from the date of the first Writ of Attachment, (d) or in case of a Warrant of Attachment, unless the same was placed in the hands of the Constable or Bailiff before or within six months after the date of the first Writ of Attachment.

§ 29

§ 30. Proviso: Who shall share if the property will not pay all.

§ 31.

(z) Substantially a re-enactment of St. U. C. 5 Wm. IV. cap. 5 s. 6.—Applied to County Courts.

(a) Under the first Absconding Debtors Act (2 Wm. IV. cap. 5) it was considered that a first attaching creditor was entitled to priority over subsequent attaching creditors, and entitled to be paid his demand before they could have any claim whatever: (see *Gamble et al.* v. *Jarvis*, 5 O. S. 272.) It was thought that much hardship might in consequence arise under that Act in certain cases where all the creditors were held back until such time as the first attaching creditor should obtain satisfaction: (*Ib.* per Robinson C.J.p. 277.) The Legislature to remedy this state of things passed the St. U. C. 5 Wm. IV. cap. 5 s. 6, the principle of which is retained in this Act. But even before the St. 5 Wm. IV. cap. 5, in a case where all the attaching creditors had agreed among themselves to share ratably the proceeds of defendant's property, the Court carried out the agreement: (*Bergin* v. *Pindar*, 3 O. S. 574.)

(b) The inference from this provision is that an attaching creditor, who, without good cause delays for an unreasonable time to proceed to judgment, will lose all right to share in the proceeds of the debtor's estate: (see *Gamble et al.* v. *Jarvis*, per Robinson, C. J., 5 O. S., p. 277.)

(c) *i. e.* pursuant to preceding s. lvi.

(d) *Within six months from the date of the first attachment*, &c. The first day would appear to be exclusive and the last inclusive, unless N. R. 166 should be held to apply to this enactment. And here a very important difference between our N. R. 166 and

LVIII. (*e*) If after the period of one month next following the return of any execution against the property and effects of any absconding Debtor, (*f*) or after a period of one month from a distribution under the order of the Court or a Judge, (*g*) which ever shall last happen, and after satisfying the several Plaintiffs entitled, (*h*) there shall be no other Writ of Attachment or execution against the same property and effects in the hands of the Sheriff, then all the property and effects of the absconding Debtor, or unappropriated moneys the proceeds of any part of such property and effects, remaining in the hands of the Sheriff, together with all books of account, evidences of title or of debt, vouchers and papers whatsoever belonging thereto, shall be delivered to the absconding Debtor or to the person

(*App. Co. C.*) When all the seizing creditors are satisfied, the remaining property to be delivered up.

con stat. for u.c. ch 25 § 32.

Eng. R. 174 from which it is taken may be noticed. Ours is to the effect that "In all cases in which any particular number of days, &c., is prescribed by the rules *of* practice of the Courts;" but the Eng. R. reads, "is prescribed by the rules OR practice of the Courts, &c." The variance between the two rules, unless our rule be held to be a misprint is such as must cause a wide distinction in their *application* —ours probably applying only to the construction of the new *rules* of practice—the English applying both to the rules and *practice* which latter is made up of Statutes as well as rules: (see *Rowberry* v. *Morgan*, 9 Ex. 780.) It may be mentioned that under our rule the first and last days of periods time are made inclusive. The English rule makes the first exclusive and the last inclusive. Under the old Statute of Hue and Cry a suit against the hundred was required to be brought within a year. Held that for a robbery committed on 9th October, a suit commenced on 9th October following was too late. (*Hob.* 189.) As between attaching creditors against a defendant in a Division Court, when there are no attachments against against the same defendant in the Superior Courts, one month from the first attachment is the limit within which attachments must be issued to be available for property in the custody of the Division Court officers attached under such first writ: (see 13 & 14 Vic. cap. 58 s. 65.)

(*e*) Substantially a re-enactment of St. U. C. 2 Wm. IV. cap. 5 s. 17.—Applied to County Courts.

(*f*) This provision seems to contemplate the case of a Sheriff having had only one execution in his hands, which he returned. "*If after the period of one month next following the return,*" &c. "Month" means a calendar month: (Interpretation Act, 12 Vic. cap. 10 s. 4 sub s. 11,) "After the period of one month," that is, the month must be fully expired. "One month next following the return," that is, next following the day of the return: (see note *k* to s. li.) Therefore the month here intended is a calendar month. It will not begin to run until the day next after the return of the writ. It must then fully expire—the last day being inclusive.

(*g*) This provision contemplates the case of a Sheriff who has had several executions in his hands, to satisfy which a distribution has been made pursuant to s. lvii. "*After the period of one month from a distribution.*" As to "period" and "month" see preceding note. One month "from a distribution" means one month from the day on which the distribution took place: (see note *k* to s. li.)

(*h*) *i. e.* the amount of the demands

or persons in whose custody the same were found, or to any lawfully appointed Agent (*i*) of the absconding Debtor, and thereupon the responsibility of the Sheriff in respect thereto shall determine. (*j*)

And with respect to the appearance of the Defendant and the proceedings of the Plaintiff in default of appearance: Be it enacted as follows: (*k*)

(App. Ch. C.) Eng. C. L. P. A. 1856, s. 26.

LIX. (*l*) From the time when this Act shall commence and

must be actually paid over to plaintiffs.

(*i*) "*Lawfully appointed agent*," does not necessarily mean an agent appointed by writing. Agents, as a general rule, may be appointed by *parol*. The exceptions to the rule may be found in Paley on Agency, by Lloyd 3 Edn. 154.

(*j*) This completes the consolidation of the law as regards absconding debtors. Compared with the old enactments, in addition to amendments already noticed, the following may be mentioned. Advertising in the *Canada Gazette*, first required by 2 Wm. IV. cap. 5 s. 2, is no longer necessary. Plaintiff is no longer bound before issuing execution to give the bond required by s. 13 of the same Statute. It would also appear from the omission of 5 Wm. IV. cap. 5 s. 5, and for other reasons, that no one creditor is any longer empowered upon the trial of a cause against an absconding debtor to contest plaintiff's claim in the same manner as the debtor himself might do if present at the trial.

(*k*) The following enactments are founded upon 1st Rep. of C.L. Comrs., (ss. 15–17 inclusive.) The immediate object of the writ is "to cause the defendant to appear," which is done by the entry of a memorandum of appearance with the proper officer. This memorandum was until lately entered either by defendant himself when he chose to appear, or by plaintiff for him when he neglected to do so. Some persons are of opinion that an appearance is an unmeaning form and "altogether needless;" but the C. L. Comrs. thought differently. They described it as "a convenient mode of intimating to plaintiff defendant's intention of resisting the action." When, however, the time fixed by the practice of the Court for appearance is allowed by defendant to elapse without appearance, it may reasonably be assumed that defendant, as he has not "intimated his intention," has no intention of resisting the plaintiff's proceedings. In the face of such a presumption an appearance by plaintiff for defendant is most undoubtedly an "unmeaning form." Therefore the Legislature by the enactments following have, upon the recommendation of the C. L. Comrs., abolished the latter mode of appearance, technically known as "appearances per Statute." But as the presumption arising from the fact that no appearance has been entered by defendant, and that he has no intention of defending, may not always be consistent with facts, it is provided by this Act that defendant shall, upon certain conditions, "be at liberty to appear at any time before judgment."

(*l*) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 26.—Applied to County Courts. The phraseology of N.R. 132, which provides for the service of declarations and subsequent pleadings "*as well as where the plaintiff has entered an appearance for the defendant*, as where the defendant has appeared in person," is not quite correct. Appearances by plaintiffs for defendants are by this section rendered unnecessary, if not abolished: (*Wallace* v. *Fraser*, Chambers, Sept. 15th, 1856, Richards J.)

take effect, no appearance need be entered by the Plaintiff for the Defendant. (*m*) Plaintiff need not enter ap. per Stat.

LX. (*n*) In case of non-appearance by the Defendant where the Writ of Summons is indorsed in the special form hereinbefore provided, (*o*) it shall be lawful for the Plaintiff, on filing an affidavit of personal service of the Writ of Sum- (*App. Co. C.*) Eng. C. L. P. A., 1852, s. 27.

(*m*) Held not to apply to actions in which the writ had been issued before the Act came into force: (*Goodiffe* v. *Neaves*, 8 Ex. 134; *Eadon* v. *Roberts*, 9 Ex. 227.) The English section repeals parts of two English Acts, neither of which was ever in force in Upper Canada (12 Geo. I. cap. 1 and 2 Wm. IV. cap. 39) "except so far as may be necessary to support proceedings heretofore taken." The sections of Prov. St. 12 Vic. cap. 63, which correspond with the above mentioned Statutes, have also been repealed by this Act, with a saving as regards proceedings previously taken, in the same words as above: (see s. cccxviii.) Although it is no longer necessary for plaintiff to enter an appearance for defendant, still plaintiff in default of appearance by defendant may, upon proof of service of writ, &c., take all such proceedings as are mentioned in the writs of summons or capias or endorsements thereon: (see s. lxv.)

(*n*) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 27.—Applied to County Courts.—Founded upon 1st Rep. of C. L. Com. (s. 15.) This section introduces an entirely new proceeding and the words of the enactment have no reference whatever to established practice: (*Rowberry* v. *Morgan*, per Parke B. 9 Ex. 736.) *Qu.* Whether the words of the enactment being affirmative take away the general powers of the Court over their judgments or are merely cumulative in their effect? (see *Hall* v. *Scotson*, 9 Ex. 238, 24 L. & Eq. 473.)

(*o*) *i. e.* by s. xli., which, be it observed, merely applies to cases where the defendant is within the jurisdiction of the Court. Proceedings under this section can only be had "in case of non-appearance by defendant." Plaintiff's attorney should therefore be careful to search for an appearance immediately before making his application to the Court or a Judge. The search ought to be made if possible on the day of the application. The affidavit should be explicit and positive to the effect that a search for appearance was made and that no appearance has been entered. Thus:—"And I further say, that the said defendant hath not appeared to this action [*or* had not appeared in this action at the hour of —— in the afternoon of the —— day of —— instant, and that he has not, to the best of my knowledge and belief, since appeared thereto"]: (see N. R. 112.) Under the old practice, where an appearance had in fact been entered for defendant but was mislaid by the Deputy Clerk of the Crown and overlooked by plaintiff's attorney, who entered an appearance per Statute and proceeded to judgment, the proceedings were set aside: (*Ryan et al.* v. *Leonard*, 3 O. S. 307.) But held under almost similar circumstances that after judgment by default and notice of assessment, it was too late to object to the irregularity: (*Ketchum et al.* v. *Keefer*, 6 O. S. 56; see also *Mapel* v. *Woodgate*, 10 Jur. 839.) The Court refused to allow a plaintiff to enter an appearance per statute without the usual affidavit and the day of indorsement of service upon the writ, althought defendant admitted the receipt of the copy of writ left at his dwelling-house: (*Russell* v. *Lowe*, 2 Dowl. N. S. 233; but see *Aston* v. *Greathead*, 2 Dowl. N. S. 547; *Rolfe* v. *Pigot*, 1 B. C. Rep. 78, Wightman J.) An appearance entered by plaintiff for an infant defendant has been

Proceedings on non appearance of Defendant on writ especially indorsed.

Signing judgment.

mons, (*p*) or a rule of Court, or a Judge's order for leave to proceed under the provisions of this Act, (*q*) and the Writ of Summons, at once to sign final Judgment (*r*) in the form contained in the Schedule (A) to this Act annexed, marked No. 7, *bis*, (on which Judgment no proceeding in error [or appeal] (*s*) shall lie) for any sum not exceeding the sum indorsed on the Writ, together with interest to the date of the

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held to be a ground of error: (*Stephens* v. *Lowndes*, 3 D. & L. 205; *James* v. *Aswell*, 11 Jur. 562.)

(*p*) This provision is in a manner a substitution for the old form of appearpearance per statute. And it has been held that in order to entitle a plaintiff to enter an appearance per statute actual personal service of the writ was necessary: (see *Goyge* v. *Huntingtower*, 1 D. & L. 599, and *Christmas* v. *Eicke*, 6 D. & L. 156.) As to when a writ can be said to be personally served, see s. xxxiv. note *f*. The affidavit need not, it seems, now more than formerly show the manner of service. Deponent if positive may in general terms swear that he "personally served defendant with a true copy of the annexed writ of summons." See Form of affidavit, Chit. F. 7 Edn. 857. As to affidavits generally see N. R. 109 *et seq.*, also p. 41 of this Work, s. xxiii., note sub-divs. 3, 9, 7, 8, intitled "Deponent," "Commissioner," "Signature of Deponent," and "Jurat."

(*q*) This rule or order to be obtained pursuant to s. xxxiv. An application to rescind the order when obtained may be supported by affidavits contradicting those upon which the order was obtained. This too without an affidavit of merits: (see *Hall* v. *Scotson*, 9 Ex. 238, 24 L. & Eq. 473.)

(*r*) "*At once to sign final judgment.*" Plaintiff, it would appear, is not bound to delay signing judgment until a copy of the order has been brought to defendant's notice: (*Hall* v. *Scotson*, *ante*, per Parke B.) This, if a correct opinion, is in strict conformity with the old practice. A plaintiff who had entered an appearance for defendant was not bound to take much further notice of him in the subsequent proceedings. Judgment signed where defendant has not appeared without filing an affidavit of personal service or obtaining a Judge's order to be allowed to proceed, would be, it is apprehended, utterly void: (see *Lane* v. *McDonell*, H.T. 7 Wm. IV. *M.S.* R. & H. Dig. "Appearance" 4; *Nichol* v. *McKelvey*, E.T. 2 Vic. *M.S.* R. & H. Dig., same title, 6; *Roberts* v. *Spurr*, 3 Dowl.P.C.451. *Sed qu.* See *Watson* v. *Dow*, 5 Dowl. P. C. 584; *Williams* v. *Strahan*, 1 N. R. 309.) But held that a defendant who pleaded a plea which was a nullity, was not in a position to move afterwards to set aside interlocutory judgment, upon the ground that there was no appearance entered: (*Brewster* v. *Davy*, H. T. 2 Vic. *M.S.* R.& H. Dig. "Appearance," 5.) *Qu.* Whether plaintiff is prevented from signing judgment when a defendant has in fact appeared but entered his appearance *after* the time limited by the writ? (See *Rogers* v. *Hunt*, 10 Ex. 474.) As to proceedings to be taken by a plaintiff suing several defendants, some of whom appear and others do not: (see s. lxvi. and notes.)

(*s*) The words in brackets are not in the English Act. They have reference to appeals under our Statute 12 Vic. cap. 63 s. 37 *et seq.* "Error" in the English Act, where the word is used has reference to proceedings in error in the Exchequer Chamber. There are in England three Courts of co-ordinate jurisdiction — Queen's Bench, Common Pleas, and Exchequer. No appeal lies directly from one to the

Judgment, (*t*) and the costs to be taxed in the ordinary way; and the Plaintiff may upon such Judgment issue execution at the expiration of eight days from the last day for appearance, and not before; (*u*) Provided always, that it shall be lawful for the Court or a Judge, either before or after final Judgment, to let in the Defendant to defend, (*v*) upon an application supported by satisfactory affidavits accounting for the non-appearance and disclosing a defence upon the merits. (*w*)

Execution.

Proviso: Defendant may be let in to defend.

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other. But an appeal may be had from any one of the three to the other two united. The two so united form the Court known as the "Exchequer Chamber."

(*t*) It is improper to sign judgment for a sum including interest, when the interest is not due upon a contract expressed or implied: (see *Rodway* v. *Lucas*, 10 Ex. 667.) The only exception to this rule appears to be an action upon a bill of exchange or promissory note, in which action plaintiff may in his special indorsement claim interest as a matter of course: (*Ib.* per Pollock C. B. p. 674.) The Court after judgment signed will not presume that the claim for interest indorsed upon the writ is made without foundation. If such were the fact, it was the duty of defendant to appear and question it. Not having done so, he will be impliedly taken to have admitted the correctness of the claim: (*Ib.* per Pollock C.B. 670.) The judgment is now final, instead of being interlocutory as heretofore; though final execution cannot be issued until the expiration of eight days from the last day for appearance. In the case of several defendants, some of whom have appeared and some not, plaintiff may sign judgment against those who have not appeared, subject to the provisions contained in s. lxvi. of this Act.

(*u*) As to Computation of the time see *Blunt* v. *Haslop*, 9 Dowl. P.C. 982. These eight days include Sunday, whether that day be either one of the intermediate days or the last of such eight days: (*Rowberry* v. *Morgan*, 9 Ex. 730.) If the last of the eight days be Sunday, plaintiff will be entitled to issue execution on the following day, Monday: (*Ib.* per Martin B.) Where the writ specially indorsed was issued on 9th February, and was served on 11th February, and consequently the time for appearance expired on 19th February (eight days only being allowed by the English Act, ten by ours,) and judgment was signed on 20th February. Plaintiff then desirous to issue execution, and finding the eight days under the Act expire on Sunday, issued the writ on the following day (Monday, 27th February.) Held regular: (*Ib.*)

(*v*) The object of this provision is to relieve a party who through ignorance of the necessity of entering appearance has allowed judgment to be signed against him: (*Warrington* v. *Leake*, Pollock, C. B., 25 L. T. Ex. 186, 33 L. & Eq. 422.)

(*w*) A party applying under this section must "account for his non-appearance," *and* "disclose a defence upon the merits," but is not bound, it seems, to state the grounds of his defence. He need only state that he has a good defence on the merits. An ordinary affidavit of merits is sufficient: (*Warrington* v. *Leake*, *ante*, per Parke B. and Platt B., Pollock C.B. *hesitante* and Martin B. *dissentiente*.) As to the "affidavit of merits" see s. xlvii. note *f*. An affidavit of merits is only necessary under this section when the judgment has been regularly signed: (*Hall* v. *Scotson*, per Parke B., 9 Ex. 238, 24 L. & Eq. 473.) Affidavits in reply ought not to be received: (*Warrington* v. *Leake*, *ante*, per

Consol. for U.C. ch 22 § 56 + 57.

(App. Co. C.)

Eng. C. L. P. A., 1852, s. 28.

And if the writ be not so specially indorsed.

Declaration.

§ 57.

Signing judgment.

LXI. (*x*) In case of such non-appearance where the Writ of Summons is not indorsed in the special form hereinbefore provided, it shall be lawful for the Plaintiff, on filing an affidavit of personal service of the Writ of Summons, (*y*) or a Judge's order for leave to proceed under the provisions of this Act, (*z*) and the Writ of Summons, to file a declaration, (*a*) indorsed with a notice to plead in eight days, (*b*) and to sign Judgment by default at the expiration of the time to plead so indorsed as aforesaid, (*c*) and in the event of no plea being filed and served

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Pollock C.B. and Platt B.; see also *Austin* v. *Mills*, 20 L. & Eq. 496.) It is probable that a defendant making application under this section will at least if successful be expected to pay the costs of the application: (see *Sisted* v. *Lee*, 1 Salk. 402.) He may in the discretion of the Judge be compelled to pay the amount claimed into Court to abide the event: (see *Wade* v. *Simeon*, 13 M. & W. 647.)

(*x*) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 28.—Applied to County Courts. Founded upon 1st Rep. of C. L. Com. (s. 15.) Not retrospective: (*Goodliffe* v. *Neave*, 8 Ex. 184.)

(*y*) Form of affidavit see Chit. F. 7 Edn. 857. Service when personal see s. xxxiv. note *f*. Further proceedings when to be taken see s. lx. note *o*.

(*z*) *i. e.* under s. xxxiv., which see, together with notes *j* and *k* thereto.

(*a*) Commencement and conclusion of Declaration, see s. cviii. Plaintiff filing a declaration under this section should observe the provisions of N. R. 20 as to particulars of demand. Of course if the writ of summons be specially indorsed pursuant to s. xli. such particulars will be unnecessary. See *Ives* v. *Calvin*, I U. C. Cham. R. 8, in which a great number of cases are collected, in which it has been held that particulars may be obtained in proceedings *ex delicto*.

(*b*) The notice to plead here mentioned is something new in Upper Canada. It is substituted for a demand of plea which by s. cxi. of this Act is declared to be unnecessary: (See also s. ccii.) Where plaintiff having served his declaration and a demand of plea under the old practice, and having signed judgment for want of a plea before this Act came into force, applied to be allowed to proceed under this section, his applicaton was refused. And per Burns J. "You must take a rule to compute under the old practice. The 61st sec. refers specially to writs issued under to the new Act, and declarations which should be indorsed with a notice to plead informing the defendant fully of his liability in case of neglect." (The *Queen* v. *Hunter*, Chambers, Sept. 12, 1856, Burns J.) The declaration and notice to plead under this enactment should be served as well as filed, unless otherwise ordered by the Court or a Judge. "Service as well as filing is evidently contemplated by this section, though not specially mentioned": (*Wallace* v. *Fraser*, Chambers, Sept. 15th, 1856, Richards J.; also, the *Queen* v. *Hunter*, Sept. 12th, 1856, Burns J; see also N. R. 132.)

(*c*) Apparently the filing of a declaration under this section would have the effect of delaying plaintiff in his proceedings, but such may not really the result to the extent supposed. If plaintiff sign judgment ever so promptly under the preceding section, still he will be obliged to wait the expiration of eight days from the last day for appearance before issuing an execution. If plaintiff sign judgment under this section execution may be issued forthwith. But before he can be entitled to judgment he must delay eight days after filing declaration so as to allow

where the cause of action mentioned in the declaration is for any of the claims which might have been inserted in the special indorsement on the Writ of Summons, (*d*) the Judgment shall be final, and execution may issue for an amount not exceeding the amount indorsed on the Writ of Summons with interest and costs; (*e*) Provided always, that in such case the Plaintiff shall not be entitled to more costs than if he had made such special indorsement and signed Judgment upon non-appearance. (*f*) Execution. Proviso: as to costs.

LXII. (*g*) The Defendant may appear (*h*) at any time before Judgment, (*i*) and if he appear after the time specified either (*App. Ch. C.*) Eng. C. L. P. A. 1852, s. 29.

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defendant, if disposed, to plead. In either proceeding the time is nearly equal. The former perhaps, upon the whole, is the most expeditious. Judgment under the preceding section is, properly speaking, signed "in default of appearance." Under this section it will be signed "in default of plea." In either case it would seem that the judgment after default may be signed without any notice to defendant. The point though raised has not yet been decided: it is still doubtful: (see *Goodiffe* v. *Neaves*, 8 Ex. 134.)

(*d*) As to which see s. xli. and notes thereto.

(*e*) "*And costs.*" This does not mean costs indorsed on the writ, but costs of the cause to be taxed by the Master. The preceding section is express upon the point.

(*f*) This is a penalty upon plaintiff's attorney for neglecting specially to indorse the writ in cases in which the same ought to be done. It is right to observe that the proviso allowing defendant to come in and defend (to be found in the preceding section,) has not been repeated in the section under consideration. A judgment signed pursuant to this section would therefore appear to be more final in its effects than judgment under the preceding section.

(*g*) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 29.—Founded upon 1st Rept. C. L. Comrs. s. 16.—Applied to County Courts. Defendant may at any time come in and watch his rights without prejudice to the plaintiff. Appearing before plea pleaded, he will will have every advantage that an appearance would have given if made within the appointed time. If he appear after plea pleaded he will be in a position to see to the regularity of plaintiff's proceedings. *Qu.* If defendant appear after the time limited to a writ *specially indorsed*, is plaintiff thereby debarred from entering judgment? (see *Rogers* v. *Hunt*, 10 Ex. 474.) If a plaintiff under the old practice entered an appearance for defendant it was unnecessary for plaintiff afterwards to serve a demand of plea before signing judgment. This too was held to be the the law in a case where the defendant after the time limited for appearance and after an appearance *per Stat.* by plaintiff, himself entered an appearance and gave notice to plaintiff: (see *Davis* v. *Cooper*, 2 thereof Dowl. P. C. 135.)

(*h*) If defendant appear under this section, he will thereby waive irregularities in the writ, copy, and service, nay, even the total want of a writ. Moreover, in doing so he submits himself to the jurisdiction of the Court in which he appears, no matter where the cause of action arose: (see *Forbes et al.* v. *Smith*, 10 Ex. 717, also *Humble* v. *Bland*, 6 T. R. 255.) The appearance if defective but not void may be amended: (see *Whesten* v. *Packman*, 3 Wils, 49; *Bate* v. *Bolton*, 4 Dowl. P. C. 677.)

(*i*) Too late after judgment is signed

Plaintiff may appear at any time before judgment.

in the Writ of Summons (*j*) or in the warning indorsed in any Writ of Capias served on him, (*k*) or in any rule or order to proceed as if personal service had been effected, (*l*) he shall, after notice of such appearance to the Plaintiff or his Attorney,

His position.

as the case may be, be in the same position as to pleadings or other proceedings in the action as if he had appeared in time; (*m*)

Proviso.

Provided always, that a Defendant appearing after the time appointed by the Writ, shall not be entitled to any further time for pleading or any other proceeding, than if he had appeared within such appointed time; (*n*) Provided also, that if the

Proviso.

Defendant shall appear after the time appointed by the Writ, and shall omit to give such notice of his appearance, the Plaintiff may proceed as in case of non-appearance. (*o*)

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under either of the preceding sections. The appearance may be entered at any time during the long vacation now as formerly.

(*j*) *i. e.* "Within ten days after service of writ." (See Sch. A, No. 1.)

(*k*) Time same as in preceding note.

(*l*) If defendant be without the jurisdiction of the Court the time for appearance is regulated "by the distance from Upper Canada of the place where the defendant is residing," &c. (see ss. xxxv. and xxxvi.) The rule or order here mentioned is obtainable under s. xxxiv.

(*m*) "*He shall, after notice, &c.*"—Though the notice here intended is a written one, (N. R. 131,) a *knowledge* by plaintiff that an appearance has been entered may in some cases be held to dispense with the necessity for such a notice. Thus, where the writ of summons specially indorsed was served on 30th August: Defendant on 9th September, entered an appearance, but gave no notice thereof to plaintiff's attorney, as required by this section. On the same day plaintiff's attorney having seen the entry of the appearance in the proper book, at the office of the Deputy Clerk of the Crown, and having also seen the appearance itself, notwithstanding, signed judgment for non-appearance. Held that the "knowledge of the plaintiff, that an appearance was entered, though it was signed on the morning of the day after which it should have been entered according to the time of the service of the writ of summons, was sufficient to dispense with a written notice by the defendant that he had appeared:" (*Lanark and Drummond Plank Road Company* v. *Bothwell*, Chambers, Oct. 11, 1856, Burns, J.) Besides, it was in this case considered that "plaintiff did not allow time for such notice to be given—for the appearance was entered at the opening of the office in the morning, and plaintiff's attorney came at the same time with the papers prepared to sign judgment, although seeing the appearance entered." (*Ib.*) The summons to set aside the judgment was made absolute without costs, because "it appeared that the Deputy Clerk of the Crown had received the appearance the day before with instructions to keep it and file it the first thing next morning." (*Ib.*) If defendant regularly appear by, and give the name of an attorney, it would seem necessary for plaintiff to serve papers on such attorney: (see s. ix. and notes thereto: *Scd qu.* See *Gourlay* v. *McLean*, 6 O. S. 79.)

(*n*) Otherwise plaintiff might be prejudiced: (see *Davis* v. *Cooper*, 2 Dowl. P. C. Bayley J.)

(*o*) This latter proviso is not con-

LXIII. (*p*) Every appearance by the Defendant in person (*q*) shall give an address, (*r*) at which it shall be sufficient to leave all pleadings and other proceedings not requiring personal service, (*s*) and if such address be not given, the appearance shall not be received, (*t*) and if an address as given shall be illusory or fictitious, the appearance shall be irregular and may be set aside (*u*) by the Court or a Judge, and the Plaintiff may

(*App. Ch. C.*) Eng. C. L. P. A. 1852, s. 30.

Defendant appearing in person to give an address, &c.

Where pleadings, &c. may be served.

tained in the English enactment. It is necessary in order to relieve plaintiff from searching the Crown office from day to day as he proceeds with his suit, in anticipation of an appearance after the time limited for appearance has expired.

(*p*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 30.—Founded upon 1st Rep. of C. L. Com. s. 18.—Applied to County Courts. The object of this enactment is to compel defendants appearing in person to give to plaintiff's attorney full and correct information as to the address or place at which all papers not requiring personal service may be left.

(*q*) This section applies only to cases where defendant appears in person. The form of appearance is given in the following section (lxiv). A defendant who appears in person is bound to know the practice of the Court and cannot be suffered to excuse himself on the ground of ignorance: (see *Gillingham* v. *Waskett*, McCiel. 568.) He is bound too by the same rules as he would have been had he appeared by attorney: (*Kerry* v. *Reynolds*, 4 Dowl. P.C. 234.) But there is nothing to prevent a defendant who appears in person afterwards pleading by attorney: (see *Soper* v. *Draper et al.* 2 O. S. 289; *Kerrison* v *Wallinborough*, 5 Dowl. P. C. 564; see also N. R. 139.)

(*r*) The memorandum stating the address together with the appearance to be given to the proper officer and filed by him (s. lxiv.) The memorandum of address to be filed "as a paper in the cause." "Such address or place to be not more than two miles from such office:" (see N. R. 138.)

(*s*) Notices, summonses, rules, orders, and generally all proceedings subsequent to the writ, including pleadings may be sufficiently served though the service be not personal: (see N. R. 138.) A rule *nisi* for an attachment is an exception, and almost the only exception to this practice. The address given by defendant may or may not be his residence. If his residence, the service may be made on a servant, and must at all events be shown to have been made upon some person connected with his residence: (*Taylor* v. *Whitworth*, 1 Dowl. N S. 600.) If the place of address be not his residence, then it seems the service must be made upon some person connected with the place so named. Service of pleadings, notices, summonses, orders, rules, and other proceedings must after the first day of Michaelmas Term, 1856, be made before 7 o'clock P.M., except on Saturdays, when it must be made before 3 o'clock P.M.: (see N. R. 135.)

(*t*) *i. e.* By the officer whose duty otherwise it would be to file it.

(*u*) It is important here to note the distinction between an irregularity and a nullity. The former may be waived by the conduct of the party, who is entitled to take advantage of it, and stands good at least till set aside. The latter is incapable of being waived and has no force or effect whatever. An appearance, if defective in the particulars mentioned in this section, is declared to be an irregularity. To set aside an irregularity, the party objecting must apply within a reasonable time and before taking any fresh step after a knowledge of the irregularity: (see N. R. 106, also note to s. xxxvii., p. 84 of this work.)

be permitted to proceed, (*v*) by sticking up the proceedings in the office from whence the Writ was sued out. (*w*)

(App. Cn. C.) Eng.C.L.P.A. 1852, s. 31.

LXIV. (*x*) The mode of appearance to every such Writ of Summons or* under the authority of this Act, shall be by filing with the proper officer in that behalf, (*y*) a memorandum in writing according to the following form, or to the like effect: (*z*)

Mode and form of appearance.

(*v*) "*Permitted to proceed*," &c. *Qu.* Does this intend an application to the Court or Judge for the necessary permission? There is nothing to hinder plaintiff moving at one and the same time to set aside the appearance and to be allowed to proceed in the manner pointed out by this section.

(*w*) Plaintiff in his application must show that the appearance is without an address; *or* an address which is illusory or fictitious; *or* that the address or place given is more than two miles from the office of the Clerk or deputy-Clerk of the Crown: (as to this latter see N. R. 138); To prove an appearance without the necessary address, the fact after search may be sworn to in positive terms. To prove a given address to be illusory or fictitious, it will be necessary to set forth particular facts which lead to that conclusion. "Illusory" means that which deceives, while "fictitious" may mean that which is designedly untrue. If from inquiries made at the place given as the address of defendant it turn out that the address be really fictitious or illusory, plaintiff, it is apprehended, is in a position to apply without further inquiry. But it must be shown by plaintiff that he used due diligence in order to find the address given by defendant: (*Fry* v. *Rogers*, 2 Dowl. P. C. 412.) Special inquiries must be made at the place designated. As to the sufficiency of the inquiries see *Fry* v. *Rogers*, *ante*; also *Hemming* v. *Duke*, 2 Dowl. P.C. 637. To prove that the address or place given is more than two miles from the office of the Clerk or Deputy Clerk of the Crown, an affidavit of the fact must be produced. If the application by plaintiff to be permitted to proceed in manner directed by this section be an application separate and distinct from that to set aside the appearance for irregulariry, it may be that the order will be granted absolute in the first instance: (see *Bridger* v. *Austin*, 1 Dowl. P.C. 272.) For a form of the affidavit and order consult Chit. F 6 Edn. 39. The words of this enactment should of course be substituted for corresponding but not exactly similar expressions made use of in these forms.

(*x*) Taken from Eng. St. 15 & 16 Vic., cap. 76, s. 31.—Applied to County Courts. This enactment is also a copy of our St. 12 Vic. cap. 63, s. 23. The origin of both enactments appears to be Eng. St. 2 Wm. IV. cap. 39, s. 2, with which both almost literally agree.

(*y*) In Eng. Act "By delivering a memorandum to the proper officer or person in that behalf, &c." The difference between ours and the English enactment appears to be one rather of form than of substance. It must be intended that the officer should keep an appearance book or other record in which entries may be made. The Statute is silent upon the subject; but N. R. 1 makes positive provision for an appearance book. The rule is in effect a re-enactment of old Rule 13 of H. T., 13 Vic.

(*z*) The forms here given are substantially the same as those of Eng. St. 2 Wm. IV. cap. 39, Sch. No. 2, and Prov. Stat. 12 Vic. cap. 63, Sch. No. 2. The Schedules to both these Statutes in reality gave three forms. 1. Where defendant appeared in person. 2. Where he appeared by attorney. 3. Where plaintiff's attorney appeared

* "Or" evidently a clerical error.

A. B., Plaintiff, against C. D., Defendant, *or* against C. D. and another, *or* against C. D. and others.	The Defendant, C.D., appears in person (*a*) *or* E. F. (*b*) Attorney (*c*) for C. D., (*d*) appears for him.

(*If the Defendant appears in person, here give his address.* (*e*)

Entered the day of A. D., 18 . (*f*)

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for defendant. The last of these three has of course been omitted from the forms above given. Appearance by plaintiff for defendant is practically abolished by s. lix. of this Act. The form here prescribed must be strictly followed. Where an Act of Parliament expressly provides that a thing is to be done in a given form the Statute must be closely pursued: (see *Warren* v. *Love*, 7 Dowl. P. C. 602; *Codrington* v. *Curlewis*, 9 Dowl. P. C. 968.) Still the form so given need only be followed in cases in which it is applicable. In cases where the form does not apply an appearance may be entered by keeping as closely to the form prescribed as possible: (see *Smith* v. *Wedderburne*, 4 D. & L., per Pollock, C. B., 297.) If two or more defendants in the same action appear at the same time by the same attorney, the name of all such defendants may be inserted in the one memorandum of appearance: (N. R 2.)

(*a*) If defendant be sued by his wrong name he would do well to appear by his right name. In the margin of the appearance paper it may be stated that he is sued by the wrong name: (see *Hobson* v *Wadsworth*, 8 Dowl. P. C. 601; *Kitchen* v. *Roots*, *Ib.* 232.) If he appear by his right name, then plaintiff may declare against him in such name, mentioning, however, that he was sued by the other, thus—"A. B., by E. F. his attorney, sues C. D., who has been summoned by the name of G. D:" (see *Doo* v. *Butcher*, 3 T.R. 611.) Thus the suit may proceed without difficulty. But if defendant appear by the wrong name, plaintiff may also declare against him by that name: (see *Clark* v. *Baker*, 13 East. 273; *Stroud* v. *Gerrard*, 1 Salk. 8; Chit. Arch. 9 Edn. 200. Also see *Gould* v. *Barnes*, 3 Taunt. 504; *Williams* v. *Bryant*, 5 M. & W. 447.) If the mistaken name be *idem sonans* there will be no irregularity, thus—Lawrance for Lawrence: (*Webb* v. *Lawrence*, 1 C. & M. 806.)

(*b*) The name of the Attorney must be given: (see *Warren* v. *Love*, 7 Dowl. P. C. 602.) And defendant cannot appear by more than one attorney: (see *Williams* v. *Williams*, per Abinger, C. B., 10 M. & W. 178.) But such an appearance would be an irregularity only, and not a nullity: (*Ib.*)

(*c*) An appearance by a person who is not an attorney of the Court, does not, it seems, entitle the opposite party to sign judgment but only to move to set aside proceedings: (see *Bazley* v. *Thompson*, 4 Tyr. 955.)

(*d*) An appearance thus worded—"In Q. B. Thomas Warren, plaintiff, against George Love, defendant, —— attorney, appears for———," was held to be a nullity: (*Warren* v. *Love*, 7 Dowl. P. C. 602; see *Codrington* v. *Curlewis*, 9 Dowl. P. C. 968.)

(*e*) As to appearances in person, see preceding section lxiii., and notes thereto.

(*f*) This blank it is presumed must be filled in as of the date of entry. The Eng. St. is to the effect that the appearance must "be dated on the day of the delivery thereof:" (s. 31.) These words have not been copied by our Legislature; but their omission

Con Stat. for U.C. ch 12. §§ 58, 59, 88.

(App. Cb. C.) Eng. C. L. P. A. 1852, s. 32.

LXV. (*g*) All such proceedings as are mentioned in any Writ of Summons [or Capias,] or notice [or warning thereto or thereon,] issued, [made or given] by authority of this Act, may be had and taken (in default of a Defendant's appearance [or putting in special bail,)] (*h*) at the expiration of ten days from the service or execution thereof, (*i*) on whatever day the last of such ten days may happen to fall, whether in term or vacation; (*k*) Provided always, that if the last of such ten days shall in any case happen to fall on a Sunday, Christmas Day or Good Friday, in either of such cases the following day, or the following Monday when Christmas Day falls on a Saturday, shall be considered as the last of such ten days; (*l*) Provided

At what time certain proceedings may be taken if Defendant do not appear.

Proviso: for Holidays.

U/ § 58.

cannot be of much importance. A blank is left by the Legislature in the form here given for some date which the appearance is to bear. It cannot be any other than the day of the date of filing. The officer who files an appearance is bound to mark upon it the day upon which it was filed with him. (see N. R. 1.) Supposing the assumption here made as to the date of an appearance to be correct, it follows that no appearance can be entered *nunc pro tunc*. If defendant enter an appearance, having a mistake in name, date, &c., he should apply to amend it and not enter a fresh one: (see *Bate* v. *Bolton*, 4 Dowl. P. C. 677.) Where an appearance is improperly entered and not a nullity, it may, on application be struck out: (see *Paget* v. *Thompson*, 3 Bing. 609.) A judge's order to set aside an appearance must be served before it will operate: (see *Belcher* v. *Goodered*, 4 D. & L. 814.) The application to set aside or strike out an appearance for irregularity, must be made within a reasonable time and before plaintiff has taken any fresh step after a knowledge of the irregularity: (see note *m* to s. xxxvii., p. 84 of this work, with cases there mentioned.)

(*g*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 32—Applied to County Courts.—Substantially the same as Prov. Stat. 12 Vic., cap. 63, s. 26, which was adopted from Eng. Stat. 2 Wm. IV. cap. 39, ss. 11 and 16.

(*h*) The English enactment ends here; besides, it does not contain any of the words placed in brackets in the commencement of this section. The reason that the words "or putting in special bail" are not to be found in the Eng. Act will be made sufficiently obvious upon reference to note *c* to s. xxii. of this Act. Briefly it may be stated that in England since the passing of St. 1 & 2 Vic., cap. 110, a *capias* is no longer in use for the commencement of actions, but that before that Statute the English law was the same as ours is now.

(*i*) Defendant is by the writ commanded to appear "within ten days" after service, "inclusive of the day of such service," (Sch. A, No. 1.) As to the computation of time see *Fano* v. *Coken*, 1 H. B. 9, and note *k* to s. li. of this Act; also note *d* to s. lvii.

(*k*) Formerly writs of first process were made returnable in term. In some cases no proceedings could be effectually had on a writ of summons returnable within four days of the end of any term until the beginning of the ensuing term. Great and unnecessary delay was thereby created. To remedy it Stat. 2 Wm. IV. cap. 39, s. 11, (which is precisely the same as the above provision) was passed.

(*l*) The old rule was different. For many purposes the return day of the writ might be on Sunday or on any other day: (see *Fano* v. *Coken*, 1 H.

also, that if such Writ shall be served or be executed on any day between the first day of July and the twenty-first day of August in any year, special bail may be put in by the Defendant on bailable process, or appearance entered by the Defendant on process not bailable, at the expiration of such ten days; (m) Provided also, that no declaration or pleading after declaration shall be filed or served between the said first day of July and the said twenty-first day of August. (n)

Proviso: for Vacation.

2nd Proviso: ditto.

LXVI. (o) In any action brought against two or more Defendants when the Writ of Summons is indorsed in the special form hereinbefore provided, (p) if one or more of such Defendants only shall appear and another or others of them shall not appear, it shall be lawful for the Plaintiff to sign Judgment against such Defendant or Defendants only as shall not have appeared, (q) and before declaration against the other Defendant or Defendants, to issue execution thereupon, in which case he shall be taken to have abandoned his action against the Defendant or Defendants who shall have appeared; (r) or the

(App. Co. C.) Eng. C. L. P. A. 1852, s. 33.

Proceedings if some of the Defendants appear and others do not, the writ being specially indorsed.

B. 9.) The provision here enacted is the same in principle as N. R. 166.

(m) *At the expiration of such ten days—i. e.*—ten days from the service or execution of the writ. But still the precise meaning of this part of the section when taken in connexion with other parts of the C. L. P. Act, is far from being clear. Defendant by the writ is *commanded* to appear "within ten days" after service; but *may* appear "at any time before judgment," (s. lxii.) It can neither be the intention of the legislature to restrict defendant to an appearance within ten days or to any period after the expiration of that time. The object of the enactment apppears to be to declare that special bail may be put in or an appearance entered at any time during the long vacation. Plaintiff cannot declare until after the expiration of vacation: (see latter part of this section.)

(n) This in effect preserves to Upper Canada the vacation first introduced by Prov. Stat. 12 Vic. cap. 63, s. 26. (See also N. R. 9.) The corresponding vacation in England is from August 10, to October 24: (see Eng. Stat. 2 Wm. IV. cap. 39, s. 11.)

(o) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 33.—Applied to County Courts.

(p) *i. e.* by s. xli. of this Act.

(q) Form of such judgment, see Sch. A No. 7, *bis*.

(r) Two modes of procedure are enacted by this section, and it is for the plaintiff to elect between them. If he sign judgment under the first part of the enactment, his judgment will be final as against defendants who have not appeared, and against whom he may issue execution without further delay. But if he adopt this course, he must abandon his action against the remaining defendants who have appeared. The question of costs then becomes a consideration. The plaintiff as against defendants who have not appeared and against whom judg-

Plaintiff may before such execution declare against such Defendant or Defendants as shall have appeared, stating by way of suggestion the Judgment obtained against the other Defendant or Defendants who shall not have appeared, in which case the judgment so obtained against the defendant or defendants who shall not have appeared, shall operate and take effect in like manner as a Judgment by default obtained before the commencement of this Act against one or more of several Defendants in an action of debt. (*s*)

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ment is signed for default of appearance is clearly entitled to costs as much as if he had obtained a verdict: (see s. lx.) It is equally clear that plaintiff abandoning his action against some defendants will be required to pay them their costs: (Lush's Prac. 693.)

(*s*) If plaintiff instead of proceeding under the first part of this enactment as pointed out in the previous note, elect to proceed under this latter part of the enactment, his judgment obtained against defendants who have not appeared, will be in effect interlocutory rather than final. What may be the result? This enactment only applies to cases where the writ is specially indorsed. The writ can only be so indorsed when the action is brought upon a contract express or implied: (s. xli.) The contract whether express or implied, is taken to be entire, and plaintiff proceeding upon it against all the defendants must as a general rule recover against all or none: (Chit. Arch. 8 Edn. 880.) If he fail upon the plea of one he loses the benefit that he might otherwise derive under the first part of this enactment against defendants who have not appeared: (see *Morgan* v. *Edwards*, 6 Taunt. 398.) Besides, he may be held to lose all right to costs of the cause: (see *Ib.*) And having signed judgment against one or more of several defendants, he is not in a position at the trial to ask for a nonsuit: a verdict must, if any one defendant succeed on his plea to the action be given to all the defendants: (Tidd's Prac. 6 Edn. 908, referring to *Hannay* v. *Smith*, 3 T. R. 662; *Weller* v. *Goyton et al*, 1 Burr. 258; *Harris* v. *Butterley*, Cowp. 483. *Sed qu.*—see *Murphy* v. *Donlan et al.* 5 B. & C. 178; *Smart* v. *Rogers*, 4 M. & W. 649; *Commercial Bank* v. *Hughes et al.* 4 U. C. R. 167.) The rule as regards non-suit would be different if one of several defendants was in fact unable to contract (*i. e.* an infant, married woman, idiot, &c.) In this case it would be absurd for any purpose to hold that the contract was joint and entire: (see *Boyle* v. *Webster*, 21 L. J. Q. B. 202.) Then plaintiff has just this choice—either to be satisfied with his judgment against such defendants as have not appeared, or if dissatisfied therewith to proceed against all the defendants, including those who have appeared, and run the risk of losing whatever advantages he has gained by his judgment: (see *Eliot* v. *Morgan*, per Coleridge, J. 7 C. & P. 334.) It would seem that even after a declaration under the latter part of this section if plaintiff repent of his course he may, under s. lxx. of this Act, apply at any time before trial to strike out the names of all defendants excepting those who did not appear, and against whom he has signed judgment. He may then issue execution with as much effect as if he had, in the first instance elected to abandon his suit against all defendants who had appeared: (Chit. Arch. 9 Edn. 918.) Indeed, the late cases have gone further. In one case where in an action upon contract against two defendants, A. and B., of whom the former suffered judgment by default,

And with respect to the joinder of parties to actions; Be it enacted as follows: (*t*)

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and the latter pleaded "never indebted," and at the trial it appeared that A., against whom judgment by default was signed, was not at all liable, while B. who pleaded was solely liable. The Judge, upon application, allowed A.'s name to be struck out of the record and directed a verdict against defendant B. The Court confirmed the decision of the Judge: (*Greaves* v. *Humfries et al.* 4 El. & B. 851.) If the name of a defendant against whom judgment by default is signed be struck out, the judgment is also thereby struck out: (per Campbell, C. J. *Ib.* p. 852.)

(*t*) The following enactments are founded upon the first report of the C. L. Comrs., s. 19, and will be found in effect to conduce largely to the administration of substantial justice. To understand completely the nature of the changes made in the law, it will be proper to state shortly the old law. This may be done almost in the words of the Commissioners.

First—As to actions *ex contractu*.—The *omission* of a party as *plaintiff* who ought to be joined or the *joinder* of a party who ought not to be joined was fatal. So the *joinder* of a person as *defendant* who ought not to be joined was likewise fatal,; whilst the *omission* of a party as defendant who ought to be joined could only be taken advantage of by a plea in abatement.

Second—As to actions *ex delicto*.—The *joinder* of a party who ought not to be a *plaintiff* was fatal; whilst the *omission* of a party who ought to be a co-plaintiff could only be taken advantage of by a plea in abatement. In such actions the *joinder* of persons who were not liable as *defendants* only entitled them to an acquittal and the *omission* of persons jointly liable was of no consequence.

So far as the law is here stated with respect to the joinder of parties it still remains; but the consequences of mistake or error are not so disastrous as here described. The proper parties to sue or be sued in an action either of contract or of tort must, as heretofore, be determined upon by the particular circumstances of the case and the due application of the existing laws that regulate the joinder of parties to an action. But if plaintiff's attorney mistake the number of parties to be joined either as plaintiff or defendant, the consequences of his mistake will now be less likely to be fatal than formerly. Powers of amendment to be exercised in a liberal spirit: (see *Parry* v. *Fairhurst*, per Alderson, B., 2 C. M. & R. 196; *Sainsbury* v. *Mathews*, per Parke, B., 4 M. & W. 347; *Ward* v *Pearson*, per same Judge, 3 M. & W. 18; *Evans* v. *Fryer*, per Williams, J., 10 A. & E. 615; *Pacific Steam Navig'n Co.* v *Lewis*, per Pollock, C. B., 16 M. & W., 792; *Smith* v. *Knowelden*, per Tindal, C. J., 2 M. & G. 561;) will go far to render substantial justice paramount to mere technicality, and so advance the remedy in a manner co-extensive at least with the mischief intended to be prevented. Statutes giving the power of amendment are most salutory remedial statutes and ought to receive a a liberal or at all events a fair construction: (*Greaves* v. *Humfries*, per Campbell, C. J., 4 El. & B. 853.) The *Non*-joinder or *Mis*-joinder of plaintiffs or defendants in any civil action may be remedied upon proper application to the Court or a Judge, to be made either before trial or at the trial, under the provisions of the enactment which here follows. If the amendment be either granted or refused at *Nisi Prius*, the party dissatisfied with the decision of the Judge, cannot, it seems, appeal to the Court *in banc.* or apply to that Court for a review of the Judge's decision, under s. ccxci. of this Act: (see *Robson* v. *Doyle et al*, 3 El. & B. 395.) The only remedy in such case for an amendment thought to be improperly made or refused is to

Const. Stat. for as. ch. 22 § 68, 64

(*Apr. Co. C.*) Eng. C. L. P. A. 1856, s. 34.

Court may in certain cases order any party not joined as Plaintiff. to be so joined, or a party joined to be struck out before trial.

LXVII. (*u*) It shall be lawful for the Court or a Judge at any time before the trial of any cause, (*v*) to order that any person or persons not joined as Plaintiff or Plaintiffs in such cause shall be so joined, (*w*) or that any person or persons originally joined as Plaintiff or Plaintiffs, shall be struck out from such cause, (*x*) if it shall appear to such Court or Judge that injustice will not be done by such amendment, (*y*) and that the person or persons to be added as aforesaid, consent either in person or by writing (*z*) under his, her or their hands to be so joined, (*a*) or that the person or persons to be struck out as aforesaid, were originally introduced without his, her or their consent, or that such person or persons consent in manner aforesaid to be struck out; (*b*) and such amendment shall be made upon such terms as to the amendment of the pleadings, if any, postponement of the trial, and otherwise, as the Court or Judge by whom such amendment is made shall think proper, (*c*) and when any such amendment shall have been made, the liability of any person or persons who shall have been added as co-plaintiff or co-plaintiffs shall, subject to any terms imposed

(1) § 63.

apply to the full Court for a new trial.

(*u*) Adopted from English St. 15 & 16 Vic., cap. 76, s. 34—Applied to County Courts. This section applies to the *non*-joinder or *mis*-joinder of *plaintiffs* in actions both upon contract and for tort. The amendment, if desired, must be applied for and made before trial. For a review of this and the following sections, see Tay. Ev. 2nd Edn. p. 184, *et seq.*

(*v*) Amendment at the trial may be made under and pursuant to the succeeding section: (lxviii.)

(*w*) Form of affidavit, summons and order, see Chit. Forms, 7 Edn. 831.

(*x*) Form of affidavit, summons and order in this case, see Chit. F. 7 Edn. 832. See further *Collins* v. *Johnson*, 16 C. B. 588.

(*y*) This is a most vague expression and yet it is difficult to imagine a better, or one more in keeping with the spirit and intent of the Act. It is incumbent upon the Judge to whom application is made before acceding to the application to look well to the circumstances of the case as affecting the rights and liabilities of both parties to the suit: (see *Cook* v. *Stratford*, per Rolfe, B., 13 M. & W. 387.)

(*z*) "*In person or by writing*," &c. The "consent in person" ought, it is presumed, be given in open Court or Chambers, as the case may be.

(*a*) Form of consent—See Chit F., 7 Edn. 831.

(*b*) Form of consent in this case—See Chit. F. 7 Edn. 832.

(*c*) The Court above will rarely interfere with the discretion of a judge exercised in Chambers in a case within his jurisdiction: (see *Tadman* v. *Wood*, 4 A. & E. 1011.) Applications to the Court above for a review of the Judge's decision when allowable should be made during the term next after the decision: (see *Orchard* v. *Moxey*, 21 L. J. Ex. 79 *n*; *Meredith* v. *Gillens*, 21 L. J. Q. B. 273; *Collins* v. *Johnson*, 16 C. B. 588; see further note *m* to s. xxxvii.

as aforesaid, be the same as if such person or persons had been originally joined in such cause. (d)

(App. Co. C.) Eng. C. L. P. A. 1852, s. 35.

Proceedings for amendment if the mis-joinder of Plaintiffs; or an omission to join those who ought to be joined, appear at the trial, the Defendant not having given notice of objection.

LXVIII. (e) In case it shall appear at the trial (f) of any action that there has been a mis-joinder of Plaintiffs, or that some person or persons not joined as Plaintiff or Plaintiffs ought to have been so joined, (g) and the Defendant shall not at or before the time of pleading have given notice in writing that he objects to such non-joinder, specifying therein the name or names of such person or persons, (h) such mis-joinder or non-joinder may be amended as a variance at the trial by any Court of Record holding plea in civil actions, and by any Judge sitting at *nisi prius*, or other presiding officer, (i) in like manner as to the mode of amendment and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendment of variances under the Act of the Parliament of Upper Canada, passed in the seventh year of the Reign of King William the Fourth,

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(d) The object of this provision is for all purposes to give effect to the amendment made. The amendment when made must be in accordance with the established practice as respects

PARTIES TO ACTIONS.

Joinder of Plaintiffs.

1.—In actions *ex contractu*—see Chit. Pl. I. 2–68, 7 Edn.

2.—In actions *ex delicto*—see Chit. Pl. I. 68–84, 7 Edn.

Cases decided since the publication of Chitty:—Actions *ex contractu*.—*Keightley* v. *Watson*, 3 Ex. 716; *Wetherall* v. *Langston*, 1 Ex. 635; *Wakefield* v. *Brown*, 9 Q. B. 209; *Hopkinson* v. *Lee*, 6 Q. B. 964; *Rayner* v. *Grote*, 15 M. & W. 359; *Webb* v. *Spicer*, 13 Q. B. 886; *Higginbottom* v. *Burge*, 4 Ex. 667; *Foley* v. *Addenbrooke*, 4 Q. B. 197; *Vertue* v. *East Auglian R. Co.*, 5 Ex. 280; *Smyth et al* v. *Anderson*, 7 C. B. 21; *Harcourt* v. *Wyman*, 3 Ex. 817; *Cobb* v. *Beck*, 6 Q. B. 930; *Mills* v. *The Guardians of the Poor of Alderbury Union*, 3 Ex. 590; *Wetherell* v. *Langston*, 1 Ex. 634; *Jones* v. *Robinson*, 1 Ex. 454; *Sutherland* v. *Wills*, 5 Ex. 715; *Crowhurst* v. *Laverack*, 8 Ex. 208; *Wheatley* v. *Boyd*, 7 Ex. 20; *Clay* v. *Southern*, 7 Ex. 717; *Schmaltz* v. *Avery*, 16 Q. B. 655; *Humble* v. *Hunter*, 12 Q. B. 310; *Thatcher* v. *England*, 3 C. B. 254; *Boyd* v. *Mangles*, 3 Ex. 387; *Jones* v. *Carter*, 8 Q. B. 134.

(e) Taken from Eng. Stat. 15 & 16 Vic., cap. 76, s. 35—Applied to County Courts. This enactment is intended to apply to cases of *non*-joinder or *mis*-joinder of *Plaintiffs*. The amendment when allowable is to be made at the trial.

(f) The application should it seems not only be made *at* the trial, but *before* verdict: (See *Brasher* v. *Jackson*, 8 Dowl. P. C. 784; See further n. *j*. to this section.)

(g) As to Joinder of Plaintiffs, see n. *d*. to preceding section, (lxvii.)

(h) Proceedings in case this notice be given, see next succeeding section, (lxix.)

(i) *i. e.* Judge or County Judge or Crown Counsel acting for and in the

intituled, *An Act for the further amendment of the law and the better advancement of Justice*, (*j*) if it shall appear to such Court or Judge or other presiding officer, that such mis-joinder or non-joinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, (*k*) and that the person or persons to be added as aforesaid, consent either in person or by writing under his, her, or their hands to be so joined, (*l*) or that the person or persons to be struck out as aforesaid were originally introduced without his, her, or their consent, or that such person or persons consent in manner aforesaid to be so struck out, (*m*) and such amendment shall be made upon such terms as the Court or

absence of the Judge of Assize under s. cliii. of this Act—does not appear to extend to Associates.

(*j*) *i. e.* Stat. U. C. 7 Wm. IV., cap. 3, s. 15, which is a transcript of the Eng. Stat. 3 & 4 Wm. IV., cap. 42, s. 23, and to which latter Act a reference is made in the Eng. C. L. P. A., 1852, similar in effect to the reference by this section made to 7 Wm. IV., cap. 3, s. 15. It is expressed that the amendments to be made under the section here annotated, shall be made "in like manner as to the mode of amendment and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments made under the Stat. of Wm. IV." A reference to the decisions under that Statute, as to the "*mode of amendment*" and "*proceedings consequent thereon*," becomes necessary.

The amendment should be liberally made: (*Smith* v. *Knowelden*, per Maule, J., 2 M. & G. 565.) The time for the amendment is before verdict: (*Brasher* v. *Jackson*, 8 Dowl. P. C. 784; *Doe* v. *Long*, per Coleridge, J., 9 C. & P. 777; also *Jones* v. *Hutchinson*, 10 C. B. 515.) By consent an amendment was allowed, though applied for after verdict, but before it was recorded: (*Roberts* v. *Snell*, 1 M. & G. 577.) Where in consequence of an amendment being made in the declaration, it becomes necessary in the plea, the Court will direct this also to be made, should the counsel for defendant decline to interfere or to amend the pleadings himself: (Tay. Ev. 2nd Edn., p. 202, referring to *Perry* v. *Fisher*, Spring Assizes, Surrey, 1846, per Lord Denman, *M.S.*) The Court cannot control the discretion of the Judge in *refusing* the amendment: (*Ib.* referring to *Doe* v. *Errington*, 1 A. & E. 750; *Jenkins* v. *Phillips*, per Coleridge, J., 9 C. & P. 768; *Whitwell* v. *Scheer*, per Patterson, J., 8 A. & E. 309; also *Lucas* v. *Beale*, 10 C. B. 739.) Nor will the Court interfere where an amendment has been *allowed* to be made, unless upon clear proof that the Judge was wrong: (*Ib.* referring to *Sainsbury* v. *Mathews*, per Lord Abinger, 4 M. & W. 347.) In all cases if both parties consent, larger powers may be exercised either by the Judge at *nisi prius*, or by the Court above: (Tay. Ev. 203, referring to *Parey* v. *Fairhurst*, 2 C. M. & R. 190, noticed by Patterson, J., in *Guest* v. *Elines*, 5 A. & E. 126; *Roberts* v. *Snell*, 1 M. & G. 577; *Brashier* v. *Jackson*, 6 M. & W. 558.)

(*k*) As to this expression, see n. *y.* to preceding section (lxvii.)

(*l*) See notes *z.* and *a.* to preceding section (lxvii.)

(*m*) Form of consent, see Chit. F. 7 Edn. 832.

Judge or other presiding officer by whom such amendment is made, shall think proper; (*n*) and when any such amendment shall have been made, the liability of any person or persons, who shall have been added as co-Plaintiff or co-Plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such action. (*o*)

Liability of persons ordered to be joined as Plaintiffs.

(2) § 66.

LXIX. (*p*) In case such notice be given, (*q*) or any plea in abatement of non-joinder of a person or persons as co-Plaintiff or co-Plaintiffs (in cases where such plea in abatement may be pleaded) (*r*) be pleaded by the Defendant, the Plaintiff shall be at liberty, without any order, to amend the writ

(*App. Co. C.*) Eng. C. L. P. A. 1856, s. 36.

Con. Stat. for U.C. ch. 22 - § 67.

If such notice have been given by the De-

(*n*) With respect to the "terms," it is difficult to lay down any distinct rule, as each case must in a degree depend upon its own circumstances; yet it may be advanced as a safe proposition, that the Court will not allow any additional expense to be thrown upon the opposite party, by reason of any amendment: (Tay. Ev. 2nd Edn., p. 203, referring to *Smith* v. *Brandran*, per Tindal, C. J., 2 M. & G. 250.) The costs of the amendment must rest in the discretion of the Court, or the Judge to whom application for amendment is made: (See *Tomlinson* v. *Bollard*, 4 Q. B. 642; see also *Parks* v. *Edge*, 1 C & M. 429; *Guest* v. *Elwes*, 5 A. & E. 118; see further Tidds N P. 515; Archd. Prac. 8 Edn. 388.) The Judge it seems may himself determine the *amount* of costs: (*Guest* v. *Elwes*, *ante*.) If the Court differ from him as to the propriety of the amount, still that will not avail as against his order: (*Ib.*) Where an amendment was allowed at the trial, subject to a motion for a non-suit, the Court held that the defendant was entitled to the costs of moving to enter the same, as they were incident to the amendment: (*Smith* v. *Brandram*, 9 Dowl. P. C. 430.) If the amendment be granted upon payment of costs, the payment of costs would it is presumed be a condition precedent to the amendment: (See *Levy* v. *Drew*, 5 D. & L. 307.)

(*o*) The same in effect as the concluding sentence of the preceding section.

(*p*) Taken from Eng. Stat. 15 & 16 Vic., cap. 76, s. 36—Applied to County Courts.

(*q*) *i. e.* The notice mentioned in the preceding section: (See Form thereof, Chit. F. 7 Edn. 837.)

(*r*) A plea in abatement is one which shows some ground for abating or quashing the writ and declaration. It does not contain an answer to the cause of action, but shows that the plaintiff has committed *some informality*, and points out *how he ought to have proceeded* in technical language, "gives him a better writ:" (Smith, Action 80.) The right of the defendant to plead a plea of abatement, cannot be better explained than by drawing a distinction between pleas in *bar* and pleas in *abatement*. Whenever the subject matter of the plea or defence is that the plaintiff cannot maintain *any* action at *any* time, whether present or future, in respect of the supposed cause of action, such defence may be pleaded in *bar*. But matter which merely defeats the *present* proceeding, and does not show that the plaintiff is *forever* concluded, may in general be pleaded in abatement: (Chit. Pl. 7 Edn. I. 462.) Pleas in

fendant, or non-joinder be pleaded in abatement.

and other proceedings before plea, by adding the name or names of the person or persons named in such notice or plea in abatement, (*s*) and to proceed in the action without any further appearance, on payment of the costs of and occasioned by such amendment only; (*t*) and in such case the Defendant shall be at liberty to plead *de novo*. (*u*)

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 37.

LXX. (*v*) It shall be lawful for the Court or a Judge (*w*) in the case of the joinder of too many Defendants, (*x*) in any

abatement are of several kinds, of which non-joinder of a co-plaintiff is one. It is the only one to which reference is made by the enactment under consideration. It would appear that a plea in abatement of the coverture of defendant, is not a plea of "non-joinder" within the meaning of this enactment: (*Jones* v. *Smith*, 3 M. & W. 526.) As to when and in what manner pleas in abatement for non-joinder of plaintiffs, may or may not be pleaded: (See Chit. Pl. 7 Edn. I. 462, *et seq.*; also *Robinson* v. *Marchant*, 7 Q. B. 918; *Guyard* v. *Sutton*, 3 C. B. 153; *Morgan* v. *Cubitt*, 3 Ex. 612; *Chantler* v. *Lindsey*, 4 D. & L. 339.) These pleas are discouraged by the Courts, and four days only are allowed for pleading them. The section of this Act which allows eight days for pleading, applies only to pleas in *bar*: (cxii.) Of the four days allowed for pleas in abatement, the first has been held to be inclusive, and the last exclusive: (See *Ryland* v *Worwald*, 5 Dowl. P. C. 581.) But if the fourth day be a Sunday, a plea by defendant on the following Monday is sufficient: (See *Lee* v. *Carlton*, 3 T. R. 642; also see N. R. 166.) It seems that s. xcviii. of this Act, and the other enactments relative to pleading in general, are applicable to pleas in abatement. It is doubtful whether s. cxvi. and the enactments which relate to the commencement and conclusions of pleas, can be held to apply to pleas in abatement: (Chit. Arch. 9 Edn. 847, n. *a*.) For the practice as to pleas for non-joinder of a co-defendant, see s. lxxiii., and notes thereto. The facilities given by this Act for amendments both before and at the trial, will have the effect in a great measure of doing away with pleas in abatement.

(*s*) It is as much necessary under this as under the preceding enactments, that a consent in writing of the party to be added, should be filed: (See N. R. 6.)

(*t*) The payment of costs under this provision, will be, beyond doubt, a condition precedent to the amendment: (*Levy* v. *Drew*, 5 D. & L. 307; *Waller* v. *Joy*, 16 M. & W. 60; see also *Johnson* v. *Sparrow*, 1 U. C. R. 396; *Gass* v. *Cocleugh*, E. T., 3 Vic., *M.S.* R. & H. Dig., "New Trial" lx. 1; *Wynn* v. *Palmer*, E. T., 3 Vic., *M.S.* R. & H. Dig, "New Trial" ix., 3; *Thompson* v. *Sewell*, 4 O. S. 16; *Reeves* v. *Myers*, T. T. 4 & 5 Vic., *M.S.* R. & H. Dig., "New Trial," ix. 6.)

(*u*) *i. e.* Under and pursuant to the provisions of s. cxxxix. of this Act, (which see.)

(*v*) Taken from Eng. Stat. 15 & 16 Vic., cap. 76, s. 37—Applied to County Courts.

(*w*) As to these words, see n. *c*. to s. lxvii. of this Act.

(*x*) The preceding ss. lxvii., lxviii., lxix., apply to cases of non-joinder or mis-joinder of *plaintiffs*.

action on contract, (*y*) at any time before the trial (*z*) of such cause, (*a*) to order (*b*) that the name or names of one or more of such Defendants be struck out, if it shall appear to such Court or Judge that injustice will not be done by such amendment, (*c*) and the amendment shall be made upon such terms as the Court or Judge by whom such amendment is made shall think proper; (*d*) and in case it shall appear at the

Mis-joinder of Defendants discovered before trial in action on contract.

(*y*) This enactment is for manifest reasons restricted to actions on contract. There is no necessity for the extension of the remedies here enacted to actions for torts; for in such actions plaintiff can at any time *before* trial, enter a *nolle prosequi*. If he fail to do so, defendants sued but not liable, may notwithstanding be acquitted *at* the trial; but the acquittal of *one* or more defendants in an action of tort, is not, as in actions of contract, a discharge of *all*.

(*z*) The application may perhaps be made *at* the trial, (as to which see note *f* to s. lxviii.) But when deferred till the trial, the amendment can only be made as a *variance*. In view of this, it is preferable for plaintiff to make application at an earlier stage of the cause, and in doing so avail himself of the first part of this enactment. *Qu.* It is not necessary under this section for the party making application before trial, to file a consent similar to that mentioned in s. lxvii: (See note *s* to preceding section lxix.)

(*a*) *Such cause. i. e.* Any cause of action founded on contract express or implied.

(*b*) Form of order, see Chit. F. 7 Edn. 832.

(*c*) The Court for the purpose of saving the Statute of Limitations, allowed a plaintiff to amend his declaration and all subsequent proceedings, by striking out the name of one of two defendants, the other being at liberty if so advised, to plead the non-joinder in abatement; and also, if necessary, to plead *de novo*. This was done, although it appeared that an action had been formerly brought for some portion of the same subject matter, against the same defendants, in which, defendants obtained a verdict by reason of the plaintiff having failed to establish a joint liability. And although on motion for a new trial in that cause, on the ground of surprise, the affidavits in support of the motion, stated that the plaintiff could have proved the joint liability of both defendants. And although it further appeared that an application for an amendment, by striking out the name of one of the defendants in that case made before the Common Law Procedure Act, was refused by the Court: (*Cowburn* v. *Wearing et al*, 9 Ex. 207; 24 L. & Eq. 467.) The Court *in banc.* confirmed the decision, and thought it reasonable that plaintiff should be allowed *before* trial to make the amendment and to try the question whether he could establish a case against one defendant alone (taking the risk of a plea in abatement) although he might believe the contract to be a joint one: (*Ib. per cur.*) An amendment similar to the above applied for *before* trial under the old practice and before the Common Law Procedure Act was allowed, defendant being at liberty to plead *de novo*: (*Palmer* v. *Beale et al*, 9 Dowl. P.C. 529.) So where the application was made even *after* a trial and a nonsuit: (*Crauford* v. *Cocks et al.* 6 Ex. 287.)

(*d*) The costs of course are entirely in the discretion of the Court or the Judge to whom the application is made. But it is apprehended that plaintiff, will seldom be allowed to strike out any defendants except upon payment of costs: (see *Cowburn* v. *Wearing et al*,

And at trial. trial of any action on contract, (*e*) that there has been a mis-joinder of defendants, such mis-joinder may be amended as a variance at the trial in like manner as the mis-joinder of Plaintiffs has been hereinbefore (*f*) directed to be amended, and upon such terms as the Court or Judge or other presiding officer by whom such amendment is made shall think proper. (*g*)

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 38. If the non-joinder of Defendants

LXXI. (*h*) In any action on contract (*i*) where the non-joinder of any person or persons as co-Defendant or co-Defendants has been pleaded in abatement, (*j*) the Plaintiff shall be at liberty, without any order, to amend the Writ of Summons

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9 Ex. 207 24 L. & Eq. 467; see also an important case upon this point, *Jackson et al.* v. *Nunn et al.* 4 Q. B. 209.)

(*e*) The amendment here intended must if made be made *at* the trial. It is not competent for plaintiff who there refuses it, afterwards to apply for it to the Court *in banc*: (*Robson* v. *Doyle et al.* 3 El. & B. 395.) The amendment if it could be at all made by the Court *in banc* would be made pursuant to s. cxxi.; but *semble* that section does not apply to the case of a misjoinder of plaintiffs or defendants: (*Ib.*)

(*f*) *i. e.* by s. lxviii of this Act.

(*g*) In an action of contract against two defendants, A. and B., the latter suffered judgment by default. The former pleaded "never indebted," upon which issue was joined. On the trial it appeared by the evidence that B. the defendant who pleaded "never indebted" was solely liable. A. the defendant who had allowed judgment to go by default, not being a contracting party, B.'s counsel claimed a non-suit. The Judge ordered the record to be amended, by striking out the name of the defendant A., and directed a verdict against B., subject to leave to move to enter a non-suit if the Court should think that the amendment ought not to have been made. Held, *per cur.*, that the amendment was properly made: (*Greaves* v. *Humfries et al.* 4 El. & B. 851.) The case of *Cooper* v. *Whitehouse et al.* (6 C. & P. 545) and other cases which decide that if the plaintiff sue several defendants in debt, and his evidence does not fix all the defendants he must be non-suited, are clearly no longer law.

(*h*) As to the "terms" see note *d* to this section.

(*h*) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 38.—Applied to County Courts. This section is applied solely to the case of non-joinder of *co-defendants*. With this exception it is similar to s. lxix.

(*i*) The enactment is confined in its operation to actions on contract. The reason of the restriction will be found explained in note *y* to the preceding section (lxx.) But notwithstanding the restrictions to "actions on contract," it is apprehended that the enactment "will include actions which, though in form *ex delicto*, are not maintainable without referring to some contract between the parties and laying a previous ground of action by showing such contract:" (Chit. Arch. 9 Edn. 849.)

(*j*) As to pleas in abatement generally see note *r* to s. lxix. As to pleas in abatement for non-joinder of a co-plaintiff see same note. As to similar pleas for non-joinder of a co-defendant see s. lxxiii. and notes thereto. The non-joinder of a joint contractor as a co-defendant can only be taken advantage of by a plea in abatement: (*Rice* v. *Shute*, 5 Burr. 2613.)

and the declaration by adding the name or names of the person or persons named in such plea in abatement as joint contractors, (*k*) and to serve the amended Writ upon the person or persons so named in such plea in abatement, and to proceed against the original Defendant or Defendants and the person or persons so named in such plea in abatement; (*l*) Provided that the date of such amendment (*m*) shall, as between the person or persons so named in such plea of abatement and the Plaintiff, be considered for all purposes as the commencement of the action. (*n*)

be pleaded in abatement in such action.

Proviso:

(*k*) The plea in abatement for non-joinder of a co-defendant must give "a better writ," *i. e.* state the names and places of residence of parties not joined. It is for plaintiff then either to amend or to commence a new action against the persons whose names are so given if in other respects the plea be legal and formal. He may either amend under this enactment or he may drop his action and commence a new one under the old practice. It has been for a long time held that a plaintiff upon a plea of abatement for non-joinder of a co-defendant may enter a *cassetur breve* without any order obtained for the purpose: (Lush. Prac. 329.) This he is allowed to do without at the time paying any costs: (see *Greenhill* v. *Shepperd*, 12 Mod. 145; *Allen* v. *Maxey*, Barn. 120; *Pocklington* v. *Peck*, 1 Str. 638.) Neither party is entitled to costs on a plea in abatement, and it was even held that plaintiff was not entitled to ask for them on setting aside such a plea for irregularity: (*Poole* v. *Pembrey*, 1 Dowl. P. C. 693.) *Sed qu.* see *White* v. *Gascoigne*, 6 D. & L. 225. But the costs of the amendments if not paid at the time of the amendment, will abide the event of the action. The practice as to allowing amendment of writs by adding fresh parties when there is no plea in abatement is unsettled in England. The Queen's Bench and Exchequer differ, the former permitting the amendment, the latter refusing it. In a late case in Chambers, the practice of the Queen's Bench was held to be of doubtful propriety, and the Judge in Chambers instead of allowing the amendment, referred the applicant to the full Court: (*Gibson* v. *Varley*, 27 Law T. Rep. 234.)

(*l*) The consequence as to costs, &c., may be ascertained upon reference to s. lxxii. Whether plaintiff abandon his old action or amend his old proceedings he must in either case frame his declaration pursuant to s. cix. of this Act.

(*m*) *Qu.* In what manner is the date of the amendment to be proved if disputed? There is no provision for a record of the amendment to be kept by the Clerk of Process or other officer. Power is given to plaintiff to amend his writ without any order. It is not stated that it shall be necessary to reseal the writ. It is simply enacted that plaintiff "shall be at liberty" to amend the summons by adding the names of the persons named in the plea of abatement. It is not enacted either that the amendment shall be made by the proper officer or that the *præcipe* upon which the writ issued shall be amended by such officer. A rule of Court is much needed to supply these omissions. Possibly in the absence of a rule upon the subject it may be held that the amended declaration will be the best if not the only reliable index to "the date of the amendment."

(*n*) This provision is manifestly necessary for the protection of whatever rights defendants newly joined may

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ue. ch 22
§ 71.

(App. Co. C.) Eng. C. L. P. A. 1852, s. 39.

Costs of such plea in abatement, &c.

LXXII. (o) In all cases after such plea in abatement and amendment, (p) if it shall appear upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original Defendant or Defendants, the original Defendant or Defendants shall be entitled as against the Plaintiff to the costs of such plea in abatement and amendment; (q) but if at such trial it shall appear that the original Defendant or any of the original Defendants is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the Plaintiff shall nevertheless be entitled to Judgment against the other Defendant or Defendants who shall appear to be liable, (r) and every Defendant who is not so liable shall have Judgment and shall be entitled to his costs as against the Plaintiff, (s) who shall be allowed the same, together with the costs on the plea in abatement and amendment, as costs in the

Judgment as regards Defendants liable or not liable, respectively.

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be possessed. Not having had any knowledge of previous proceedings, it would be unjust in any manner to hold them bound by such proceedings. If the writ first issued, when issued, could, as against these defendants, be held to be "the commencement of the action," then they might, without any knowledge of the process and without having been served with it, be prevented from availing themselves of the Statute of Limitations or other like statutable defence. If, then, as the practice now stands, the right of action should be barred by effluxion of time at a period between the issue of the writ and its subsequeut amendment by the addition of co-defendants, it appears clear that the Statute of Limitations would under such circumstances be a good defence.

(o) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 39.—Applied to County Courts. Substantially the same as our St. 7 Wm. IV. cap. 3 s. 7, which is a transcript of Eng. St. 3 & 4 Wm. IV. cap. 42 s. 10. Our statute of Wm. IV. has not been repealed.

(p) *i. e.* under the last preceding section (lxxi.)

(q) The previous section is silent as to the costs of the amendment. It is presumed that they will, generally, be in abeyance until trial and verdict under this section. They will abide the event, and as such form part of the costs of the cause: (see note *k* to the preceding section lxxi.)

(r) This provision is intended to prevent the effect of that rule which decides that a plaintiff in an action of contract failing as to one defendant fails as to all the defendants sued: (see note *s* to s. lxvi.) The joinder of a co-defendant by plaintiff under and in consequence of a plea of non-joinder by defendant is not so much the act of the plaintiff as of the original defendant. Therefore it is only reasonable to declare that plaintiff shall not be made to suffer from the act of others.

(s) It is not declared in what manner defendant shall recover these costs from plaintiff. No doubt it would be proper to proceed by rule and attachment in case of non-payment. But the point as to whether defendant would be also entitled to an execution as against the plaintiff is not so clear.

cause against the original Defendant or Defendants who shall have so pleaded in abatement the non-joinder of such person; (*t*) Provided that any such Defendant who shall have so pleaded in abatement, shall be at liberty on the trial to adduce evidence of the liability of the Defendants, named by him in such plea in abatement. (*u*) Proviso.

LXXIII. (*v*) Provided always, that in any action to be brought in Upper Canada against any joint obligor or contractor, the action shall not abate (*w*) on account of any other joint obligor or contractor not being made a Defendant, (*x*) unless (*App. Co. C.*) U. C. 59 Geo. III. cap. 25, s. 41. Action not to abate by non-joinder

consd. for U.C. ch 22 §70

(*t*) Plaintiff before paying the costs contemplated by this enactment, would act prudently in having defendants bill taxed. Then having obtained the Master's *allocatur* of the amount, plaintiff could without difficulty claim to have that sum allowed upon the taxation of the general costs of the cause.

(*u*) This provision is intended for the benefit of a defendant who pleads in abatement the non-joinder of a co-defendant. From the time that he files and serves his plea he is bound to substantiate it or pay the costs incurred by plaintiff in consequence thereof. To substantiate his plea and so, if possible, prevent costs, it is only just that defendant should be allowed to prove his allegations. The allegations are in effect that certain persons not joined are with himself jointly liable to the plaintiff. Defendant in view of these facts is allowed "to adduce evidence of the liability of the defendants named by him in such plea of abatement."

(*v*) Substantially a re-enactment of St. 59 Geo. III. cap. 25 s. 1.—Applied to County Courts.

(*w*) The judgment for defendant on a plea in abatement is *quod breve et narratio cassetur*: (see Sellon Pr. 273.) This is in exact accordance with the prayer of the plea, "the defendant prays judgment of the said writ and declaration, and that the same may be *quashed*," &c.: (Chit. Jr. Pl. 2 Edn. 211.) The plea must pray judgment both of the writ and declaration: (*Davies* v. *Thomson*, 14 M. & W. 161; *Whitling* v. *Des Anges*, 3 C. B. 910.) *Qu.*—Is it any longer necessary for a plea in abatement to contain a prayer of judgment? (see s. cxv., also see Chit. Jr. Pl. 2 Edn. 19 note *z* and 21 note *f*.)

(*x*) As to the general form and requisites of a plea in abatement, see Chit. Pl. 7 Edn. I. 470 *et seq.*; also note *z* to s. lxix. of this Act. As to form of plea for non-joinder of a co-defendant, bearing in mind the enactment of this section as to place of residence, see Chit. F. 6 Edn. 289; *Ib.* 7 Edn. 448. Pleas in abatement for non-joinder of a co-defendant must be full, clear, and certain: (see *Heap et al.* v. *Livingston et al.*, 11 M. & W. 896; *Bleakley et al.* v. *Jay*, 13 M. & W. 464.) If the plea be bad to one count of a declaration containing several counts, it is bad as to all: (*Phillips* v. *Claggett*, 10 M. & W. 102.) Formal defects in such a plea have been held open to objection without a special demurrer. The statutes of Elizabeth and Anne respecting special demurrers, have been held not to apply to such pleas: (see *Esdaile et al.* v. *Lund*, per Parke B. 12 M. & W. 613.) Stat. 7 Wm. IV. cap. 3 s. 6 does not upon the whole appear to be inconsistent with the section under consideration. It was held not to be inconsistent with St. 59 Geo. III. cap. 25 s. 1, of which the section under

of joint contractor, &c., unless it be averred and sworn that

the party pleading such non-joinder (*y*) shall aver in his plea that such joint obligor or contractor (*z*) is living (*a*) within the limits of Upper Canada, (*b*) and shall state the place (*c*) of

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consideration is almost a copy: (*Corbett* v. *Calvin et al.* per Robinson C. J. 4 U. C. R. 124.) St. 7 Wm. IV. cap. 3 s. 6 is unrepealed, and is in these words: "No plea in abatement for the non-joinder of any person as a co-defendant shall be allowed in any Court of Common Law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the Court, and unless the place of residence of such person shall be stated with convenient certainty in an *affidavit* verifying such plea." The latter statement as to place of residence as well as the statement as to residence within the jurisdiction must now appear in the *plea*. This appears to be the only departure from the old enactment.

(*y*) A plea of coverture is not, it seems, a plea of "non-joinder" within the meaning of this section. (see *Jones* v. *Smith*, 3 M. & W. 526.)

(*z*) It will be insufficient to describe the parties not joined by initial letters of their Christian names: (*Hastings* v. *Champion et al.* M.T. 8 Vic. *M.S.* R. & H. Dig. Abatement, 4.) *Sed qu.* if defendant cannot by any means ascertain the true names, would it not be sufficient for him to describe the parties as best he could? The plea must mention *all* the co-contractors not joined: *Abbot* v. *Smith*, 2 W. B., 951; *Godson* v. *Good*, 6 Taunt. 587; *Hill* v. *White*, 8 Dowl. P. C. 13; *Crellin* v. *Brook*, 14 M. & W. 11.)

(*a*) It does not appear to be necessary that the co-contractor should be actually and literally "*living* within the limits of Upper Canada," at the time of plea pleaded, if his *domicile* or residence be then within Upper Canada. A temporary absence on a tour for health or other similar cause is not a living without Upper Canada as contemplated by the Act: (see *Lambe* v. *Smythe*, 3 D. & L. 712.)

(*b*) Defendant is bound in his plea to disclose a joint contract. In Upper Canada it has been held that he must do this, though upon the face of his plea it appear that some of the joint contractors are *without* the jurisdiction of the Court: (*McKnight* v. *Scott*, M. T. 3 Vic. *M.S.* R. & H. Dig. Abatement, 6; upheld in *Corbett* v. *Calvin et al.* 4 U. C. R. 123.) It was remarked by Robinson C.J. in the latter case, that a defendant under such circumstances is not to be understood by his plea as pleading the non-joinder of the persons without the jurisdiction: (*Ib.*) The plea in *Calvin* v. *Cook et al.* upheld by the Court, was to the effect "that the supposed promises were made jointly by defendant with one Hiram Cook and one Timothy H. Dunn —that Cook was living and resident within the jurisdiction of the Court— and that Dunn at the time the action was brought was and still is a resident of Lower Canada, *out* of the jurisdiction of the Court." See a similar plea and authorities cited in support of it in note *a* to *Newton et al.* v. *Stewart*, 4 D. & L. 89. But in England the law conflicts with that laid down by our Courts upon this point, though the Statute law in each country is is much alike. In the first place, it has been held in England that in the case of joint contractors, where one is out of the jurisdiction of the Court, the contract thereby becomes joint and several: (see *Henry* v. *Goldney*, per Alderson B. 15 M. & W. 494.) In the second place, as a sequence to this reasoning, it has been held that no plea in abatement can be put upon the record for non-joinder of co-contractors where some at the time of plea pleaded are without the jurisdiction of the Court: (*Joll* v. *Curzon*, 4 C. B. 249, see also *Maybury* v. *Mudie*, 5 C. B. 283, 5 D. & L. 292.) These cases being more recent than ours, may have the effect of shaking the autho-

his residence, (*d*) nor unless an affidavit of the truth of such he lives in Upper

rity of ours, at least to some extent. To apply ourselves to the reasoning of the English cases we find it said by Williams, J., in *Joll* v. *Curzon*, that the Eng. St. 3 & 4 Wm. IV. cap. 42 s. 8, (which is word for word the same as our 7 Wm. IV. cap. 3, s. 6,) that requires the plea to state that the co-contractor, the non-joinder of whom is complained of, "is resident *within* the jurisdiction of the Court, *ousts* the party of his plea if *all* the co-contractors are not *within* the jurisdiction of the Court." This was the manner in which the case was argued, and is the reasoning upon which the decision depends. Without attempting to reconcile the decisions in the two countries, the Editor must leave to others the formation of their own opinions.

(*c*) The *place* as well as residence must now be stated in the plea instead of in the affidavit as formerly. The plea must state the *true* place and abode of the party whose non-joinder is objected to: (*Maybury* v. *Mudie*, Maule J. 5 C. B. 283.) Whether it does so or not is a matter which formerly might be controverted and determined upon motion to set aside the plea: (*Ib.*) If the plea be *false*, it is apprehended that it may still be set aside on motion. But the meaning of the word "place" itself, as used in this Act is from its vagueness, open to much uncertainty. It is extremely doubtful whether in Upper Canada the like precision must be observed as in England: (see note *b* to s. xxi. of this Act.) Our 7 Wm. IV. cap. 3 s. 6 requires the place to be stated with "convenient certainty." These too are the words of the Eng. St. 3 & 4 Wm. IV. cap. 42, s. 8. What, then, is meant by stating a place with convenient certainty? The object of the requirement is unquestionably that the plaintiff may know not only who the co-contractors are, *but also* the place of their residence, in order that he may be enabled to serve process upon them: (see *Newton* v. *Stewart*, per Wightman J. 4 D. & L. 92.) Now there can be no reason for holding greater preciseness to be necessary for that purpose under this section than under sec. xxi., which requires a writ of summons to be indorsed with the name and "place of abode" of the attorney suing out the same. In this latter case it is presumed for the reasons mentioned at length in the note *b* to that section, that the street or house will not be requisite. Between the expression "place of abode" and "place of residence" there can be no difference. One case has arisen in England under the section which corresponds to the one here annotated, and is worthy of mention. Two defendants whose non-joinder was pleaded, were stated to be resident, the one at "No. 20, Gower Street, Bedford Square," the other "High Street, Canterbury." The Court on affidavit that inquiries were made at "these places," and that no such persons were there living, set aside both the plea and affidavit, although the defendant showed that the mistakes had been made accidentally, and that the one party was to be found at "No. 22" instead of "No. 20," and that his name was in the Post Office Directory and other similar works of reference as residing at No. 22, and that the other party was well known in Canterbury, and that he lived in a street *adjoining* to the one named: (*Newton et al.* v. *Stewart*, 4 D. & L. 89.) It is scarcely possible that in Upper Canada, where the circumstances of the country are so different from those of England, that so much particularity will be needed in describing "the place of residence" of a contractor "living within the limits of Upper Canada," but not joined.

(*d*) The *actual* residence must be stated. It is not sufficient to give the best statement of it that can be obtained: (*Wheatley* v. *Golney*, 9 Dowl. P.C. 1019.) The object of the provision is that plaintiff may without delay or difficulty be able to serve process upon the parties whose non-joinder is pleaded: (*Newton* v. *Stewart*, per

Canada. plea be filed therewith. (*e*)

Wightman J. 4 D. & L. 92.) That benefit would not be secured to plaintiff unless the information stated in the plea should be correct: (*Maybury* v. *Mudie*, per Maule J. 5 D. & L. 292.) If the plea do not state the place of residence it is a nullity: (*Brewster* v. *Davis*, H.T. 2 Vic. *M.S.* R. & H. Dig. Abatement, 3.) A statement of the place of business would not be sufficient: (*Maybury* v. *Mudie*, 5 D. & L. 360.) The word *residence* is understood to mean home or domicile: (*Lambe* v. *Smythe*, 3 D. & L. 712.) The expression "place of residence" might be taken to mean dwelling-house. A man's *dwelling-house* is *prima facie* where his wife and family reside, and if he has a family dwelling in one place and be occupy a house and occasionally sleep in another, he will not be a resident in the latter place, for his residence is his domicile, and his domicile is his home, and his home is where his family reside: (Story's Conflict of Laws, s. 63; *R.* v. *Duke of Richmond*, 6 T. R. 560; U. C Law Journal, Vol. II. 105.) Pleas in abatement are not in general allowed to be amended, because they are dilatory and do not go to the merits of the action: (Chit. Arch. 8 Edm. 820.) They may, however, in some cases be allowed to be amended: (Chit. Arch. 9 Edn. 853.)

(*e*) *Nor unless an affidavit of the truth of such plea be filed therewith.* This is a very general provision. The specific allegations as to residence, &c. formerly necessary in the affidavit, must now be stated in the plea. It is apprehended that the affidavit for the future if annexed to the plea, for annexed it may be, will be in a very general form. The affidavit in use before the enactment, which made it necessary to state residence, &c., was to the effect that the plea was "true in substance and in fact:" (see *Maybury* v. *Mudie*, per Maule J. 4 C. B. 254; *Munden* v. *the Duke of Brunswick*, 4 C. B. 321.) The origin of verification of pleas of abatement seems to be Stat. 4 Anne cap. 16 s. 11. It is as follows —"No dilatory plea shall be received in any Court of Record, unless the party offering such plea do by affidavit *prove the truth thereof*," &c. It was held under this statute that the affidavit must prove the fact of the truth. "This is a true plea," instead of "This plea *is true*," was held to be insufficient: (*Onslow* v. *Booth* 2 Str. 705.) If the affidavit be either false or insufficient, it is presumed that the plea may still be set aside on motion: (see *Maybury* v. *Mudie*, 5 D. & L. 360.) The affidavit may, it seems, be made either by defendant or a third party: (see *King* v. *Turner*, 1 Chit. R. 58 n.) And if sworn before declaration filed, it would appear that plaintiff may treat the plea as a nullity: (*Bower* v. *Kemp*, 1 C. & J. 287; *Johnson* v. *Popplewell*, 2 C. & J. 544; but see *Lang* v. *Comber*, 4 East. 347.) The affidavit when made must be filed with the plea. The annexing of the affidavit to the plea would be the most convenient mode, and in such case could verify the contents of the plea without entering into details. Besides, if annexed to a plea intitled in the cause the affidavit need not be so intitled. An affidavit is intitled in order that it may be sufficiently certain in what cause it is made to admit, if necessary, an indictment for perjury. But if an affidavit refer to the "annexed plea," and the annexed plea is "intitled in the cause," and *verba relata videntur in esse*, therefore it amounts to the same thing as if the affidavit itself were intitled in the cause, and an indictment for perjury would lie on such an affidavit: (*Prince* v. *Nicholson*, per Heath, J., 5 Taunt. 337; *Richards* v. *Setree*, per Thompson, C. B. 3 Price 197; *Poole* v. *Pembrey*, Bayley J. 1 Dowl. P. C. 694.) It is usual notwithstanding and perhaps safer to intitle the affidavit though annexed: (Chit. Arch. 9 Edn. 852.) But if the affidavit be intitled at all it must be correctly intitled: (*Poole* v. *Pembrey et ux.*, 1

LXXIV. (*f*) The joint obligation, contract, or promise may be given in evidence against any one or more of the joint obligors or contractors, (*g*) and shall have the same force and effect for the recovery of Judgment thereon as if it were only the obligation, contract, or promise of the Defendant or Defendants actually sued. (*h*)

(*App. Ch. C.*) 59 Geo. III. cap. 25, s. 2. Joint contract &c., may be given in evidence against any one contractor, &c.

con. stat. fn. U. C. ch. 22 § 72.

LXXV. (*i*) Causes of action of whatever kind, provided they be by and against the same parties and in the same

(*App. Ch. C.*) Eng. C. L. P. A. 1852, s. 41.

con. stat. fn. U. C. ch. 22 § 73 & 74

Dowl. P. C. 693; *Phillips* v. *Hutchinson et al.* 3 Dowl. P. C. 20; *Clark* v. *Martin*, *Ib.* 222; *Shrimpton* v. *Carter*, 3 Dowl. P. C, 648; *Bland* v. *Dax*, 15 L. J. N. S., Q. B. 1; *Fletcher* v. *Lechmere*, 2 Dowl. N. S. 848.) No reference to a plea annexed will aid an affidavit if otherwise incorrectly intitled: (*Poole* v. *Pembrey et ux.* 1 Dowl. P. C. 693.) If the plea be filed without an affidavit, or with an affidavit so insufficient as to amount to no affidavit, plaintiff may treat the plea as a nullity and sign judgment: (Chit. Arch. 8 Edn. 819; *Ib.* 9 Edn. 852.) Still plaintiff may, if he so choose, move to set aside the plea for irregularity: (*Ib.*) But it would seem that an affidavit though sworn before defendant's attorney, is not so far void as to entitle plaintiff to sign judgment, however warranted he might be in moving to set the plea aside: (*Horsfall* v. *Mathewman*, 3 M. & S. 154.)

(*f*) Substantially a re-enactment of Stat. U. C. 59 Geo. III. cap. 25, s. 2. —Applied to County Courts. The object of the enactment is to carry out the principles involved in the preceding section. If an action be brought against one or more of several joint contractors, and there be no plea in abatement setting up the non-joinder of the others, the contract sued upon may, notwithstanding the non-joinder of the other co-contractors, be given in evidence against such as are made defendants. The practical effect of this will be to allow plaintiff to sue and recover his claim from such co-contractors as may be within the jurisdiction of the Court, without at all endeavouring to proceed against those who may be without the jurisdiction.

(*g*) For well-known reasons the enactment is confined to actions on contract. In actions for torts the non-joinder of wrong-doers is not attended with the same results as in actions on contracts: (see note *y* to s. lxx.)

(*h*) Formerly it was necessary for a plaintiff suing upon "joint contract," to proceed against all the contractors, whether within or without the jurisdiction. Those within the jurisdiction were served with process—those without were proceeded against to outlawry. The latter proceeding is now in this respect altogether dispensed with; but it is still necessary if all the joint-contractors be within the jurisdiction of the Court that *all* should be sued: (*Corbett* v. *Calvin*, 4 U. C. R. 123.) If there be a non-joinder or mis-joinder of co-contractors, plaintiff cannot cure his proceedings either by a *nolle prosequi* or non-suit as to some of the defendants. A nonsuit as to some is a nonsuit as to all. If plaintiff abandon his suit as to some he abandons it as to all: (see *Commercial Bank* v. *Hughes et al.* 4 U. C. R. 167, Macaulay J.)

(*i*) Taken from Eng. St. 15 & 16 Vic. cap. 76, s. 41.—Applied to County Courts. See also County Court P. A. s. 9.

Several causes of action.

rights, (*j*) may be joined (*k*) in the same suit, (*l*) but this

(*j*) *And in the same rights.* From this it is inferred that a plaintiff has no right now more than before the passing of this Act to join a cause of action accruing to him in his individual capacity with one accruing to him in a representative character as executor, &c: (see generally *Powley et al.* v. *Newton*, 6 Taunt. 453; *Ashby* v. *Ashby*, 7 B. & C. 444; *Webb et ux.* v. *Cowdell*, 14 M. & W. 820; *Kiteenman* v. *Skeel et al.* 3 Ex. 49; *Bignell* v. *Harpur*, 4 Ex. 773; *Haun et al.* v. *Madden et al.* E. T. 2 Vic. *M.S.* R. & H. Dig. "Executor, &c." II. 1; *Walker* v. *Court*, H. T., 6 Wm. IV., *MS.*, *Ib.*; *Davis* v. *Davis*, T. T., 1 & 2 Vic., *MS.*, *Ib.*; *King* v. *Thom*, 1 T. R. 487; *Smith* v. *Barrow*, 2 T. R. 476; *Petrie* v. *Hannay*, 3 T. R. 659; *Jennings* v. *Newman*, 4 T. R. 347; *Ord* v. *Fenwick et al.* 3 East. 104; *Henshall* v. *Roberts*, 5 East. 150; *Cowell et ux.* v. *Watts*, 6 East. 405; *Cowell* v. *Partridge*, 7 Price, 591.)

(*k*) *May be joined*, &c. This is not compulsory upon plaintiff. He is enabled but not *compelled* to join in the same suit several causes, &c.: (Lush's Prac. 288,) but where two or more actions are brought by and against the same parties for causes which might have been joined an application may, at the option of the defendant, be made to the Court to consolidate the actions: (Bag. Cham. Prac. 226.) Causes of action which arise in different counties though they may be joined in the Superior Courts, and the venue laid in either county, cannot (as we shall shall have occasion to notice hereafter) be so joined in actions in the County Courts.

(*l*) A plaintiff has not heretofore in actions brought by him been confined to one cause of action. It has always been understood that a declaration might consist of several counts, and that each count might state a separate cause of action. Thus it has been quite allowable for the first count of a declaration to be on a bill of exchange, a second on a promissory note, a third on an account stated, &c.: (Smith on Action, 75.) Indeed, it has been lately allowed that several causes of action might be joined in one and the same count. Thus it has been usual in one count to condense two or more of the following—goods sold, work done, money lent, money paid, money had and received, &c.: (Steph. Pl. 269.) But the rule allowing several causes to be joined in the same suit was subject to the express limitation—that demands only of a similar quality or character, *i.e. of the same kind* could be joined: (*Ib.* 267.) Now the rule has been extended by the abrogation of the limitation, and causes of action *of whatever kind* may be joined, provided they be by and against the same parties and in the same rights, &c. The amendment made is only as to the *joinder of causes of action.* It does not affect the cause or gist of any *single action.* It neither makes that a cause which was not one before the act; nor renders that less a cause which has been held to be one. It does not affect the framing of declarations, except so far that each separate cause of action a separate count would seem to be desirable, and for causes of action not *ejusdem generis*, separate counts would seem to be indispensable.—If the counts can be stated shortly, as in the forms given in Sch. B. to this Act, such or similar concise forms should be adopted. It may be that if the pleadings are given at length instead of abbreviated in the manner illustrated in the schedule, no costs will be allowed for the excess. In cases where a plaintiff could or could not before the passing of this Act declare on the common counts for his cause of action, it is apprehended the law is still the same: (see *McKee* v. *Huron Dist. Cl.* 1 U. C. R. 368; *Todd* v. the *Gore Bank*, 1 U. C. R. 40; *Mc Mahon* v. *Coffee*, 1 U. C. R. 110; *Aitkin* v. *Malcolm*, 2 U. C. R. 134; *McGuffin* v. *Cayley*, 2 U. C. R. 308; *Du-*

shall not extend to replevin or ejectment; (*m*) and where two or more of the causes or action so joined are local and arise in different Counties, the venue may be laid in either of such Counties, (*n*) but the Court or a Judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient, (*o*) and in such case the Court or a Judge may order separate records to be made up and separate trials to be had; Provided always, that nothing herein contained shall be construed to restrict or diminish the obligation or right of a Plaintiff to include in one action all or any of the drawers,

tion may be joined, subject to certain conditions.

§ 73. See Page 7.

Court may order separate trials.

Proviso: as to promissory notes, bills, &c.

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eat v. *Sweeney et al.* M. T. 3 Vic. *M.S.* R. & H. Dig. "Money had and received," 4; *Ross et al.* v. *Tait*, H. T. 7 Wm. IV. *M.S. Ib.* Assumpsit, I. 5; *Miller* v. *Munro*, 6 O.S. 166; *Armstrong* v. *Anderson*, 4 U. C. R. 113; *Kitson* v. *Short*, 4 U. C. R. 220; *Fisher* v. *Ferris*, 6 U. C. R. 534; *Chapel* v. *Hickes*, 2 C. & M. 214; *Spencer* v. *Parry*, 3 A. & E. 331; *Baker* v. *Dewey*, 1 B. & C. 704; *Amos* v. *Temperley*, 8 M. & W. 798; *Paul* v. *Dod*, 2 C. B. 800; *Lamond* v. *Davall*, 9 Q. B. 1030; *Hewings* v. *Tisdal*, 1 Ex. 295; *Middleditch* v. *Ellis*, 2 Ex. 623; *Sweeting* v. *Asplin*, 7 M. & W. 165; *Garrard* v. *Cottrel*, 10 Q. B. 679; *Lewis* v. *Campbell*, 8 C. B. 541; *De Barnardy* v. *Harding*, 8 Ex. 822.)

(*m*) Replevin and ejectment cannot be joined together, nor can either be joined with any other form of action. The remaining forms of action in common use may be joined. They are assumpsit case, covenant, debt, detinue, trespass, trover. It may not be amiss to refer to the authorities in which the boundaries between these forms of action have been defined and preserved. Although no longer necessary to be strictly observed, yet for many purposes the classifications and distinctions are important to be kept in view.

Assumpsit and Case—See *Ross et al.* v. *Webster*, 5 U. C. R. 570; *Quin* v. *School Trustees*, 7 U.C.R. 130; *Woods* v. *Finnis et al.* 7 Ex. 363; *Boorman* v. *Brown*, 3 Q. B. 511; *Courtnay* v. *Earle*, 10 C. B. 73.

Assumpsit and Covenant—See *Schlencker* v. *Moxey*, 3 B. & C. 789; *Gwynne* v. *Davy*, 1 M. & G. 857; *Filmer* v. *Burnby*, 2 Scott. N. R. 689.

Assumpsit and Debt—See *Beebe* v. *Secord et al.* Tay. U. C. R. 565.

Assumpsit and Trover—See *Land et al.* v. *Woodward*, 5 U. C. R. 190; *Orton* v. *Butler*, 5 B. & A. 652.

Case and Debt—See *Miles* v. *Bough*, 3 Q. B. 843.

Case and Trespass—See *Savignac* v. *Roome*, 6 T. R. 125; *Reynolds* v. *Clarke*, 1 Str. 635; *Turner et al.* v. *Hawkins et al.* 1 B. & P. 472; *Martinez et al.* v. *Gerber*, 3 M. & G. 88; *Lear* v. *Caldecott*, 4 Q. B. 123; *Fay* v. *Prentice*, 1 C. B. 829; *Firmstone* v. *Wheeley*, 2 D. & L. 203.

Covenant and Debt—See *Harrison* v. *Mathews*, 2 Dowl. N. S. 318.

Debt and Detinue—might be joined together even before the C. L. P. Act: (see Smith on Action, 76.)

Supplementary to these forms of action plaintiff may now claim either a mandamus (s. cclxxv.) or an injunction (s. cclxxxiii.)

(*n*) Venue when local and effect of local *venue* upon plaintiff's proceedings: (see notes *j*, *k* to ss. vi. vii. of this Act.)

(*o*) Trial of local actions in counties other than that where course of action arose: (see note *k* to s. vii. p. 8 of this work.)

makers, endorsers or acceptors of any Bill of Exchange or Promissory Note. (p)

con. stat. for U.C. Ch 22 § 75.

(App. Co. C.) Eng. C. L. P. A. 1856, s. 40.

LXXVI. (q) In any action brought by a man and his wife on any cause of action, (r) accruing personally to the wife, (s) in respect of which they are necessarily co-Plaintiffs, (t) it shall

(p) This proviso is new and not to be found in the Eng. stat. from which the one here annotated is adopted. It pointedly relates to our Stat. U. C. 5 Wm. IV. cap. 1, s. 2, which is as follows:—"It shall be lawful for the holder of any bill of exchange or promissory note hereafter to be made for a sum not exceeding one hundred pounds (restriction as to amount removed by St. 13 & 14 Vic. cap. 59) instead of bringing *separate* suits against the drawers, makers, endorsers, and acceptors of such bill or note, to include all or any of the parties to the said bill or note in *one* action, and to proceed to judgment and execution in the same manner as though all the defendants were *joint contractors*." If several actions should, notwithstanding this provision, be brought when one only would suffice, costs in one only shall be taxed. (see section 1 of the same statute as amended by 13 & 14 Vic. cap. 59; also see R. & H. Dig. "Costs," VI.)

(q) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 40.—Applied to County Courts.—Founded upon 1st Rep. C. L. Com.: (see latter part of s. 19.) The reasons for the changes there recommended and here carried out are clearly stated. The Report proceeds, "With respect to the joinder of a cause of action arising to a husband in his own right with one accruing to him in respect of his wife, as the judgment in the event of his recovering a verdict, and the fund to which the judgment would be applied, would be the same, we see no objection to permit the joinder, in order to prevent the necessity of bringing two actions in respect possibly of a cause of action arising out of the same transaction; as for instance where an injury has been done to the wife *and* the husband by the same wrongful act."

(r) *On any cause of action*, &c, It seems that these words are intended to have a very general operation. "*Any* cause of action" applies to *all* causes of action whether *ex contractu* or *ex delicto* without distinction.

(s) *Accruing personally to the wife, i. e. any* cause of action accruing personally to the wife. These expressions deviate widely from the provisions of the Eng. Act, whence our enactment is taken. The Eng. Act is restricted to actions brought by husband and wife, "*for an injury done to the wife*," (see argument of counsel in *Johnson et ux.* v. *Lucas*, 1 El. & B. 659, in which argument the Court apparently acquiesced.) In fact the language used in the English Act admits of no doubt. The English enactment is confined exclusively to actions of *tort*. Ours clearly extends to actions on contract as well as tort. The example given by the C.L.Com'rs (note *q ante*,) seems to favor the restriction made in the English Act; but the course pursued by the Legislature of Canada is evidently more in accordance with the *spirit* of that Report.

(t) *In respect to which they are necessarily co-plaintiffs.* When and for what causes must husband and wife be "necessarily co-plaintiffs?" The law upon this subject conveniently divides itself into two heads corresponding to the two great divisions of actions under one or other of which every cause of action must be found, viz:—Actions upon contract, and actions for torts.

Actions upon contract. In general the wife cannot join in any action upon a contract made *during* marriage for her work and labour, goods sold, or money lent by her during that time:

be lawful for the husband to add thereto claims in his own Cases where

(Chit. Pl. 7 Edn. I. 34: *Bidgood* v. *Way et ux.* 2 W. Bl. R. 1239; *Buckley* v. *Collier*, 1 Salk. 114: Com. Dig. "Baron and Feme," W.; *Weller* v. *Baker*, 2 Wils. 424; *Chambers* v. *Donaldson et al.* 9 East. 472; *Murphy* v. *Bunt et al.* 2 U. C. R. 284) for the husband is entitled to her earnings, and they shall not survive to her but go to the personal representatives of her husband, and she could have no property in the money lent or the goods sold: (*Ib.*; *Abbott et ux.* v. *Blofield*, Cro. Jac. 644; *Weller* v. *Baker*, 2 Wils. 424; *Bridgood* v. *Way et ux.* 2 W. Bl. Rep. 1237; *Buckley* v. *Collier*, Carth. 251; *Crowhurst et ux.* v *Laverack*, 8 Ex. 208; *Dengate et ux*, v, *Gardiner*, per Abinger C.B. 4 M. & W. 5.) But when the wife can be considered as the *meritorious* cause of action, as if a bond or other contract under seal, or a promissory note be made to her separately or with her husband: (*Ib.*; *Howell* v. *Maine*, 3 Lev. 403; *Alerberry* v. *Walby*, Str. 230; *Ankerstein* v. *Clarke et al.* 4 T. R. 616; Co. Lit. 351 a, note *i*, 304; *Philliskirk* v. *Pluckwell*, 2 M. & S. 393: *Harcourt et al.* v. *Wyman*, 3 Q. B. 817); or if she bestow her personal labour, skill, on curing a wound, &c.: (*Fountain* v. *Smith*, 2 Sid. 128; *Brashford* v. *Buckingham et ux.* Cro. Jac. 77; *Weller* v. *Baker*, 2 Wils. 424; Bac. Abr. "Baron and Feme," K.) She may be joined with her husband, or he may sue alone: (Chit. Pl. 7 Edn. Vol. I. 34.) In general, wherever the cause of action would *survive* to the wife, she and her husband ought to be joined in the action: (Chit. Arch. 8 Edn. 1095; *Ib.* 9 Edn. 1173; see also *Gaters et ux.* v. *Madeley*, 6 M. & W. 422.) Where the wife is joined in the action in any of these cases, the declation must distinctly declare her *interest* and show in what respect she is the *meritorious* cause of action and there can be no intendment to this effect: (*Bidgood* v. *Way et ux.* 2 W. Bl. R. 1236; *Philliskirk* v. *Pluckwell*, 2 M. & S. 396; *Serres et ux.* v. *Dodd*, 2 N. R. 405; *Hopkins et ux.* v. *Logan*, 7 Dowl. P. C. 360; *Shuberg et ux.* v. *Cornwall*, M. T. 5 Vic. *M. S.* R. & H. Dig. "Arrest of Judgment," 6.) But *after verdict* everything will be intended in support of the declaration: (*Howe et ux.* v. *Thompson*, M. T. 6 Vic. *M.S.* R. & H. Dig. "Arrest of Judgment," 13.) Even since the English C. L. P Acts it has been held that a declaration by husband and wife on an account stated must show that the account was concerning matters over which the wife *had an interest*: (*Johnson et ux.* v. *Lucas*, 1 El. & B. 659.)

Actions for torts. Torts may be either to the person or the property personal or real of a party. The wife having no legal interest in the person or property of her husband, cannot in general join with him in any notion for any injury to them: (Chit. Pl. 7 Edn. I. 82; *Lea* v. *Telfer*, 1 C. & P. 147; *Doe d. Palmer* v. *Andrews*, 4 Bing. 384.) For injuries to the person or to the personal or real property of the wife committed *before* marriage when the cause of action would survive to the wife, as a general rule she must join in the action: (*Ib.*; *Milner* v. *Milner*, 3 T. R. 627; *Mitchinson* v. *Hewson*, 7 T. R. 348, Com. Dig. "Baron and Feme," V.) Torts according to their nature may be divided in the manner above mentioned—

i. Injuries to the person of the wife.
ii. " to the personal property of the wife.
iii. " to the real property of the wife.

i. *Injuries to the person of the wife.* If committed *during* coverture by battery, slander, &c. both husband and wife must join: (Chit. Pl. 7 Edn. I. 82; *Baggett* v. *Frier*, 11 East. 301; *Chambers* v. *Donaldson*, 9 East. 471.) For words spoken of the wife not actionable of themselves but which occasion some special damage to the husband, he must sue alone: (*Ib.*; *Har-*

a husband and wife are co-plaintiffs.

right, (*u*) and separate actions brought in respect of such claims may be consolidated, if the Court or a Judge shall think fit; (*v*) Provided, that in case of the death of either Plaintiff, (*w*) such

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wood v. *Hardwick*, 2 Keb. 387, pl. 63; *Coleman et ux.* v. *Harcourt*, 1 Lev. 140; *Russell* v. *Corne*, 1 Salk. 119; *Baldwin* v. *Flower*, 8 Mod. 120; Selwyn N. P. 10 Edn. 291.) If loss of service be the special damage alleged, the wife should not be joined. Whatever might be the nature of the wife's service the profits of it would accrue to the husband: (*Dengate et ux.* v. *Gardiner*, 4 M. & W. 5.)

ii. *Injuries to the personal property of the wife.* Wherever the cause of action had only its inception *before* the marriage but its completion *afterwards*, as in case of trover before marriage and conversion during marriage, or of rent due before marriage and a rescue afterwards, husband or wife may join or may sever in detinue trover or trespass: (Chit. Pl. 7 Edn. 83; Bac. Abr. Detinue; Bul. N. P. 53, 2 Saund, 47 b; *Blackborne* v. *Greaves*, 2 Lev. 107, Com. Dig. "Baron and Feme," X; *Ayling et ux.* v. *Whicher*, 6 A. & E. 259.) Where the cause of action has its inception as well as completion *after* marriage, the husband must sue alone —the legal interest in personalty being vested by the marriage in him: (*Ib.* 2 Saund. 47 h. i.; *Buckley* v. *Collier*, Salk. 114; *Bidyood* v. *Way*, 2 W. Bl. Rep. 1236; *Spooner* v. *Brewster*, 2 C. & P. 34.)

iii. *Injuries to real property of wife.* —In real actions for the recovery of the land of the wife, both husband and wife must join: (Chit. Pl. 7 Edn. I. 84; *Odell* v. *Tyrrill*, 1 Bulst. 21, Com. Dig.; "Baron & Feme," V. Selwyn's N. P. 10 Edn. 288.) But under the old form of ejectment the husband alone might be lessor of the plaintiff. (*Doe d. Eberts* v. *Montreuil*, 6 U. C. R. 515; *Doe d. Peterson* v. *Cronk*, 5 U. C. R. 136.) The husband alone may, it seems, still be plaintiff: (*Holmes v. Hennejan*, 28 L.T. Rep. 25.) So it has been held that an action for damages to the realty though in the possession of the wife was properly brought in the name of the husband: (*Jones* v. *Spence*, 1 U. C. R. 367.)

(*u*) *Claims in his own right.* This is as general and comprehensive an expression as could well be used. It includes all manner of claims whether upon contract or for tort. One effect of the enactment will be to do away with the difficulty that presented itself to the Court in *Dugate* v. *Gardiner* (4 M. & W. 5.) This was an action by husband and wife for slanderous words spoken of the wife. Special damage was laid for loss of service by the wife in consequence thereof. The Court held that as the results of the service would belong only to the husband and not to the wife, he only could sue for such special damage. Thus it was decided in effect that for two causes of action closely united and arising out of one and the same transaction, two separate actions were necessary, one for the slander *per se*, in which action both husband and wife should join; the other for the consequence of the slander in loss of service, &c., in which action the husband alone could sue: (see also *Russell* v. *Corne*, 1 Salk. 119, Com. Dig. Pleader 2 A. 1.) Both these or similar causes of action might now be joined in the same action under the section here annotated.

(*v*) Mode of consolidation see Bag. Cham. P. 226.

(*w*) I. *Contracts.*

If the *husband survive*, there is a material distinction to be observed respecting chattels real and *choses in action*. The husband is entitled to the chattels real by survivorship and to all rent, &c., accruing during the coverture; he is also entitled to all chattels given to the wife during coverture in her own right, though not to her in *autre droit*. But mere *choses in action* or contracts

suit, so far only as relates to the causes of action, if any, which do not survive, shall abate. (*x*) Proviso.

And for the determination of questions raised by the consent of the parties without pleading; Be it enacted as follows: (*y*)

LXXVII. (*z*) Where the parties to an action (*a*) are agreed (*b*) as to the question or questions of fact to be decided (*App. Ch. C.*) Eng. C. L. P. A., 1852, s. 42.

made with the wife before coverture do not survive to the husband, and he must, to recover the same, sue as administrator of his wife: (Chit. Pl. 7 I. 36.)

If the *wife survive*, she is entitled to all chattels real which her husband had in her right, and which he did not dispose of in his life time, and to arrears or rent, &c., which became due during the coverture upon her antecedent demise, or upon their joint demise during the coverture to which she assents after his death; and to all arrears of rent and other *choses in action* to which she was entitled before the coverture, and which the husband did not reduce into actual possession: (*Ib.* 36 37.)

II. *Torts.*

If the *husband survive*, he may maintain an action of trespass, &c., for any injury in respect to the person or property of the wife, for which he might have sued *alone* during coverture. Thus he might maintain an action after the wife's death for any battery or personal tort to her, which occasioned him a particular injury, as the loss of her society and assistance in domestic affairs, or a pecuniary expense, or for any injury to the land of the wife when living. If the wife die pending an action by her husband and herself for any tort committed either before or during coverture and to which action she is a necessary party, the suit will abate: (Chit. Pl. 7 Edn. I. 84.)

If the *wife survive*, any action for a tort committed to her personally, or to her goods, or real property before marriage, or to her personal or real property during coverture, will survive to her: (*Ib.* 85.)

(*x*) As to abatement of actions see ss. ccviii.–ccxiii. inclusive of this Act. The above proviso may occasion some difficulty in the taxation of costs. When the plaintiff or plaintiffs join several causes of action in the same suit, his or their declaration ought to contain several distinct counts, one at least for each cause of action. This, in the event of further proceedings, will in all probability give rise to several distinct issues. Then to apply s. cxxx. of this Act, "The costs of any issue either of fact or of law shall follow the finding or judgment on such issue, and be adjudged to the successful party, *whatever may be the result of the other issue or issues:*" see also N. R. 51.

(*y*) The enactments following from lxxvii.–lxxxiii. inclusive are founded upon 1st Rep. of C. L. Com'rs (s. 22,) and are in effect an extension of the principles contained in St. U. C. 7 Wm. IV. cap. 3 s. 17, which is a transcript of Eng. St. 3 & 4 Wm. IV. cap. 42 s. 25. Parties to an action could only avail themselves of this statute "after issue joined." Besides, the only provision thereby made, is for taking the opinion of the Court was upon a point of *law* without at all proceeding or incurring the expense of proceeding to a trial of the facts.

(*z*) Adopted from Eng. St. 15 & 16 Vic. cap. 76 s. 42.—Applied to County Courts.

(*a*) *To an action*, &c. seems to apply to all descriptions of action whether *ex contractu* or *ex delicto*.

(*b*) *Are agreed.* An agreement is defined to be "*aggregatio mentium*," or the union of two or more minds in a thing done or to be done, and is therefore not to be understood

Parties may agree upon an issue of fact, and try it.

between them, (*c*) they may, (*d*) after writ issued and before Judgment, (*e*) by consent and order of a Judge, (*f*) (which order any Judge shall have power to make upon being satisfied that the parties have a *bonâ fide* interest in the decision of such question or questions, and that the same is or are fit to be tried,) (*g*) proceed to the trial of any question or questions of

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in the loose incorrect sense in which it is sometimes used as synonymous to promise or undertaking: (Plowd. 5 *a*, 6 *a*, 17 *a*.) If either party dissent from the course pointed out by the enactment here annotated, there can be no "agreement." Compulsory references by order of a judge are in some cases permitted: see s. lxxxiv. *et seq.* *Qu.* Would the death of either party before judgment revoke the special case: (see *James et al.* v. *Crane et al.* 15 M. & W. 379, and s. cxviii. of this Act.)

(*c*) Provision is made for the disposal of questions of law by s. lxxxi. of this Act.

(*d*) "*May*," *i. e.* The parties when agreed upon the question or questions to be decided between them have the option but are not compelled to proceed under this section. Should either party object, the proceedings must be conducted in the ordinary manner.

(*e*) *After writ issued and before judgment.—Qu.* Is it necessary for the writ to be served or for defendant to appear to the action before the parties can agree in the manner contemplated by this section? Strictly speaking, defendant cannot be a *party* to an action at law unless he has appeared. It is difficult to see how defendant can before service of the writ make any application in respect of the writ. Until service of the writ, there is nothing to show that the party applying is the party *summoned*. This would seem to hold good especially as to voluntary references. Compulsory references are placed upon a different footing. With respect to them the reference may be made "at any time after the *issuing* of the writ": (see s. lxxxiv. of this Act.)

(*f*) *Forms*—1. Affidavit to obtain judge's order: (Chit. F. 7 Edn. 435.

——2. Summons thereon: (*Ib.* 436.)

——3. Order: (*Ib.* 438.)

——4. Issue and subsequent proceedings: (*Ib.* 439.)

(*g*) *i. e.* The question or questions of fact to be decided, &c. The judge before making the order must be satisfied that the parties have a *bona fide* interest in the question or questions to be decided. The manifest object being to prevent the time of the Court being employed in the determination of gambling, or other transactions of a like character, in which neither party can be said to have an actual and *bona fide* interest. "Courts of justice are constituted for the purpose of deciding *really existing questions of right between the parties*, and are not bound to answer whatever impertinent questions parties think proper to ask them in the form of a wager at law:" (*Henkin* v. *Guerss*, Lord Ellenborough, 12 East. 247; see also *Wellesley* v. *Withers*, 4 El. & B. 750.) Judges in England have repeatedly ordered wager actions to be struck out of the docket and have in the most positive terms refused to try such actions: (see *Henkin* v. *Guerss* and *Brown* v. *Leeson*, 2 H. B. 43.) The general law applicable to wager cases will be found compendiously stated in Chit. Contr 8 Am. Edn. 433. It would appear that it is not sufficient for the parties to have *some* interest in the question, the question itself must be one really and *bona fide* in controversy between them: (see *Doe d. Duntze* v. *Duntze*, 6 C. B. 100.) This, like applications under the Interpleader Acts, is discretionary not compulsory upon the Court: (see *Belcher* v. *Smith*, 2 M. & Sc. 184.)

fact without formal pleadings, (*h*) and such question or questions may be stated for trial in an issue in the form contained in the Schedule (A) to this Act annexed, marked No. 8, (*i*) and such issue may be entered for trial, and tried accordingly, in the same manner as any issue joined in an ordinary action, (*j*) and the proceedings in such action and issue shall be under and subject to the ordinary control and jurisdiction of the Court, as in other actions. (*k*)

Form of stating questions and trial of issue thereon.

LXXVIII. (*l*) The parties may, if they think fit, enter into an agreement in writing, (*m*) which shall be embodied in the said or any subsequent order, (*n*) that upon the finding of the

(App. Co. C.) Eng. C. L. P. A. 1852, s. 43.

(*h*) The dispensing with formal pleadings will be a saving of costs to the parties, besides being one mode of avoiding the risk of defective pleading. In a case such as intended by this enactment, in which both parties are agreed as "to the question or questions to be decided," there cannot be any necessity for formal pleadings. The design of formal pleadings is to accomplish what the parties here do by consent, viz., develope the subject of decision by the production of an issue or issues: (Steph. Pl. 124.)

(*i*) The form of issue given in the Schedule is an exact copy of that in the English enactment. It, too, is the same precisely as that used in Eng. St. 8 & 9 Vic. cap. 109, s. 4, and is not unlike that made use of in interpleader cases. One party affirms and the other denies, and it is for the jury to decide between them. Between the proceedings to be had pursuant to this enactment and those necessary in interpleader cases there is a very strong resemblance: (see Prov. St. 7 Vic. cap. 30, which is a transcript of Eng. St. 1 & 2 Wm. IV. cap. 58.) In some respects the decisions under the Interpleader practice will be in point under this new practice. For the decisions under the English Interpleader Act see Chit. Arch. 8 Edn. 1211 *et seq.*; *Ib.* 9 Edn. 1307; Tidd's N. P. 270. For the decisions under our Interpleader Act see R. & H. Dig. "Interpleader." In framing the special case the parties should be careful to state facts as contradistinguished from mere evidence: (*Palmer* v. *Johnson*, 2 Wils. 163.)

(*j*) *i. e.* Under ss. cliv. and clv. of this Act.

(*k*) It is presumed that the powers of the presiding judge to deprive plaintiff of costs and to order full costs, &c.: (see 43 Eliz. cap. 6; 21 Jac. I. cap. 16 s. 10; 22 & 23 Car. II. cap. 9; 8 Vic. cap. 13, s. 59,) are exercisable under the provisions here annotated. The power to order execution forthwith or at a future day is also a power incident to the presiding judge: (see s. clxxxii. of this Act.)

(*l*) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 43.—Applied to County Courts. The enactment appears to apply only to actions where the claim is for debt or damages, *i. e.* some claim for which compensation in money is demanded.

(*m*) This provision is by no means compulsory. It is optional for either party to dissent. See note *b* to preceding section (lxxvii.) *Form* of agreement see Chit. F. 7 Edn. 437.

(*n*) Not necessary it seems to embody the agreement in the issue or Nisi Prius record. Though it is usual in feigned issues nominally at all events for the parties to fix some sum of money which is made to depend upon the finding of the jury for one party or the other: (see Chit. Pl. 7 Edn. 11. 172.) These feigned issues alleging a pretended wager are still legal: (see

And may enter into agreement to pay money or not, according to the result

Jury in the affirmative or negative of such issue or issues, a sum of money to be fixed by the parties, (*o*) or to be ascertained by the Jury upon the issue or issues and evidence submitted to them, (*p*) shall be paid by one of such parties to the other of them, either with or without the costs of the action. (*q*)

Con. Stat. for U.C. ch. 22 § 142.

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 44.

Judgment may be entered and execution issued, &c., upon the finding.

LXXIX. (*r*) Upon the finding of the Jury upon any such issue, Judgment may be entered for any such sum as shall be so agreed, or ascertained as aforesaid, with or without costs, as the case may be, (*s*) and execution may issue upon such Judgment forthwith, (*t*) unless otherwise agreed, (*u*) or unless the Court or a Judge shall otherwise order, for the purpose of giving either party an opportunity for moving to set aside the verdict or for a new trial. (*v*)

Luard et al. v. *Butcher et al.* 2 C. B. 858.)

(*o*) *To be fixed by the parties*, &c. —The principle of this provision is not new. It is the same that allows parties in an agreement to fix a certain sum to be paid by one party to the other as "liquidated damages and not as a penalty," upon default made in the doing of something stipulated to be done, &c.: see note *j* to s. cxxii. of this Act.

(*p*) The venue in this event would be *tam triandum quam inquirendum*: (see Chit. F. 6 Edn. 74.)

(*q*) *Either with or without costs of the action.*—This expression must mean that the agreement to be entered into between the parties may as regards the costs of the action stipulate either that they shall or shall not follow the result of the trial. In case no agreement be entered into as to the costs they will follow the event: (s. lxxxiii.) In a special case stated under the Eng. C. L. P. Act, 1852, s. 4, (s. lxxxi. of ours) the plaintiff claiming two sets of fixtures, the Court gave judgment in his favour for the one and for the defendant as to the other, and no agreement having been made between the parties as to costs, ruled that the plaintiff was entitled to the general costs of the proceedings, and the defendant to whatever costs he could satisfy the Master had been incurred solely in respect of that part of the case in which he succeeded. The defendant subsequently brought error on the judgment, but so far from succeeding the Court of Error reversed that portion of the judgment which was in his favor and gave judgment for the plaintiff for the whole, but with no direction as to the costs which the Court below had directed to be taxed to the defendant. Held that the Court below had no power after the partial reversal of their judgment to order those costs to be taxed to the defendant: (*Elliott* v. *Bishop*, 33 L. & Eq. 391.)

(*r*) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 44.—Applied to County Courts.

(*s*) See the forms of judgment prepared to meet these several cases, Chit. F. 7 Edn. 440.

(*t*) The form of execution need not in anywise vary from forms in common use. As to executions generally, see s. clxxxii. *et seq.*

(*u*) As to when parties can be said to have agreed, see note *b* to s. lxxvii.

(*v*) One object that a judge might have in refusing to allow execution forthwith, would be "to allow either party an opportunity for moving to set aside the verdict or for a new trial." If

LXXX. (*w*) The proceedings upon any such issue (*x*) may be recorded at the instance of either party; (*y*) and the Judgment, whether actually recorded or not, shall have the same effect as any other Judgment in a contested action. (*z*)

(App. Co. C.) Eng. C. L. P. A. 1852, s. 45. Proceedings may be recorded, &c. Effect of judgment.

con. stat. for U. C. ch 22. sec. §153.

LXXXI. (*a*) The parties may, (*b*) after writ issued, and before Judgment, (*c*) by consent and by order of a Judge, (*d*) state any question or questions of law (*e*) in a special case

(App. Co. C.) Eng. C. L. P. A., 1852, s. 46. parties may agree upon a special case

con. stat. for U. C. ch 22 §154.

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the cause were tried out of term, then the motion for a new trial or to set aside the verdict would require to be within the first four days of the term following such trial; (N. R. 40; Chit. Arch. 8 Edn. 1440 R. & H. Dig. "New Trial," II.) The Courts have refused to allow the motion after the expiration of the four days: (see *Orser* v. *Stickler*, Tay. U. C. R. 46.) The new rule is most express to the same effect—"No motion for a new trial, &c., *shall be allowed*, &c., after the expiration, &c.:" (N. R. 40.) The analogy between proceedings here mentioned and an arbitration fails, because an arbitrator has no power to order a verdict to be entered up unless expressly authorized. In ordinary cases a provision is made that the arbitrator shall be at liberty to enter a verdict, and that no error shall be brought. If the clause be omitted in the submission, it will be presumed that the parties did not intend to give that authority to the arbitrator nor any power beyond that of proceeding by attachment for non-performance of the award: (*Hutchinson* v. *Blackwell*, per Tindal C. J. 8 Bing. 333.)

(*w*) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 45.—Applied to County Courts.

(*x*) Our Interpleader Act enacts "that all rules, matters, orders, and decisions to be made and done in pursuance of this act, except only the affidavits to be filed, may together with the declaration in the cause (if any) be entered of record, &c., to the end that the same may be evidence in future times if required, and to secure and enforce the payment of costs directed by any such rule or order, &c.:" (7 Vic. cap. 30 s. 7.)

(*y*) Where a judgment on an interpleader issue was entered up in the ordinary manner instead of having been recorded as the Act directs, such judgment was set aside: (see *Dickenson* v. *Eyre*, 7 Dowl. P. C. 721.)

(*z*) *Same effect as any other judgment*, &c.—When recorded in the County Registry Office, it would, it is presumed, bind lands, though judgments in interpleader cases have not that effect: (see 7 Vic. cap. 30 s. 7.) *Qu.* Would an appeal from such a judgment lie to the Court of Error and Appeal under s. 40 of 12 Vic. cap. 63: (see *Snook* v. *Mattoch*, 5 A. & E. 239; *King* v. *Simmonds et al.* 7 Q. B. 298; *Thorpe* v. *Plowden*, 2 Ex. 387.)

(*a*) Taken from Eng. St. 15 & 16 Vic. cap. 76 s. 46.—Applied to County Courts.

(*b*) See note *d* to s. lxxvii.

(*c*) See note *e* to same section.

(*d*) *Forms*—Order, &c., Chit. F. 7 Edn. 441. No special case could, under the old practice, be set down without leave: (*Kennet et al.* v. *G. W. Railway Co.*, 2 D. & L. 115.)

(*e*) Questions of *fact* may without pleadings be stated in the form of a special case under s. lxxvii. St. U. C. 7 Wm. IV. cap. 3 s. 17, though it provided for the taking of the opinion of the Court in the form of a special case upon questions of law, yet only promitted the application "after issue joined": (see note *z* to s. lxxvii) It is provided by the Eng. C. L. P. Act 1854 that the parties may by consent leave the decision of questions of *fact* to the *Court:* (17 & 18 Vic. cap.

without pleading. (*f*) for the opinion of the Court, without any pleadings. (*g*)

125, s. 1.) Our Legislature has not thought proper to follow this example. Questions submitted to the Court under this enactment must be of law unmixed with fact. If matters of fact necessarily enter into the consideration of the questions, the Court may order the case to go before a jury: (see *Aldridge* v. *the G. W. Railway Co.* 1 Dowl. N. S. 247; also see *Brockbank* v. *Anderson et al.* 13 L. J. C. P. 102.) In one case the Court decided questions of fact "without thereby intending to create a precedent:" (*Price et al* v. *Quarrell et al*, 12 A. & E. 784.) In another case the Court granted a rule *nisi* for defendant to admit certain facts necessary to raise the questions stated in a special case: (*Buckle* v. *Hollis*, 2 Chit. R.398.) The Court will not go behind a special case in order to inquire what took place before the case was signed: (see *Pike* v. *Carter*, per Best C. J. 3 Bing. 87.) Where therefore in a special case after trial under the old practice, judgment was given for the defendant on a supposed state of facts collected by the Court from a document appended to the case, but in truth the reverse of the real facts, the Court refused to stay proceedings or reconsider the case without defendant's consent. They persisted in the refusal, notwithstanding it was made to appear that a statement of the real facts was contained in the case, when agreed on by the defendants junior counsel and engrossed and signed by the plaintiff's leading counsel, but afterwards struck out by the plaintiff's counsel because not enumerated in a collection of facts agreed on at the trial of the cause with a view to the special case: (*Ib.*) Unless expressly authorised by the parties the Court will not, infer the existence of material facts not stated from other facts stated in the special case: (*Doe d. Taylor et al.* v. *Crisp*, 8 A. & E. 779.) If an award be part of the case, the Court will not it seems allow facts to be argued which are not stated on the face of the award: (*Tayler* v. *Marling*, 4 Jur. 1161.)

(*f*) *Form* of case, see Chit. F. 7 Edn. 443; see also a case set out at length in *Wellesley* v. *Withers*, 4 El. & B. 750. The case should, it is apprehended, be signed; especially, as it may be stated immediately "after writ" and when there are no pleadings in the cause. Upon the authority of the case of *Price* v. *Quarrell*, 6 Jur. 604, 11 Law J. N.S. Q.B. 84, it is laid down in Chit. Arch. 8 Edn. 442, that "it is not absolutely necessary that the case should be signed by counsel; but that anything which shows consent to a case as stated is sufficient." The authority cited does not fully bear out the dictum. In the *Jurist* Lord Denman is reported as having said "The practice is that anything which shows *consent* to a case, &c.;" but in the *Law Journal* his words are very differently reported, "I am informed that according to the practice anything which evinces the *consent of counsel* to the case is sufficient," &c, The signature of plaintiff in person who intended to argue his own case, though he had a counsel retained, has been held sufficient: (*Udney* v. *East India Co.* 13 C.B. 732.) The Common Pleas in one case refused to receive a special case from Chancery without the signature of counsel, though signed by the Master in Chancery, who settled the case: (*Ray* v. *Champney*, 3 Dowl. P. C. 105.) A verdict was taken by plaintiff subject to a special case to be prepared by a barrister. The case was accordingly prepared but defendant refused to procure the signature of his counsel thereto. A rule was thereupon issued that unless defendant within a week caused the case to be settled and signed by counsel, the *postea* should be delivered to plaintiff: (*Doe d. Phillips* v. *Rollings*, 2 C.B. 842; also see *Jackson et al.* v. *Hall*, 8 Taunt. 421.) Under somewhat similar circumstances the Court allowed a case to be set down without the signature of defendant's counsel: (*Price* v. *Quarrell et al.* 6 Jur. 604, 11 L. J. Q. B. 84.)

(*g*) It is clear that this enactment only enables the parties to state a

LXXXII. (*h*) The parties may, if they think fit, enter into an agreement in writing, (*i*) which shall be embodied in the said or any subsequent order, that upon the Judgment of the Court being given in the affirmative or negative of the question or questions of law raised by such special case, a sum of money, (*j*) fixed by the parties, (*k*) or to be ascertained by the Court or in such manner as the Court may direct, shall be paid by one of such parties to the other of them, either with or without costs of the action, (*l*) and the Judgment of the Court may be entered for such sum as shall be so fixed or ascer-

(*App. Ca. C.*) Eng. C. L. P. A. 1852, s. 47.

And may agree to pay or not to pay money according to the decision upon such case, &c.

question without pleadings which they might have raised *with pleadings*, but does not entitle them to ask a question on speculation: (*Wellesley* v. *Withers*, per Parke B. 4 El. & B. 758.) The Court, it seems, may refuse to answer a question stated for their opinion under this enactment unless it relate to something for which an *action will lie*: (per Parke B. *Ib.*) There would be no object in requiring the case to be stated "*after* writ," unless the enactment were limited to a question to which a writ might apply: (per Cresswell J. *Ib.*) Where under the old practice a judge at *Nisi Prius* refused to try a wager case on an appeal to the full Court against his decision, it was supported: (*Henkins* v. *Guerss*, 12 East. 247.) Lord Loughborough remarked that although there was nothing immoral in the *subject* of the wager, yet he considered the proceeding as an extremely impudent attempt to compel the Court to give an opinion upon an abstract question of law, not arising out of pre-existing circumstances in which the parties had an interest: (*Ib.* p. 248; see also *Doe d. Duntze* v. *Duntze*, 6 C. B. 100.) Where it is intended to take the opinion of a Court upon points of *law* it would appear to be necessary for the parties to admit *all* facts necessary to raise these points. The Courts have refused to hear special cases framed under Eng. St. 3 & 4 Wm. IV. cap. 42 s. 25 (of which our 7 Wm. IV. cap. 3 s. 17 is a transcript) where it was expressed therein that the Court should draw all necessary inferences as might be done by a jury, with liberty to either party to turn the special case into a special verdict: (see *Engstrom* v. *Brightman*, 5 C. B. 419; *Cocks* v. *Purday*, 6 C. B. 69.) If the parties desire to escape the costs of a trial of issues upon pleadings, their proper course is to state a case under s. lxxvii. of this Act. An amendment of the case stated may be allowed when necessary: (see *Wellesley* v. *Withers*, per Jervis C. J. 4 El. & B. 759.)

(*h*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 47.—Applied to County Courts.

(*i*) Form of agreement see Chit. F. 7 Edn. 437; see further note *m* to s. lxxviii. and note *b* to s. lxxviii.

(*j*) The judgment contemplated by this enactment appears to have reference to money demands or demands for which satisfaction in money is sought, and not to actions for the recovery of property, real or personal. Only actions which operate *in personam* are embraced; actions *in rem* and proceedings auxilliary thereto are not contemplated. If the enactment had gone further it would be in accordance with the report of the Commissioners, who recommended that the judgment should "be moulded to meet the circumstances of each particular case": (see 1st Rep. s. 22.)

(*k*) See note *o* to s. lxxviii.

(*l*) If there be no directions as to costs they will abide the event of the suit: (s. lxxxiii.)

tained, (*m*) with or without costs, as the case may be, and execution may issue upon such Judgment forthwith, (*n*) unless otherwise agreed or unless stayed by proceedings in error or appeal. (*o*)

App.) Co. C.) Eng. C. L. P. A. 1852, s. 48. Costs when there is no agreement about them.

LXXXIII. (*p*) In case no agreement shall be entered into as to the costs of such action, (*q*) the costs shall follow the event, (*r*) and be recovered by the successful party. (*s*)

(*m*) Judgment may be entered and execution issued from the office in which first process was sued out: (ss. viii. ix. and xi.)

(*n*) As to the issue of execution, see ss. olxxxii. *et seq.*

(*o*) *Unless stayed by proceedings in error or appeal.* The implication is that proceedings in error or appeal may be had upon a special case submitted to and adjudicated upon by the Courts under this enactment, and that when such proceedings are had execution shall be stayed in the Court below. The words "error *or* appeal" are used with reference to our St. 12 Vic. cap. 63, which constitutes a Court of "error and appeal": (s. 38 *et seq.*) "Error" strictly speaking, relates to matters of fact as well as law. Error may be brought on a single point in a case leaving the remainder of the case in the Court below. But an appeal intends the removal of all proceedings from one Court of interior jurisdiction to another of appellate and superior jurisdiction. No writ of error lies to any other than a Court of Record: (Stat. U. C., 5 Wm. IV., c. 2.) There may be an appeal from any inferior Court, though not of record. Thus we speak of an appeal from a magistrate to the Quarter Sessions. Error besides only lies to impeach a judgment in its nature a record of the lower Court. The error to be brought under this enactment must be upon a matter of law, but no express provision is made for entering the proceedings of record. With respect to matters of fact there is such a provision (s. lxxx.) The enactment of the provision in the one case and the omission of it in the other leaves the intention of the Legislature ambiguous.

(*p*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 48.—Applied to County Courts.

(*q*) *Such action, i. e.* the action first mentioned in s. lxxvii. of this Act—"Where the parties to *an* action," &c. This provision is enacted with especial reference to cases upon questions of fact under s. lxxvii. and the agreement to be entered into in respect thereof under s. lxxviii. As also to cases upon questions of law under s. lxxi. and the agreement to be entered into in respect thereof under s. lxxxii.

(*r*) Where under the old practice the parties agreed to state a special case but made no provision for costs, and though the case was drafted it was never in fact agreed upon, the costs of such abortive case were held not to be costs in the cause: (*Foley* v. *Botfield*, 16 M. & W. 65.)

(*s*) *Successful party.* Who is the "successful party" within the meaning of this section when both parties succeed—plaintiff as to part and defendant as to part? Certainly the party who succeeds upon the real and substantial issue that involves the cause of action. If there be several issues, some decided for plaintiff and some for defendant, and those for plaintiff entitle him to recover his debt, damages, or property, or any part thereof, he will be entitled to the general costs of the cause. So, *vice versa*, if the issues found for defendant go the whole cause of action: (see s. cxxx. of this Act and R. & H. Dig. "Costs," III.) In a special case stated under the preceding section plaintiff claimed certain fixtures

And for the more expeditious determination of mere matters of account; Be it enacted as follows: (*t*)

LXXXIV. (*u*) If it be made to appear, at any time after the issuing of the writ (*v*) to the satisfaction of the Court or a Judge, upon the application of either party, (*w*) that the matters in dispute consist wholly or in part of matters of mere account, (*x*) which cannot conveniently be tried in the ordinary

Eng. C. L. P. A. 1854, s. 3.

The Court or a Judge on the application of either party may refer the whole or

com. stat. for U.C. ch 22 §158

being trade fixtures and tenant's fixtures. As to the former he succeeded, but as to the latter he failed. No provision was made for costs. Held that plaintiff was entitled to the general costs of the cause, and defendant to the costs of the part found for him which in truth were nothing: (*Elliott* v. *Bishop*, 10 Ex. 522.)

(*t*) The C. L. Com'rs in their Report observed that there was a large class of cases in which the intervention of a jury was positively mischievous, from their inability to deal with such cases. Of this class of cases matters of "mere account" form a very great portion. The inability of juries to deal with claims of this nature has in modern times manifested itself in a manner most convincing by the frequent verdicts taken subject to references to arbitration. This appears to have been the natural and most convenient channel through which to conduct such cases to judgment. The Legislature acting upon the principle that each Court should have complete jurisdiction in matters of which it has cognizance has in the enactments following widened the channel and thus adapted the machinery of the Common Law Courts to the wants of suitors.

(*u*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 3. Founded upon 2d Rep. C. L. Com'rs (s. 2.)—Not applied to County Courts. See a similar provision as to County Courts: Co. C. P. A. s. 10.

(*v*) *At any time after the issuing of the writ*, &c. The application may, it is presumed, be made, though defendant has not been served with the writ. "At any time *after issue* of the writ" may embrace the time between the issue and the service of the summons: (see note *e* to s. lxxvii.)

(*w*) The application of course must be by affidavit; (see form thereof Chit. F. 7 Edn. 894.) As either party may apply, and as the application if successful may materially affect the rights of the opposite party, it is apprehended that the party to be affected should have notice of the proceedings before order made. A summons or rule to show cause is the practice adopted in England: (Forms thereof Chit. F. 7 Edn. 894.)

(*x*) *That the matters in dispute consist wholly or in part of mere matters of account.* These words are susceptible of two modes of interpretation—1. Either "that where the matters in dispute consist wholly of matters of account, the *whole* may be referred, and that where it consists wholly of matters of mere account, such *part* only may be referred;" or 2. "That where the matter in dispute consists wholly or in part of matters of mere account, the reference may be either of the whole matter in dispute *or* part only as the Court or Judge may think fit." The latter appears to be the true construction. The matter to be decided or referred is the *matter in dispute* and not the *matter of mere account*, of which the matter in dispute may consist: (*Brown et al.* v. *Emerson*, 33 L. & Eq. 251.) Where therefore the claim in a cause consisted of a long account for goods sold, money paid, &c., and the defendant had a similar set-off, the Court ordered the *whole cause* to be referred, although some of the items on each side were disputed between the parties

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any part to an arbitrator, officer or County Judge.

way, (*y*) it shall be lawful for such Court or Judge, upon such application, if they or he think fit, to decide such matter in a summary manner, (*z*) or to order (*a*) that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, (*b*) or to an officer of the Court, (*c*) or in country causes (*d*) to the Judge of any County Court, (*e*) upon such

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and so were not mere matters of account but of liability: (*Ib.*) It does not follow from this decision that *every case* ought to be referred which involves in part matters of mere account. The rule is well laid down in the case of *The Taff Vale Railway Co.* v. *Nixon*, 1 H.L. Cas. 111, and was probably the origin of the enactment under consideration. So much for "mere matters of account." In cases where the amount of damages sought to be recovered is "substantially a matter of calculation" there is an entirely different mode of procedure: (see s. cxliii of this Act.)

(*y*) This enactment is made to include cases "which cannot be *conveniently* tried in the ordinary way." No new right is given: but a new mode of procedure is enacted for the more convenient trial of such cases It is for the Court or a Judge to decide upon the convenience or inconvenience of the "ordinary way" of trial: the decision when made being compulsory upon the parties. The section cannot be held to apply to a case carried down to trial in the "ordinary way." Sec. clvi. gives power to deal with such a case, and though the words of the section under consideration are not restrictive as to the time of application, yet if it could be made to a Judge in Chambers after the cause is entered for trial, it might lead to great confusion in practice. Taking therefore the two sections together, the most reasonable construction to put upon them is that the Legislature intended that the judge having possession of the record at Nisi Prius should be *the* judge to deal with it: (*Sheil* v. *O'Neil*, Chambers, Oct. 14, 1856, Burns J.)

(*z*) If the Court or a judge undertake the burden of deciding the case in a "summary manner" the ordinary affidavit (Chit. F. 7 Edn. 894) will not be sufficient. All the facts necessary to be known to a just decision must be laid before the Court.

(*a*) Forms, Chit. F. 7 Edn. 894.

(*b*) An arbitrator so appointed should it is apprehended govern himself by the practice relating to Arbitrations and the proceedings upon such reference should be conformable to the established practice in such cases: (s. lxxxvii.) As to the practice, see Chit. Arch. 8 Edn. 1470; *Ib.* 9 Edn. 1547; Tidd's N. P. 497; Bag. Prac. 406. Plaintiff, who brought an action against defendant for the amount of a bill of costs in Chancery and who had signed judgment by default, applied under s. cxliii. of this Act, for a reference to the Master; but upon request of defendant's counsel the reference was made under this section to an arbitrator skilled in Chancery costs: (*Duggan* v. *Bright*, Chambers, Sept. 27, 1856, Burns J.)

(*c*) An officer of the Court, if appointed, must of necessity have all the powers of an arbitrator as regards the attendance of witnesses, production of evidence, &c.

(*d*) Causes in which the venue is laid in the United Counties of York and Peel are *Town* causes. All others are *Country* causes: (see s. cl.)

(*e*) *Judge of any County Court.* The exact import of these words, when the venue is laid in one county and a reference is sought to the judge of a different county has been recently under consideration. In an action in which the venue was laid in the county of A, application was made by plaintiff for a reference to the Judge of B, in which county the principal witnesses

terms as to costs and otherwise as such Court or Judge shall think reasonable; (*f*) and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a Jury upon the matter referred. (*g*)

Enforcing such order or decision under it.

LXXXV. (*h*) If it shall appear to the Court or a Judge that the allowance or disallowance of any particular item (*i*)

Eng. C. L. P. A. 1854, s. 4. Any incidental question

Con. Stat. for U.C. ch. 22. § 159.

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of plaintiff were resident, but held per Burns, J., that taking ss. lxxxiv. and cxliii., of this Act together, a reference could not be made to any other judge than the one in whose county the venue was laid, unless by consent of parties: (*Cotton* v. *Mackenzie*, Chambers, Oct. 6, 1856.) It is presumed that upon a reference to a judge of a County Court under this section, he would be empowered of himself to decide all matters both of law and of fact that might arise out of the case before him. *Qu.* Is a Judge of a County Court bound to *accept* such a reference? He is at all events not called upon to postpone the business proper of his own Court to attend to a matter referred to him from another tribunal. As to charges to fee fund under such a reference see s. xviii. of Co. C. P. A., and notes thereto.

(*f*) An order made under this section, but silent as to costs, does not confer upon the arbitrator any power to deal with the costs: (*Bell* v. *Postlethwaite*, 33 L. & Eq. 131; *Leggo* v. *Young*, per Maule J. 16 C. B. 635; 32 L. & Eq. 433.) If the parties mean to give such power they should provide for it in the order: (per Maule J. in *Leggo* v. *Young*, *ante*.) As to the form of order now used in England as regards costs, see 16 C. B. 635, note. Where under this enactment a "cause" was referred but no provision for costs made in the order, and it was awarded "that the defendant should pay to the plaintiff £159. 0s. 9d. in full of all demands in the above-mentioned action." Held that the Master could not upon the award tax to plaintiff either the costs of the cause or of the reference, in addition to the sum specifically mentioned in the award: (*Ib.*) It was also held that a letter written to the plaintiff by the umpire who made the award (in which letter he expressed an opinion that the costs of the action and of the reference should bn paid by defendants, and that he would have so ordered, but that he could not do so, inasmuch as the order was silent as to costs) could not be referred to as part of the award so as to give plaintiff a right to the costs: (*Ib.*) Although the rule or order be silent as to costs, the Court or Judge has still power to reform the rule or order by inserting a clause providing for the costs *nunc pro tunc*, and then the costs will follow according to the just and ordinary course of law: (*Bell* v. *Postlethwaite*, *ubi supra*.)

(*g*) This latter provision seems to pre-suppose that the award or certificate which it mentions shall be a final decision in the cause. For in such an event only could either the one or the other "be enforced by the same process as the *finding* of a jury upon the matter referred."

(*h*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 4.—Not applied to County Courts. As to these Courts see a similar provision in Co. C. P. Act s. 11.

(*i*) It will be observed that this enactment supports the law as explained in note *x* to the preceding section, and in which a distinction was made between the matters in dispute and mere matters of account, of which the matters in dispute might in whole or in part consist. If the liability to pay the

of law may be decided by the Court or one of fact by a Jury upon a special case or issue.

or items in such account (*j*) depends upon a question of law fit to be decided by the Court, or upon a question of fact fit to be decided by a Jury, (*k*) it shall be lawful for such Court or Judge (*l*) to direct a case to be stated (*m*) or an issue or issues to be tried; (*n*) and the decision of the Court upon such case, (*o*) and the finding or the Jury upon such issue or issues, (*p*) shall be taken and acted upon by the arbitrator as conclusive. (*q*)

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items or an item of the plaintiff's claim be brought in question, it is manifest that the items so disputed are no longer "mere matters of account." The *liability* to pay the items is one thing: the liability admitted or proved then, the *amount* of the liability is quite another. The decision of the "matters in dispute" must of necessity involve both the one and the other. It has been held that "the matters in dispute whether consisting wholly or in part of mere matters of account" should be referred: (see note *x*, *ante*.) This involves the allowance or disallowance of particular items, which will depend upon the adjudication of certain questions either of fact or of law. The proper and most convenient modes of deciding such questions when raised as independent issues, are (according to the nature of the case,) by the court or a jury. To facilitate these modes of decision the above enactment has been passed. It is easy to conceive cases in which the allowance or disallowance of particular items might depend upon the solution of questions either of fact or of law. Suppose, for example, that plaintiff claims interest upon his account from a certain fixed period. Defendant may insist as to the interest that the same has been paid, which will raise an issue in fact. Or he may insist that plaintiff has no right to charge interest, which will give rise to an issue in law: (see *Mowatt* v. *Lord Londesborough*, 8 El. & B. 307, 4 El. & B. 1.) This and many other examples, such as the operation of the Statutes of Limitation, &c., will occur to the mind. To these and the like cases when made "to appear to the Court or a Judge," the section applies.

(*j*) *Such account, i. e.* the matters in dispute mentioned in the preceding section, which may "consist wholly or in part of mere matters of account." This and the preceding section must be taken together. *Qu.* Can the Court or a Judge interfere pursuant to this section before a reference of the matters in dispute made under the preceding section?

(*k*) In English Act "to be decided by a Jury *or by a Judge upon the consent of both parties as hereinbefore provided.*" The words in italics have, it will be seen, been omitted in our Act.

(*l*) The Court during term and the Judge during vacation. See note *m* to s. xxxvii.

(*m*) *i. e.* upon a point of law. The Judges of our Courts have not power to decide questions of fact in the same manner as the Judges in England. The latter are empowered to do under s. 1 of Eng. C. L. P. Act, 1854, (see note *k*, *ante*,) which provision has been omitted by our Legislature.

(*n*) *to be tried. i. e.* in a manner somewhat similar to issues of fact provided for under s. lxxvii. of this Act.

(*o*) *i. e.* the special case containing the questions of law.

(*p*) *i.e.* the issues of fact.

(*q*) The powers of an arbitrator depend almost wholly upon the submission, reference, or other authority under which he is entitled to act.—He is, as a general rule, the final judge both of law and fact. In respect to a reference made at the trial he usually stands in the place of the Jury, and his award is looked upon as their ver-

LXXXVI. (*r*) It shall be lawful for the arbitrator (*s*) upon any compulsory reference under this Act, (*t*) or upon any reference by consent of parties, (*u*) where the submission is or (*v*) Arbitrator may make

Eng. C. L. P. A. 1854, s. 5.

Conv. stat. for U.C. ch 22 § 162.

diet. At times he is clothed with many of the powers of a Judge at Nisi Prius. Occasionally some of the functions of the Court in *banc.* devolve upon him: (See Russell Arbr. & Award, 112 *et seq.* and cases there noted; *Ib.* 2 Edn. 112 *et seq*; also R. & H. Dig. "Arbitration and Award," III.)

(*r*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 5—Not applied to County Courts; but as to these Courts there is a similar provision: (see Co. C. P. Act s. 12.)

(*s*) *Qu.* Is either a Judge of the Superior Court sitting in Chambers a Judge of the County Court in country causes, or an officer of the Court acting under s. lxxxiv. of this Act, an "arbitrator" within the meaning of the enactment? The arbitrator appointed to act, whether of the legal profession or not, and whether the matter referred to him involve questions of law or of fact, is, it appears, authorised in his *discretion* to decide such questions: (see *Jupp et al.* v. *Grayson et al.* 1 C. M. & R. 523; *Young* v. *Walter*, 9 Ves. 364; *Perriman* v. *Stegall*, 9 Bing. 679; *Holmes* v. *Higgins*, 1 B. & C. 74; *Campbell* v. *Twemlow*, 1 Price 81; *Wilson* v. *King*, 2 C & M. 689; *Hall* v. *Fergusson*, 4 O. S. 392.) If he decline of himself to decide questions of law, he is enabled by the section under consideration to state his award "in the form of a special case for the opinion of the Court." In questions of perplexity an arbitrator will feel the propriety of adopting this latter course, rather than rely upon his own judgment. But supposing he resolves himself to decide incidental points of law it does not follow that if he proceed upon a mistaken view of a clear principle of law the Court will not set aside his award: (*Richardson* v. *Nourse*, per Abbott, C. J., 3 B. & A. 237.) Under such circumstances the Court, if there be no sufficient reason for setting aside the award, may remit the matters in dispute "to the reconsideration and redetermination of the arbitrator": (s. lxxxviii.)

(*t*) *i. e.* under s. lxxxiv. of this Act.

(*u*) *Or upon any reference by consent of parties.* By this expression is meant such references as might be or were commonly made before the passing of this Act. Disputes between parties of whatever nature, provided an action at law or suit in equity will lie by one party against the other, may as a general rule be the subject of a reference by consent: for instance, all matters in dispute concerning any personal chattel or personal wrong. Thus, breaches of contract generally, breaches of promise of marriage, trespasses, assaults, charges of slander, differences respecting partnership transactions or the purchase price of property, and questions relating to tolls: (See Russell Arb. 3-4; *Ib.* 2 Edn. 3–4.) Things in realty as well as personalty may be submitted, and if there be an award of the possession of the realty, the Court may enforce such award as if it were a judgment in ejectment: (s. xcvi.) Practically, therefore, no distinction any longer exists in this respect between realty and personalty. It is in the power of an arbitrator by his decision to give to the party in whose favor he awards, a *right* to the property in dispute whether personal or real. As to realty see *O'Dougherty* v. *Fretwell*, 11 U. C. R. 65; *G. W. Railway Co.* v. *Baby et al.* 12 U. C. R. 114; *McPherson* v. *Walker*, 1 U. C. R. Prac. Rep. 30, Draper J.; *Doe d. Macdonald* v. *Long*, 4 U. C. R. 146; *Doe d. Galbraith*, v. *Walker*, E. T. 2 Vic. *M.S.* R. & H. Dig. "Arbitration and Award," IV. 3 9.

(*v*) This is made to depend upon the Eng. St. of Wm. III. and s. xcvii. of this Act. Though both enactments are very general in their purport, the latter (which see) is the more ex-

award in the may be made a rule or order of any of the Superior Courts of

tensive. The former is in these words: "Whereas it hath been found by experience, that references made by rule of Court have contributed much to the ease of the subject, in the determining of controversies, because the parties become thereby obliged to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt in case they refuse submission. Now for promoting trade, and rendering the award of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account or trade, or other matters. Be it enacted, &c., that from &c., it shall and may be lawful for all merchants and traders, and others, desiring to end any controversy, suit, or quarrel, controversies, suits, or quarrels, for which there is no other remedy but by personal action or suit in Equity, by arbitration, to agree that their submission of their suit to the award or umpirage of any person or persons, should be made a rule of any of his Majesty's Courts of Record, which the parties shall choose, and to insert such their agreement in their submission, or the condition of the bond or promise, whereby they oblige themselves respectively to submit to the award or umpirage of any person or persons, which agreement being so made and inserted in their submission or promise, or condition of their respective bonds, shall or may, upon producing an affidavit thereof made by the witnesses thereunto or any one of them in the Court of which the same is agreed to be made a rule, and reading and filing the said affidavit in Court, be entered of record in such Court, and a rule shall thereupon be made by the said Court, that the parties *shall* submit to, and be finally concluded by the arbitration or umpirage which shall be made concerning them by the arbitrators or umpire pursuant to such submission; and in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same or any part thereof, shall be subject to all the penalties of contemning a rule of Court, when he is a suitor or defendant in such Court, and the Court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any Court either of law or equity, unless it shall be made to appear on oath to such Court that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage was procured by corruption or other undue means." (9 & 10 Wm. III. cap. 15 s. 1.) It was not, before this statute, in the power of parties out of Court by any agreement either before or after award to bring themselves into Court and create a jurisdiction to issue process of contempt: (*Nichols* v. *Chalie*, 14 Ves. 265; *Lyall* v. *Lamb*, 4 B. & Ad. 468; *Steers* v. *Harrop*, 1 Bing. 138.) The statute enacts that the submission may be made a rule "of any Court of Record." These words have been held to include the English Court of Chancery: (*Pownall* v. *King*, 6 Ves. 10.) The statute also enacts that the parties shall "insert" their consent to make the submission a Rule of Court in the submission itself. It has therefore been held that a *parol* submission cannot be made a rule of Court under the statute: (*Ansell* v. *Evans*, 7 T. R. 1.) And though it is enacted that the consent shall be "inserted," still in a case where the consent clause was no part of the condition of the bond, but was written *under* it before execution and not signed, the submission was made a rule of Court: (*Carter* v. *Mansbridge*, Barnes, 55.) *Semble.* Where the submission at the time of the execution thereof does not contain the consent, a clause added several months afterwards will not supply the defect so as to admit of the submission being made a rule of Court: (*In re Thirkell et al.* 2 U. C. R. 178.) If the consent be inserted and properly executed, it is not in the

Law or Equity in Upper Canada, if he shall think fit, (*w*) and if it is not provided to the contrary, (*x*) to state his award as to the whole or any part thereof, (*y*) in the form of a special case for the opinion of the Court, (*z*) and when an action is refer-

Form of a special case.

Effect thereof.

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power of either party to revoke his submission without leave of the Court: (St. U. C. 7 Wm. IV. cap 3 s. 29, which is a transcript of Eng. St. 3 & 4 Wm. IV. cap. 42 s. 39.) The Statute limits no time within which the application to enforce the award must be made: (Russell Arb. 60; *Ib.* 2 Edn. 58.) It has been held that it is no objection to the making of a submission a rule of Court that all the proceedings taken under such submission were null and void: (*Anon.* 10 Jur. 525.) An objection to the validity of an award, even though apparent on its face, is no objection to making the submission a rule of Court: (*Flemming* v. *Simmington*, 5 Hare 350.) Where two parts of a deed of submission were executed and the arbitrator indorsed the enlargements of the time for making the award on one part the Court compelled the party in whose possession that part was, to make it a rule of Court: (*Smith* v. *Blake*, 8 Dowl. P. C. 130; see also *Boston* v. *Mesham*, 8 Dowl. P. C. 867.) Where it was necessary to make a submission a rule of Court before moving to set it aside, and the party in whose favor the award was, refused to produce the submission, the Court permitted a copy to be made a rule of Court for the purpose: (*In re Plews*, 6 Q. B. 845.) As to a reference from Nisi Prius the order does not belong to either party; but the party holding it holds it for the benefit of both parties, and is bound to produce it when required: (*Bottomley* v. *Buckley*, 4 D. & L. 157.) Where the making of a submission a rule of Court was delayed, until the time limited for setting aside the award had elapsed, the Court ordered the party who delayed it to allow the opposite party to move to set it aside *nunc pro tunc*: (*Ib.*; see also *In re Midland Railway Co.* v. *Hemming*, 4 D. & L. 788.)

(*w*) "*If he shall see fit.*" This enactment is one which enables the arbitrator to state a case, but does not make it obligatory upon him to do so. He may do so if he "see fit," that is, he is not bound to do so if he do *not* see fit. Where, by the terms of an order of reference made before the C. L. P. Act, an arbitrator was at *liberty* to raise any point of law for the opinion of the Court: Held that he was not *bound* to do so: (*Wood* v. *Hotham*, 5 M. & W. 674; *Miller* v. *Shuttleworth*, 7 C. B. 105; see also note *s* to this enactment.)

(*x*) *And it is not provided to the contrary.* It might be inferred from this enactment, taken alone, that an *express* provision to the contrary would be requisite; but this enactment and that of s. xcvii. of this Act are *in pari materia*. Indeed, as relates to "references by consent" both provisions occupy a common ground. The latter enactment provides that every agreement or submission to arbitration by consent may be made a rule of Court, "*unless such agreement contain words purporting that the parties intend that it should not be made a rule of Court.*" The intention of the instrument, even in the absence of express provision must govern in either case.

(*y*) "*As to the whole or any part thereof,*" *i. e.* of the matters referred.

(*z*) It has been considered before the C. L. P. A. that an arbitrator could not without leave expressed in the order of reference or submission state a case for the opinion of the Court: (*Bradbee* v. the *Governors of Christ's Hospital*, 2 Dowl. N. S. 164; *sed qu.* see *Wood* v. *Hotham*, 5 M. & W. 674.) It has always been usual for well drawn submissions and orders of reference to contain a clause to the effect that the arbitrator might in his discretion state any point of law on the face of his

red, (*a*) Judgment, if so ordered, may be entered according to the opinion of the Court. (*b*)

Eng. C. L. P. A. 1854, s. 7. Proceedings before arbitrator and his power to be as upon

LXXXVII. (*c*) The proceedings upon any such arbitration as aforesaid, (*d*) shall, except otherwise directed hereby or by the submission or document authorising the reference, be conducted in like manner and subject to the same rules (*e*) and

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award for the opinion of the Court. And it has been held that if it clearly appear upon the reading of an award that the arbitrator intended to leave a particular question of law open, the Court will consider it: (*Sherry* v. *Oke et al.* 3 Dowl. P. C. 849.) Where an arbitrator to whom a cause was referred by order of reference directed a verdict for a certain sum to be reduced to a lesser sum, if the Court should be of opinion that it ought to be so, a motion for that purpose was said by Parke B. to be in substance a motion to set aside the award: (*Anderson* v. *Fi ler*, 7 Dowl. P. C. 51.) Form of special case under this enactment see N. R. Form 4.

(*a*) Besides mere matters of account which may under ss. lxxxiv. or clvi. this Act be compulsorily referred at any time after writ, it may be mentioned that where there is a cause depending, a rule of Court or a Judge's order, or on the trial an order of Nisi Prius referring the cause to arbitration, may at common law be drawn up on consent of the parties: (Russell Arb. 76, referring to *Lucas* v. *Wilson*, 2 Burr. 701; *Harrison* v. *Smith*, 1 D. &. L. 876.)

(*b*) The opinion of the Court obtained under such circumstances is in effect the decision of the arbitrator, and therefore, notwithstanding the statement of the special case by the arbitrator, the judgment of the Court upon the matter referred is final, and entitles the successful party to enter his judgment and issue execution. Form of Judgment see N.R. Forms 12, 28.

(*c*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 7.—Not applied to County Courts; but as to these Courts there is a similar provision: (Co. C.P. Act s. 13.) The object of this enactment is to make the proceedings contemplated conformable as far as circumstances will permit to proceedings before arbitrators appointed by consent of parties. Also to assimilate all subsequent proceedings to the existing practice upon a reference by consent.

(*d*) *i.e.* the arbitration intended by the preceding section (lxxxvi.)

(*e*) The mode in which proceedings upon a reference to arbitration should be conducted must, in the absence of express directions in the rule or order of reference, depend much upon the discretion of the arbitrator: (see *Tillam* v. *Copp*, 5 C. B. 211.) It rests with him to appoint the time and place of meeting (*Form* of appointment Chit. F. 6 Edn. 655,) and it is the duty of the parties to attend to his appointment: (*Featherstone* v. *Cooper*, 9 Ves. 67.) When the time and place has been appointed and the parties or their attorneys (see *Allan* v. *Brown*, Tay. U. C. R. 460) informed thereof (*In re Johnson and M. of Gloucester*, 12 U. C. R. 135) they must attend with all necessary witnesses. If either party absent himself after being notified to attend, it is in the power of the arbitrator to proceed *ex parte:* (see *Wood* v. *Leake*, 12 Ves. 412; *Harcourt* v. *Ramsbottom*, 1 J. & W. 512; *Scott* v. *Van Sandan*, 6 Q. B. 237;) but to warrant him in so proceeding there ought to be a very strong case: (see *Gladwin* v. *Chilcote*, 9 Dowl. P. C. 550; *Proudfoot* v. *Trotter et al.* 6 O. S. 163.) Either party may be represented by counsel. And it would be prudent for the party who intends to engage counsel to notify the opposite party of such his intention. This course will both pre-

enactments as to the power of the arbitrator and of the

reference by consent.

vent surprise at the hearing and at the same time remove all suspicion of a desire to take undue advantage. It will be proper for the arbitrator to regulate, the proceedings of parties, such as examination of witnesses, address of counsel, &c., by analogy to the practice of Courts under similar circumstances. The discretion of the arbitrator, when there is a cause in Court, is at all times subject to the supervision of the Court in which the cause was commenced. The Court has power not only to review his decision but to set aside his award, especially in cases of compulsory reference, if it be made to appear that he has acted unfairly towards either party: (Russ. Arb. 169; *G. W. R. Co.* v. *Baby*, 12 U. C. R. 106.) For instance, if he refuse to receive evidence tendered to him by either party, though he may be of opinion that he has sufficient evidence before him: (see *Phipps* v. *Ingram*, 3 Dowl. P. C. 669; *Hamilton* v. *Wilson*, 4 O. S. 16; *Bull* v. *Bull*, 6 U. C. R. 357; *McMullen in re*, 2 U. C. R. 175; *Grisdale* v. *Boulton*, 1 U. C. R. 407.) Yet if he refuse the evidence as being inadmissible, it appears his decision will rarely if ever be disturbed: (see *Symes* v. *Goodfellow*, 4 Dowl. P. C. 642.) In some cases it may appear very indispensable that an arbitrator should within proper limits be allowed to deviate from the ordinary rules which govern Courts of Justice; *ex. gr.* he may properly and conveniently take the examination of a sick or infirm person at the house of such person: (*Tillam* v. *Copp*, per Maule J. 5 C. B. 214) But the deviation must not be an unnecessary or a glaring departure from well established rules of practice. Thus an arbitrator has no power privately to examine a party to a reference upon his own behalf. Such a proceeding would be contrary to the rules for the regulation of evidence adopted both by Courts of law and equity: (*In re Hick et al.* 8 Taunt. 694; *Dobson et al* v. *Groves et al.* 6 Q. B. 637; *Davis* v. *Birdsall et al.* 2 U. C. R. 199; see also remarks of McLean J. in *Boyle* v. *Humphrey et al.* 1 U. C. Prac. R. 187.) And if the order of reference require the arbitrator to take evidence upon oath he would not be justified in receiving the affidavits of parties not attending: (see *Banks* v. *Banks*, 1 Gale. 46.) If *liberty* be given to him so to examine the parties, he may or may not do so in the exercise of his discretion: (see *Smith* v. *Goff*, 3 D. & L. 47.) It is in the power of the Court or a Judge from time to time, if necessary, to remit the matters referred or any part thereof to the redetermination of the arbitrator: (see s. lxxxviii. of this Act.) It is also in the power of the Court either to allow a revocation of the submission or reference: (see *James* v. *Attwood*, 7 Scott 841; *Faviell* v. *Eastern Cos. R. Co.*, 6 D. & L. 54) or to enlarge the time for making the award: (*Jones* v. *Russell*, 5 U. C. R. 303; see also s. xcv. and notes *u* and *z* thereto.) An arbitrator if he award the payment of a sum of money may as a general rule name a day for the payment. The rule is different where a cause only is referred, or where a reference is made for no other purpose than to make an estimate or fix a price, or where the terms of the submission contain something restricting the arbitrator in this respect: (*Addison* v. *Corbey*, 11 U. C. R. 433.) An arbitrator should at all times be careful neither to overstep the bounds of propriety nor with reference to the subject matter of his award to exceed the authority conferred upon him by the submission or reference. If he do, although the excess may in some cases be rejected as surplusage, in others it may be a ground for setting aside his award: (see the following cases—*Aicheson* v. *Cargey*, 2 Bing. 199; *Tattersall* v. *Groote*, 2 B. & P. 131; *Shaw* v. *Turton*, 4 O. S. 100; *Brown* v. *Watson*, 6 Bing. N. C. 118; *Boodle* v. *Davies*, 3 A. & E. 200; *Morley* v. *Newman*, 5 D. & R. 317; *Hutchinson* v. *Blackwell*, 8 Bing. 331; *Jackson* v. *Clarke*, 18

Court, the attendance of witnesses, (*f*) the production of

Price 28; *Cayme* v. *Watts*, 3 D. & R. 224; *Gray* v. *Gwennap*, 1 B. & A. 106; *Harding* v. *Forshaw*, 4 Dowl. P. C. 76; *Donlan* v. *Brett*, 2 A. & E. 344; *Watson* v. *Black*, H. T. 4 Vic. *M.S.* R. & H. Dig. "Arbitration & Award," III. (2) 2; *Cock* v. *Gent*, 13 M. & W. 364; *Mathew* v. *Davis*, 1 Dowl. N. S. 679; *Hawkyard* v. *Stocks*, 2 D. & L. 937; *Round* v. *Hatton*, 10 M. & W. 660; *Eastern Cos. R. Co.* v. *Robertson*, 6 M. & G. 38; *In re Tandy*, 9 Dowl. P. C. 1044; *Boyes* v. *Black*, 13 C. B. 652; *Law* v. *Bluckbarrow*, 14 C. B. 77; *Hill* v. *Hill*, 11 U. C. R. 262; *G. W. R. Co.* v. *Hunt*, 12 U. C. R. 124; *same Plaintiffs* v. *Dougall*, *Ib.* 131; *same Plaintiffs* v. *Dodd*, *Ib.* 233; *In re Miller and G. W. R. Co.* 13 U. C. R. 582; *Faulkner* v. *Saulter*, 1 U. C. Prac. R. 48; *In re Harley et al.*, *Ib.* 173.) If there be any just cause for setting aside an award the party aggrieved must take good care to move within the time limited by statute or rule of Court: (see *Crooks* v. *Chisholm et al.* Robinson C. J. 4 O. S. 123.)

(*f*) The Court if not empowered at common law (see *Wawsell* v. *Southwood*, 4 M. & R. 359; *Webb* v. *Taylor*, 1 D. & L. 676) to command the attendance of witnesses and production of documents before an arbitrator upon an order of reference, has full power so to do by statute. ".When any reference shall have been made by any such rule or order as aforesaid (*i. e.* by rule of Court or Judge's order or order of Nisi Prius in any action), or by any submission containing such agreement as aforesaid (*i. e.* that the submission shall be made a rule of any of her Majesty's Courts of Record), it shall be lawful for the Court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any Judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience of any such rule or order shall be deemed a contempt of Court, if in addition to the service of such rule or order an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire before whom the attendance is required, shall also be served, either together with or after the service of such rule or order. Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money and payment of expenses, and for loss of time, as for and upon attendance at any trial. Provided also that the application made to such Court or Judge shall set forth the place at which such witness is residing at the time. Provided also that no person shall be compelled to produce under any such rule or order any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order." (St. U. C. 7 Wm. IV. cap. 3 s. 30, a transcript of Eng. St. 3 & 4 Wm. IV. cap. 42 s. 41.) The Courts of common law are not deprived by this stat. of their concurrent jurisdiction to swear the witnesses: (*James* v. *Attwood*, 5 Bing. N. C. 628.) And the arbitrator, on the other hand, may swear the witnesses, notwithstanding the order of reference directs them to be sworn before the Judge of Assize: (*Hodsall* v. *Wise*, 4 M. & W. 536.) But a Court of Equity has no power under the statute to compel witnesses to attend before an arbitrator: (*Hall* v. *Ellis*, 9 Sim. 530.) Courts of law have not, it seems, the power, except in cases provided for by the statute: (Chit. Stat. I. 67, note *m.*) If the witness whose attendance is necessary be a prisoner in close custody the Court may grant a *habeas corpus*, in order that he may be brought before the arbitrator: (*Graham* v. *Glover*, 33 L. & Eq. 55.) Where it is requisite to resort to the above compulsory proceed-

documents, enforcing (*g*) or setting aside the award, or

ing, an order for the attendance of the witnesses may be obtained either upon motion in Practice Court or on application to a Judge in Chambers grounded on affidavit. The affidavit should set forth the existence of the reference either shortly in words or by verifying a copy of the rule or order authorising the same—the names of the witnesses and the county in which they reside, or if their residence be not known, should set forth facts sufficient to satisfy the Court or the Judge that they cannot at the time of the making of the affidavit be found. *Form* see Chit. F. 6 Edn. 654. If a document be required to be produced it should be properly described as in a *subpœna duces tecum*. It should also be stated that the attendance of the witness or production of the document is material: (Chit. Arch. 8 Edn. 1472.) The rule or order will be absolute in the first instance: (Form thereof Chit. F. 6 Edn. 655.) The Court in granting it acts in a ministerial rather than in judicial capacity: (*Guarantee Society, In re*, 1 D. & L. 907.) The rule or order when obtained, and a copy of the arbitrator's appointment should, if possible, be served on the witness, and his reasonable expenses tendered to him at the time of the service thereof. To bring him into contempt the originals should be shown to him: (Chit. Arch. 8 Edn. 1472.) The parties, their attorneys, counsel, and witnesses, in going to, attending to, and returning from the arbitration, are privileged in the same manner as on a trial at law: (*Webb* v. *Taylor*, 1 D. & L. 671; *Spence* v. *Sheard*, 3 East. 89; *Randal* v. *Gurney*, 3 B. & A. 252; *Ricketts* v. *Gurney*, 1 Chit. R. 682.) A voluntary attendance when the witness might be compelled to attend is equally privileged: (*Webb* v. *Taylor*, 1 D. & L. 676.) The privilege holds good during the adjournment of the arbitration from one period to another of the same day, or when the adjournment is from day to day; but not when many days are to elapse before the next meeting: (*Spencer* v. *Newton*, 6 A. & E. 623.) Provision may be made for the examination of the witnesses upon oath: (St. U. C. 7 Wm. IV. cap. 3 s. 31, which is a transcript of Eng. St. 3 & 4 Wm. IV. cap. 42 s. 41.) Where witnesses on one side have been examined without oath, the other party waives the objection by calling witnesses and examining them in like manner: (*Allen* v. *Francis*, 4 D. & L. 607.)

(*g*) There are two modes of enforcing an award upon "a reference made by consent under a rule of Court or Judge's order." *First*, the ordinary common law remedy by action. *Second*, the extraordinary statutable one of process of attachment. Of these two, the party aggrieved should make an election. He will not be allowed to pursue both remedies at one and the same time: (see *Stock*, *Huggens*, and *De Smith* cases, temp. Hardwicke 106.) The adoption, however, of one remedy does not, it seems, necessarily exclude the other: (*R.* v. *Hemsworth*, Wilde C. J. 3 C. B. 753.)

First. Proceeding by action. This remedy may be adopted whether the submission be by writing not under seal: (see *Hodsden* v. *Harridge*, 2 Saund. 62 b, n.); bond (see *Winter* v. *White*, 3 Moore, 674; *Ferrer* v. *Oven*, 7 B. & C. 427); judge's order (see *Still* v. *Halford*, 4 Camp. 17; *Stalworth* v. *Inns*, 13 M. & W. 466; *Wharton* v. *King*, 1 M. & R. 96); order of Nisi Prius (see *Bonner* v. *Charlton*, 5 East. 139); rule of Court (see *Tremenhere* v. *Tresillian*, 1 Sid. 452; *Carpenter* v. *Thornton*, 3 B. & A. 52); or order of equity (see *Dowse* v. *Cone*, 3 Bing. 20.)

The forms of action to be followed in the different cases vary with reference to the mode of submission. Though no longer compulsory to mention the form of action in any writ of summons (s. xvii.), yet it will be found convenient to adhere to the long established division actions. This, too, would appear to be the view of the

Judges in framing our new rules: (see Forms 29, 30 to N. Rs.)

I. *Assumpsit*—The submission implies mutual promises to perform, and for non-performance of these promises this action will lie: (see *Hodsden* v. *Harridge*, 2 Saund. 62 b. n.; *Brown* v. *Tanner et al.* McCl. & Y. 464; *Purslow* v. *Bailey*, 2 Rayd. 1039; *Tilford* v. *French*, 1 Sid. 160: *Squire* v. *Greville*, 2 Rayd. 961; *Lupart* v. *Wilson*, 11 Mod. 171; *Mansell* v. *Burredge et al.* 7 T. R. 352; *Charles* v. *Carroll*, 9 U. C. R. 357.)

II. *Case.*—If the award impose a duty upon one of the parties, for instance, that he clean and keep clean a certain drain, it would appear that in the event of non-feazance the opposite party, if prejudiced thereby, might maintain this form of action: (see *Sharpe* v. *Hancock*, 7 M. & G. 354.)

III. *Covenant.*—If the submission be by deed this form of action may be maintained for non-performance of any part of the award: (see *Tait et al.* v. *Atkinson*, 3 U. C. R. 162; *Tomlin* v. *Mayor of Hardwicke*, 6 N. & M. 594; *Charnley* v. *Winstanley*, 5 East. 266; *Marsh* v. *Bulteel*, 5 B. & A. 807.)

IV. *Debt.*—If the submission be by bond, this form of action will lie to recover the penalty upon breach of the condition of such bond: (see *Ferrer* v. *Oven*, 7 B. & C. 427; *Boyd et al.* v. *Durand*, 5 O. S. 122; *Hughes* v. *the Mutual Fire Insurance Co.*, 9 U. C. R. 387; *Lossing* v. *Horned*, Tay. U. C. R. 103; *Beasley* v. *Stegman*, Tay. U. C. R. 685; *Skinner* v. *Holcomb*, E.T. 5 Vic. *M.S.* R. & H. Dig. "Arbitration & Award, VI. (2) 11; *Purslow* v. *Baily*, 2 Rayd. 1039.) This action will also lie to recover a sum of money awarded upon a submission whether made by rule of Court, deed, or writing not a deed: (see *Hodson* v. *Harrige*, 2 Saund. 62 b. n.; *Baker* v. *Booth*, Dra. Rep. 68; S. C. 2 O. S. 373; *Turner* v. *Alway*, *Purslow* v. *Baily*, 2 Rayd. 1039; *Sutcliffe* v. *Brooke*, 14 M. & W. 855.)

As to the time for entering a verdict subject to a reference upon which an award has been made, see *Laurie* v. *Russell*, 1 U. C. R. 36.

Second. Proceeding by attachment. Whenever the submission is by or can be made a rule of Court, the remedy by attachment may be adopted: (st. 9 & 10 Wm. III. cap. 15, as to which see note *v* to preceding section.) When an award has been made a rule of Court, a party who fails to perform what the award orders is considered as disobedient to a rule of Court as much as if the award were part of the rule, and is consequently guilty of a contempt of that Court by which the rule has been made. The process, therefore, by which the Courts punish contempts, being an attachment, will be issued against him to compel his obedience to the directions of the arbitrator under a penalty in ordinary cases of imprisonment until he comply: (Russell Arb. 555.) But if the period of imprisonment be limited, the party undergoing such imprisonment is not thereby exonerated from the performance of the award: (*The Queen* v. *Hemsworth*, 3 C. B. 745.) This case is in many respects a most important one. In it the several steps towards bringing a party into contempt and the pains thereof, together with all necessary forms of procedure, are carefully mentioned. Though an award find one party indebted to the other, if there be no order to pay the money, there can be no attachment. If there be no order to do a thing it stands to reason that a party cannot be attached for disobeying it: (see *Edgell* v. *Dallimore*, 3 Bing. 634. *Scott* v. *Williams*, 3 Dowl. P. C. 508; *Thornton* v. *Hornby*, 1 Dowl. P. C. 237; *Seaward* v. *Howey*, 7 Dowl. P. C. 318.) The award may be enforced by attachment so long as it order the payment of money, even though it be to one person named for the use of a third: (*Snook* v. *Hellyer*, 2 Chit. R. 43.) but such third party being a stranger to the submission cannot himself apply for the writ: (*In re Skeete*, 7 Dowl. P. C. 618.) The Court will enforce the performance of an award by attachment though it direct something else other than the payment of money: (see *Doe d. Clarke* v. *Stillwell*, 8 A. & E. 645.) And there does

otherwise, (*h*) as upon a reference made by consent under

not seem to be any reason why this mode of enforcing should not extend to the possession of land: (*McPherson* v. *Walker*, per Draper J. 1 U. C. Prac. R. 31; see also s. xcvi. of this Act.) This remedy will not be allowed unless the party sought to be attached has had full and distinct notice of the duty that is required of him. The duty—the whole and entire duty—with which it is sought to charge the party must be distinctly ascertained by the award: (*Graham* v. *Darcey*, Wilde C. J. 6 C. B. 537.) If the award in its meaning be doubtful, the writ will be refused: (*Heatherington* v. *Robinson*, 7 Dowl. P. C. 192; see also *Stalworth* v. *Inns*, 2 D. & L. 428.) And the party applying will be left to his remedy by action upon the award: (see *Graham* v. *Darcey*, 6 C. B. 537.) When it is considered that it is the summary process of the Court that is asked, it is necessary that the matter upon which it is invoked should be perfect, and show that the party is truly entitled to ask for what he does: (*In re Mc Lean* v. *Keezar*, per Burns J. 1 U. C. Prac. R. 126.) The original award when practicable should be brought into Court and the rule drawn up on reading it: (*Ib.*) The affidavit should deny payment "of any part" of the sum awarded: (*Masecar* v. *Chambers et al.* 4 U. C. R. 171.) The rule is properly a four day and not a six day rule: (*Jones* v. *Reid*, 1 U. C. Prac. R. 247.) It will not be made absolute in the first instance, though the parties consent by their counsel: (*Stewart* v. *Crawford*, Tay U. C. R. 564.) If it be altogether refused the Court will rarely if ever reserve leave to move again: (*Reynolds* v. *Burkhart*, 1 U. C. Prac. R. 213.) The attachment is always discretionary with the Court. It was refused in a case where it appeared that subsequently to the award the parties entered into a new arrangement: (*Thompson et al.* v. *Macklem*, 1 U. C. Prac. R. 293.) See further as to the practice, Chit. Arch. 8 Edn. 1508; R. & H. Dig. Arbitration & Award, VI. 1 (1.) *Forms*, Chit. F. 6 Edn. 664.

(*h*) It is enacted "that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties:" (St. 9 & 10 Wm. III. cap. 15 s, 2.) As to the construction of this enactment, see Russell Arb. 2 Edn. 634. It may be mentioned that this Statute is declaratory only, and does not therefore affect the common law jurisdiction of the Courts to set aside an award made in an action *under a submission by rule or order*. Hence in these latter cases the limitation of the statute as to the time within which a party should apply to set aside an award does not apply: (see remarks of Coleridge J. in *Reynolds* v. *Askew*, 5 Dowl. P. C. 682; see further *Hobbs* v. *Ferrars*, 8 Dowl. P. C. 779; *Allenby* v. *Proudlock*, 4 Dowl. P. C. 54; *Faxton* v. *Great North of Eng. R. Co.* 8 Q. B. 938; and remarks of Burns J. in *Laurie* v. *Russell*, 1 U. C. Prac. R. 36; see also s. lxxxix of this Act.) The application to set aside an award under the statute can only be made when the submission to the award is or can be made a rule of Court: (*Mitchell* v. *Staveley*, per Bayley J. 16 East 58; *Veale* v. *Warren*, 1 Saund. 327 c. notes; *Cumming* v. *Allen*, Tay. U. C. R. 369.) *Qu.* as to the order of a Judge directing compulsory references under s. lxxxiv. of this Act; see also notes to s. lxxxix. as to the same point. An award cannot be set aside upon the merits except under clear and extraordinary circumstances: (*Winter* v. *Lethbridge*, 13 Price 533; *Schabell* v. *Gilmour*, 5 U. C. R. 48; see also *Thirkell* v. *Strachan*, 4 U. C. R. 136.)

rule of Court or Judge's order. (*i*)

And yet the Court will interfere if it be made to appear that either party has not had an opportunity of explaining or examining into the whole matter submitted: (*Small* v. *Rogers*, H.T. 4 Vic. *M.S.* R. & H. Dig. "Arbitration & Award," V. 6.) The Court, however, will not intend matter for the purpose of setting aside the award; such matter must be shown affirmatively: (*Tracey* v. *Hodgest*, 7 U. C.R. 5.) The application will seldom be entertained unless something can be alleged amounting to a perverse construction of the law or misconduct on the part of the arbitrators: (*Hall* v. *Hinds*, 2 M. & G. 847; *Phillips* v. *Evans*, 12 M. & W. 309; *Hagger* v. *Baker*, 14 M. & W. 9; *Jones* v. *Corry*, 5 Bing. N. C. 187; *Doe* v. *Cropper*, 10 A. & E. 197); or some ground appearing on the face of the award, on a statement annexed to it, or on something in an authentic shape before the Court: (see *Kent* v. *Elstob*, 3 East. 18; *Chace* v. *Westmore*, 13 East. 357; *Sharman* v. *Bell et al.* 5 M. & S. 504; *Payne* v. *Massey*, 9 Moore, 666; *Richardson* v. *Nourse*, 3 B. & A. 237; *Boutillier* v. *Thick*, 1 D. & R. 366; *Mun. of Kingston* v. *Day*, 1 U. C. Prac. R. 142; *Price* v. *Jones*, 2 Y. & J. 114; *Symes* v. *Goodfellow*, 2 Bing. N. C. 532; see further, *Delver* v. *Barnes*, 1 Taunt. 48; *Phillips* v. *Evans*, 12 M. & W. 309; *Hagger* v. *Baker*, 14 M. & W. 9; *Doe d. Madkins* v. *Horner*, 8 A. & E. 235; *Fuller* v. *Fenwick*, 3 C. B. 705; *Havrill* v. *Eastern Counties R. Co.* 17 L. J. Ex. 223, 297.) Still the Court has a discretion to decline setting aside an award on grounds which, if fatal, could be taken advantage of by way of defence in an action on the award, or on resisting a motion for an attachment: (*Smith et al.* v. *George et al.* 12 U.C.R. 870.) Whenever a certain fact is relied on to set aside an award, that fact must be distinctly sworn to: (*Slack* v. *McEathron*, 3 U. C. R. 184.) An award cannot be set aside on the ground that the submission was obtained by fraud; the application should be to set aside the order: (*Sackett* v. *Owen*, 2 Chit. 39); and will not be set aside because the style of the cause in which it is intitled is not set out correctly and at length, provided it can be sufficiently identified by reference to the body of the award as being in the cause referred: (*Creighton* v. *Brown et al.* 1 U. C. Prac. R. 331.) In the rule nisi for setting aside an award, it must be stated that the award is drawn up "on reading the award" or a "copy of it": (*Wilkins* v. *Peck*, 4 U. C. R. 263,) but such an objection is well answered by showing that among "the affidavits and papers filed," on reading which the rule was drawn up, there is a copy of the award verified by affidavit: (*Tracey* v. *Hodgest*, 7 U. C. R. 5.) The rule must state the several objections intended to be insisted upon when moving it absolute: (N. R. 141; *Boodle* v. *Davies*, 4 N. & M.788; *Whatley* v. *Morland*, 2 C. & M. 347; *Allenby* v. *Proudlock*, 4 Dowl. P. C. 54; *Staples* v. *Hay*, 1 D. & L. 711:) and should be drawn up on reading the rule of reference: (*Christie* v. *Hamlet*, 4 Bing. 195.) Where an award is set aside for irregular proceedings on the part of the arbitrator, such as the examination of witnesses in the absence of parties, it will be set aside without costs: (*Campbell* v. *Boulton*, M. T. 6 Vic. per Jones J. *M.S.* R. & H. Dig. "Arbitration & Award," VII. 3.) See further, Chit. Arch. 8 Edn. 1485, R. & H. Dig. "Arbitration & Award," V; *Forms*, Chit. F. 6 Edn. 667.

(*i*) The subject of costs is one of no ordinary perplexity to arbitrators and others concerned in arbitraments.—For the convenient understanding of it, a distinction may be drawn between "costs of the cause," "costs of the reference," and "costs of the award." Each of these may be separately defined:—*First.* Costs of the cause comprise the costs incurred in the cause up to the time of the submission, the costs of the order of re-

ference, and of making it a rule of Court, and the costs of ulterior proceedings in the cause, if any, after the award. *Second.* Costs of reference comprise the expenses of the whole inquiry incurred by the parties before the arbitrator, whether with respect to the matters in the cause or matters out of it, as for instance, the costs of a brief in the cause referred, prepared after the reference for the purpose of the arbitration. These costs if left to the discretion of the arbitrator, may, it seems, be fixed by him and awarded in an entire sum: (*Lawrie* v. *Russell*, 1 U. C. Prac. R. 65.) But if a very extravagant sum be awarded, the Court would undoubtedly interfere to prevent extortion and injustice: (*Ib.* per Mc Lean J.) *Third.* Costs of the award comprise the amount of the arbitrators's charges, which are usually paid to him when the award is taken up: (Russell Arb. 370.) The fee of the arbitrator, whether named by him or not, is subject to taxation by the Master: (see *Miller* v. *Robe*, 3 Taunt. 461; *Fitzgerald* v. *Graves*, 5 Taunt. 342.) But held that the Court has no general authority to make an order on an arbitrator to refund so much of his fee as exceeds the amount allowed on taxation: (*Dossett* v. *Gingell*, 2 M. & G. 870.)

The power of awarding costs appears to be necessarily consequent on the authority conferred upon the arbitrator if he be authorised "to determine the cause." The reason why in references to arbitration a provision is frequently inserted that costs shall abide the event, is that the arbitrator might not have it in his power to withhold costs from the party who is in the right. It has been considered as a restriction of a power which he otherwise would have: (*Roe d. Wood* v. *Doe, per Cur.* 2 T. R. 644, approvingly cited in *Whitehead et al.* v. *Firth*, 12 East. 166; see also *Anon.* Loft. R. 34.) This rule is confined to costs as between party and party; it does not extend to costs between attorney and client: (*Whitehead et al* v. *Firth*, 12 East. 166.) The arbitrator has no power of himself to tax costs in the cause: (*Morris* v. *Morris*, Compton J. 27 L. T. Rep. 103.) Where the cause and "all matters in difference" were referred, but the submission which was by bond said nothing of costs; Held that the costs of the cause, being matters in difference, the arbitrator had power over them, but not over the costs of the reference: (*Firth* v. *Robinson*, 1 B. & C. 277.) Where the reference was of "all matters in dispute, costs to abide the event," held that the arbitrator had no power over the costs of the reference: (*Strutt* v. *Rogers*, 7 Taunt. 214.) Where the terms of a rule of reference direct costs to abide the event, the legal event is meant. The losing party is liable to pay such costs as he must have paid had the cause pursued its ordinary course and a verdict had passed against him. The costs of the arbitration cannot, it seems, be included unless by express direction: (*Hale* v. *Mathieson*, 3 O.S. 78.) Where owing to the misconduct of a party to the reference arbitrators do not make their award, but the award is made by an umpire in favor of one of the parties, costs will not be granted to the other party on a summary application under a clause in the rule of reference "that if either party shall be affected by delay or otherwise wilfully prevent the arbitrators or umpire from making their award, he shall pay such costs to the other as the Court shall think reasonable and just:" (*Proudfoot* v. *Trotter et al.* 1 U. C. R. 398.) If a general power as to costs be delegated to the arbitrator, he will have full authority over costs of the reference: (see *Wood* v. *O'Kelly*, 9 East. 436; *Bradley* v *Tunstow*, 1 B. & P. 34; *Fitzgerald* v. *Graves*, 5 Taunt. 342.) In the absence of any specific direction the costs will follow the verdict: (*Mackintosh* v. *Blyth*, 1 Bing. 269.) *Qu.* If a suit be commenced in a Superior Court for a sum exceeding County Court jurisdiction, but upon a reference of the cause to arbitration the arbitrator award a sum within such jurisdiction,

Con. stat. for U.C. ch 22 § 164

(App. Co. C.) LXXXVIII. (*j*) In every case of reference to arbitration, whether under this Act or otherwise, (*k*) where the submission shall be made a rule of any Court of Upper Canada, (*l*) such Court or a Judge thereof (*m*) shall have power at any time and from time to time (*n*) to remit (*o*) the matters referred or any or either of them, (*p*) to the reconsideration and redeter-

Eng. C. L. P. A., 1845, s. 8.

Cases may be remitted to the arbitrator for reconsideration, &c.,

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is the successful party restricted to County Court costs? (see *Lang* v. *Hall*, Tay. U. C. R. 286; *Elmore* v. *Colman*, 4 O. S. 321; *Holland* v. *Vincent*, 20 L. & Eq. 470.) Where an order of Nisi Prius was silent as to costs, it was held that the arbitrator had no authority to adjudicate upon them, "and that each party should bear his own expenses and the half of the award:" (*Taylor* v. *Gordon*, Tindal, C. J., 9 Bing. 573.) Where after a payment into Court by defendant there was a reference without mention of costs, held that the arbitrator had no power over the costs incurred before the payment into Court; for defendant by the payment had admitted that he was in error up to the time of the payment: (*Stratton* v. *Greene*, 8 Bing. 437.)

(*j*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 8.—Applied to County Courts. The object of this enactment is to confer upon the Courts a convenient power which formerly was only exercisable when expressly given by the submission, rule, or order of reference between the parties.

(*k*) *Whether under this Act or otherwise.* These words are substituted for the words "as aforesaid" used in the corresponding section of the Eng. C. L. P. Act. It is clear that this enactment applies to the various references mentioned in the Act, such as compulsory references under s. lxxxiv., and references by consent under ss. lxxxvi. and lxxxvii.: (see *Morris* v. *Morris*, 27 L. T. Rep. 103.)

(*l*) *Or otherwise where the submission shall be made*, &c. This expression though very general, can scarcely embrace any other than the references intended by ss. lxxxiv., lxxxvi., and lxxxvii., and perhaps clvi. of this Act. As to when a submission may be made a rule of Court see note *v* to s. lxxxvi.

(*m*) *Court or Judge thereof.* See note *m* to s. xxxvii.

(*n*) *From time to time*, &c., clearly intending a second, third, or more references if necessary. As to the necessity for this provision, see *Nickalls* v. *Warren*, 6 Q. B. 615.

(*o*) The application to remit must be made within the same time as an application to set aside an award: (*Doe Banke et al.* v. *Holmes*, 12 Q. B. 951; and see *Brown* v. *Collyer*, 20 L. J. Q. B. 426; *Zachary* v. *Shepherd*, 2 T. R. 781; *Doe Mayo* v. *Cannell*, 22 L. J. Q. B. 321.)

(*p*) This is a wise provision. Instead of referring back the whole matter in dispute because of a defective award as to part, that part may be referred back and the remainder retained, as to which remainder the arbitrator is *functus officio*. There is a great difference between referring back an award altogether and referring back a particular part of it. If an award generally and not a part thereof be referred back, the arbitrator may possibly be called upon to hear the whole case again: (see remarks of Denman C. J. in *Nickalls* v. *Warren*, 6 Q. B. 618.) If the award be sent back for a specific purpose and the arbitrator needs no assistance from either side, he is not bound to give notice to the parties: (*Howett* v. *Clements*; *Clements* v. *Howett*, 1 C. B. 128, ex parte *Huntley*, 1 El. & B. 786,) This holds good especially if neither party after a reference back by consent require the arbitrator to hear fresh evidence: (see *Baker* v. *Hunter*, 4 D. & L. 696.) If the award be sent back only to alter such things as make it bad upon the face of it and

mination of the arbitrator or arbitrators or umpire as the case may require, (*q*) upon such terms as to costs and otherwise as to the said Court or Judge may seem proper. (*r*)

whenever the reference is made a rule of court.

not to vary at all the substance of the decision, it is clearly not necessary for the arbitrator to resummon the parties: (*Morris* v. *Morris*, 27 L. T. Rep. 103.) Where plaintiff was described in an award by the wrong Christian name, the Court sent back the award for correction: (*Howett* v. *Clements*, *ubi supra*.) If an award be good as to three points but bad as to one, and is sent back to the arbitrator as to that one alone, the arbitrator, it seems, cannot alter his decision as to the other two: (*Johnson* v. *Latham*, Erle, J., 20 L. J. Q. B. 236.) The amended award need not recite the order by which the award was referred back: (*Baker* v. *Hunter*, 4 D. & L. 696.) In one case it was held that the party disputing the validity of an award might apply to the Court to refer back the award, and that the Court might do so as when setting aside an award under like circumstances: (*Bradley* v. *Phelps*, 6 Ex. 900.) Where a letter alleged to have been written by one of the parties to a reference was not discovered until after award made, but which the arbitrator swore would, if discovered in time, have materially affected his decision, the award was referred back: (*Barnard* v. *Wainwright*, 10 L. J. Q. B. 423.) And where the rule of reference provided that "in the event of any application being made on the subject of the award" the Court should have power to remit such award, held that a rule for the payment of the money was an "application" within the meaning of the provision, and empowered the Court to remit the award: (*Johnson* v. *Latham*, 19 L. J. Q. B. 329.) Where an arbitrator upon a reference from Nisi Prius found a sum due to plaintiff within the jurisdiction of the inferior Courts, but expressed an opinion that the cause was a proper one to be tried in the superior Courts, held that there was no power to refer back for the arbitrator's certificate as to the costs; but that the proper course was to lay his award before the Judge at Nisi Prius, who would exercise his discretion: (*Webb* v. *Lee*, 1 D. & L. 584.) It is a rule of extended application that the Court cannot receive affidavits to explain the intention of the parties to a written instrument, if such affidavits are in contradiction of the instrument sought to be explained. Where therefore, upon a reference by order of Nisi Prius, the parties agreed that a statement of certain sums admitted to be due to the plaintiff should be annexed to the order, and one of these was £750, but by mistake of a copying clerk was written £450; held that the mistake was in effect the mistake of the plaintiff and could not be amended: (*Wynn* v. *Nicholson*, 6 D. & L. 717.) The arbitrator should make his award within three months after he shall have entered on the reference: (see s. xcv. of this Act.) Where the costs which an award had directed defendant to pay had been taxed, but the award was as to one part of it referred back to the arbitrator; held that a second taxation of costs was necessary: (*Johnson* v. *Latham*, 20 L. J. Q. B. 236.) If under the original reference the arbitrator has power over the costs of the reference and of the award, that power continues as to the costs of the award when referred back: (*McRae* v. *McLean*, 2 El. & B. 946.) If an arbitrator, when an award has been referred back to him, hear fresh evidence and thereupon amend his award so as to supersede part of his former award, the costs of proving the part so superseded should, it seems, be divided between the parties: (*Blair* v. *Jones*, 6 Ex. 701.)

(*q*) *As the case may require*, *i. e.* as to the whole matters referred or any part thereof in the discretion of the Court or the Judge to whom application is made under this section.

(*r*) It is in the power of the Court or Judge to impose costs or give

Consult. for U. C. ch. 22 § 165.

(App. Co. C.) Eng. C. L. P. A. 1854, s. 9. Period within which application to set aside award must be made.

LXXXIX. (*s*) All applications to set aside any award made on a compulsory reference under this Act, (*t*) shall and may be made (*u*) within the first six days (*v*) of the term next following the publication of the award to the parties, (*w*) whether made in vacation or term; (*x*) and if no such application be

such directions when referring back the award as may at the time of the application be thought necessary. If the application be granted "upon payment of costs," the payment of the cost will be a condition precedent to the redetermination: (see note *t* to s. lxlx. of this Act.)

(*s*) Taken from Eng. St. 17 & 18 Vic. cap. 125, s. 9.—Applied to County Courts. The words of this enactment, which are restricted to awards made upon compulsory references, (s. lxxxiv.) are not so extensive in meaning as those used in s. lxxxvii., which relate to awards made under s. lxxxvi. of this Act.

(*t*) *i. e.* Pursuant to s. lxxxiv. of this Act. There cannot be compulsory references except of mere matters of account. By "compulsory reference" is meant references *other* than by consent. Such seems to be the only inference to be drawn from the reading of s. lxxxvi., which enacts that "it shall be lawful for the arbitrator upon any compulsory reference under this Act *or* upon any reference by consent of parties, &c."

(*u*) *Shall and may be, &c.* The obvious intention is to lay down a rule limiting the time for moving to set aside the awards mentioned in this section. That rule must be taken to be imperative and not merely directory. The words "shall and may be, &c," as used in this enactment, are synonymous with "must be," and yet the Courts have power to extend the time for moving against awards beyond the period of time limited.

(*v*) Computation of time: (see N. R. 166.)

(*w*) What is the meaning of the word "publication?" "I think that word satisfied by *the award having been made and notice having been given to the parties* that it is within their reach upon payment of just and reasonable expenses. And I concur in thinking that the award cannot be said to be ready when it is only to be had on submitting to a wrongful demand." (Tindal, C.J., in *Musselbrook* v. *Dunkin*, 9 Bing. 606.) The part italicised of this definition has been upheld; but the remainder has been denied: (*Macarthur* v. *Campbell*, 5 B. & Ad. 518; see also remarks of Coleridge J. in *Reynolds* v. *Askew*, 5 Dowl. P. C. 682.) The accepted definition appears to be this—An award is published when the parties have *notice* that it is ready, without reference to the circumstance whether the charges are reasonable or not. The notice, it seems, should be such as to enable the parties to obtain a knowledge of the contents of the award: (*Brooke* v. *Mitchell*, 8 Dowl. P. C. 392.) It is not now any excuse for not applying to set aside an award within the proper time that the parties had been prevented from obtaining a knowledge of the contents by the arbitrator withholding the award until payment of extortionate fees: (*Moore* v. *Darley*, 1 C. B. 445; *Macarthur* v. *Campbell*, *ubi supra*;) but it has been held under the old practice that the Courts have no general jurisdiction over fees paid to arbitrators under protest: (*Dossett* v. *Gingell*, 2 M. & G. 870.)

(*x*) *Qu.* If an award be made during term but too late to be moved against within the first six days of such term, when must the application be made? The meaning of the enactment under consideration is not very clear upon the point. The doubt is, as to whether a party desiring to move against an award must move within the first six days of term, or with-

made, or if no rule be granted thereon, or if any rule granted thereon be afterwards discharged, such award shall be final between the parties. (*y*)

(App. Co. C.) Eng. C. L. P. A. 1854, s. 10. Award may, by order of a judge, be enforced though the

XC. (*z*) Any award made on a compulsory reference under this Act, (*a*) may, by authority of a Judge (*b*) on such terms as to him may seem reasonable, (*c*) be enforced (*d*) at any time after six days (*e*) from the time of publication, (*f*) notwith-

in the first six days of term next after publication, if award made during term. If the enactment will bear the latter construction, then, for example, an award made on the fourth or fifth day of a term must be moved against on or before the tenth or eleventh day of the same term. But if the contrary construction be the true one, then the party wishing to move would have the first six days of the term next following the term in which publication was made. The latter seems to be the better opinion. See *Laurie* v. *Russell*, 1 U. C. Prac. R. 38.

Though the enactment under consideration is restricted to awards made upon *compulsory* references, a general view of the time within which awards may be set aside, may be here introduced. Awards for the purpose of the inquiry may be divided into three classes —1. Those under St. 9 & 10 Wm. III. cap. 15; 2. Those under the enactment here annotated; 3. Those not embraced in either of the said statutes. As to the first, the application must be made before the last day of the term next after publication: (*In re Burt*, 5 B. & C. 668.) As to the second, within the first six days of the term next after publication: (s. lxxxix.) As to the third, within the first four days of the term next after publication (being the period allowed for moving new trials), unless there is good reason for further delay: (see *Rawsthorn* v. *Arnold*, 6 B. & C. 629; *Emet* v. *Ogden*, 7 Bing. 258; *Mussellbrook* v. *Dunkin*, 9 Bing. 605; *Laurie* v. *Russell*, Burns J. U. C. Prac. R. 38; further as to the practice, see note *h* to s. lxxxvii. of this Act.)

(*y*) It is apprehended that the word "final" must be understood *sub modo*. The award mentioned in this enactment, if not moved against within the prescribed time, may be taken to be so far final that it cannot afterwards be set aside in a summary manner; but if the same award be sued at common law for the purpose of enforcing it, it is presumed that all the usual defences would be open to defendant. It can be that an intentional or inadvertent omission to move against the award will debar the party who might have moved and taken the initiative, from objecting to an award void or defective upon which he is sued, and against which at common law he may have a good defence.

(*z*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 10.—Applied to County Courts.

(*a*) *i.e.* Pursuant to s. lxxxiv. which is restricted to mere matters of account.

(*b*) *By authority of a Judge*, intends an application to the Judge to be, it is presumed, supported by affidavit. *Qu.* is the order absolute in the first instance? The practice here enacted seems to be analogous to that of obtaining speedy execution, and therefore leads to the inference that the order may go in the first instance. The Judge meant as regards the Superior Courts is either the Judge in Chambers or in Practice Court. As to the powers of the former see note *m* to s. xxxvii. As to the powers of the latter see St. 13 & 14 Vic. cap. 51 s. 3.

(*c*) See note *r* to s. lxxviii.

(*d*) As to the mode of enforcing awards in general see note *g* to s. lxxvii.

(*e*) The time mentioned in the English Act is "*seven* days."

(*f*) When award said to be published see note *w* to s. lxxxix.

said period has not elapsed.

standing that the time for moving to set it aside has not expired. (g)

const. stat for u.c. ch 22 s 167.

(App. Ca. C.) Eng. C. L. P. A. 1854, s. 11.

When parties to any instrument hereafter made have agreed that any difference between them shall be referred to arbitration, the Court or a Judge may stay proceedings in any action or suit, respecting such dif-

XCI. (h) Whenever the parties to any deed or instrument in writing to be hereafter made or executed, (i) or any of them, (k) shall agree (l) that any then existing or future differences (m) between them or any of them shall be referred to arbitration, (n) and any one or more of the parties so agreeing or any person or persons claiming through or under him or them, shall nevertheless commence any action at Law or suit in Equity against the other party or parties or any of them, or against any person or persons claiming through or under him or them in respect of the matters so agreed to be referred or any of them, (o) it shall be lawful for the Court in which such action or suit is brought (p) or a Judge thereof (q) on application by the Defendant or Defendants or any of them, (r)

(g) See note *x*, *ante*.

(h) Taken from Eng. St. 17 & 18 Vic., cap. 125, s. 11.—Applied to County Courts.

(i) Only applicable to deeds or other instruments of submission executed after 21st August, 1856, when this Act came into force.

(k) *Or any of them*—that is, of the parties to the deed, &c.

(l) *Or any of them shall agree*—One party cannot make an agreement. There must be the *aggregatio mentium* of at least two persons. The word "agreement" is often used as synonymous with promise. In this sense it appears to be used here. And yet the party promising or agreeing must be one of the parties to a deed or instrument—without the promise of the other party or parties to the instrument there would be a want of mutuality and therefore no agreement. The submission intended is manifestly one by consent of parties: (see notes to s. xcvii.) Compulsory references already noticed can only be as to matters of mere account: (see note *x* to s. lxxxiv.) A submission though of prospective disputes has been held to be proper to be made a rule of Court: (*Parkes* v. *Smith*, 19 L. J. Q. B. 405.)

(m) See note *l*, *supra*.

(n) Apparently a matter of indifference whether it is or is not agreed that the submission shall be made a rule of Court. In this respect there is a difference between submissions under this enactment and under s. lxxxvi.

(o) The agreement so made shall be binding not only upon the parties to the instrument but upon their representatives, that is to say—all persons claiming through or under the parties to the instrument in respect of the matter in dispute.

(p) The application can only be made to one Court—that being the Court in which the action is brought—and if an order be made in that Court it is not in the power of either party to avoid it by bringing an action in any other Court: (See *Doe d. Carthew et al* v. *Brenton*, 6 Bing. 469; see also *Parkin* v. *Scott*, 1 Taunt. 565.)

(q) *Or a Judge thereof*. As to these words see note *m* to s. xxxvii. of this Act.

(r) The application may it seems be made by a defendant whether within or without the jurisdiction. There

after appearance and before plea or answer, (*s*) upon being satisfied (*t*) that no sufficient reason exists why such matters cannot be or ought not to be referred to arbitration according to such agreement as aforesaid, (*u*) and that the Defendant was at the time of the bringing of such action or suit, and still is ready and willing to join and concur in all acts necessary and proper for causing such matters so to be decided by arbitration, (*v*) to make a rule or order staying all proceedings in such action or suit, on such terms as to costs and otherwise, as to such Court or Judge may seem fit; (*w*) Provided always, that any such rule or order may at any time afterwards be discharged or varied as justice may require. (*x*)

ference, on application of defendant and proof of certain matters.

Proviso.

XCII. (*y*) If in any case of arbitration, the document authorising the reference, (*z*) provides that the reference shall be to

(*App. Cb. C.*) Eng. C. L. P. A. 1854, s. 12.

con sad. for u.c. c/l 22 § 168

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is nothing in the context that manifests a contrary intention

(*s*) If defendant plead, he will, it appears, be stopped from afterwards raising the objection.

(*t*) As to the mode of satisfying the Court or a Judge see note *q* to s. xxxv.

(*u*) *According to such agreement as aforesaid.* This provision is one entirely new in principle, and is directly opposed to many decided cases. The effect of the enactment is to drive the parties from the Court to the arbitrators chosen or to be chosen by themselves—perhaps long before the existence of difficulties between them. It has been over and over again held that neither Courts of Law nor Equity could be ousted of jurisdiction by agreement of the parties: (*Kill* v. *Hollister*, 1 Wils. 129; *Thompson* v. *Charnock*, 8 T. R. 139; see also *Harris* v. *Reynolds*, 7 Q. B. 71; and *Scott* v. *Avery*, 8 Ex. 487,497.) The change introduced by this Act is one for the better.

(*v*) Mutuality must be shown. In the first place it must be made to appear that the party suing had agreed to refer, and that he is suing in breach of that agreement. In the next place it must appear that the party applying was a party consenting to the intended reference.

(*w*) There is no doubt that the Courts have always had power to stay an action brought against good faith: (*Cocker* v. *Tempest*, Parke, B. 9. Dowl. P. C. 306.) The power of each Court over its own process is unlimited, it is a power incident to all Courts, both superior and inferior: (*Ib.* per Alderson, B.) The exercise of the power is certainly a matter for the most careful discretion, and when there are conflicting statements of facts it is in general better not to try the question between the parties by affidavit: (*Ib.*) Even if the Court should refuse to stay proceedings under this enactment, and indeed even if defendant neglect to avail himself of its provisions it would appear that he may notwithstanding, sue plaintiff for having violated his agreement to refer to arbitration: (*Livingston* v. *Ralli*, 24 L. J. Q. B. 269; see also *Wade* v. *Simeon*, 3 D. & L. 27.)

(*x*) *i. e.* Either by the Judge who made the order or by the Court *in banc.*: (see *Shaw et al Nickerson*, 7 U. C. R. 543.)

(*y*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 12.—Applied to County Courts.

(*z*) *Document, i. e.* The submission or agreement between the parties, evidenced by writing: mere verbal sub-

Provision for supplying the place of a single arbitrator or umpire, dying, refusing to act, &c. when the reference does not show an intention that his place should not be supplied.

a single arbitrator, (*a*) and all the parties do not, after differences have arisen, (*b*) concur in the appointment of an arbitrator, or if any appointed arbitrator refuse to act, (*c*) or become incapable of acting, (*d*) or die, (*e*) and the terms of such document do not show that it was intended that such vacancy should not be supplied, (*f*) and the parties do not concur in appointing a new one, (*g*) or if, where the parties or two arbitrators are at liberty to appoint an umpire (*h*) or third

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missions not being within this enactment. The general term "document" is evidently used to embrace the submission described in the preceding section (xci.) in whatever shape it may be drawn.

(*a*) *i.e.* An arbitrator not named in the document authorising the reference.

(*b*) Manifestly intending a document executed before differences have arisen, but in anticipation of such differences. Such a clause is by no means an uncommon one in deeds of copartnership, &c.

(*c*) No man not being a Judge or other such public officer can be compelled to act as an arbitrator or mediator between parties against his will: (*Crawshay* v. *Collins*, 8 Swanst. 90.) As to neglect to act after having accepted the office: see *Willoughby* v. *Willoughby*, 9 Q. B. 923. As to wilful delay, see *Bradley* v. *Phelps*, 6 Ex. 897.

(*d*) It has been said that neither natural nor legal disabilities render a person incapable of being an arbitrator: for every person is at liberty to *choose* whom he likes best for his Judge, and he cannot afterwards object to the manifest deficiencies of those *whom he has himself selected:* (Russell Arb. 107.) Supposing this to be the true doctrine, it will be observed that it is restricted to cases where the disability, &c., was in existence and manifest when the arbitrator was appointed, and to cases where the arbitrator has been appointed by the parties themselves. If the arbitrator be appointed by the Court, or, though appointed by consent, if after his appointment a natural or legal disability happen to him, it follows that the parties will not be necessarily bound to continue him.

(*e*) As to the death of one of several arbitrators: see *Crawshay* v. *Collins*, 3 Swanst. 90; *Cheslyn* v. *Dalby*, 2 Y. & C. 170. As to the death of one of the parties to a reference, see *Lewis* v. *Holbrook*, 2 Dowl. N. S. 991; *Bowen* v. *Williams*, 6 D. & L. 235.

(*f*) A clause may be inserted in any submission to provide for the contingencies noticed in this enactment: (see *Bythewood*, by Jarman, Vol. I. 533, 619.) If there be no express stipulation, then of course this enactment is applicable.

(*g*) It has been held that the death of an arbitrator defeated a reference and opened up the whole matter between the parties so as to place them in the same position as if no reference had ever been made or agreed upon. Under these circumstances it was allowable for either party to abandon the submission: (*Harper et al.* v. *Abrahams*, 4 Moore 3.) And yet such conduct has never been looked upon indifferent to that of a clear breach of faith: (*Id.*) To prevent it the section under consideration has been enacted. It has been held under the old practice that no action would lie for refusing to nominate an arbitrator pursuant to a covenant in that behalf: (see *Tattersall* v. *Groote*, 2 B. & P. 131; see also *Scott* v. *Avery*, 8 Ex. 487, 497.)

(*h*) Arbitrators are not at liberty to appoint an umpire unless express authority to do so be given them by the submission or other instrument of reference: (see *Listle* v. *Newton*, 9 Dowl. P. C. 437.)

arbitrator, (*i*) such parties or arbitrators do not appoint an umpire or third arbitrator, (*j*) or if any appointed umpire or third arbitrator refuse to act, (*k*) or become incapable of acting, (*l*) or die, (*m*) and the terms of the document authorising the reference do not show that it was intended that such vacancy should not be supplied, and the parties or arbitrators respectively do not appoint a new one, (*n*) then and in every such instance, (*o*) any party may serve the remaining parties or the arbitrators, as the case may be, with a written notice to appoint an arbitrator, umpire or third arbitrator respectively; (*p*) and if within seven clear days after such notice shall have been served, (*q*) no arbitrator, umpire, or third arbitrator be appointed, it shall be lawful for any Judge of any of the Superior Courts of Law or Equity in Upper Canada, upon summons to be taken out by the party having served such notice as aforesaid, (*r*) to appoint an arbitrator, umpire, or third arbitrator, as the case may be, and such arbitrator, umpire, or third arbitrator respectively, shall have the like power to act in

Notice.

A judge to appoint another in default of the proper party.

(*i*) A third arbitrator must be appointed before the arbitration proceeds. An umpire may be and usually is appointed after the arbitrators have entered upon the reference and are unable to agree. There are other distinctions between the two unnecessary to be mentioned here: see *Bates* v. *Townley et al.* 1 Ex. 572; *Peterson* v. *Ayre*, 13 C. B. 353.

(*j*) The appointment of a third arbitrator or umpire may be a condition precedent to the right of the arbitrators to act. The provision under consideration contemplates some such case.

(*k*) *Refuse to act.* As to these words see note *e*, *supra*. The refusal to act by an umpire named by the arbitrators does not make the arbitrators incapable of naming another person. Their power continues until they have named some one who accepts the office: (see *Oliver* v. *Collings*, 11 East. 367; *Trippet* v. *Eyre*, 3 Lev. 263.) This enactment appears to be directed to the case where arbitrators refuse to make an effective appointment.

(*l*) See note *d*, *supra*.

(*m*) See note *e*, *supra*.

(*n*) A special clause may be introduced into the submission to meet this case. See note *f*, *supra*.

(*o*) *i.e.* In the several instances detailed in the early part of this section.

(*p*) No particular form of words is necessary; the notice must of course be varied to accord with the facts of the case. As to the service of the notice, &c., see N. R.131 *et seq*.

(*q*) The period of seven clear days appears to be a very common one with the English Legislature for such appointments in the case of public companies. See English Statutes 8 & 9 Vic. cap. 18 s. 28; 8 & 9 Vic. cap. 16 ss. 130, 131; 8 & 9 Vic. cap. 20 s. 120. In Upper Canada as regards public companies, there are many enactments *in pari materia*. See for example stats. U. C. 4 Wm. IV. cap. 29 s. 3; 5 Wm. IV. cap. 19 s. 3.

(*r*) As to the powers of a Judge see note *m* to s. xxxvii. of this Act.

the reference, and make an award as if he had been appointed by consent of all parties. (*s*)

con. stat. for U.C. ch 22 § 169

(*App. Co. C.*) Eng. C. L. P. A., 1854, s. 13.

When the reference is to two arbitrators and one party neglects to appoint, the other may, after certain notice, &c., appoint his arbitrator to act alone, unless the reference provides that the vacancy should not be supplied.

XCIII. (*t*) When the reference (*u*) is or is intended to be to two arbitrators, one appointed by each party, it shall be lawful for either party in case of the death, (*v*) refusal to act, (*w*) or incapacity of any arbitrator appointed by them, (*x*) to substitute a new arbitrator, unless the document authorizing the reference (*y*) show that it was intended that the vacancy should not be supplied, (*z*) and if on such a reference one party fail to appoint an arbitrator either originally or by way of substitution as aforesaid, (*a*) for seven clear days (*b*) after the other party shall have appointed an arbitrator, and shall have served the party so failing with notice in writing to make the appointment, (*c*) the party who has appointed an arbitrator may appoint such arbitrator to act as sole referee in the reference, (*d*) and an award made by him shall be binding on both parties as if the appointment had been by consent; provided, however, that the Court or a Judge (*e*) may revoke such appointment on such terms as shall seem just.

Proviso.

con. stat. for U.C. ch 22. § 170.

(*App. Co. C.*) Eng. C. L. P. A. 1854, s. 14.

XCIV. (*f*) When the reference (*g*) is to two arbitrators, and the terms of the document authorizing it (*h*) do not show that

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(*s*) An umpire may, it seems, be appointed under this enactment though the instrument of reference were executed before this Act came into force: (see *In re Lamb*, 24 L. J. Chan. 145.)

(*t*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 13.—Applied to County Courts.

(*u*) *Reference*—intended to apply to submissions by consent of parties. The instrument of reference being the "deed or instrument in writing" mentioned in s. xci. of this Act.

(*v*) See note *e* to preceding section (xcii.)

(*w*) See note *k* to preceding section.

(*x*) See note *l* to preceding section.

(*y*) *Unless the document authorizing the reference*, &c., see note *z* to preceding section; also note *u* to the section here annotated.

(*z*) See note *f* to preceding section (xcii.)

(*a*) It has been usual in ordinary submissions to provide by express stipulation that if either party fail or neglect to appoint an arbitrator within a specified time, the other may upon proper notice do so for him. See further note *d*, *infra*.

(*b*) See note *q* to preceding section.

(*c*) As to service of notice, &c., see N. R. s 131 *et seq.*

(*d*) It is important to note the effect on the part of either party to appoint an arbitrator. In such case the arbitrator appointed by the other may proceed as sole referee.

(*e*) *Court or Judge*, see note *m* to s. xxxvii.

(*f*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 14—Applied to County Courts.

(*g*) See note *u* to preceding section (xciii.)

(*h*) See note *z* to s. xcii.

it was intended that there should not be an umpire, or provide otherwise for the appointment of an umpire, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award, (*i*) unless they be called upon by notice as aforesaid to make the appointment sooner. (*j*)

Two arbitrators may always appoint an umpire unless the reference forbid it.

XCV. (*k*) The arbitrator acting under any such document (*l*) or compulsory order of reference as aforesaid, (*m*) or under any order referring the award back, (*n*) shall make his award under his hand, (*o*) and (unless such document or order respectively shall contain a different limit of time) (*p*) within three

(*App. Co. C.*) Eng. C. L. P. A. 1854, s. 15.

Award to be made within a certain period.

Con. Stat. for U.C. ch 22. s. 171, 172, 173

(*i*) When two arbitrators differ between themselves the power to call in an umpire is a most useful and necessary one. However, it is not the office of the umpire when appointed to decide between the two arbitrators, but to decide between the parties to the reference. The powers of arbitrators are often terminated by the appointment of an umpire. It is his duty to decide all matters referred, including those upon which the arbitrators are unable to agree. This appears to be one of the leading distinctions between an umpire and third arbitrator: (see *Tollit* v. *Saunders*, 9 Price. 612; *Reynolds* v. *Gray*, 1 Rayd. 222; *Mitchell* v. *Harris*, 1 Rayd. 671; *Bates* v. *Cooke*, 9 B. & C. 407; *Soulsby* v. *Hodgson*, 1 W. B. 463; *Beck* v. *Sargent*, 4 Taunt. 232; and generally see 2 Saund. 133, note 7; see also *Heatherington* v. *Robinson*, 7 Dowl. P. C. 192; *Harlow* v. *Read*, 3 D. & L. 203.)

(*j*) *i. e.* Under s. xcii.

(*k*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 15.—Applied to County Courts.

(*l*) *i. e.* The document in ss. xcii. xciii. and xciv. of this Act.

(*m*) *i.e.* Under s. lxxxiv. or lxxxvi.

(*n*) *i.e.* Under s. lxxxviii.

(*o*) *i.e.* The award must not only be in writing but signed: (see *Everard* v. *Paterson*, 6 Taunt. 625.) Consequently the award to be made in any of the cases enumerated in the commencement of this section must be made in writing signed by the arbitrator making it. Still it is apprehended that this enactment is only cumulative, and that it does not deprive the parties to a submission from requiring a form of award different to that in this enactment prescribed. If, for example, the submission provide that the award be under the hand *and seal* of the arbitrator, an award not sealed may not be considered a sufficient compliance: (see *Henderson* v. *Williamson*, 1 Str. 116.) And yet it is doubtful whether in the example supposed the omission to affix the seal would at this day invalidate the award. In such cases there is ample discretion reposed in the Courts to cause formal omissions to be rectified, which in one case they did not hesitate to exercise. Though in an old case where the submission called for an award indented, an award both in writing and sealed but not indented was held to be bad: (see *Hinton* v. *Cray*, 3 Keb. 512.) yet in a later case the Court refused to entertain a similar objection: (see *Gatliffe* v. *Dunn*, Barnes, 55.) It may be added that it is usual for awards to be executed in the presence of a subscribing witness or witnesses.

(*p*) Every well drawn submission contains a provision fixing a period within which it is declared that the award shall be made.

months (*q*) after he shall have been appointed and shall have entered on the reference, (*r*) or shall have been called upon to act by a notice in writing from any party, (*s*) but the parties may by consent in writing (*t*) enlarge the term for making the award; (*u*) and it shall be lawful for the Superior Court of which such submission, document, or order is or may be made

Period may be enlarged.

(*q*) As to computation of the time see *In re Higham and Jessop*, 9 Dowl. P. C. 203; *Kerr* v. *Jeston*, 1 Dowl. N. S. 538. The necessity for a limitation as to time can be readily understood when it is mentioned that without such limitation the authority of an arbitrator to make an award will continue for his life, or at least until revoked: (Russell Arb. 131.)

(*r*) The appointment of an arbitrator, when by consent, dates from the submission or other document of reference; but for this purpose execution by all parties is necessary: (see *Antram* v. *Chace*, 15 East. 208.) The award may be made on the same day that the document authorizing the reference has been executed: (see *Barnardiston* v. *Fowler*, 10 Mod. 204.)

(*s*) This notice of course to be effective only when the document of reference has been executed by all the parties, if from the reading of the instrument it appear that the consideration to each party is the accession of all parties.

(*t*) The specific mode of enlargement, viz., by *writing*, is pointed out. It must, as regards all references coming within the meaning of the enactment, be carefully observed: (see *Burley* v. *Stephens et ux.* 1 M. & W. 156.)

(*u*) The right of the parties to a reference by consent to enlarge the time for making an award has never been questioned. The enlargement, if there be a period limited by the instrument of reference for making the award, should be made within that period. The consent must be mutual: (*Ruthven* v. *Ruthven*, 5 U. C. R. 273.) And the enlargement ought to be indorsed at the time it purports to be signed: (S. C. 5 U. C. R. 276.) But the parties by their conduct, such as as attending meetings, &c., have at common law been held to authorize and assent to enlargements made by the arbitrator: (see *Leggett* v. *Finlay*, 6 Bing. 255.) Where the parties conducted themselves as if there were a good enlargement, an irregular enlargement was held to be thereby waived: (*Hallett* v. *Hallett*, 5 M. & W. 25; see also *Ruthven* v. *Ruthven*, *ubi supra*; *Brown* v. *Collyer*, 20 L. J. Q. B. 426; *Hull* v. *Alway*, 4 O. S. 374.) It is usual in well drawn submissions to give the arbitrator himself power when necessary to make enlargements. That power is considered as running from time to time so as to feed future enlargements: (see *Payne* v. *Deakle*, 1 Taunt. 509; *Barrett* v. *Parry*, 4 Taunt. 658; *Leggett* v. *Finlay*, 6 Bing. 255.) The arbitrator has not the power unless express authority be conferred upon him: (*In re Morphett*, 2 D. & L. 967.) If the time be enlarged by consent of parties when there is no express authority conferred upon the arbitrators, the enlargement must be made a rule of Court before the issue of an attachment for non-performance: (*Macarthur* v. *Campbell*, 5 B. & Ad. 518.) If the enlargement be made pursuant to agreement in the instrument of reference contained, the enlargement is part of the submission: (*Re Smith and Blake*, 8 Dowl. P.C. 130.) It seems clear that when the time for making an award is enlarged, the enlargement, whether by the parties, the arbitrators, or by Judge's order, should with a view to an attachment be made a rule of Court as well as the original submission: (*Masecar* v. *Chambers et al.* 4 U. C. R. 171.) Where a cause

a rule or order, (*v*) or for any Judge thereof, (*w*) for good cause to be stated in the rule or order for enlargement (*x*) from time to time, (*y*) to enlarge the term for making the award, (*z*) and if no period be stated for the enlargement in such consent

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was referred under a Judge's order containing a proviso that the arbitrator should make his award on or before a day appointed, but if not then prepared to enlarge the time, "as he might require and a Judge of the Court might think reasonable and just," held that the time was duly enlarged by a Judge's order obtained after the time limited for making the award had expired: (*Reid* v. *Fryatt*, 1 M. & S. 1.) *Per cur.* "Such a term ought never to have been inserted in the order of reference" (*Ib.*) If an arbitrator be authorized to enlarge the time by Judge's order, an enlargement by himself alone is insufficient: (*Maron* v. *Wallis*, 10 B. & C. 107.)

(*v*) Before application can be made under this provision, it would seem that the submission, if the reference be by submission, must be made a rule of Court: (see *Lambert* v. *Hutchinson*, 2 M. & G. 858.)

(*w*) *Or for any Judge thereof*, see note *m* to s. xxxvii.

(*x*) The rule or order cannot be made *ex parte*; it must be *nisi*, and to show cause: (see *Clarke* v. *Stocken*, 5 Dowl. P. C. 32.)

(*y*) See note *u supra*.

(*z*) Neither the Court nor a Judge had power at Common Law to enlarge the time for making an award: (see *Halden* v. *Glasscock*, 5 B. & C. 390, Tidd's Pr. 9 Edn. 826.) The power was for the first time conferred by Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 39, of which our 7 Wm. IV. cap. 3, s. 29, is a copy: (see *Doe d. Jones et ux* v. *Powell*, 7 Dowl. P. C. 539.) "And that the Court or any Judge thereof, may from time to time enlarge the term for any such arbitrator making his award:" (7 Wm. IV. cap. 3, s. 29.) It has been after some doubt established that this clause, although annexed to and immediately follwing a provision in reference to revocations, applies equally to all cases, whether there has been an attempt to revoke or not: (see *Doe d. Jones* v. *Powell*, 7 Dowl. P. C. 539; *Parbery* v. *Newnham*, 7 M. & W. 378; *Lambert* v. *Hutchinson*, 2 M. & G. 858.) The right of the Court or a Judge to interfere where a special power to enlarge has been conferred upon the arbitrator is not clear; though the preponderance of authority seems to be in favor of the proposition. Held where there was power in the arbitrator to enlarge the time, but the time was *intentionally* allowed to expire that the Court could not interfere: (*Doe d. Jones et ux* v. *Powell*, 7 Dowl. P. C. 539. *Contra—Newman* v. *Parbury*, 9 Dowl. P. C. 288.) *Semble*, per Tindal, C. J.: "Where the rule or order of reference contains *no power* to enlarge the time, the above enactment is a very useful provision, as it enables the Court or a Judge to supply the defect. But I doubt whether the Statute empowers the Court or a Judge to interfere where the arbitrator has power to enlarge but has *inadvertently* permitted the time to expire without exercising his power": (*Lambert* v. *Hutchinson*, 2 M. & G. 860; see also *In re Salkeld* v. *Slater*, 10 A. & E. 767; *Davison* v. *Gauntlett*, 1 Dowl. N. S. 198.) In a more recent case the Court expressed a decided opinion that the time might be enlarged by a judge, though the arbitrator had the power but neglected to exercise it: (*Re Browne* v. *Collyier*, 2 L. M. & P. 470, Wightman, J.; see also *Leslie* v. *Richardson*, 6 D. & L. 91; *Doe d. May* v. *Connell*, 22 L. J. Q. B. 321.) If no power be conferred upon the arbitrator, it is clear under our Statute that that the Court has power to enlarge the time upon a proper application: (*Jones et al* v. *Russell*, Robinson, C.J., 5 U.C.R. 303.) The validity

When the umpire shall act.

or order for enlargement, it shall be deemed an enlargement for one month;[12] (a) and in any case where an umpire shall have been appointed, (b) it shall be lawful for him to enter on the reference in lieu of the arbitrators, (c) if the latter shall have allowed their time to expire without making an award, (d) or

(2) § 172

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of an award made by an arbitrator after the time limited in his authority for making it, but before enlargement by the Court is very doubtful: (*Re Browne* v. *Collyier*, 2 L. M. & P. 470.) It has been intimated that where a verdict has been taken subject to a reference the Court can compel either of the parties to consent to an enlargement under peril of the verdict being allowed to stand: (see *Wilkinson* v. *Time*, 4 Dowl. P. C. 37.) A rule to enlarge the time for making an award issued on the third or fourth day of term, but as the term generally has been held to relate back to the first day of term, (*Hawke* v. *Duggan*, 5 U. C. R. 636,) a distinction between enlargements by the arbitrator and enlargements by the court should be noted. Though the arbitrator must exercise his power of enlargement during the period limited for making his award, the period within which the court will make an order for the purpose is only limited by its own discretion: (Russell, Arb. H., 146, referring to *Hall* v. *Rouse*, Parke, B. 4 M. & W. 26; *Parbury* v. *Newman*, 9 Dowl. P. C. 288; *Leslie* v. *Richardson*, 12 Jur. 730, 6 D. & L. 91; *Bowen* v. *Williams*, Ex. Nov. 24, 1848, 6 D. & L. 235.) But the court will seldom interfere except in cases where the arbitrator has by accident let slip the precise day: (*Andrews* v. *Eaton*, Parke, B., 7 Ex. 223; see also *Edwards* v. *Davies*, 18 Jur. 448; *Leslie* v. *Richardson*, 6 C. B. 378; *Salkeld* v. *Slater*, 12 A. & E. 767.)

(a) *i. e.* Calendar month: (see Interpretation Act, 12 Vic. cap. 10, s. 5, sub-s. 11,) "It seems clear that when the *time* for making an award is enlarged, the enlargement, whether by the parties, the arbitrators, or by judge's order, should be made a rule of court as well as the original submission:" (*Masecar* v. *Chambers et al*, Macaulay, J., 4 U. C. R. 172; see *Crooks* v. *Chisholm et al*, 4 O. S. 121; *Charles* v. *Hickson*, T. T., 3 & 4 Vic., *MS.*, R. & H. Dig., "Arbitration and Award," II. 3; also see *In re Thirkell et al*, 2 U. C. 173.)

(b) An umpire may be appointed by name in the document of reference. If not so appointed, provision is made for his appointment under s. xciv. of this Act. And it would seem that in the absence of express directions the umpire may be appointed without waiting, though for obvious reasons the latter mode is in all respects preferable: (see *Ray* v. *Durand*, 1 U. C. Cham. R. 27.)

(c) It is established law that the umpire is to decide between the parties to the reference and not between the arbitrators in case of disagreement. When he enters upon his duties, the duties of the arbitrators terminate. In the words of this enactment he "enters on the reference in lieu of the arbitrators." It is not unusual for an umpire appointed in the first instance, to sit with the arbitrators and hear the evidence, but to take no part in the proceedings unless the arbitrators disagree. This is a convenient practice, and saves at least the expense of a second examination of witnesses.

(d) The power of the umpire under this enactment is deferred until the arbitrators "shall have allowed their time to expire without making an award." Whether this provision is cumulative or the contrary is doubtful. Decisions before the passing of this Act seem to establish "that an award of umpirage is valid though made before the time limited for the award of the arbitrators, if they disa-

shall have delivered to any party or to the umpire a notice in writing stating that they cannot agree.[3](e)

(3) § 173-

XCVI. (f) When any award made on any such submission, document, or order of reference as aforesaid, (g) directs that possession of any lands or tenements capable of being the subject of an action of ejectment, (h) shall be delivered to any party either forthwith or at any future time, (i) or that any such party is entitled to the possession of any such lands or tenements, (j) it shall be lawful for the Court, (k) of which the document authorizing the reference is or is to be made a rule or order, (l) to order any party to the reference who is in possession of any such lands or tenements, or any person in possession of the same claiming under or put in possession by him since the making of the document authorizing the reference, (m) to deliver possession of the same to the party entitled

(App. Co. C.) Eng. C. L. P. A. 1854, s.10. Con. Stat. for U.C. ch 22 § 174-

When the award directs possession of real property to be delivered, the Court may order such delivery, and enforce it as a judgment in ejectment.

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gree and do not make any award afterwards:" (*Ray* v. *Durand*, Macaulay, J., 1 U. C. Cham. R. 27.)

(e) As to disagreement between arbitrators, see *Doddington* v. *Bailward*, 7 Dowl. P. C. 640.

(f) Taken from Eng. Stat. 17 & 18 Vic. cap.125, s. 16.—Applied to County Courts. The beneficial application of this section to County Courts is very questionable, the action of ejectment not being within their cognizance.

(g) *i.e.* The order of reference under s. lxxxiv. as to compulsory references or the deed or instrument in writing as to references under s. xci. This enactment is made to extend to any award referred or made pursuant to those sections which directs that possession of any lands, &c.

(h) By the common law an ejectment will not lie for anything whereon an entry cannot be made, or of which the Sheriff cannot deliver possession. In other words, ejectment is only maintainable for corporeal hereditaments: (Tillinghast's Adam's Eject. 18; also see a late case of ejectment for "a "pasture gate" and a "cattle gate," *Doe d. Haxby* v. *Preston et al.* 5 D. & L. 7.)

(i) This accords in principle with the power of a Judge to certify that execution may issue forthwith "or at some day to be named in such certificate:" (s. clxxxii.)

(j) The distinction between an award that one party named "is entitled to the possession of land" and that "the possestion of the land shall be delivered" by the other, is now practically of little importance. It may, however, be mentioned that decided cases before this Act established the doctrine that no *interest* in land could be *transferred* by an award: (see Rolle Ab. Arbitrator A; *Marks* v. *Marriott*, 1 Rayd. 114; *Johnson* v. *Wilson*, Willes. 248; *Doe d. Morris* v. *Rosser*, 3 East. 15; *Thorpe* v. *Eyre*, 1 A. & E. 926.) The reason of the law was based upon feudal principles, viz., that lands should not be aliened without the consent of the lord: (Black. Com. III. 15.)

(k) *For the Court. Qu.* "or a Judge?" see note *m* to s. xxxvii.

(l) As to the mode of making a submission a rule of Court, see note *v* to s. lxxxvi; also see s. xcvii. of this Act.

(m) An application under this enactment should show the reference, the subject matter thereof, the award, and the parties in the possession of the land

thereto, pursuant to the award, and such rule or order to deliver possession shall have the effect of a Judgment in ejectment against every such party or person named in it, (*n*) and execution may issue and possession shall be delivered by the Sheriff (*o*) as on a Judgment in ejectment. (*p*)

Eng. C. L. P. A. 1854, s. 17.

Every submission to arbitration may be made a rule of

XCVII (*q*) Every agreement or submission to arbitration by consent, (*r*) whether by deed or instrument in writing not under seal, (*s*) may be made a rule of any one of the Superior Courts of law or equity in Upper Canada (*t*) on the application

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awarded. As to delivery of possession, see *Mays* v. *Cannell*, 24 L. J. C. P. 41.

(*n*) A judgment in ejectment before this Act has been held not to be as other judgments, final between the parties: (Tillinghast's Adam's Eject. 327, 512; *Clubine* v. *McMullen*, 11 U.C.R. 250. See ss. ccxxxix., ccxlvi., and cclxi. of this Act.) The result of enacting that a rule or order under this enactment shall have the effect of a judgment in ejectment will be to introduce, to a certain extent, the law laid down in Eng. St. 1 & 2 Vic. cap. 110, s. 18. As to which see Chit. Arch. 8 Edn. 1428, 1508; Lush. Prac. 2 Edn. 814.

(*o*) By the Coroner, if there be any just exception to the Sheriff. See note *g* to s. xxii.

(*p*) The writ of execution upon a judgment in ejectment is known as a writ of *habere facias possessionem*. It as a general rule must, like other executions, follow the judgment. As to the effect of such executions, see ss. ccxli. cclxi. and cclxvii. of this Act.

(*q*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 17.—Not applied to County Courts.

(*r*) A submission by written agreement is a contract requiring to be proved like any other contract if it existence be denied. It is true that by statute it may be made a rule of Court; but that is only for the purpose of enforcing its performance in a summary manner. The character of the contract is not altered by its being made a rule of Court, nor is it the rule which gives it the binding effect upon the parties, as in the case of a submission by rule: (*Berney* v. *Read*, Denman C.J. 7 Q. B. 83.) There can be no agreement unless there be mutuality of consideration. The consideration to one party is the signing of the other. Without the signatures, or at least the assent of both, there can be no agreement. It has been held that an order of reference of a borough Court in England, purporting to be made by consent, and containing a stipulation for making it a rule of a Superior Court, might be made a rule of such Court as an agreement of reference between the parties: (*Harlow* v. *Winstanley*, 19 L. J. Q. B. 430.)

(*s*) Oral submissions are clearly excluded from the operation of this section: (see *Ansell* v. *Evans*, 7 T. R. 1; —— v. *Mills*, 17 Ves. 419.)

(*t*) Until this provision has been complied with the Courts have no jurisdiction over agreements of submission: (see *Harrison* v. *Grundy*, 2 Str. 1178; *In re Perring and Keymer*, 3 Dowl. P.C. 98; *Davis* v. *Getty*, 1 S. & S. 411; *Harvey* v. *Shelton*, 7 Beav. 455; *Kirkus* v. *Hodgson*, 8 Taunt. 733; *Mayor of Bath* v. *Pinch*, 4 Scott 299; *Bottomley* v. *Buckley*, 4 D. & L. 157; *Ross* v. *Ross*, 4 D. & L. 648; but see *Little* v. *Newton*, 1 M. & G. 976.) But there is inherent power in the Court independently of any statutory enactment to make a Judge's order or order of Nisi Prius a rule of Court: (*Aston* v. *George*, 2 B. & A. 395; *Harrison* v. *Smith*, 1 D. & L. 876; *Millington* v. *Claridge*, 3 C. B. 609.) Where it was

of any party thereto, (*u*) unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of Court; (*v*) and if in any such agreement or submission it is provided that the same shall or may be made a rule of one in particular of such Superior Courts, it may be made a rule of that Court only; (*w*) and if when there is no such provision (*x*) a case be stated for the opinion of one of the Superior Courts, (*y*) and such Court be specified in the award, (*z*) and the document authorizing the reference have not before the publication of the award to the parties been made a rule of Court, such document may be made a rule only of the Court specified in the award; (*a*) and when in any case the document authorizing the reference is or has been made a rule or order of any one of such Superior Courts, no other of such Courts

Court, unless the instrument forbid it.

Of what Court it may be made a rule.

And if a case be stated in the award for the opinion of a Court.

Other Courts not to interfere.

agreed that a submission should be made a rule of "the Court," without specifying any particular Court, the Common Pleas allowed the submission to be made a rule of that Court: (*Soilleux* v. *De Herbest*, 2 B. & P. 444.)

(*u*) The application may be made by either party at any time either before or after award. The practice of Courts of law and equity in this respect appears to be the same: (*In re Taylor*, 5 B. & A. 217; *Ross* v. *Ross*, 4 D. & L. 648; *Smith* v. *Symes*, 5 Madd. 75; *Pownall* v. *King*, 6 Ves. 10; *Fetherstone* v. *Cooper*, 9 Ves. 67; *Heming* v. *Swinnerton*, 5 Hare. 350.) Further as to the practice, see note *v* to s. lxxvi. of this Act.

(*v*) The difference between this enactment and that of 9 & 10 Wm. III. cap. 15 should be noted. A submission under the latter can only be made a rule of Court when the parties in the submission "agree that their submission of their suit to the award or umpirage of any person or persons should be made a rule of any of his Majesty's Courts of Record," &c.: (s. 1.) Whereas under the section here annotated the submission may be made a rule of Court "unless such agreement or submission contain words purporting that the parties intend that it should not be made a rule of Court." In the former case an express clause of consent is necessary. In the latter consent is presumed unless dissent be expressed. As to the intention of the parties in such matters, see *In re Woodcraft and Jones*, 9 Dowl. P. C. 538.

(*w*) This has been the established practice ever since St. 9 & 10 Wm. III. cap. 15: (see *Milstead* v. *Craufield*, 9 Dowl. P. C. 124.) Where a submission by deed of three actions in the Exchequer and one in the King's Bench provided that the agreement might be made a rule either of the Court of King's Bench or Exchequer, the Court of Exchequer refused to allow the submission to be made a rule of that Court after it had been made a rule of the King's Bench: (*Winpenny* v. *Bates*, 2 C. & J. 379.)

(*x*) *i.e.* a provision that the submission shall or may be made a rule of one in particular of the Superior Courts.

(*y*) As to the statement of special cases for the opinion of the Court by arbitrators, see note *z* to s. lxxxvi.

(*z*) The case may be stated on the face of the award, and if stated for one Court in particular, the name of that Court must also appear on the face of the award.

(*a*) As already noticed the submission may be made a rule of Court as

shall have any jurisdiction to entertain any motion respecting the arbitration or award.[3](b)

And with respect to the language and form of pleadings in general; (c) Be it enacted as follows:

App.) Co. C.) Eng. C. L. P. A. 1852, s. 49.

XCVIII. (d) All statements that need not be proved, (e)

well *after* as before award. See note *u ante*.

(b) This is consonant with the decision of *Winpenny* v. *Bates*, *ante*, note *w*. In England there has been provision made for bringing error on a special case the same as on a special verdict: (Eng. C. L. P. Act 1854, s. 32.) The provision has not been inserted in our C. L. P. Act.

(c) The sections following, from xcviii. to cvi. inclusive, are founded upon 1st Report C. L. Com'rs, s. 20, *et seq*. All these sections with reference to the time when the Act came into force apply to future pleadings not to past: (*Pinham* v. *Souster*, Parke, B. 14 L. & Eq. 418, 8 Ex. 138.) The expressed intention is to simplify "the language and form of pleadings." What is understood by "pleadings?" In the words of the Commissioners—they are written statements made by the plaintiff and defendant of their respective grounds of action and defence. The object is to ascertain what are the matters really in controversy between the parties, so as to avoid all discussion and inquiry on those which are not so—thus simplifying the matter for the decision of the judge or jury, and saving the parties unnecessary expense and trouble. To accomplish this object the plaintiff in the first place is required to state the facts which constitute his cause of action. The defendant is required to answer, and in so doing is compelled at his option to take one of the following courses: either he denies the statement of the plaintiff; or confessing it, avoids its effect by asserting some fresh fact; or admitting the facts alleged he denies the legal effect of them as contended for. In the second case the plaintiff will be under the like necessity, and will have to reply to the fresh matter of fact alleged by the defendant, subject to the same rules. In like manner if necessary defendant rejoins; and so the parties proceed until it is ascertained that there is some fact asserted by the one side and denied by the other, or that there is some proposition of law affirmed on the one hand and denied on the other. The question so raised is called an issue in fact or in law, according to its nature.

(d) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 49.—Applied to County Courts—Founded upon 1st Report C. L. Com'rs s. 36. The words of the enactment are *verbatim* the same as those used by the Commissioners in its Report.

(e) The law recognizes the rule that mere formal allegations need not be proved. The term "formal allegations" comprises among other matters "all those averments of *place*, *time*, *number*, *value*, *quality*, and the like, which are inserted in pleadings without being either essentially descriptive of the subject of the claim or charge, or otherwise rendered material by special circumstances. It includes also a multitude of other idle statements, which, until very recently, English lawyers with tautological pedantry loved to introduce into every record of legal proceedings. While judges were content to bestow more attention on technical precision than on substantial justice, the rule in question was highly important; but since the late amendments in the law it has fortunately become a matter more of historical curiosity than of present practical interest:" (Tay. Ev. 2 Edn., s. 224.)

such as the statement of time, (*f*) quantity, quality and value, (*g*) where these are immaterial, (*h*) the statement of losing and finding, and bailment in actions for goods and their value (*i*)—the statements of acts of trespass having been committed with force and arms and against the peace of our Lady the

Statements which need not be proved need not be made.

(*f*) The time is in general considered as forming no part of the issue, so that one time may be alleged and another proved: (Steph. Pl. 5 Am. Edn. 292.) Time is seldom material unless when of the essence of the contract: (see *Wimshurst* v. *Deeley*, 2 C.B. 253,) or unless the precise time of the happening of an event is—with reference to the purpose for which it is alleged in pleading—of the essence of that event: (*Nash* v. *Brown*, 6 C.B. 584.) When time happens to form a material point in the merits of a case, if a traverse be taken, the time laid is of the substance of the issue and must be strictly proved: (Steph. Pl. 293.) It was a general rule that to all traversable facts there should be time and place, though the want of them under certain circumstances might be cured by the statutes of jeofails: (*Ring* v. *Roxborough*, Bayley, B., 2 C. & J. 423.) Dates may be assumed to be material upon demurrer when, if truly stated, they would support the plea demurred to: (*Ryalls* v. *Bramall*, per Parke, B., 5 D. & L. 755.)

(*g*) Quantity, Quality and Value, are in general material in actions for goods and chattels or their value: (Steph. Pl. 296; *Bertie* v. *Pickering*, 4 Burr. 2455; *Holmes* v. *Hodgson*, 8 Moore 379; *Scott* v. *Jones*, 4 Taunt. 865; *Phillips* v. *Jones*, in error, 15 Q. B. 859.) Unless the article in respect of which the party is stated to be indebted be of some *value*, there is no consideration for the subsequent promise: (*Mayor of Reading* v. *Clarke*, *per cur.* 4 B. & A. 271. *Sed qu.*—see Forms of Pleadings in Sch. B. to this Act.) Many of these objections could only be raised by special demurrer and it is now enacted "that no pleading shall be deemed insufficient for any defect which could heretofore only be objected to by special demurrer:" (s. c. of this Act.)

(*h*) It is only necessary for defendant to state the substance of his cause of action, whether upon contract or for tort: (see forms as to both in Sch. B, and also see notes to s. xcix.) Substantial words when used will include averments, without the averments commonly stated under a *videlicet*. An example may be given—Plaintiff declared on contract alleging that defendant agreed to keep and employ his horses "for a certain space of time then agreed upon between the plaintiff and defendant, *to wit:* for the space of one year next ensuing, and to pay the plaintiff for the use thereof, certain hire and reward in that behalf, *to wit:* £50 a year for each of such horses, payable quarterly." Held that everything following the *videlicets* might be safely rejected and the declaration read as alleging a contract to hire for a certain time for certain hire and reward: (*Harris* v. *Phillips*, 10 C. B. 650; see also *Ward* v. *Harris*, 2 B. & P. 265.)

(*i*) The actions usually brought for goods or their value before Prov. Stat. 14 & 15 Vic. cap. 64, were detinue and trover. The averments of losing and finding in trover have always been considered fictitious and immaterial. So of detinue, it has been adjudged that the gist of the action is the detainer and that the bailment is altogether immaterial—in the sense of being traversable. It has been likened to the allegation of the loss in a count in trover: (*Clossman* v. *White*, Wilde, C. J., 7 C. B. 43; see also *Gledstane* v. *Hewitt*, 1 C. & J. 565; *Walker* v. *Jones*, 2 C. & M. 672; *Whitehead* v.

Queen—(*j*) the statement of promises which need not be proved, as promises in *indebitatus* counts and mutual promises to perform agreements, (*k*) and all statements of a like kind, (*l*) shall be omitted. (*m*)

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 50. Demurrers to be for substance only.

XCIX. (*n*) Either party may object by demurrer to the pleading of the opposite party on the ground that such pleading does not set forth sufficient ground (*o*) of action, defence, or

Harrison, 6 Q. B. 423; *Mason* v. *Farnell*, 12 M. & W. 674.) The bailment is of course material in actions on contract: (see *Ross* v. *Hill*, 2 C. B. 877.)

(*j*) These averments have been held to be clearly immaterial, that is, not traversable: (see *Harvey* v. *Brydes et al.* 14 M. & W. 437; S.C. in error, 1 Ex. 261; but see *Spear* v. *Chapman*, in error, 8 Jur. 461.)

(*k*) A promise set forth as a mere inference of law arising upon a liability stated is not necessary to be proved, and therefore not traversable: (see *Masson* v. *Hill et al.* 5 U. C. R. 60; *Bank B. N. A.* v. *Jones et al.* 7 U. C. R. 166; see also *Mountford* v. *Herton*, 2 N. R, 62; *Wade* v. *Simeon*, 2 C. B. 548); but where the promise of plaintiff is the consideration of a contract, it is material: (see *Sutherland* v. *Pratt*, 11 M. & W. 296.)

(*l*) Where the declaration was on the common courts for board, &c., found for defendant's illegitimate child at defendant's *request*, the request was held to be immaterial and not traversable: (*Flaherty* v. *Mairs*, 1 U. C. R. 221.) The omission of a special request even when necessary has been held to be matter of form only: (*Macleod* v. *Jackson*, 5 O. S. 318.)

(*m*) *Shall be omitted.* The precise effect of these words is doubtful. The doubt is as to whether the words are compulsory or merely directory. The better opinion appears to be that they are compulsory: (*Moberley* v. *Baines*, Chambers, Sept. 18, 1856, Richards J.) If compulsory, the only penalty would be an order of a Judge to strike out the unnecessary averments on the application of the opposite party. Reasoning by analogy, it may be mentioned that our old rule No. 29 E. T. 5 Vic. ordered that "every declaration shall in future . . commence," &c., and that it was copied from Eng. R. G. 3 Wm. IV. No. 33, under which it was held that averments made unnecessary by that rule might be struck out as surplusage: (*Alderson* v. *Johnson*, 5 Dowl. P. C. 294; see also *Dod* v. *Grant*, 4 A. & E. 485.) Statements which need not be proved are needless averments, and needless averments may be struck out on application to the Court or a Judge: (*Ward* v. *Graystock*, 4 Dowl. P.C.717.) The application for such a purpose ought to be made by defendant before plea: (*Thomas* v. *Jackson*, 2 Bing. 453.) An amendment without doubt would be allowed in every such case under s. ccxci. of this Act; but probably only upon payment of costs: (see *Lawrence* v. *Stephens*, 3 Dowl. P. C. 777.) It is not likely that the Court would set aside a pleading pleaded in contravention of this section: (see *Bacon* v. *Ashton*, 5 Dowl. P. C. 94.) An unnecessary allegation would not now, it is apprehended, be demurrable: (*Bodenham* v. *Hill*, 7 M. & W. 274; *Hart* v. *Meyers*, 7 U. C. R. 416.)

(*n*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 50.—Applied to County Courts. The effect if not the object of this enactment is to abolish special demurrers. It is clearly prospective: (*James* v. *Isaacs*, Jarvis C.J. 12 C.B. 794.)

(*o*) The sufficiency of a pleading has from the earliest period been held to depend upon its *substance*; but when written were substituted for oral pleadings, attention to *form* became requisite. The parties instead of pleading

impromptu before the Judge who tried the cause, were enabled sometime before the time appointed for the trial by an exchange between themselves of written statements of grounds of action and defence to arrive at issue. The object in requiring a proper attention to form was to ascertain and settle upon the pleadings the exact questions to be determined between the parties, and as an incident to prevent the introduction of extraneous matter. The necessity for form once recognized let in a number of arbitrary rules intended to prevent uncertainty, obscurity, duplicity, and other like defects. An anxiety on the part of the Judges, that pleadings should be certain and at the same time sure, led to unnecessary precision, which occasioned on the part of pleaders much and useless prolixity. The result of the whole has been obscurity, perplexity, and fiction, the very evils that special pleading was designed to prevent. In this way the evils grew in magnitude as decisions accumulated, until in the end *form* too often triumphed over *substance*. The legislature at a very early period of English history were alive to the growing tendency to technicality and subtlety. In the year 1585 a statute was passed which recited that "great delay and hindrance of justice has grown in actions and suits between the subjects of this realm, by reason that upon some small mistaking or want of form in pleadings, judgments are often reversed by writs of error and oftentimes upon demurrers in law given otherwise than the matter in law and *very right of the cause* doth require, whereby the parties are constrained either utterly to lose their right, or else after long time and great trouble and expences to renew again their suits." For remedy whereof it was thereby enacted "that from henceforth after demurrer joined and entered in any action or suit in any Court of Record within this realm, the judges shall proceed and give judgment according as *the very right of the cause and matter in law* shall appear unto them, without regarding any imperfection, defect or want of form in any writ, return, plaint, declaration, or other pleading process or course of proceeding whatsoever except those only which the party demurring shall *specially* and particularly set down and express together with his demurrer; and that no judgment to be given shall be reversed by any writ of error, for any such imperfection, defect, or want of form as is aforesaid, except such only as is before excepted :" (27 Eliz. cap. 5 s. 1.) Notwithstanding this enactment objections to form were frequently raised, to which the Courts were constrained to yield, although "the very right of the cause and matter in law" might be with the party whose pleading was found to be defective, but who was unfortunate enough to risk a special demurrer. For remedy of this evil it was enacted that "where any demurrer shall be joined and entered in any action or suit in any Court of Record within this realm, the Judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them without regarding any imperfection, omission or defect in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer as causes of the same, &c., *so as sufficient matter appear in the said pleadings upon which the Court may give judgment according to the very right of the cause,*" &c. (4 Anne c. 16, s. 1.) There is but one pervading spirit in these Acts, which is, to make substantial justice paramount to mere *form;* and yet experience has shown that the Acts, though of great benefit, have failed in their object. Both Acts required the Judges to give judgment "according to the very right of the case and matter in law," without regarding imperfections, omissions, or defects in form "*except those which were specifically set forth,*" thus impliedly authorising the Judges to

Court may give judgment, &c. reply, as the case may be; (p) and where issue is joined on

(p) 120.

give judgment *against* the very right of the cause, &c., on an objection for want of form, provided it were specifically pointed out. This gave birth to "special demurrers," the ally of unscrupulous technicality, and the preserver of all that was obnoxious and embarrassing in the rules of pleading. The necessity for for form was retained with all its evils. Nothing remained to be done but to destroy a system which, though intended for good, had been perverted to serve dishonest purposes. Special demurrers are therefore by this enactment numbered with the things that are past. Demurrers were of two kinds—general, which related to matters of substance; and special, which related to matters of form. The latter only having been abolished, the former if not retained in name are in effect preserved. The true construction to be put upon this enactment is to ascertain whether the declaration or other pleading demurred to *would have been good on general demurrer before the Act;* if so it will not be demurrable under this Act. This is the true and almost the only test. It is intended by the Act to do away with matters of form, but still it is not meant that that should be held to be good which is not good in *substance*: (*Richards* v. *Beavis*, Campbell C.J. 28 L. & Eq. 159; 2 N. C. L. Rep. 676.) The question as to what is good on general demurrer is not altered by this Act: (*Ib.* Crompton J.) Of course pleadings cannot be held good where the parties do not choose to say what they mean. If the Court were to hold such pleadings good they would be getting into the region of ambiguity and uncertainty, which would be a worse evil than that which the Act was intended to remedy. (*Ib.* Crompton J.)

(*p*) The boundary between substance and form is not at all times easy to be defined. The only guide in the way of precedent is that of general demurrer. Whenever before this Act pleadings were held to be bad on general demurrer, they will generally be held to be bad upon demurrer under this Act; but the converse as to special demurrers is by no means a safe guide. It will not do to say that in all cases where pleadings were held bad on special demurrer only, they will be good under this Act. An analysis of the cases will do more to assist the judgment in this inquiry than any theory that can be propounded. With a view to this, the Editor subjoins *some* cases decided before the Act. To review *all* would be the work of a pleader, and a labor which it is believed no pleader can satisfactorily accomplish.

It is enacted that either party may object to the pleading of the opposite party on the ground that such pleading does not set forth "sufficient *ground of action, defence,* or *reply,* as the case may be." As to these severally—

First—as to the *ground of action,* which must appear in the declaration. Plaintiff must so explain his cause of action as to make it appear to the Court that there is sufficient foundation for the action. All essentials or whatever is of the substance of the action must be alleged, that the Court may be enabled to give judgment for him in case a verdict is found in his favour: (Bac. Abr. "Pleas and Pleading," A.) The law requires the declaration to contain certainty and truth that the defendant may be able to make a proper answer thereto and the Court give a right judgment thereon: (*Ib.* B.) In trespass for taking goods, &c., a declaration not setting out the goods by specific description but mentioning them as "divers goods and chattels," &c., bad on general demurrer: (*Freeman* v. *Donelly et al,* 3 O. S. 16; see also *Holmes* v. *Hodgson,* 8 Moore, 378.) But though informal if it do not aver the goods, &c., to be the goods of the plaintiff it is not bad on general demurrer: (*O'Brien* v. *Howling,* 1 U.

such demurrer, the Court shall proceed and give Judgment ment on the substance

C. R. 475.) A declaration by plaintiff suing on a lease as reversioner, which shows plaintiff if reversioner at all, to be so jointly with another person not a co-plaintiff, bad on general demurrer: (*Scott* v. *Godwin*, 1 B. & P. 67.) So a declaration on a charter party describing plaintiff as "freighter for six voyages," but omitting to aver that defendant agreed to six voyages, has been held bad since the Eng. C. L. P. Act: (*Richards* v. *Beavis*, 28 L. & Eq. 157; 2 N. C. L. Rep. 676.) So a declaration for omitting to cleanse drains whereby the plaintiff's premises suffered damage, is not sufficient, though it describe defendant as "owner and proprietor" of the premises on which the drains are situate. Some further grounds of liability should be stated to make the cause of action good in substance. Defendant though both owner and proprietor, is not necessarily as such bound to cleanse drains: (*Russell* v. *Shenton*, 3 Q. B. 449.) But the statement in a declaration on a promissory note against the maker and indorser, that the note was duly presented and *dishonored* is a sufficient averment of non-payment as against the *maker* and probably as against the indorser—*sed qu.* (*Nimmo* v. *Flannigan et al.* Chambers Nov. 10, 1856, Hagarty J.) A declaration in case against a tenant for allowing premises to become out of repair, but not showing defendant to be more than a tenant at will, has been held bad on general demurrer: (*Harnett* v. *Maitland*, 16 M. & W. 257.) *Qu.* If a declaration in *covenant* for non-repair not stating a term would be bad on general demurrer? (see *Turner* v. *Lamb*, 14 M. & W. 412.) A declaration averring a promise to have been made by defendant, in consideration that plaintiff would forbear to prosecute a *qui tam* action, but not averring that plaintiff did forbear, has been held bad on general demurrer: (*Hart* v. *Meyers*, 7 U. C. R. 416.) Where the declaration sets out the consideration for defendant's promise, and in doing so discloses in substance a good cause of action, an uncertainty in stating a part of the demand will not make the declaration bad on general demurrer: (*Bradford* v. *O'Brien*, 6 U. C. R. 417.) If any part of the declaration show a good cause of action, it will be sufficient: (*Davis* v. *London & Blackwall R. Co.* Tindal C. J. 1 M. & G. 801.) A declaration *in assumpsit* averring in consideration that plaintiff, at request of defendant, had promised to do all the work necessary in bottling beer, it was agreed between plaintiff and defendant that defendant should within twelve months from a certain day (named) supply plaintiff with at least 500 hogsheads of beer to bottle, and breach, that defendant not regarding, &c., held good in substance: (*Fannin* v. *Anderson*, 7 Q. B. 811; see also *Duke* v. *Dive*, 1 Ex. 36, and *Rolfe* v. *West*, 1 N. C. L. Rep. 225, the latter case having been decided since the Eng. C. L. P. A.) It would appear that a declaration for a libel, averring the libel to be "in substance as follows," would be bad on demurrer, under this Act: (*Wright* v. *Clements*, 3 B. & A. 503; also see Sch. B. to this Act, No. 29.) Where by agreement concurrent acts are to be done by plaintiff and defendant, it is sufficient in a declaration against defendant for not doing the act on his part, for plaintiff to allege generally "that he was willing to perform the agreement" without expressly averring that he was ready and willing to do the concurrent act on his part: (*Kemble* v. *Mills*, 1 M. & G. 757.) In an action for breach of contract plaintiff averred that defendant on 4th August, 1844, agreed with plaintiff to erect a house by the middle of November "next ensuing." Breach that the house was not erected in the middle of the month of November. Held bad on general demurrer in not showing that November, 1844, was November next ensuing the agreement: (*Ekins* v. *Evans*, 2 U. C. R. 144.) In debt on

without re- according as the very right of the cause and matter in law

bond the declaration averred that defendant and one S. acknowledged themselves bound to plaintiff in £8000, to be paid to plaintiff, or to one W. E. on request, and that thereby and by reason of the non-payment thereof an action hath accrued, &c. Held that it was unnecessary to allege a request, and that non-payment was sufficiently shown: (*Kepp et al.* v. *Wiggett et al.* 6 C. B. 280.) The omission of a special request even when proper to be inserted is matter of form only, and cannot be objected to on general demurrer: (*MacLeod* v. *Jackson*, 5 O. S. 318.) But where in debt on bond, conditioned on delivery of good "merchantable" grain, to deliver a certain quantity of whiskey, an averment in the declaration that plaintiff had delivered good "distillery" grain, but that defendant had not, &c., was held to be bad on general demurrer: (*Cowper* v. *Fairman et al*, 3 O.S. 568.) A count on a bond conditioned to pay money on notice, but averring notice only that the money was due, is bad; (*Bolson* v. *Spearman*, 9 A. & E. 77.) So in an action on a policy of insurance on which losses arising from riot or civil commotion were excepted, a declaration negativing loss by civil commotion only is bad: (*Condlin* v. *H. D. Mutual Ins. Co.* H. T. 6 Vic. *M.S.* R. & H. Dig. Insurance 2.) A declaration averring that A. and others had agreed to become members of a certain society, and that in the event of either of them leaving it he should pay to *the President*, but not averring to what president or how the obligation should be enforced, was held bad on general demurrer: (*Shepherd* v. *Duncan*, 15 L. T. Rep. 303.) Where the declaration stated that plaintiff sued the defendant for that the defendant agreed with the plaintiff to cause a certain valuation to be made, by neglecting to do which special damage accrued to the plaintiff but did not aver any consideration for the agreement, it was held bad. And *per cur.* "The C. L. P. Act, 1852, has no doubt afforded great latitude in pleading; but it has not removed the necessity of stating a consideration for an agreement upon which a party is sought to be charged:" (*Fremlin* v. *Hamlin*, 8 Ex. 808.) So where a declaration in an action for freight stated that "the defendants are indebted to the plaintiff for freight," &c., but omitted to aver that there was any money payable by defendant to plaintiff, the declaration was held bad: (*Place* v. *Potts*, 8 Ex. 705.) This is a defect which may be cured by pleading over: (*Wilkinson* v. *Sharland*, 24 L. J. Ex. N. S. 116.) But a declaration "for money found to be due from the defendant to the plaintiff on account stated between them" has been held sufficient, as the law implies a promise between them: (*Fagg* v. *Nudd*, 3 El. & B. 650.)

2. *Plea.*—If defendant do not demur to the declaration, his only alternative is to answer it by matter of fact. In doing so he is said to plead, and the answer of fact so made is called the plea. Pleas are divided into dilatory and peremptory: (Steph. Pl. 46.) with the latter only is the Editor at present concerned. A peremptory plea or plea in bar may be defined as one which shows some sufficient ground for barring or defeating the plaintiffs action. Pleas in bar are divided into pleas by way of traverse and pleas by way of confession and avoidance: (*Ib.* 52.) As the plaintiff's declaration must set forth all essentials necessary to maintain his action; so the defendant's plea in bar must be substantially good and certain: (Bac. Abr., "Pleas & Pleadings," V.) Pleas though they may be general, yet should not be so general as to be vague. Care should be taken not to get "into the region of uncertainty and ambiguity." A plea to an action of covenant that defendant did not break his covenant is bad on demurrer: (*Taylor* v. *Needham*, 2 Taunt. 278.) A plea of performance otherwise than in the terms of the covenant is also bad: (*Scudamore*

shall appear unto them, without regarding any imperfection, garding

v. *Stratton et al*, 1 B. & P. 455.) So to a bond conditioned to pay a sum of money in the event of another person not paying it, a plea of satisfaction and discharge before breach is bad: (*Spence* v. *Healy*, 1 N. C. L. Rep. 857.) In debt on bond a plea of licence not being by deed is bad: (*Sellers* v. *Bickford*, 1 Moore, 460.) So to a declaration in covenant for not repairing a house within a reasonable time, it is a bad plea that defendant repaired the house within a reasonable time after he was required to do so by plaintiff: (*Fisher* v. *Ford*, 4 Jur. 1034; *Jones* v. *Gibbons*, 22 L. J. Ex. 34.) To a similar declaration a plea of eviction is bad: (*Newton* v. *Allen*, 1 G. & D. 44.) Where, in an action of assumpsit for non-payment of rent, according to agreement, defendant pleaded eviction by a stranger, but omitted to negative that the stranger derived title under himself, the plea was held bad: (*McNab* v. *McDonell*, 2 U. C. R. 169.) A plea justifying an arrest on suspicion of felony, without showing the grounds of the suspicion, is bad: (*Mure* v. *Kaye*, 4 Taunt. 34.) To a declaration charging expulsion from a dwelling-house, a general plea of *liberum tenementum*, is good: (*Harvey* v. *Bridges*, 3 D. & L. 55,) but not to a declaration charging an assault, (*Roberts* v. *Taylor*, 1 Ex. 261;) nor to a declaration in trespass, *quare clausam fregit* and carrying away plaintiff's hay and corn, &c.: (*Wilcox* v. *Montgomery*, 5 O. S. 312.) There may be a general plea of fraud: (*Washbourn* v. *Burrowes*, 1 Ex. 107; see also *Robson* v. *Luscombe*, 2 D. & L. 859.) To an action for a libel a plea in general terms that plaintiff is a swindler and an immoral character, is bad: (*Holmes* v. *Catesby*, 1 Taunt. 543,) but if the declaration charge some specific fact of libel, a plea that it is true in substance and in fact seems to be good: (*Weaver* v. *Lloyd*, 2 B. & C. 678.) To an action on the case for fixing a dog spear whereby plaintiff's dog was wounded, a general plea alleging that plaintiff had notice of the spear, is good: (*Jordin* v. *Crump*, 8 M. & W. 782.) To trespass for shooting a dog, a plea that the dog was used to worry sheep; that just before he was shot, he was worrying defendant's sheep, and could not be otherwise restrained from so doing, has been held a good plea, as it would be intended that the dog was about to renew the attack: (*Hallett* v. *Stannard*, 2 Ir. Law. Rep. 156.) To an action against a Gas Company for a nuisance, a plea that they are "now" managing their works carefully, &c., is bad: (*Watson* v. *Gas Co.*, 5 U. C. R. 262.) So a plea of set-off to an action claiming unliquidated damages: (*Allwood* v. *Allwood*, 1 N.C. L. R. 242.) To an action on a bond, the plea of *nil debet* is bad: (*Anon.* 2 Wils. 173.) And a plea contrary to the express condition of the bond is bad. Therefore to a bond conditioned for the payment of money, a plea that the bond was given as an indemnity, was held to be bad: (*Mease* v. *Mease*, Cowp. 47; see also *Murray* v. *King*, 5 B. & A. 165.) To a declaration on an agreement to forbear suing, a plea that defendant had no cause of action is bad: (*Wade* v. *Simeon*, 2 C. B. 548.) So to an action on a note, a plea that it was given for lands sold without a note in writing: (*Jones* v. *Jones*, 6 M. & W. 641.) A material alteration in writing avoids a bond, but a plea alleging an alteration without averring it to be in writing is bad: (*Harden* v. *Clifton*, 1 Q. B. 522.) To an action on a bond, conditioned for the performance of several matters, a general plea of performance is bad: (*Roakes* v. *Manser*, 1 C. B. 531.) So to an action on a bond conditioned that A, as a bank agent, should account &c., a plea that before action brought, A ceased to be agent, and that while he was agent he kept all the clauses of the bond: (*Bank of Upper Canada* v. *Bethune et al*, E. T. 2 Vic., *MS.*, R. & H. Dig., "Pleading," V. 2.) Debt on bond conditioned that

form. omission, defect in or lack of form, and no Judgment shall be

if the obligor should practice as a surgeon at S, at any time without the consent in writing of the obligee, then obligor should be obliged to pay obligee £1000 — the bond to be void. Plea—that defendant did not practice as a surgeon at S, without the consent in writing of the obligee: Held bad on general demurrer: (*Hastings et al* v. *Whitley*, 2 Ex. 611.) So to a bond conditioned that defendant should "well and truly" convey to plaintiff, his heirs and assigns forever, a piece of land, a plea by defendant that he did make and execute a conveyance in fee simple to plaintiff, is bad: (*Prindle* v *McCan et al*, 4 U. C. R. 228.) To an action of debt for money lent a plea as to £100, part thereof, that defendant made his note to plaintiff's order for £100, is bad for not averring that the note was still running: (*Price* v. *Price*, 16 M. & W. 232.) A plea of infancy when there has been a liability contracted and subsequent repudiation should allege that the repudiation was made within a reasonable time after defendant attained his majority: (*Dublin R. R. Co.* v. *Black*, 8 Ex. 181.) To an action on a foreign judgment defendants pleaded that they were not served with any process, and that plaintiff unjustly and behind thier backs, entered an appearance for them, was held bad in not averring that defendants had no notice of the writ: (*Shechy* v. *Prof. Ass. Company*, 13 C. B. 787.) In assumpsit for work and labor there was a plea, that the money mentioned in the declaration accrued due to the plaintiff for the building of a church; that the plaintiff having suspended the work another agreement was entered into between him and one A, under which the plaintiff, in consideration of certain stipulated payments, undertook to complete the work and to rely for the residue of the contract price upon certain subscriptions which were to be raised; and that A duly made, and the plaintiff received, the payments stipulated for by the second agreement, in satisfaction and discharge of the original agreement between the plaintiffs and the defendants, and of the performance thereof by the latter: Held a bad plea in substance: (*James* v. *Isaacs et al*, 12 C.B. 791.) A plea to a declaration on a note showing it to have fallen due in January, 1848, that defendant paid the note on 31st December, 1847, before it became due, is bad on general demurrer: (*Bown* v. *Hawke*, 6 U. C. R. 275.)

3. *Replication.*—A replication is the plaintiff's answer to defendant's plea, and should fortify and support the declaration. The material requisite in a replication is that it should pursue what has been first alleged and insisted upon in the declaration, otherwise there will be a departure in pleading: (Bac. Abr. Pl. A.) A replication which in general terms denies the whole substance of the plea is good even on special demurrer: (*Darbyshire* v. *Butler*, 5 Moore, 198.) Where in trespass for seizing cattle and causing them to be sold, defendant pleaded that the cattle were taken *damage feazant*, and proceeded to justify the sale under Prov. Stat. 1 Vic. cap. 21. Replication that defendant's fences were defective, and that the cattle escaped from the highway into the close. Held replication clearly bad, in not averring that the cattle escaped through the defect in the fences: (*Stedman* v. *Wasley*, 1 U. C. R. 464.) Since the first Eng. C. L. P. Act it has been held that in an action on a foreign judgment to which there was a plea denying notice of the proceedings and residence in the jurisdiction, a replication that the action was on a bill accepted within the said jurisdiction by defendant (who was then a resident there) and payable at a place within the jurisdiction, and that by the laws of the foreign country in such cases, the place of payment is deemed the elected domicile of the acceptor, and that notice of the proceedings were

arrested, stayed, or reversed for any such imperfection, omission, defect in or lack of form.[q] (q)

(App. Co. C.) Eng. C. L. P. A. 1852, s. 51. No pleading invalid for cause now

C. (r) After this Act comes into operation, (s) no pleading or amended pleading (t) shall be deemed insufficient (u) for

served there in accordance with the foreign law; Held bad for not alleging that the law was so at the time the bill was accepted: (*Mens* v. *Thellussin*, 22 L. J. Ex. 239.) To an action of assumpsit defendants pleaded payment into Court as to part and a set-off as to the residue. Replication to the first plea that defendants were indebted in a greater amount than the amount paid, and to the other plea that plaintiff was not (not adding "nor is" in either case) indebted *modo et forma*, both replications were held bad on general demurrer: (*Small* v. *Strachan*, 2 U. C. R. 434.) To an action of replevin in the old form, the defendant avowed for a distress for rent due to him by one C. on a demise at a yearly rent, of which one year's rent was in arrear on 1st January, 1850. Replication to this that the close on which the distress was made was at the time when, &c., the close of him the plaintiff: Held bad as containing no answer in substance to the avowry: (*Robertson* v. *Meyers*, 7 U. C. R. 415.)

4. *Rejoinder.*—Rejoinder is defendant's answer to plaintiff's replication, which must fortify and support defendant's plea. It must also pursue the line of defence first insisted upon, or else there will be a departure: (Bac. Abr. Pl. A.) To debt on an indemnity bond the defendant pleaded *non damnificatus*, and the plaintiff having replied, showed how she was damnified. The defendant rejoined that the injury arose through the plaintiff's own fraudulent act: Held on general demurrer to be a departure: (*Hamilton* v. *Davis et al.* 1 U. C. R. 490.) So where plaintiff declared in debt on bond for the non-performance of an award, the defendant pleaded no award. The plaintiff replied setting out the award, to which the defendant rejoined matter extrinsic to the award, and relied upon it as showing the award void; Held a departure: (*Maxwell* v. *Ransom*, 1 U. C. R. 219.)

5. *Surrejoinder.*—This and all subsequent pleadings being governed by the same rules and with the same effect as the pleadings already noticed, there is no necessity for pursuing the subject any further.

(q) The latter part of this enactment is in effect the same as the Statutes of Elizabeth and Anne, recited in note *o*, *ante*, with one exception—the designed omission of all mention respecting special demurrers.

(r) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 51.—Founded upon 1st Rep. C. L. Com. s. 35.—Applied to County Courts. This section is clearly prospective: (*James* v. *Isaacs*, per Maule J. 12 C. C. 795; see also *Pinhorn* v. *Souster*, 8 Ex. 138, 14 L. & Eq. 415.)

(s) 21st August, 1856 (s. i.)

(t) Applies equally to declarations, pleas, replications, rejoinders, and all subsequent pleadings: (see note *p* to s. xcix.) *Qu.* whether a pleading which has been demurred to before this Act came into operation, but amended afterwards, can be argued on a special demurrer? (see *Pinhorn* v. *Souster*, *ubi supra*.)

(u) Before the passing of this Act the sufficiency of a plea depended upon its substance *and* its form. The doctrine was well expressed as follows: "The law requires two things. The one that it (the pleading) be in matter sufficient. The other that it be deduced and expressed according to the form of law. If either the one or the other of these be wanting, it is cause of demurrer: (*Colt* v. *Bishop of Coventry*, Hobart C.J. Hob. Rep. 164.) For the future the sufficiency of a pleading must depend more upon its substance than form—the latter being only neces-

pleadable only by special demurrer.

any defect which could heretofore only be objected to by special demurrer. (*v*)

(App. Cb. C.) Eng. C. L. P. A. 1852, s. 52. Unfair pleadings.

CI. (*w*) If any pleading (*x*) be so framed (*y*) as to prejudice, embarrass, or delay the fair trial of the action, (*z*) the opposite

sary in so far that the party pleading must use apt language to explain what he means in describing his cause of action, ground of defence, &c. If a pleading though not deficient in matter be so far deficient in form as to prejudice, embarrass, or delay the opposite party, then an application to amend would appear to be the correct course: (s. ci.)

(*v*) *For any defect which could only be objected to by special demurrer, i. e.* for any defect which could heretofore have been objected to by special demurrer *only*. The true meaning of the sentence rests upon the import of the word "only," and its connection with the context. Many pleadings have been held insufficient upon special demurrers which might have been held equally so upon general demurrers. Both for matters of substance and of form a special demurrer was deemed a prudent proceeding. It follows that there may be pleadings held bad upon special demurrers, which under this Act would be also bad, though special demurrers are abolished. For example, reference may be made to the following decided cases: *Burgess* v. *Beaumont*, 2 D. & L. 590; *Hill* v. *Montague*, 2 M. & S. 377; *Vyse* v. *Wakefield*, 6 M. & W. 442; *Bevis* v. *Hulme*, 15 M. & W. 88; *Crawshay et al.* v. *Barry*, 1 M. & G. 235; *Milner* v. *Jordan*, 8 Q. B. 615; *Robertson* v. *Showler*, 2 D. & L. 687; *Dawson* v. *Collis et al.* 10 C. B. 523.

(*w*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 52.—Applied to County Courts.—Founded upon 1st Rep. C. L. Com'rs, s. 37. *Qu.* Does this section apply to proceedings on writs of *mandamus?* (*Regina* v. *The Saddlers' Co.* Coleridge J. 20 L. & Eq. 152, 22 L. J. Q. B. 456.)

(*x*) Applies to all ordinary pleadings, such as declaration, plea, replication, rejoinder, &c.

(*y*) The question is not whether the pleading was intended to prejudice, &c., but whether in fact it be so framed.

(*z*) The chief consideration is the fair and speedy trial: (*Regina* v. *Saddlers' Co.* Coleridge J. *ubi supra.*) Any pleading so framed as to prejudice, embarrass, or delay either party in the attainment of this end is within the meaning of the Act. The words "prejudice, embarrass, *or* delay" are used disjunctively. The legal import of each word detached from the others has not been decided. Indeed, the idea which attaches to each word must of necessity be much blended with the ideas conveyed by the others. A party delayed may be prejudiced; a party prejudiced may be embarrassed; a party delayed and embarrassed must be prejudiced. The words are of very general signification, and must in all cases be received with reference to the object of pleading. The object of all written pleadings is to enable the parties before trial to arrive at some statement affirmed on one side and denied on the other, that the same may be submitted for decision to the proper tribunal, as the issue between the parties. The reason of the thing requires clearness and singleness of averment as much now as before the C. L. P. Act. A power must exist somewhere of compelling the parties to be clear and distinct in their statements. There must be a remedy against ambiguity whether intended or not. A rambling pleading, mixing up several grounds of action or defence, and composed of different matters of fact and law, must be objectionable: (1st Rep. C. L. Comrs.) The delivery of any such pleading by one party to the other must necessarily "embarrass" him, and perhaps "delay" the trial to the

party may apply to the Court or a Judge (*a*) to strike out or pleadings may be struck out,

"prejudice" of one party or the other. The remedy of the party aggrieved instead of being by special demurrer as formerly, is by application to amend at the costs of the party in fault. In effect the Statute says, "no pleading shall be demurred to specially, and even if it be not open to general demurrer, yet if it be so framed as to prejudice, embarrass, or to impede the trial, it shall be open to amendment or excision by the Judge": (Coleridge J. in *Reg.* v. *The Saddlers' Co. ubi supra.*) The rule is this, No mistake heretofore available only on special demurrer is now available, except where the mistake is one calculated to embarrass the plaintiff: (*Dunmore* v. *Tarleton*, Erle J. 16 L. & Eq. 393.) The desirable object in pleading is now to place on record the simple ground of action defence, &c., in as intelligible a form as possible: (*Ib.* p. 394.) A pleading so framed as unnecessarily to embrace more points than one and compel the opposite party to come prepared for all is a pleading so framed as to prejudice the fair trial of the action: (*Forsyth* v. *Bristowe*, 8 Ex. 347.) Pleadings which before this Act would have been bad for duplicity, argumentativeness uncertainty, or inconsisteney, may be such as to render necessary applications to amend under the enactment here annotated. Reference may be properly made to some such cases—

1. *Duplicity*—see *Messiter* v. *Rose*, 13 C. B. 162, 14 L. & Eq. 422; *Forsyth* v. *Bristowe*, 8 Ex. 347; *Deacon et al.* v. *Stodhart et al.* 5 Bing. N. C. 594; *Webster* v. *Watts*, 11 Q.B. 311; R. & H. Dig. "Pleading," VI.)

2. *Argumentativeness*—*Leaf* v. *Tutton*, 10 M. & W. 359; *Turnley* v. *McGregor*, 6 M. & G. 46; R. & H. Dig. "Pleading" I.)

3. *Uncertainty*—*Flockton et al.* v. *Hall*, 14 Q. B. 380; *Cubbitt et al.* v. *Thompson*, 5 Ex. 811; R. & H. Dig. "Pleading" II.)

4. *Inconsistency*—Inconsistent pleas have been allowed when amounting to a "substantial defence": (*Dueer* v. *Tribuer*, 3 Dowl.P. C. 133; *Wilkinson* v. *Small*, 3 Dowl. P.C. 564); but pleas "vexatiously inconsistent," as *non assumpsit* to a whole declaration and payment as to part, have been disallowed: (*Steill* v. *Sturry*, 3 Dowl. P. C. 133; *Bastard* v. *Smith*, 5 A. & E. 827; see further R. & H. Dig. "Pleading" VII.) Though a pleading in form be technically correct and in substance not open to demurrer, yet if it be an unfair pleading, and of a sort to prevent or impede a just trial of the merits, the statute has given the Court or a Judge power to amend or strike it out: (*Regina* v. *The Saddlers' Co.* Coleridge J. 22 L. J. Q.B. 451.) As to pleadings, false, trickey, or otherwise unfair, reference may be had to the following cases—*Mitford* v. *Finden*, 8 M. & W. 511; *Blewitt* v. *Marsden*, 10 East. 237; *Pierce* v. *Blake*, Salk. 515; *Bell* v. *Alexander*, 6 M. & S. 133; *Young* v. *Gadderer*, 1 Bing, 380; *Smith* v. *Blackwell*, 4 Bing. 513; *Vere* v. *Carden*, 5 Bing.413; *Harman* v. *Teague*, 6 Bing. 197; *Levy* v. *Railton*, 19 L. J. Q. B. 511; *Nutt* v. *Rush*, 4 Ex. 490; *Shadwell* v. *Berthoud*, 5 B. & A. 750; *Ritchley* v. *Proone*, 1 B. & C.286; *Merington* v. *Becket*, 2 B. & C. 81; *Body* v. *Johnson*, 5 B. & A. 751; *Corbett* v. *Powell*, *Ib.*; *Bones* v. *Punter*, 2 B. & A. 777; *Thomas* v. *Vandermoolen*, 2 B. & A. 197; *Smith* v. *Hardy*, 8 Bing. 435; *Waterman* v. *Carden*, 6 M. & G. 752; *Bartley* v. *Godslake*, 2 B. & A. 199; *Miley* v. *Walls*, 1 Dowl.P. C. 648.) Since this Act *non assumpsit* pleaded to an action on a promissory note was in Upper Canada struck out on an application to a Judge in Chambers: (*Ross* v. *Dobson*, Chambers, 19th Sept. 1856, Richards J.) And a pleading though not designedly unfair if in fact frivolous may be struck out under the statute. As to frivolous pleadings reference may be had to the following cases—*Bradbury* v. *Emans*, 5 M. & W. 595; *Knowles* v. *Burward*, 10 A. & E. 19; *Murray* v. *Boucher*, 9 Dowl. P.C.

or amended. amend such pleading, (*b*) and the Court or any Judge shall make such order respecting the same, and also respecting the costs of the application, as such Court or Judge shall see fit. (*c*)

587: *Balmanno* v. *Thompson*, 8 Dowl. P.C. 76; *Horner* v. *Keppel*, 10 E.A. & 17; *Humphreys* v. *Waldegrave*, 8 Dowl. P. C. 768; *Blackburn* v. *Edwards*, 10 A. & E. 21; *Emanuel* v. *Randall*, 8 Dowl. P. C. 238; *Papineau* v. *King*, 2 Dowl. N. S. 226; *Cowper* v. *Jones*, 4 Dowl. P. C. 591; *Tullis* v. *Tullis*, 21 L. J. Q. B. 269. Pleadings not issuable must often prove embarrassing. An issuable plea is one that at once puts the merits of the cause in issue either on the facts or the law: (*Steele* v. *Harmer*, 14 M. & W. 139.) A plea cannot be issuable if clearly bad in substance: (*Lloyd* v. *Blackburn*, 1 Dowl. N. S. 647; *Watkins* v. *Bensuson*, 1 Dowl. N. S. 715; see also *Thompson* v. *Redman*, 2 Dowl. N. S. 1028; *Mackay* v. *Wood*, 9 Dowl. P. C. 278; *Selby* v. *the East Anglian R. Co.* 7 Ex. 53.) A sham plea cannot be issuable: (*Heron* v. *Heron*, 1 W.Bl.376; *Lowfield* v. *Jackson*, 2 Wils. 117; *Cave* v. *Aaron*, 3 Wils. 33; *Brown* v. *Austin*, 4 Dowl.P.C. 161.) As to when pleadings generally are or are not issuable, reference may be had to the following cases:—*Dickson* v. *Boulton*, 5 U.C.R.558; *Blewitt* v. *Gordon*, 1 Dowl. N. S. 815; *Humphreys* v. *Waldgreave*, 6 M. & W. 622; *Myers* v. *Lazarus*, 1 Dowl. N. S. 316; *Willis* v. *Hallett*, 5 Bing. N. C. 465; *Hughes* v. *Pool*, 6 Scott. N. R. 959; *Parratt* v. *Goddard*, 1 Dowl. N. S. 874; *Mackay* v. *Wood*, 9 Dowl. P.C. 278; *Bateson* v. *Lee*, 1 D. & L. 224; *Whitehead* v. *Harrison*, 1 D. & L. 706; *Sewell* v. *Dale*, 8 Dowl. P. C. 309; *Sloane* v. *Packman*, 11 M. & W. 770; *Thompson* v. *Redman*, 2 Dowl. N. S. 1028; *Bury* v. *Goldner*, 1 D. & L.834; *Searle* v. *Bradshaw*, 2 Dowl. P. C.289; *Birch* v. *Leake*, 2 D. & L. 88; *Wilkinson* v. *Page*, 1 D. & L. 913; *Harvey* v. *Watson*, 7 M. & G. 644; *Verbist* v. *Dekeyser*, 3 D. & L. 392; *Huthewaite* v. *Phaire*, 8 Dowl.P.C. 541; *Beauclerk* v. *Hooke*, 20 L. J. Q. B. 485; *Tagg* v. *Simmonds*, 4 D. & L. 582; *Blousefield* v. *Edge*, 1 Ex. 89; *Wettenhall* v. *Graham*, 4 Bing. N. C 714; *Besant* v. *Cross*, 20 L. J. C. P. 173; *Mayhew* v. *Blofield*, 1 Ex. 469; *Cork & Bandon R. Co.* v. *Goode*, 13 C.B. 618; *Birch* v. *Leake*, 2 D. & L. 88; *Chrutchley* v. *London and Birmingham R. Co.*, 2 D. & L. 102; *Laforest* v. *Wall*, 9 Q. B. 599; *Hunter* v. *Wilson*, 19 L. J. Ex. 8; *Linwood* v. *Squire*, 16 L. J. Ex. 237; *Moore* v. *Foster*, 5 C. B. 220; *Schenck* v. *Godts*, 1 N. C. L. Rep. 115; *Dunmore* v. *Tarletan*, 16 L. & Eq. 391; *Roberts* v. *Brett*, 34 L. & Eq. 421; *Wallace* v. *Grover*, 1 U.C. Cham. R. 1; *Eccles* v. *Johnson*, *Ib.* 93; *Sherwood* v. *March*, *Ib.* 176; *Dickson* v. *Boulton*, 5 U. C. R. 558; *Jessup* v. *Fraser*, H.T. 4 Vic. *MS.* R. & H. Dig. Ass. of Dam. 5.

(*a*) *Court or a Judge*—relative powers, see note *m* to s. xxxvii.

(*b*) To hold that a plea is bad because more or less obscure would be unreasonable unless the party pleading it will not amend and clear up the obscurity when it is pointed out to him. (C. L. Com'rs 1st Rept.) If he fail or refuse to do so there is but one alternative—to strike out the pleading. A party whose pleading is defective or vicious will see the propriety of himself applying for an amendment. Even surplusage may vitiate and may if embarrassing be struck out upon application of the adverse party. But it has been held that breaches in a declaration where there were three, one of which was good and two bad, to which latter there was a demurrer, could not be treated as surplusage after demurrer: (*Lush* v. *Russell*, 4 Ex. 637.)

(*c*) As a general rule, when leave to amend is given, costs will be imposed upon the party in fault where there is an application by his opponent to strike out his pleading. This application will, of course, be the one most frequently made.

CII. (*d*) No rule to declare, to declare peremptorily, to reply or plead any pleading whatever, (*e*) shall be allowed, (*f*) but a notice (*g*) requiring the opposite party to declare, reply, rejoin, or otherwise, as the case may be, (*h*) within eight days, (*i*) otherwise Judgment, shall be sufficient; (*j*) and such

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 53.

Notice instead of Rule to declare, &c.

(*d*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 53.—Applied to County Courts.—Substantially a re-enactment of rule 4 of E. T. 2 Geo. IV. (Cam. Rules 12) and old rule 10 of E. T. 5 Vic. (*Ib.* 22.)

(*e*) Will apply to rejoinder, &c., as well as pleadings here enumerated. The words "and subsequent pleadings" are used in the Eng. C. L. P. Act. Will also, it is apprehended, apply to pleadings on a writ of revivor (s. ccv.)

(*f*) *Shall be allowed.* These words appear to be imperative not directory. A rule to declare, &c., will be irregular if not void. The Act Eng. C. L. P. instead of "shall be allowed" uses the words "shall not be necessary."

(*g*) It was a demand under the old rules, 4 E. T. 11 Geo. IV. (Cam. R. 9), 10 E. T. 5 Vic. (*Ib.* 22). Between a demand of plea and notice there is also a distinction, as the latter is by this Act expressly substituted for the former (s. cxi.)

(*h*) There is no time limited within which these notices must be given. They are not so much compulsory as optional; but in order to force either party to proceed with his action or defence, as the case may be, the notice is necessary. For instance, a notice to declare given by defendant to plaintiff "otherwise judgment," entitles defendant if his notice be unheeded to sign judgment of *non pros.* But plaintiff has, it would seem, the whole of the term next following appearance within which to declare: (*Forster* v. *Pryme*, 9 Dowl. P. C. 749.) And if after that time defendant omit to serve a notice to declare, plaintiff will have twelve months within which to declare: (*Chaplin* v. *Showler*, 18 L. J. Ex. 34.) Even if notice to declare has been given it is still in the power of plaintiff to apply for further time to the Court or a Judge: (*Beazley* v. *Bailey*, 4 D. & L. 271.) If the time granted be allowed to expire without declaring defendant may sign judgment without a fresh notice: (*Teulon* v. *Gant*, 5 Dowl. P. C. 153.) In any event if plaintiff do not declare within one year after the writ is returnable he will be deemed out of Court (s. cvii.) So if no notice to plead be given by plaintiff to defendant, or notice to reply by defendant to plaintiff, either party will for that purpose have whatever time he thinks proper. After the expiration of four terms from the last proceeding by plaintiff, it has been held that no future proceeding can be taken without a term's notice: (see *Lord* v. *Hilliard*, 9 B. & C. 621; *Lumley* v. *Thompson*, 3 M. & W. 632; also see R. & H. Dig. "Term's Notice.") It is ordered by the English New Rules that in such cases a calendar month's notice shall be given (R. G. H. T. 1853, No. 176); but this rule 176 has not been adopted by our Courts. One of several defendants, who alone appeared, has been held not to be entitled to sign judgment of *non pros.* though he demanded a declaration: (see *Hamlet* v. *Breedon*, 4 M. & G. 909; *Shore et ux.* v. *Bradley et al.* T.T. 4 & 5 Vic. *M.S.* R. & H. Dig. "*Judgment of Non Pros*" I.)

(*i*) "*Within four days*," in Eng. C. L. P. Act. As to computation of time see note *k*, *infra*.

(*j*) *Shall be sufficient*, "unless otherwise ordered by the Court or a Judge," in old rule 10 E.T Vic. The omission of these words in the section under consideration cannot be of much importance as the Courts have unlimited power over process and pleadings. Further time to declare, plead (Chit. Arch. 8 Edn. 216), reply, &c. (*Ib.* 276), may still as much as ever be obtained upon proper application to the Court or a Judge.

notice may be delivered separately or be indorsed on any pleading which the other party is required to answer. (*k*)

Con stat. for ue. ch 22 § 77.

CIII. (*l*) Every declaration or other pleading (*m*) shall be (*App. Co. C.*)

But it is ordered "that no side bar rule for time to declare shall be granted" (N. R. No. 7.) The party desirous of further time to plead, reply, rejoin, &c. must obtain a rule of Court or Judge's order for the purpose: (*Small* v. *Mackenzie*, Dra. Rep. 353.) As to further time to plead, see note *q* to s. cxii. It is not usual when granting further time to reply to put plaintiff under terms to reply issuably: (*Crutchley* v. *the London and B. R. Co.*, 2 D. & L. 102.)

(*k*) The notice, if indorsed, may be in the following form:—"The defendant is to plead, reply, &c., hereto in eight days, otherwise judgment:" (Chit. F. 7 Edn. 93, and s. lxi. of this Act.) If not indorsed the notice may be in the same words, but intitled in the Court and cause and both dated and signed by the attorney serving the same: (*Ib.* 94.) A notice thus, "to plead in —— days has been held to be a notice to plead according to the practice of the Court and within the time limited by the Rules of the Court: (*Hifferman* v. *Langelle*, 2 B. & P. 363; see also *Collins* v. *Rose*, 5 M. & W. 194; *Ramm* v. *Duncomb*, 2 D. & L. 88.) It is doubtful whether such a notice would not now be set aside as irregular or amended at the costs of the party who served it. Where the time limited in the notice to plead was less than that allowed by the practice of the Court, judgment signed by plaintiff for want of a plea, though signed after the time limited by the Court, was set aside: (*Braty* v. *Baldock*, Barnes, 302.) But where the time given was greater than that allowed by the Court, defendant was held entitled to the whole of the time so given: (*Solomonson* v. *Parker*, 2 Dowl. P. C. 405.) These cases it is apprehended will apply to replication, &c., and other pleadings subsequent to plea: (*Winterbottem* v. *Lees*, 2 Ex. 325.) No pleading can be filed during vacation. (N. R. 9.) A plea dated during the vacation would appear to be a nullity: (*Mills* v. *Brown*, 9 Dowl. P. C. 151.) A notice to plead within a time expiring during vacation, if not a nullity, would at least entitle defendant to the same number of days for the purpose of pleading after 21st August, as if the declaration of preceding pleading had been delivered or filed on that day: (N. R. 9.) If the time to plead has expired *before* 1st July, the plaintiff may sign judgment on that or any subsequent day: (*Morris* v. *Hancock*, 1 Dowl. N. S. 320.) But if the time expire only *on* 1st July, or any subsequent day, it would appear that no judgment can be signed until after 21st August: (*Savery* v. *Lister*, 6 D. & L. 257; *Severin* v. *Leicester*, 12 Q. B. 949; *Morris* v. *Hancock*, *ubi supra*.) Computation of time. (See *Liffin* v. *Pitcher*, 1 Dowl. N. S. 766; *Reg* v. *Justices of Shropshire*, 8 A. & E. 173; *Dunn* v. *Hodson*, 1 D. & L. 204; see also N. R. 166.

(*l*) Taken from Eng. St. 15 & 16 Vic. cap. 76, s. 54.—Applied to County Courts.—Substantially a re-enactment of old Rule 29 of E. T. 5 Vic., which was copied from Eng. R. G. 1, of H. T. 4 Wm. IV. (Jervis N. R. 115.) The origin of the latter rule is Eng. Rule 15 of M. T. 8 Wm. IV. (Jervis N. R. 98.)

(*m*) "*Or other pleading*"—clearly embraces replication, rejoinder, &c., but apparently not a *similiter* added as of course by plaintiff for defendant where the pleading of the latter concludes to the country: (See *Shackel* v. *Ranger*, 3 M. & W. 409; *Edden* v. *Ward*, 8 Dowl. P. C. 725.) The *similiter* when added by plaintiff for himself has been held to be a pleading, and ought to be intitled: (see *Meddleton* v. *Woods*, 8 Dowl. P. C. 170. *Contra*: *Blue* v. *Toronto Gas Company*, 1 U. C. Cham. Rep. 7.) And yet it is

entitled, of the proper Court, (*n*) and of the day of the month and year when the same was filed, (*o*) and shall bear no other time or date, (*p*) and every declaration or other pleading shall also be entered on the record made up for trial, and on the Judgment Roll, under the date of the day of the month and year when the same respectively took place, and without reference to any other time or date, (*q*) unless otherwise specially ordered by the Court or a Judge. (*r*)

Eng. C. L. P. A. 1852, s. 54.

Entering, dating, and recording pleadings.

CIV. (*s*) It shall not be necessary to make profert of any deed or other document mentioned or relied on in any plead-

(App. Co. C.) con stat. for U. C. ch 22 § 78

Eng. C. L. P. A. 1852, s. 55.

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apprehended that the old practice as to *similiter* is obsolete. The *similiter* under this Act is in effect a traverse and so a pleading in the cause: see s. cxxviii. It is presumed that this enactment will also extend to pleadings and other proceedings upon a writ of revivor: (see s. ccv.)

(*n*) The court must be stated in the body of the pleading—intitling on the back of it is not sufficient: (*Ripling* v. *Wattis*, 4 Dowl. P. C. 290.)

(*o*) Both the day of the month *and* year must be given. It would be irregular to omit the words, "in the year of our Lord:" (*Holland et al* v. *Tealdi*, 8 Dowl. P. C. 320; *Lewis* v. *Duthie*, *MS.*, Chambers, 1st August, 1839, Parke, B., Cam. Rules 35, note *v.*)

(*p*) A pleading dated on a day other than that on which it is filed, is an irregularity only—not a nullity: (see *Hodson* v. *Pennell*, 4 M. & W. 373.) The copy of a pleading wrongly dated is certainly only an irregularity: (*Commercial Bank* v. *Boulton*, 1 U. C. Cham. Rep. 15.) And an application may be made to amend: (see *Ikin* v. *Plevin et al*, 5 Dowl. P. C. 594; *Whipple* v. *Manley*, 5 Dowl. P. C. 100; *Hough* v. *Bond*, 1 M. & W. 314.) The irregularity, if not promptly moved against, may be waived: (*Newnham* v. *Hanny*, *et al*, 5 Dowl. P. C. 259.) A demurrer to a pleading filed on the ground that the pleading was wrongly intitled has been set aside with costs: (*Neal* v. *Richardson*, 2 Dowl. P. C. 89.)

(*q*) The omission to state the date of a pleading in the issue or record is clearly such an irregularity as may be moved against. Where, in the issue, the dates were omitted, but correctly given in the record, held a variance of which the defendant was entitled to avail himself even after trial: (*Worthington* v. *Wigley*, 5 Dowl. 209; see also *Ball* v. *Hamlet*, 3 Dowl. P. C. 188.) And where in a writ of trial, the date was incorrectly given, the Court upon application after verdict, set aside the verdict and subsequent proceedings: (*Wight* v. *Perrers*, 5 Dowl. P. C. 463; see *White* v. *Farrer*, 2 M. & W. 288.) But any such irregularity may be waived if defendant appear at the trial and enter upon his defence: (*Percival* v. *Connell*, 6 Dowl. P. C. 68; see also *Whipple* v. *Manley*, 1 M. & W. 432; *Farwig* v. *Cockerton*, 3 M. & W. 167.) It will make no difference though defendant's counsel protest against the trial so long as he allow it to proceed: (*Blissett* v. *Tenant*, 6 Dowl. P. C. 436.) Defendant should apply to have the record amended at the expense of plaintiff: (*Whipple* v. *Manley*, 5 Dowl. P. C. 100.)

(*r*) *Court or a Judge*—relative powers. See note *m* to s. xxxvii. of this Act.

(*s*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 55.—Applied to County Courts.—Founded on 1st Rep. C. L. Com. (s. 41.) "To prevent needless length," the Commissioners "proposed to do away with profert and oyer."

Profert, oyer, &c., unnecessary.

ing; (*t*) and, if profert shall be made, it shall not entitle the opposite party to crave oyer of or set out upon oyer, such deed or other document. (*u*)

This section carries their proposal into effect. When pleadings were oral, a party founding his claim upon a deed was bound to make profert, that is, to offer to produce it to the Court. Profert when made entitled defendant to demand oyer, that is, to have the deed read. Thereupon the deed was read aloud by an officer of the Court. When written were substituted for oral pleadings the same forms were observed, with this exception, the defendant who demanded oyer was entitled to a *verbatim* copy of the deed mentioned in plaintiff's declaration, which he (defendant) usually set out at length in his plea, and which for the purposes of pleading was taken to be part of plaintiff's declaration. Such a proceeding caused endless prolixity and in many cases useless expense; (see Steph. Pl. 66 *et seq.*) Hence the change introduced by this Act. It may be mentioned that the law as to profert extended only to written instruments under seal.

(*t*) In some cases the omission of profert without a corresponding substitute may have the effect of placing a defendant in difficulty. One such case has actually arisen. An executor suing as such is not bound to produce probate until the trial of the cause, though formerly bound to make profert of it. As the law now stands, it might be held that he is neither bound to produce probate nor to set it out upon oyer. The consequence would be this. Defendant is sued by a person who assumes to act as executor for a demand which he is not disposed to dispute. If he pay the demand to plaintiff, he may be paying money to a person who is really not executor. If he do not pay he is put to the expense of a suit. The Court in one such case considering "the peculiarity of the case and the anomalous position in which defendant was placed by an oversight of the Legislature" in the exercise of a common law jurisdiction to prevent the abuse of its process upon application of defendant, stayed proceedings until probate should be taken out and reasonable notice thereof given to defendant: (*Webb* v. *Adkins*, 14 C. B. 401.) The oversight to which allusion is made in this case is the omission to enact that whenever any party relies upon a deed in his pleading the opposite party may apply for and demand an inspection of it. The C. L. Comrs. recommended that this should be done. And though the idea has not been taken up in the first Eng. C. L. P. Act, it was in the Irish C. L. P. Act 16 & 17 Vic. cap. 113 s. 64. The application in question if allowable under any circumstances in Upper Canada can only be either under Prov. St. 16 Vic. cap. 19, s. 8, or under s. clxxv. of this Act, or failing both of these under the common law jurisdiction of the Courts. Failing this latter the application cannot be made at all. For a review of the law as to the discovery and inspection of documents, see notes to s. clxxv.

(*u*) Defendant may notwithstanding, if necessary to support his defence, set out the agreement sued upon: (see *Wood* v. *the Coopers' Min. Co.* 14 C.B. 423; also *Smart* v. *Hyde*, 1 Dowl.N.S. 60; *Nash* v. *Breeze*, 2 Dowl.N.S. 1015; *Sieveking* v. *Dutton*, 3 C. B. 331; *Heath* v. *Durant*, 1 D. & L. 571; *Sharland* v. *Leifchild*, 4 C. B. 521; *Weston* v. *Woodbridge*, 18 L. J. Q. B. 158; *Friar* v. *Gray et al.* 15 Q. B. 891; see also following section cv.) But the agreement so set out will be part of defendant's plea and not of plaintiff's declaration. Defendant therefore cannot, relying upon his plea, demur to plaintiff's declaration: (see *Sims* v. *Edmands*, 15 C. B. 240.)

CV. (*v*) A party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or any part thereof which may be material, (*w*) and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out. (*x*)

(App. Co. C.) Eng. C. L. P. A. 1852, s. 56. Setting out in answer documents referred to in pleading.

CVI. (*y*) It shall be lawful for the Plaintiff or Defendant in any action to aver performance of conditions precedent generally, (*z*) and the opposite party shall not deny such per-

(App. Co. C.) Eng. C. L. P. A., 1852, s. 57. As to averment of performance

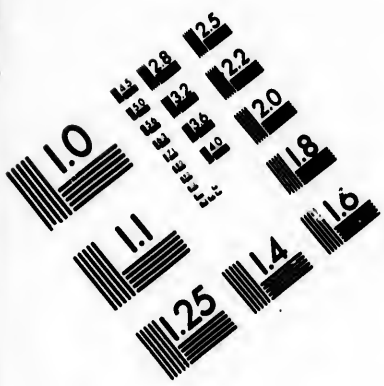
(*v*) Taken from Eng. St. 15 & 16 Vic. cap. 76, s. 56.—Applied to County Courts.

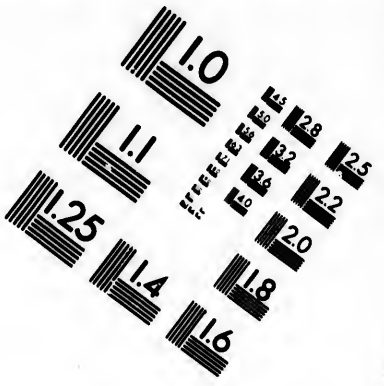
(*w*) Even before this Act the party who set up a document as a ground of action was not bound to set out in his pleading more than was material for his case; but if the document were an instrument under seal it was necessary for him to make profert which entitled his adversary to demand oyer. In this way the whole of the instrument was at length set out upon the Record. As both profert and oyer are abolished, a party adverse to a pleading which mentions and relies upon any document must, in order to obtain a copy of it, make application for leave to inspect. If he succeed, he will then be in a position to set out "the whole or any part thereof that may be material" for his defence or action as the case may be. This a party to a suit has always been entitled to do, and only prevented from doing when unable to obtain a copy of the document in question: (see note *u* to preceding section civ.) There is nothing at present to hinder either party setting out a whole document in his pleading when it is expedient to do so in order to a correct understanding of its intent and meaning: (See *Morrison* v. *Trenchard*, 4 M. & G. 709.)

(*x*) Under the old system of pleading, the party pleading set out the document on oyer, making it a part of the *previous* pleading, but by s. civ. of this Act, profert and oyer are abolished, and by s. cv. here annotated the document when set out "shall be deemed and taken to be part of the pleading in which it is set out." It is a rule that a defendant cannot demur to a declaration upon the ground that *his* plea shows something which makes the declaration untenable. Wherefore since the C. L. P. Act, a plaintiff declared for money payable to him under an award, and defendant pleaded setting out the award *in hac verba*, and concluded "that the said declaration is not sufficient in law," the plea was held bad: (*Sims* v. *Edmands*, 15 C. B. 240; 26 L. & Eq. 379.) It would also appear where under this Act a party sets out any part of a document pleaded by his opponent that the latter is not called upon to traverse or make any answer to it: (*Reg* v. *Saddlers Co.*, 22 L. J. Q. B. 451; 20 L. & Eq. 152.)

(*y*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 57.—Applied to County Courts.—Founded upon 1st Rep. C. L. Com. (s. 42). The object of this enactment and indeed of all these enactments relative to pleading is at once to "curtail unnecessary prolixity" and to "cause actions to be defended on their merits" (C. L. Comrs.) The effect of the enactment under consideration seems to be that a defendant, instead of denying every allegation of performance contained in the declaration, will be confined to the denial of the performance of some condition "which he really believes has not been performed" (*Ib.*)

(*z*) This is a return to the ancient system of pleading: (see *Thorpe* v. *Thorpe*, 1 Ld. Rayd. 669.) General averments of the performance of conditions precedent have before this Act been held good on general demurrer,





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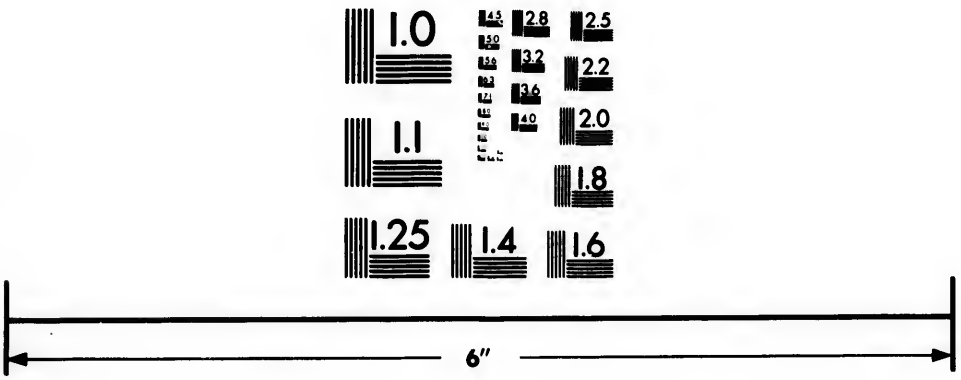

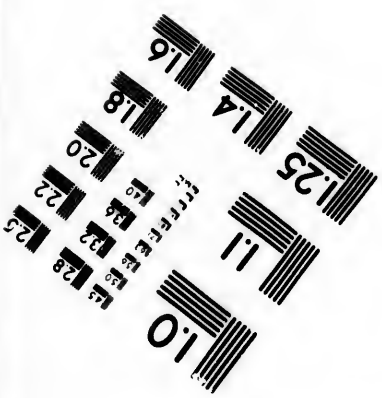

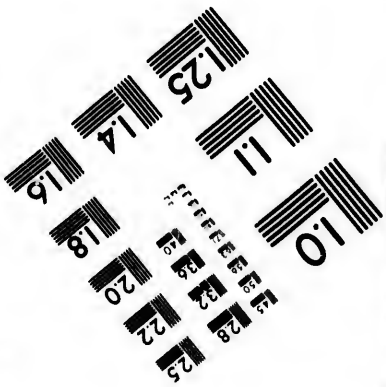

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or non-performance of a condition precedent.

formance generally, but shall specify in his pleading the condition or conditions precedent the performance of which he intends to contest. (*a*)

(*App. Ch. C.*) And with regard to the time and manner of declaring; (*b*)

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and only objectionable upon special demurrer: (see *Varley* v. *Manton*, Tindal C. J. 9 Bing. 363; *Proctor* v. *Sargent*, 2 M. & G. 20; *De Medina* v. *Norman*, 9 M. & W. 820; see also *Roakes* v. *Manser*, 1 C.B. 531; *Kemble* v. *Mills*, 1 M. & G. 757; *Court* v. *Ambergate R. Co.* 20 L. J. N. S. 465; *Cines* v. *Smith*, 15 M. & W. 189; *Kepp* v. *Wiggett*, 6 C. B. 280; *Manby* v. *Cremonini*, 6 Ex. 808.) Special demurrers having been abolished, such general averments would consequently stand good and unassailable. The Commissioners, though sensible of this result, thought that it had better be "substantially enacted." The form of a general averment of conditions precedent given in the schedule had better been observed. It is on a charter party as follows—"that the plaintiff *did all things necessary on his part to entitle him to have* the agreed cargo loaded on board the said schooner at Hamilton," &c.: (Sch. B. No. 18.) In a declaration for the non-delivery of goods purchased, plaintiff after admitting the delivery of part, averred "the performance of all conditions precedent on the part of the plaintiff to be performed, and that all things had been done and happened to *entitle plaintiff to have* the residue delivered to him," &c.: Held sufficient without an averment of readiness and willingness to pay: (*Bentley* v. *Dawes*, 9 Ex. 666; 25 L. & Eq. 540.) See further *Rust* v. *Nottidge*, 1 El. & B. 99; *Bamberger et al.* v. *The Commercial Credit Mutual Assurance Co.* 15 C. B. 676; *Wheeler* v. *Bavidge*, 9 Ex. 668; *Phelps* v. *Prothero*, 16 C. B. 370; *Gether* v. *Capper*, 15 C. B. 39.)

(*a*) The principle in pleading that to a general averment there should be a particular issue has long been acknowledged. The reason of it being that the question to be tried may be brought to some degree of certainty, and notice given of what is to be agitated at the trial: (*Sayre et al.* v. *Minns Mansfield*, Cowp. 578.) This principle has in a very recent and important case been fully canvassed and confirmed: (*Gray et al.* v. *Friar*, in error, 15 Q. B. 901.)

(*b*) The first step in pleading is the declaration, in which plaintiff sets forth the cause of his complaint particularly and thereby explains his writ: (Bac. Abr. "Pleas and Pleading" A.) Where plaintiff has several causes of complaint he is allowed to pursue them cumulatively in the same suit, provided they be against the same parties and in the same rights: (s. lxxv. of this Act.) Such different complaints constitute different parts or sections of the declaration, and are known in pleading by the description of counts: (Steph. Pl. 267.) It is a singular fact that this Act is silent as to the allowance or disallowance of several counts, though provision is made for several pleas and other subsequent pleadings: (s. cxxx.) The law therefore in this respect in Upper Canada remains much the same as before the Act. The use of several counts in the same declaration has always been permitted under certain restrictions: (*Onslow* v. *Horne*, 3 Wils. 185; *Smith* v. *Milles*, 1 T. R. 475.) A restriction in England was to the effect that they should not be allowed "unless a distinct subject matter of complaint was intended to be established in respect of each:" (Eng. Rule 5 H. T. 4 Wm. IV.; Jerv. N. R. 116.) A restriction in Upper Canada almost in similar words was held from the peculiar phraseology of the rule to have reference to costs only: (Rule 32, E.T. 5 Vic. Cam. R. 87; and see *Johnson* v. *Hunter*, 1 U. C. R. 280.) Notwithstanding, the power of the Courts to strike out such counts of a declaration

Be it enacted as follows:

as are double and vexatious has never been doubted. For example, where a declaration contained ninety-eight counts upon as many notes for £1 each the Court ordered all to be struck out but one: (*Cunnack* v. *Gundry*, 1 Chit. R. 709; see further *Nelson* v. *Griffiths*, 2 Bing. 412; *Lane* v. *Smith*, 3 Smith 113; *Meeke* v. *Oxlade*, 1 N. R. 289; *Gabell* v. *Shaw*, 1 D. & R. 171; *Newby* v. *Mason*, *Ib.* 508.) It is now provided by the new rules of pleading which will come into force in Easter Term next, that upon any application to strike out counts the Court or a Judge may allow "such counts upon the same cause of action as may appear to such Court or Judge to be proper for determining the real question between the parties on its merits:" (N. R. Pl. 2.) The power to strike out some of several counts founded on the same cause of action is, it will be noticed by this rule, taken for granted. The Courts have a general jurisdiction in such matters, which has never been taken away or altered by the rules, though in the exercise of it the Courts have always been governed by such rules: (*James* v. *Bourne*, Tindal C. J. 4 Bing. N. C. 423.) It has been held in many cases that if there be a distinct contract in respect of the same subject matter, a count on each contract may be allowed: (Tindal C. J. *Ib.*) A count on a promise to carry goods from Dublin to London, and a count on a promise to carry the same goods from the wharf at London to plaintiff's place of business have therefore been permitted in the same declaration: (*James* v. *Bourne et al.*, *ubi supra;* see also *Vaughan* v. *Glenn*, 5 M. & W. 577; *Rex* v. *Archbishop of York*, 1 A. & E. 394; *Dueer* v. *Triebuer*, 8 Dowl. P. C. 133; *Wilkinson* v. *Small*, *Ib.* 564; *Bleadon* v. *Rupallo*, 9 Dowl. P. C., 857; *Cahoon* v. *Burford*, 2 D. & L. 234; *Lucas* v. *Beale*, 2 L. M. & P. 47; *Hernod Wilkin*, 11 Q. B. 1.) The common counts for the purposes of pleading and costs have been held to be separate counts: (see *Jourdain* v. *Johnson*, 4 Dowl. P. C. 534; *Fergusson* v. *Mitchell*, 4 Dowl. P.C. 513; *Spyer* v. *Thelwell*, 4 Dowl. P.C. 509; *Ring* v. *Roxbrough*, 2 C. & J. 418.) Where a declaration contained eighteen counts, nine for malicious prosecution and nine for slander, to which defendant pleaded the general issue, and at the trial the jury found for plaintiff on the tenth, eleventh, and twelfth counts, and for defendants on the residue of the declaration: Held that a distinct issue was raised on each count by the general issue pleaded without restriction, and therefore that defendant was equally entitled to a deduction from plaintiff's costs in respect of counts found for him, as if issue had been joined on these counts by pleading separately to each: (*Cox* v. *Thomason*, 2 C. & J. 498.) From what has been already said, it may be laid down that if counts are on the face of them founded on the same subject matter of complaint, the Court or a Judge may upon application strike them out: (*Hernod* v. *Wilkin et al*, 11 Q.B.1; *Ramsden* v. *Gray et al*, 7 C.B. 961.) In pleading several counts by the insertion of the word "other," counts are made to represent different subject matters: (*Hart* v. *Longfellow*, 7 Mod. 148.) Thus, a declaration upon an agreement contained two counts. The first averred that plaintiff agreed to let and defendant to take certain premises specified, subject to an undertaking that defendant should keep the same in repair. The second count stated in consideration that the defendant had become and was tenant of a certain *other* messuage, he promised, &c. At the trial of this case one contract of demise only applying to one house only was proved: Held that plaintiff was not entitled to recover damages in respect of the breaches alleged in *both* counts: (*Holford* v. *Dunnett*, 7 M. & W. 348.) From this it appears that where there are several counts apparently founded upon different subject matters of complaint, but in fact the same, though

con. stat. for U.C. ch 22 § 81.

Eng. C. L. P. A. 1852, s. 58. Plaintiff must declare within a year.

CVII. (*c*) A plaintiff shall be deemed out of Court unless he declare (*d*) within one year (*e*) after the Writ of Summons is returnable. (*f*)

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allowed to stand together, plaintiff runs the risk of failing upon all except one at the trial. This strengthens the general rule that several counts giving different versions of the *same* subject matter will not be allowed: (See *Cholmondeley* v. *Payne*, 3 Bing. N. C. 708; *Jenkins* v. *Treloar*, 4 Dowl. P.C. 690; *Lawrence* v. *Stevens*, 3 Dowl. P. C. 778; *Thornton* v. *Whitehead*, 4 Dowl. P. C. 747; *Weeton* v. *Woodcock*, 5 M. & W. 143; *Roy* v. *Bristow*, 5 Dowl. P. C. 452; *Temperley* v. *Brown*, 1 Dowl. N. S. 310; *Mathewson* v. *Ray*, 16 M. & W. 329: *Grissel* v. *James*, 4 C. B. 768; *Fagan* v. *Harrison*, 4 C. B. 909; *Boozey* v. *Tolkien*, 5 C. B. 476; *Smith* v. *Thompson*, 5 C. B. 486; *Hoare* v. *Lee*, 5 C. B. 754; *Arden* v. *Pullen*, 1 Dowl. N. S. 612; *Gilbert* v. *Hales*, 2 D. & L. 227: *Ramsden* v. *Gray*, 7 C. B. 961; *Bulmer* v. *Bousefield*, 9 Q. B. 986; *Simpson* v. *Rand*, 1 Ex. 688; The rule since the C. L. P. Act, will be of wide application whenever several counts, if allowed to stand, would be likely to "prejudice, embarrass or delay the fair trial of the action:" (see s. ci.) The application to strike out counts ought to be made to a judge in Chambers, in the first instance, and if a doubt arise the parties may apply to the Court: (*Ward* v. *Graystock*, Parke, B., 4 Dowl. P. C. 717.) The summons or rule ought to be drawn up on reading the declaration or an affidavit of the identity of the counts: (*Roy* v. *Bristow*, 5 Dowl. P. C. 452.)

(*c*) Taken from Eng. St. 15 & 16 Vic. cap. 76, s. 58.—Applied to County Courts.—A re-enactment of our Rule 19 H. T., 13 Vic., which was copied from Eng. Rule 35 H. T., 2 Wm. IV.: (Jervis, N. R. 68.) The English rule has been held not to apply to a case where the plaintiff was prevented from declaring by an order obtained by defendant to stay proceedings until security for costs: (*Ross* v. *Green*, 29 L. & Eq. 491.) It was also held that where plaintiff's proceedings were stayed by rule which expired on a certain day, that plaintiff was bound to declare within a year from the expiration of that rule: (*Unite* v. *Humphrey et al*, 3 Dowl. P. C. 532; see also *Horne* v. *Tooke*, 2 Dowl. P. C. 776.) These rules were based upon an acknowledged rule of practice that a plaintiff must declare within twelve months after the return of first process: (*Worley* v. *Lee*, 2 T. R. 112; see also *Penny* v. *Harvey*, 3 T. R. 123; *Cooper* v. *Nias*, 3 B. & A. 271.)

(*d*) Plaintiff to declare, within the meaning of this enactment, must serve as well as file his declaration within the year: (*Eadon* v. *Roberts*, 24 L. & Eq. 413; see further *Wallace* v. *Fraser*, Chambers, Sept. 15, 1856, Burns, J., 2 U. C. L. J. 184.) If served after the expiration of a year the declaration may be set aside upon application of defendant: (see *Barnes* v. *Jackson et al*, 1 Bing. N. C. 545.)

(*e*) *i. e.* Within twelve calendar months: (see *Bishop of Peterborough* v. *Caterby*, Cro. Jac. 166.) "Within one year" and "within four terms," are not synonymous expressions: (*Chaplin* v. *Showler*, 6 D. & L. 227.) The days between 1st July and 21st August,—the long vacation—will be calculated as part of the year, (Chit. Arch. 8 Edn. 185.) It has been held where a cause was removed from an inferior court, that plaintiff could ... be considered out of Court until a ... after the return of the writ by ...ich the suit was removed: (*Narrish* v. *Richards*, 5 N. & M. 268; *Pierce* v. *Street*, 8 B. & Ad. 397.)

(*f*) The summons is returnable immediately after service; wherefore it would seem that the year should be reckoned from the date of service: (see *Barnes* v. *Jackson*, 3 Dowl. P. C. 404; *Hodgson* v. *Mee*, 3 B. & A. 765.)

CVIII. (*g*) Every declaration shall commence as follows, or to the like effect: (*h*) "(*Venue,*) (*i*) A. B. by E. F. "his Attorney *or in person,* (*j*) (*as the case may be*) Commence-

Eng. C. L. P. A. 1852, s. 59. (App. Co. C.)

It is not to be understood from this enactment that plaintiff cannot be *compelled* to declare before the expiration of a year. Plaintiff has of right until the expiration of the term next following the date of appearance within which to declare. If within that time he neglect to do so, defendant can by notice require him to declare within eight days, otherwise judgment of *non pros*: (13 Car. 2 St. II., cap. 2, s. 3, and s. cii. of this Act.) But if the appearance be entered in term, plaintiff may have the whole of the term next after the term in which appearances is entered: (*Foster* v. *Pryme*, 8 M. & W. 664.)

(*g*) Taken from Eng. Stat. 15 & 16 Vic., cap. 76, s. 59.—Applied to County Courts. The commencement of the form of a declaration here given is much the same as that prescribed by Rule 13 H. T., 13 Vic., which was taken from Eng. R. G. 15, M. T., 3 Wm. IV.

(*h*) It should be remembered that the declaration must be intitled of the proper Court and of the true day of the month and year of pleading the same: (see s. ciii.) And if it be intitled in a particular Court, the action cannot afterwards be transferred to a Court of co-ordinate jurisdiction, unless the Crown be concerned: (*Attorney General* v. *Hallett*, 15 M. & W. 97.)

(*i*) For the law as to venue see note *k* to s. vii.; see also *Peacock* v. *Bell et al*, 1 Wms. Saunders 73. As to changing venue see note *l* to s. viii. of this work. If several causes of action, in themselves local, but which arose in different counties, are joined together, the venue may be laid in either of the counties: (see s. lxxv.) No venue need be stated in a declaration except the one alleged in the margin: (see *Baydell et al* v. *Harkness*, 4 D. & L. 178; also N. R. Pl. 4.) But *local* description, whenever requisite, must still be given in the body of the declaration.

(*j*) If the declaration omit to show whether plaintiff sue in person or by attorney, it will be irregular and may be set aside: (*White* v. *Feltham*, 3 C.B. 68,) or amended under s. ccxci. of this Act. The application to set it aside should be made to a judge in Chambers: (see *White* v. *Pelham*, *ubi supra.*) Such an omission before this Act was however held to be no ground of special demurrer: (*Murphy* v. *Burnham*, 2 U. C. R. 261.) Where the plaintiff in the commencement of his declaration, declares without stating that he does so by attorney, the Court may consider that he is suing in person: (*Ib.*) If the signature of an attorney be appended to the declaration that shows that plaintiff sues by attorney, but is not a repugnance of one part of the declaration to another: (*Ib.*) If the attorney's name be stated in the commencement of the declaration it is not necessary that it should be also subscribed: (*Crooks* v. *Davis et al*, 5 O. S. 141.) But if the declaration be drawn up in a slovenly manner, the Court will direct an amendment: (*Murphy* v. *Burnham*, *ubi supra.*) It seems if a declaration be ordered to be amended in the name of the attorney, that is sufficient to amend the declaration filed without filing an amended copy: (*Hart et al* v. *Boyle*, 6 O. S. 168.) All persons excepting married women, infants and idiots, can sue and declare by attorney: (Tidd Pr. 9 Edn. 92–93.) Married women must sue with their husbands; infants by *prochein amy*, (note *k*, infra;) and idiots in person. No attorney can be changed without the order of a judge: (N.R.4.) The order may be granted without an affidavit: (*In re Glasse* v. *Glasse*, Chambers, 2 U. C. L. J. 213.) In case of the attorney dying, no order is necessary: (*Ryland* v. *Noakes*, 1 Taunt. 342.) But notice of the appointment of a new atttorney should be given to the opposite party before

ment of declaration. "(*k*) sues (*l*) C. D., (*m*) who has been summoned (*n*) (*or* arrested) (*o*) by virtue of a writ issued on the day of A. D., 18 , (*p*) for (*here state cause of action*)": and shall

Conclusion. conclude as follows or to the like effect, "and the Plaintiff claims £ , (*q*) (*or if the action is brought to recover specific goods,*) (*r*) the Plaintiff claims a return of the said goods or their value, and £ for their detention."

Con Stat. for U.S. ch 22. § 86 -

(*App. Co. C.*) CIX. (*s*) In all cases in which after a plea in abatement of

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any proceedings taken by such new attorney. (*Ib.*)

(*k*) An infant can only sue by *prochein amy*, (St. Westmin. II. cap. 15.) An authority to sue from the infant to the *prochein amy* is unnecessary: (*Morgan* v. *Thorne*, 9 Dowl. P. C. 228; see also *Nunn* v. *Curtis*, 4 Dowl. P. C. 729; *Leech* v. *Clabburn*, 2 L. M. & P. 614.) The latter is an officer appointed by the Court: (Fitz. *Natura Brevium*, p. 26.) The distinction between a guardian proper and *prochein amy*, is pointed out in *Simpson* v. *Jackson*, Cro. Jac. 640. The declaration in any action by an infant may be as follows: "*Venue.*—A. B. by E. F. who is admitted by the Court here to prosecute for the said A. B., who is an infant within the age of twenty-one years, as the next friend of the said A. B., sues C.D., who has been summoned, &c.:" (Chit. Pl. 2 Edn. 16.) The form directed by Rule 13, H. T., 13 Vic., provided for the case of an infant plaintiff.

(*l*) "Complains of C. D," were the words used in the Rule H. T. 13 Vic. and Eng. Rule G. 15, M. T. 3 Wm.IV.

(*m*) Misnomer is no longer a ground for a plea in abatement: (St. U. C. 7 Wm. IV. cap. 3, s. 8,—taken from Eng. St. 3 & 4 Wm.IV.cap. 42, s. 11.) If either plaintiff or defendant be misnamed, defendant's course is to apply to amend the declaration at plaintiff's costs: (*Lindsay* v. *Wells*, 3 Bing. N.C. 77; *Rush* v. *Kennedy*, 7 Dowl. P C. 199; *Murphy* v. *Bunt et al*, 2 U. C. R. 284.) Application ought to be made within the time allowed for pleading: (*Kitchen* v. *Brooks*, 5 M. & W. 522.) Parties may sue or be sued in a representative capacity as executors, &c.: (see cases collected in 1 Dowl. P. C. 98.) As to the proper mode of declaring either when defendant sued by a wrong name, appears by that name or otherwise by his right name, see note *a* to s. lxiv. If the name mistaken be *idem sonans* with the true name there can be no objection: (*Webb* v. *Lawrence*, 1 C. & M. 806.)

(*n*) *i. e.* Pursuant to and under s. xvi.

(*o*) *i. e.* Under s. xxii. To describe defendant as summoned when he was in reality arrested, is irregular: (*Tory* v. *Stevens*, 6 Dowl. P. C. 275.)

(*p*) Every writ of summons and capias must bear date on the day when issued: (s. xix.)

(*q*) The sum to be here inserted must be sufficient to cover all that plaintiff expects to obtain. The jury cannot exceed the damages so limited: (*Cheveley* v. *Morris*, 2 W. Bl. 1300; *Pickwood* v. *Wright*, 1 H. Bl. 643.) It has been held where a jury did give larger damages than the declaration authorized, that an amendment might be made: (*Tibbs* v. *Bacon*, 5 Scott N R. 837.) If interest be claimed by plaintiff as damages, it should be also included: (see *Watkins* v. *Morgan*, 6 C. & P. 661; *Baker* v. *Brown*, 2 M. & W.199.) The sum to be awarded by the judgment may be awarded without any distinction as to debt or damages: (s. cxliv.)

(*r*) As to execution for the specific delivery of chattels: (see s. cci.)

(*s*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 60.—Applied to County

the non-joinder of another person as Defendant, the Plaintiff shall, without having proceeded to trial on an issue thereon, commence another action against the Defendant or Defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, (*t*) or shall amend by adding the omitted Defendant or Defendants, (*u*) the commencement of the declaration shall be in the following form, or to the like effect:

Eng. C. L. P. A. 1852, s. 60.

Commencement after abatement for non-joinder.

"(*w*) (*Venue.*) (*x*) A. B. by E. F., his Attorney, (*or* in his own proper person,) (*y*) sues (*z*) C. D. (*a*) (*the Defendant originally named in the Summons*) who has been summ·d (*b*) (*or* arrested) (*c*) by virtue of a Writ issued on the day of A. D., 18 , (*d*) and G. H., which said C. D. has heretofore pleaded in abatement the non-joinder of the said G. H., for," &c. (*e*)

Form.

CX. (*f*) In actions of libel and slander, the Plaintiff shall

const'l. for U.C. ch. 103 § 2.

Courts.—Substantially a re-enactment of rule 38 E.T. 5 Vic. which was copied from Eng. rule 20 H. T. 4 Wm. IV. (Jervis N. R. 125.)

(*t*) This plaintiff might have done before the C. L. P. Act, and may do still. He will by so doing avoid payment of costs: (see note *k* to s. lxxi.)

(*u*) *i. e.* under s. lxxi. of this Act. If defendant's plea of non-joinder be true and plaintiff amend his declaration pursuant thereto, he will be bound to pay the costs of such plea: (s. lxxii.)

(*w*) See note *h* to preceding section.

(*x*) See note *i*, *Ib.*

(*y*) See note *j*, *Ib.*

(*z*) "Complains of C. D." in rule 38 E. T. 5 Vic and Eng. rule 20 H. T. 4 Wm. IV.

(*a*) See note *m* to preceding section.

(*b*) See note *n*, *Ib.*

(*c*) See note *o*, *Ib.*

(*d*) See note *p*, *Ib.*

(*e*) As to when such pleas may be pleaded, see notes to s. lxxi.

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 61.—Not applied to County Courts.—Founded upon 1st Rept. C. L. Com'rs, s. 46. The Commissioners, "with a view at once of shortening the pleadings and generally removing sources of objection purely technical," recommended the subject matter of this enactment as to averments in actions of libel and slander. Expressions or words are either libellous *per se* or by reason of some precedent circumstances taken in connexion therewith. To charge a man with being a robber or a thief is to make a charge which can only be understood in a criminal sense, irrespective of any particular office, character or fact: (see *Jones* v. *Steuart*, Tay.U.C.R.626; *Bell* v. *Stewart*, E. T. 11 Geo. IV. *MS.* R. & H. Dig. "Libel and Slander," II. 1; *Cox* v. *Thompson*, 2 C. & J. 362; *Cook* v. *Ward*, 6 Bing. 409.) But to charge a man with being a bankrupt or an insolvent, &c., of itself imports nothing criminal without reference to some other circumstance to explain the intention and actionable quality of the expression: (see *Galway* v. *Marshall*, 23 L. J. Ex. 78.) In the former case no prefatory matter is necessary. In the latter it is indispensable to state by

Eng. C. L. P. A. 1852, s. 61.

Averments in actions for slander or libel.

be at liberty to aver that the words or matter (*g*) complained of were used in a defamatory sense—specifying such defamatory sense without any prefatory averment to show how such words or matter were used in that sense, (*gg*) and such averment shall be put in issue by the denial of the alleged libel or slander; (*h*) and where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient. (*i*)

Consol. for use. ch. xii. § 99.

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 62.

And as to pleas and subsequent proceedings; Be it enacted as follows: (*j*)

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way of inducement, plaintiff's good character, business reputation, &c., and defendant's intention to injure The latter is technically called the inuendo. To prove the inducement and inuendo properly has often been found a task of no small difficulty. To do so, it was necessary to state "the facts in reference to which the publication was actionable; secondly, to show that the words or libel were published of and concerning such facts; thirdly, to connect the words or libel with such previous facts, by means of inuendoes, thus importing into the words a slanderous and actionable quality." Numerous instances might be given where judgment has been arrested or reversed because the inuendo or meaning ascribed to the words used, which is the essence of the cause of complaint, was not, in the opinion of the Court, supported by the prefatory statements, although the jury must have found that the meaning alleged was intended by defendant: (see *Johnson* v. *Hedge*, 6 U. C. R. 337; *Marter* v. *Digby*, 4 U. C. R. 441; *Taylor* v. *Carr*, 8 U. C. R. 306; *Jackson* v. *McDonald*, 1 U. C. R. 19; *Solomon* v. *Lawson*, 8 Q. B. 823; *Griffiths* v. *Lewis*, *Ib.* 841; *Alfred* v. *Farlow*, *Ib.* 854; *Alexander* v. *Angle*, 1 C. & J. 143; *Hawkes* v. *Hawke*, 8 East. 427; *Lafame* v. *Malcolmson*, 1 H. L. C. 637; *Hall* v. *Blandy*, 1 Y. & J. 480; *Jones* v. *Stevens*, 11 Price 235; *Harvey* v. *French*, 1 C. & M. 11; *Goldstein* v. *Foss*, 4 Bing. 489.)

(*g*) *Matter—Qu.* Is it intended that this section should apply to cases of libel by pictures or other caricatures?

(*gg*) Where the words written or spoken are *per se* actionable, as—"He is a thief," it would appear unnecessary to aver that they were used in a defamatory sense and that to such a case the present enactment is inapplicable: (See Sch. B. No. 28.) But where such words are not of themselves of an actionable quality, the defamatory meaning must be explained. Ex. gr.—"He is a regular prover under bankruptcies," "The defendant meaning thereby, &c." (*Ib.* No. 29.) This illustration is evidently taken from an actual case: viz. *Alexander* v. *Angle*, 1 C. & J. 43. To cases of this latter description this section is intended to apply.

(*h*) "Not guilty," form of—see Sch. B. No. 39.

(*i*) This is in keeping with other sections of this Act, and is a great relief from the old form of pleading. The old system was thus described by the Commissioners: "The statement now required of the train of circumstances in connexion with the slander to show the meaning imparted to it, appears to us to be unnecessarily prolix and more calculated to impede than to advance justice, by imposing difficulties of a *technical* nature."

(*j*) Though since this Act a plea in form need not be technically as correct as before the Act, yet it must in substance, if it be a plea in bar, be a good

CXI. (*k*) No rule to plead or demand of plea (*l*) shall be necessary, and a notice to plead served shall be sufficient. (*m*) Notice to plead sufficient.

CXII. (*n*) In cases where the Defendant is within the jurisdiction, (*o*) the time for pleading in bar, (*p*) unless extended (*App. Ca. C.*) Engr. C. L. P. A. 1852, s. 63.

defence. The essential rules of pleading are in no wise changed by the Act: (see *Holmes* v. *Bugge*, 22 L. J. Q. B. 301; *Melzner* v. *Bolton*, 9 Ex. 518.) And though the Courts have liberal powers of amendment under s. cxxci. yet it is doubtful whether these powers can be so far exercised as to enable a defendant to put a defence upon the record differing from that by him first pleaded: (see *Mitchell* v. *Crasweller*, 22 L. J. C. P. 100.) The pleas upon the record must show a good "*ground* of defence," or they will be open to demurrer: (s. xcix.) The facts necessary to sustain the defence must be stated in a clear and distinct manner. It has been held if defendant sued by a corporation plead over and take no exception to the declaration that the Court cannot take judicial notice of the want of legal authority in the plaintiffs to sue in their corporate capacity: (*Bank of B. N. A.* v. *Sherwood et al.* 6 U. C. R. 213.) Pleas on the face of them not identified with the cause, by being intitled, &c., have been held defective: (*Shore* v. *Shore*, 3 O.S. 176 note *a*.) Now they must be pleaded according to the directions laid down in s. cxvi. of this Act. Pleas, if filed, though not served, will be sufficient to prevent plaintiff signing judgment: (*Mackinnon* v. *Johnston*, 3 O. S. 169.) And though pleaded by a person who is not an attorney, it seems they are not upon that account null: (*Hill* v. *Mills*, 2 Dowl. P. C. 696.)

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 62.—Applied to County Courts.—Founded upon 1st Report C.L.Com'rs, s. 60.

(*l*) Rules to plead were made unnecessary by old Rule 4 E. T. 11 Geo.IV., and Rule 10 E. T. 5 Vic., and demands of plea were thereby substituted.

(*m*) Demands of plea are now made unnecessary, and notices to plead substituted: (*Form* thereof—see note *k* to s. cii.) An irregularity in a notice to plead may be waived by defendant taking out a summons for further time to plead: (*Pope* v. *Mann*, 2 M. & W. 881.) Indeed the want of a notice may, it seems, be waived by defendant's conduct, for instance—if he obtain an order for time to plead: (*Pearson* v. *Reynolds*, 4 East. 571; see also *Nias* v. *Spratley*, 4 B. & C. 386.) Even a summons for time to plead, obtained by defendant, may be held to be such a waiver: (*Bolton* v. *Manning*, 5 Dowl. P. C. 769.—*Sed qu.* See *Decker* v. *Shedden*, 3 B. & P. 180.) But a summons obtained by one of two defendants who appear by separate attorneys will clearly not affect the rights of the remaining defendant: (*Showler* v. *Stoakes*, 2 D. & L 3.) No judgment for want of a plea can be signed as a general rule without a notice to plead: (see *Heath* v. *Rose*, 3 N. R. 223; *Fenton* v. *Anstice*, 5 Dowl. P. C. 113.) It has been held that a demand of plea cannot be served before declaration filed, however short the time may be: (*Read* v. *Johnson*, Tay. U. C. R. 674.)

(*n*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 63.—Applied to County Courts.—Substantially a re-enactment of rule 10 E.T. 5 Vic. and U. C Stat. 2 Geo. IV. cap. 1 s. 5.

(*o*) As to defendant without the jurisdiction, plaintiff after service of summons is at liberty to proceed "in such manner and subject to such conditions" as to the Court or a Judge may seem fit: (ss. xxxv. and xxxvi.)

(*p*) A plea in bar may be defined as one which shows some ground for barring or defeating plaintiff's action. It is, in short, a substantial and conclusive answer to the action: (Steph. Pl. 51.)

Time for pleading in bar, when Defendant is within the jurisdiction. (App. Ch. C.) Eng. C. L. P. A. 1852, s. 64.

by the Court or a Judge, (*q*) shall be eight days, and a notice requiring the Defendant to plead thereto in eight days, (*r*) otherwise Judgment, (*s*) may be indorsed on the copy of the declaration served or delivered separately. (*t*)

Express colour unnecessary.

CXIII. (*u*) Express colour (*v*) shall no longer be necessary in any pleading. (*w*)

(*q*) The Courts have always had power, upon motion, to grant a defendant longer time, to put in his plea than that limited by the practice of the Court. It is for the Court to judge whether it be necessary for defendant to plead such a plea as requires longer time than ordinary: (Bacon's Abr. "Pleas and Pleading," O.) The powers are now usually entrusted to a Judge in Chambers: (see note *m* to s. xxxvii.) The application for further time to plead should be made before the time when plaintiff would be entitled to sign judgment: (*Ottiwell* v. *D'Aeth*, Barnes, 254; *Barnett* v. *Newton*, 1 Chit. R. 689; *Calze* v. *Littleton*, 2 W. Bl. R. 954; *Cumberlege* v. *Carter*, 6 M. & G. 748.) But if the summons be returnable before judgment signed, judgment signed while the parties are attending the Judge would be irregular: (*Abernethy* v. *Paton*, 4 Scott 586; *Wells* v. *Secret*, 2 Dowl. P. C. 447; *Spenceley* v. *Shoule*, 5 Dowl. P.C. 562; *Burton* v. *Warren*, 14 L. J. Q.B. 312; *Daley* v. *Arnold*, 1 Dowl. N. S. 938; *Glen* v. *Lewis*, 8 Ex. 131.) The application may be made though previously a "peremptory" order for further time had been obtained by consent: (*Beazley* v. *Bailey*, 4 D. & L. 271.) Further as to the application, see Chit. Arch. 8 Edn. 216. Where an order was for four days' time to plead, omitting the word "further," held that the time should be computed from the date of the order and not from the expiration of the original time to plead: (*Lane* v. *Parsons*, 5 Dowl. P.C. 359.) If defendant's summons be dismissed and the time for pleading have expired, defendant will not be entitled to more time for pleading than the rest of the day on which the summons was dismissed: (*Mengens* v. *Perry*, 15 M. & W. 537, confirmed in *Evans* v. *Senior*, 4 Ex. 818.)

(*r*) The same period as fixed by the old practice (see note *n supra*.) It has been held that defendant is entitled to eight days to plead to a new assignment: (*Unger* v. *Crosby*, 3 O. S. 175.) And that after a demand of replication plaintiff has eight days to reply: (*Robinson* v. *McGrath*, H. T. 2 Vic. *M.S.* R. & H. Dig. "Practic," I. 10.) As to time for pleading after amendment, see s. cxxxix. Sunday, though a *dies non*, if neither the first nor last of the eight days, is counted: (*Shoebridge* v. *Irwin*, 6 Dowl. P. C. 126.) Four days only are allowed for pleading in abatement, (see note *r* to s. lxix. of this Act.)

(*s*) Judgment cannot, it is apprehended, be signed if the pleas are in the office and filed, though not served.

(*t*) Form thereof see note *k* to s. cii. The notice to plead, if not delivered with the declaration, may be delivered at any time within twelve months after the declaration: (*Anon.* 2 Wils. 137; see also *West* v. *Radford*, 3 Burr. 1452.)

(*u*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 64.—Applied to County Courts.—Founded upon 1st Rep. C. L. Comrs. s. 39.

(*v*) Before this Act it was a rule that pleadings should not be argumentative. This has given rise to what was called express colour. Thus, if to a declaration stating that plaintiff was possessed of a house, the defendant were in his plea to state that the house was his, the plea would have been held bad as being an argumentative and indirect denial of the statement in the declaration that the house was the

CXIV. (*x*) Special traverses (*y*) shall not be necessary in any pleading. (*z*)

(App. Co. C.) Eng. C. L. P. A. 1852, s. 65. And special traverses.

CXV. (*a*) In a plea or subsequent pleading it shall not be necessary to use any allegation of *actionem non* or *actionem ulterius non*, or to the like effect, or any prayer of Judgment; nor shall it be necessary in any replication or subsequent

(App. Co. C.) Eng. C. L. P. A. 1852, s. 66. Certain allegations and

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house of the plaintiff; but if the defendant were to state and show that he had a good title to the house, and admit the plaintiff's possession in fact, but surmise that the plaintiff was in possession by some bad title, the plea would be good, as giving *express colour* to the plaintiff's alleged possession: (*Ib.*) This form of pleading is now more a matter of history than of practice. Those interested in its history may refer to Finlason's C. L. P. Acts, 1852, s. 64, note *a*.

(*w*) The "express colour" declared to be unnecessary by this section is of course that *fiction* in pleading of which an example is given in the previous note—a proceeding characterised by the C. L. Comrs. as being, "however ingenious, too subtle and ought to be abolished." Indeed its express abolition by this section is almost a work of supererogation. The want of "express colour," technically so called, has always been a defect of form, which could only be objected to on special demurrer, and it has been already enacted "that no pleading shall be deemed insufficient which could heretofore only be objected to on special demurrer" (s. c.) But by the operation of this Act, independently of the section under consideration, the omission of such a fiction is not only unobjectionable but actually commanded, for an allegation or "statement that need not be proved," should be omitted: (s. xcviii. and especially note *m* to that section.)

(*x*) Taken from Eng. St. 15 & 16 Vic. cap. 76, s. 65.—Applied to County Court—Founded upon 1st Rept. C. L. Com'rs, s. 44.

(*y*) The form of a special traverse comprised *first* an inducement or statement of new matter which was required to be an indirect denial of the fact intended to be traversed, and *secondly* the conclusion or traverse, which was in these words, "without thus, that, &c," (denying, directly, the fact intended to be disputed.) If the inducement stood alone the plea would have been open to objection for argumentativeness, because it would only show by inference or indirectly, that the allegation intended to be denied could not be true. The direct or "*special* traverse," therefore, was added to avoid such an objection. (*Ib.*) The use and object of such a form of pleading is well explained in Steph. Pl. 185. Of it as of express color, it may be said now only to be interesting in a historical point of view. For a history of it see Finlason's C.L.P.Act, s. 65, note *a*.

(*z*) The abolition of special traverses by express enactment may be also said to be a work of supererogation, and for the reasons mentioned in note *w* to the preceding section: (s. cxiii.)

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 66—Applied to County Courts—Substantially a re-enactment of Rule 41 E. T. 5 Vic., which was copied from Eng. R. G. 9 H. T. 4 Wm. IV. (Jervis N. R. 122.) These rules were expressed to be applicable only to a plea or subsequent pleading, intended to be pleaded in bar of the whole action generally, as distinguished from pleas, to the further maintenance thereof only, a restriction which does not obtain as regards this section. Our old rule was held to apply to cases commenced before it came into operation: (*Hamilton* v. *Davis et al*, 1 U. C. R. 176.)

prayers not required.

pleading to use any allegation of *precludi non*, or to the like effect, or any prayer of Judgment. (*b*)

Const. stat. for U.C. ch 22 § 96

(App. Co. C.) Eng. C. L. P. A. 1852, s. 67.

CXVI. (*c*) No formal defence shall be required in a plea or avowry or cognizance, (*d*) and it shall commence as follows, or to the like effect, (*e*) "The Defendant, by E. F., (*f*) his Attorney (*g*) (*or* in person, *as the case may be*) says that (*h*) (*here state first defence*);" (*i*) and it shall not be necessary to state in a second or other plea or avowry or cognizance, that it is pleaded by leave of the Court or a Judge (*j*) or according to the form of the Statute (*k*) or to that effect, but every such plea, avowry, or cognizance, shall be written in a separate paragraph and numbered, (*l*) and shall commence as follows,

Commencement of plea, &c.

Second plea, &c.

(*b*) It was held under our Rule 11 E. T. 5 Vic., that it was a good ground of special demurrer to a replication that it improperly concluded with a prayer for relief: (*Rees* v. *Dick*, 7 U. C. R. 496.) Such an objection would not now be entertained on demurrer: (s. c.) It is apprehended if any pleading contain matter by this section declared to be unnecessary, that the proper course would be to strike out such matter under s. xcviii.: (see note *m* to that section.)

(*c*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 67.—Applied to County Courts.—Substantially a re-enactment of our rule 10 E. T. 5 Vic. which was copied from Eng. R. G. 10 H. T. 4 Wm. IV. (Jervis N. R. 123.)

(*d*) Though a formal defence be used the plea would not upon that account be set aside: (*Bacon* v. *Ashton*, 5 Dowl. P. C. 94.) Nor be demurrable since s. c. of this Act. The formal matter might be struck out upon motion: (see note *m* to s. xcviii.)

(*e*) The plea must be intitled of the proper Court, &c.: (see s. ciii.)

(*f*) An infant can only plead by guardian. The commencement of a plea in such case may be as follows: "E. F. admitted by the said Court here as guardian of the defendant to defend for him, he being an infant within the age of twenty-one years, &c." (see note *k* to s. cviii.)

(*g*) A plea for another by a person who is not an attorney is not a nullity: (*Hill* v. *Mills*, 2 Dowl. P. C. 696.)

(*h*) The Court will consider every plea as pleaded to the whole declaration, which is not in the introduction limited in terms as a defence to part only: (*Poulton* v. *Dolmage*, 6 U. C. R. 277; see also *Putney* v. *Swann*, 2 M. & W. 72.) If a plea professing to answer the whole declaration answer only part, or if professing to answer only part answer the whole, plaintiff's course is to make application to have it amended under s. ci. These defects were formerly objectionable upon special demurrer: (see *Eddison* v. *Pigram*, 16 M. & W. 137; *Gray* v. *Pindar*, 2 B. & P. 427.)

(*i*) As to the nature of the defence see note *j* to s. cxi. If the defence be an equitable one the plea must begin thus, "For defence on equitable grounds, &c," (see s. cclxxxvii.)

(*j*) *i. e.* obtained under s. cxxx.

(*k*) *i. e.* The statute authorizing double pleading or some particular statute in which power to plead a defence in a special form is conferred.

(*l*) A defendant may in one plea refer to allegations in another, in the same manner as in separate counts of a declaration: (*Beatson* v. *McKenzie*, T. T. 1 & 2 Vic. *M. S.* R. & H. Dig. "Pleading," XI, 1.)

or to the like effect, "And for a second (&c.) plea to (*stating to what it is pleaded*) (*m*) the Defendant says that, &c.," and no formal conclusion shall be necessary to any plea, avowry, cognizance, or subsequent pleading. (*n*)

Formal conclusions unnecessary.

CXVII. (*o*) Any defence arising after the commencement of any action shall be pleaded according to the fact (*p*) without any formal commencement or conclusion, (*q*) and any plea which does not state whether the defence therein set up arose before or after action shall be deemed to be a plea of matter arising before action. (*r*)

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 68.

Defence arising after action, how pleaded.

(*m*) See note *h*, *supra*.

(*n*) Prayer of judgment, &c., is declared to be unnecessary by the preceding section (s. cxv.)

(*o*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 68.—Applied to County Courts.

(*p*) Between pleas contemplated by this enactment and pleas *puis darrein continuance* contemplated by the enactment following, there is a difference. The latter must express the ground of defence to have arisen since the last *plea*; but the pleas here intended may express the ground of defence as arising after the *commencement of the action*, which may be at any time after issued writ and before plea pleaded. It has been held before this Act that no such plea could be pleaded in bar to the action, thought it might be to the further maintenance. A ground of defence arising after action brought was looked upon as something collateral, admitting the action to be well brought, but alleging that by reason of the new matter, plaintiff ought not *further* to maintain his action. It was considered that a cause of action at the time of the commencement of the suit was thereby acknowledged, whereas a plea in bar must deny any cause of action to have ever existed: (*LeBret* v. *Papillon*, 4 East. 502.) The following may be given as an example of such a plea. To an action on the case by plaintiff as owner of a steamship, against defendants as owners of another steamship, for injuries caused to plaintiff's vessel by collision: defendant pleaded amongst other pleas a release after action, by a certain person jointly entitled with the plaintiff to the ship and to the cause of action and damages in the declaration mentioned: (*Suckling* v. *Wilson et al*, 4 D. & L. 167.) Such a plea having been held to be one in bar of the further maintenance of the action, and not in bar of the action generally, has been held to be inconsistent with and not pleadable with pleas in bar: (*Ib.* but now see N. R. Pl. 22.) And yet before this Act it was held that though such a plea was improperly framed in bar to the whole action, instead of its further maintenance, that the Court after verdict was bound to pronounce judgment that the action be not further maintained: (*Cabbet* v. *Grey et al*, 4 Ex. 729; see also *Allen* v. *Hopkins*, 13 M. & W. 94.) It has also been held in England, owing to the peculiar wording of the St. 2 Geo. II. cap. 22. s. 13, that a debt which arises after action brought can not be the subject of a set-off: (*Richards* v. *James*, 2 Ex. 471.)

(*q*) It is therefore apprehended that whether the plea be to the further maintenance or otherwise, the Court will be bound to give judgment according to the very right and justice of the matter in dispute. The plea if improperly framed was objectionable only upon special demurrer, which by this Act is abolished: (s. c.)

(*r*) Matters of defence which arose

(App. Co. C.) Eng. C. L. P. A. 1852, s. 69. Or after the last pleading.

CXVIII. (*s*) In cases in which a plea *puis darrein continuance* (*t*) has heretofore been pleadable (*u*) in Banc or at *Nisi Prius*, (*v*) the same defence may be pleaded with an allegation

before action, must be pleaded in chief: (*Vaughan* v. *Brown*, And. 328; see also *Wilson* v. *Wymonald*, Say. 268.)

(*s*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 69.—Applied to County Courts.—Substantially a re-enactment of our old rule 23 E. T. 5 Vic. which was copied from Eng. rule 5 H.T. 4 Wm. IV. (Jervis N. R. 117.)

(*t*) *Plea Puis darrein continuance.* This term is applied to a well-known form of pleading, though the reason for the name no longer exists. By an ancient rule of practice when adjournments of proceedings took place for certain purposes from one day or one term to another, there was always an entry made on the record expressing the ground of the adjournment and requiring the parties to re-appear at the given day, which entries were called *continuances*. In the intervals between such continuances and the day appointed, the parties were, for the purposes of pleading, *out of Court*, and consequently not in a situation to plead. But it sometimes happened that after a *plea* had been pleaded, and while the parties were so out of Court in consequence of the continuance, a new matter of defence arose, which did not exist, and which the defendant consequently had no opportunity to plead *before* the last continuance. This new defence he was therefore entitled, at the day given for his re-appearance, to plead as a matter that had happened *after* the last continuance—*puis darrein continuance*. By our rule 23 of E. T. 5 Vic. it was provided that no entry of continuances (with a single exception) should in future be made; but there was a saving clause that in all cases in which a plea *puis darrein continuance* was then by law pleadable "the same defence may be pleaded with an allegation that the matter arose after the last *pleading*," &c. After the first day of E. T. 1856, no entry of continuances (without exception) shall be made on any record or roll whatever or in the pleadings: (N.R.Pl.25.) but pleas *puis darrein continuance* are preserved by the section here annotated.

(*u*) As to when such a plea is pleadable, see Chit. Arch. 8 Edn. 323; Tidd's Prac. 9 Edn. 851; Bag. Prac. 143; Chit. Pl. 7 Edn. Vol. I. 688.

(*v*) *Pleadable in banco or at Nisi Prius.* Between these two there is a distinction. The former has been held to be pleadable by attorney and the latter by counsel only: (see forms Chit. Pl. 7 Edn. Vol. 3, 526.) The former may be filed, and delivered to the opposite party, but the latter can only, it seems, be delivered to the Judge at Nisi Prius: (*Payne* v. *Shenstone*, 4 D. & L. 396,) and both require to be verified by affidavit. If these distinctions are still to be observed, the effect of this section will be that if the plea be pleaded *before* the sittings at *Nisi Prius*, it must be pleaded in banc. filed and served as other ordinary pleadings; but if *after* the commencement of the *Nisi Prius* sittings it must be pleaded at *Nisi Prius* and given to the Judge. The object of these rules of practice is to prevent the inconvenience that might arise if a cause were for trial in one place and a plea filed and served in another: (*Payne* v. *Shenstone*, Paterson J. *ubi supra*.) It would also seem that the plea may be pleaded at *Nisi Prius* though there was time to plead it in *banco*: (*Prince* v. *Nicholson*, 5 Taunt. 333.) If pleaded at *Nisi Prius* it must be before verdict; but will be in time though the jury have left the bar, provided there be no actual rendering of their verdict: (Bull N. P. 310; *Todd* v. *Emly et al.* 9 M. & W. 606.) Certainly it would be too late after the discharge of the jury: (*Anon.* Cro. Car. 232.) When pleaded at Nisi Prius it should be transcribed by the

that the matter arose after the last pleading; (*w*) but no such plea shall be allowed (*x*) unless accompanied by an affidavit (*y*) Affidavit required.

proper officer on the record: (*Myers* v. *Taylor*, 2 C. & P. 306.) And the presiding Judge must certify it as part of the record: (*Abbot* v. *Rugely*, 2 Mod. 307; *Townsend* v. *Smith*, 1 C. & K. 160.) If good in point of form and in other respects regular, it has been held that the Judge though of opinion that the plea is pleaded for delay only has no discretion to refuse it: (*Corporation of Ludlow* v. *Tyler*, 7 C. & P. 537.) The authority of this case since the C. L. P. Act is much shaken: (see s. ci.) The plea though bad may, it seems, be amended: (*Holroyd* v. *Reed*, 5 Q. B. 594; but see Bull N. P. 308; *Moore* v. *Hawkins*, Yelv. 191.) It has also been held that a Judge at *Nisi Prius* cannot receive from plaintiff a replication or even a confession of the plea: (*Prescott* v. *Horsely*, 3 C. & P. 372; but see N. Rs. 22 and 23.) The Judge's only power has been held to be to return the plea as parcel of the record: (*Moore* v. *Hawkins*, Yelv. 180.) And it has been held that he had no authority to reject or set aside the plea, though insufficient in point of law: (*Paris* v. *Salkeld*, 2 Wils. 137; *Fitch* v. *Toulmin*, 1 Stark, 62.) Whether such would now be held to be the case is very doubtful, considering the object of pleading and the whole scope and intention of this Act.

(*w*) A plea *puis darrien continuance* has in England been held to operate as a withdrawal of pleas in chief, so as to entitle plaintiff to discontinue without costs: (*Wallen* v. *Smith*, 9 A. & E. 505.,) and so as to prevent defendant if successful recovering the costs of such prior pleadings: (*Lyttleton* v. *Lush*, 4 B. & C. 117.) The prior pleas have been held to be so far waived by a plea *puis darrein continuance* that if the latter turn out to be defective defendant cannot avail himself of his former pleas: (*Barber* v. *Palmer*, 2 Ld. Rayd. 693.) The only reason why the defendant on pleading *puis darrein continuance* must withdraw or be held to have withdrawn his former pleas, is that otherwise he would plead double; and the practice with respect to this was settled before the statute of 4 Anne cap. 16, which first allowed double pleading: (*Wagner* v. *Imbrie*, per Parke B. 2 L. M. & P. 333; but see N. R. Pl. 23.) Defendant can only plead one plea *puis darrein continuance:* (Bull N. P. 312) and it cannot be pleaded after a demurrer: (*Homer* v. *Gibbons*, F. Moore, 821.) But it would appear that if any issue remain to be tried, it may be pleaded, though plaintiff has obtained a verdict on other issues: (*Wagner* v. *Imbrie*, *ubi supra*; see also *Wright* v. *Burroughs*, 3 C. B. 344.) After judgment by default no such plea will be allowed: (*Shaw* v. *Shaw*, M. T. 6 Vic. *M.S.* R. & H. Dig. "*Puis darrein continuance*," I.) An attorney cannot proceed for his costs after this plea, unless he establish a clear case of fraud: (*White* v. *Boulton*, E. T. 2 Vic. *M.S.* R. & H. Dig. "Attorney," &c., III. 9.) Judgment upon a plea *puis darrein continuance* is peremptory: (*Beaton* v. *Forrest*, Alleyn, 66.)

(*x*) *Qu.* Would it be void or irregular only if pleaded contrary to this enactment? The expression "shall be allowed" refers to some authority vested with power to allow or disallow, and implies reference to that authority to decide. If a plea were void in its inception a reference would be absurd. The want of an affidavit would for this reason appear to be an irregularity only.

(*y*) Generally the affidavit states the plea to be true in substance and matter of fact: (*Minshall* v. *Evans*, Patteson, J. 4 C. & P. 555; see form thereof Chit. F. 6 Edn. 292.) If the affidavit refer to the plea and the plea be intitled in the cause, the affidavit will be sufficient though not specially intitled: (*Prince et al.* v. *Nicholson*, 5 Taunt. 333.) It would seem to be necessary that the affidavit if

that the matter thereof arose within eight days next before the pleading of such plea, (*z*) or unless the Court or a Judge (*a*) shall otherwise order. (*b*)

(*App. Co.* C.) Eng. C. L. P. A. 1852, s. 70.

CXIX. (*c*) It shall be lawful for the Defendant (*d*) in all

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made during the *Nisi Prius* sittings should be sworn before the presiding Judge: (*Bartlett* v. *Leighton*, 8 C. & P. 408.) As to affidavits generally see s. xxiii. note, p. 41, sub. divs. 3, 4, 7, 8, intitled "Deponent," "Signature of Deponent," "Commissioner," and Jurat," and N. Rs. 109 *et seq.* The affidavit may be dispensed with if the subject matter of the plea arose at the trial and before the Judge: (*Todd* v. *Emly*, 1 Dowl. N. S. 598.) And in other cases also in the discretion of the Court or the Judge: (*Dunn* v. *Loftus*, 8 C. B. 76; *Warren* v. *Kerby*, M. T. 2 Vic. *M. S.* R. & H. Dig. "Abatement," 5; but see *Powell* v. *Duncan*, 5 Dowl. P. C. 550.)

(*z*) If the last of the eight days fall on Sunday a plea on Monday would be good: (*Dudden* v. *Triquet*, 4 M. & W. 676; see also N. R. 166.) And if the last day expire during the *Nisi Prius* sittings the plea ought to be delivered to the Judge within the eight days, though the case may be low down on the docket: (*Townsend* v. *Smith*, 1 C. & K. 160.) But if the last of the eight days fall between 1st July and 21st August, when shall the plea be filed and served? Between these dates, as a general rule, no pleading can be filed: (See N. R. 9.) In the English Act whence ours has been taken, it is provided that "such plea may when necessary be pleaded at *Nisi Prius* between the tenth day of August and twenty-first day of October." However, in Upper Canada no Court of *Nisi Prius* sits until long after the vacation: (s. clii.)

(*a*) *Court or Judge.* Relative powers, see note *m* to s. xxxvii.

(*b*) The party has a certain time within which to plead as of right. It is discretionary with the Court or a Judge to allow him to plead after that time upon proper grounds being laid for it. But the plaintiff has a right to come and contest the defendants reasons for not proceeding according to the strict course and practice of the Court, and to take the opinion of the Court or a Judge thereon. And that opinion if in favor of defendant will, as a general rule, be only upon payment of costs: (*Dunn* v. *Loftus*, 8 C. B. 76.)

(*c*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 70.—Applied to County Courts.—Substantially the same as U. C. Stat. 7 Wm. IV. cap. 3 s. 13, which was copied from Eng. St. 3 & 4 Wm. IV. cap. 42 s. 21. Both our Statute of William and the English Statute of which it is a transcript conclude in substance as follows—"to pay into Court a sum of money by way of compensation or amends, in such manner and under such regulations as to payment of costs and the form of pleading, as the said Judges or a majority of them as aforesaid, shall by any rules or orders by them to be from time to time make order and direct." In Upper Canada, pursuant to this statute, rules 17 and 18 of E. T. 5 Vic. were passed. In England R. G. of H. T. 2 Wm. IV. Nos. 55 and 56, of H. T. 4 Wm. IV. Nos. 17, 18, 19, and T. T. 1 Vic.

(*d*) To entitle a sole defendant to pay money into Court no order is necessary; but in the case of one or more of several defendants the law is different: (see s. cxxi.) An order when necessary may be obtained at any time before plea. It may be immediately after writ issued, but then it must be done in such a way as not to prejudice the plaintiff, and so as not to deprive him of any costs to which he would be otherwise entitled: (*Edwards* v. *Price*, Patteson, J. 6 Dowl. P. C. 489.) Though the summons be

actions (*e*) (except (*f*) actions for assault and battery, (*g*) false imprisonment, (*h*) libel, (*i*) slander, malicious arrest or prosecution, criminal conversation or debauching of the Plaintiff's daughter or servant), (*j*) and (by leave of the Court or a Judge, (*k*) upon such terms as they or he may think fit), for one or more of several Defendants, (*l*) to pay into Court a sum of money by way of compensation or amends; provided that nothing herein contained shall be taken to affect the provisions

Defendant may pay money into Court except in certain cases.

See Rules Page 596

taken out before declaration, the payment into Court must be afterwards pleaded to the declaration: (*Molson* v. *Munro*, 1 U. C. Cham. R. 97,)

(*e*) *In all actions.* The present enactment clearly extends to damages in detinue: (*Phillips* v. *Haywood*, 3 Dowl. P. C. 862; *Crossfield* v. *Suck*, 8 Ex. 159), and trover: (*Peacock* v. *Nicholls*, 3 Dowl. P. C. 367), but whether or not to damages or mesne profits claimed in ejectment is not decided. A defendant is not entitled to pay money into Court in a case where the plaintiff assigns several breaches in his declaration under Stat. 8 & 9 Wm. III. cap. 11, and where the judgment obtained by plaintiff is to stand as a security for any future breaches of covenant, of which the defendant may be guilty: (*Bishop of London* v. *McNeill*, 9 Ex. 490; *England* v. *Watson*, 1 Dowl. N. S. 398.) The St. 8 & 9 Wm. III. cap. 11 is expressly excepted out of the operation of this Act: (see s. cxlv.) As to payment of money into Court of principal and interest on bonds, see St. 4 & 5 Anne cap. 16, s. 13, and as to which it has been held before the C. L. P. Act that payment into Court could not be pleaded: see *England* v. *Watson*, *ubi supra*.

(*f*) This is a general law with respect to payment of money into Court. In the cases excepted defendant can only have a right to pay money into Court if he act in some character or under some special circumstance which entitle him by Act of Parliament to pay money into Court, for instance as a justice of the peace, &c.: (See *Aston* v. *Perkes*, 15 M. & W. 383; *Key* v. *Thumbleby*, 6 Ex. 692; *Thompson* v. *Shepherd*, 4 El. & B. 53.) And it has been held since the C. L. P. Act that it is not now any more necessary than formerly for one party to state and the other to deny the special character or circumstances which give the right to pay money into Court contrary to the usual rule of law in such cases: (*Thompson* v. *Shepherd*, *ubi supra*; also see note *q* to s. cxx.)

(*g*) *Assault and battery.* Similar words in the Eng. St. of William were held to be used only with reference to the persons of plaintiff and his wife, and not to that of his son or servant. Plaintiff, for instance, suing for an assault upon his son would be subject to a plea of payment into Court: (*Newton* v. *Holford*, 6 Q. B. 921; see also *Aston* v. *Perkes*, 15 M. & W. 385.)

(*h*) *False imprisonment.* As to magistrates and others sued for something done in an official capacity, see note *f*, *ante*.

(*i*) *Libel.* An exception to this has been created as regards libels printed in a newspaper or periodical publication by Stat. 13 & 14 Vic. cap. 60, the provisions of which have been saved by this section. (See note *m infra*.)

(*j*) *Debauching of plaintiff's daughter or servant.* This particular kind of injury having been expressly excepted it would seem to show according to the rule *expressio unius*, &c., that *other* cases of injuries to members of plaintiff's family are not excepted: (*Newton* v. *Holford*, Tindal C.J. 6 Q.B. 925.)

(*k*) *Court or Judge.* Relative powers see note *m* to s. xxxvii.

(*l*) The paragraph in parentheses "by leave of the Court, &c.," must be

of a certain Act of the Parliament of this Province, passed in the Session of Parliament holden in the thirteenth and fourteenth years of her Majesty's reign, intituled, (*m*) *An Act to amend the law relating to slander and libel.*

(*App. Co. C.*) CXX. (*n*) When money is paid into Court, (*o*) such pay-

taken exclusively to refer to an application by one or more of several defendants to be allowed to pay money into Court: (see s. cxxi.) The practice as to these latter was first introduced by the discretionary power of the Court. It is still made subject to its discretion, and may be subjected to terms: (*Kay* v. *Panchiman*, De Grey C.J. 2 W. Bl. 1029)

(*m*) The Statute here referred to is 13 & 14 Vic. cap. 60, which was taken from Eng. St. 6 & 7 Vic. cap. 96, and so far as material is as follows, "And be it enacted, &c., that in an action for libel *contained in any public newspaper or other periodical publication*, it shall be competent for defendant to plead that such libel was inserted in such newspaper or other periodical publication, without actual malice, and without gross negligence, and that before the commencement of the action or at the earliest opportunity afterwards he inserted in such newspaper or other periodical publication a full apology for the said libel, or if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that any defendant shall upon filing such plea *be at liberty to pay into Court a sum of money by way of amends* for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect, and be available to the same extent and in the same manner, and be subject to the same rules and regulations as to payment of costs, and the form of pleading, except so far as regards the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel *had not been excepted* from the personal actions in which it is lawful to pay money into Court under an Act of the Parliament of Upper Canada passed in the session held in the seventh year of the reign of his late Majesty, intitled 'An Act for the further amendment of the law and better advancement of justice,' (7 Wm. IV. cap. 3 s. 13) and that to such plea and such action it shall be competent for the plaintiff to reply generally, denying the whole of such plea": (s. 3.) This statute extends the power of paying money into Court to actions for libel, but only to certain special cases; and in order to make the plea good, it must appear that the libel is one of these special cases. The substance of the plea is this—"I admit that I am wrong, but pay money into Court, which I say is a satisfaction;" but in order to justify the defendant in doing so, he must in his plea show that the libel was published without actual malice and without gross negligence. In truth it is nothing more than a special plea of payment of money into Court: (*O'Brien* v. *Clement*, Parke B. 3 D. & L. 676.) And held in England that defendant can with such a plea plead not guilty: (*Ib.*) Plaintiff in his replication may deny the whole or any part of the plea: (*Chadwick* v. *Herapath*, 3 C.B. 885.) A replication admitting the insertion of the libel in a newspaper named, but denying the insertion to have taken place in actual malice or gross negligence, *and* also the sufficiency of the defendant's tender for damages, was held to be good: (*Ib.*)

(*n*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 71.—Applied to County Courts.—Substantially a re-enactment of our Rule 17 of E.T. 5 Vic. which was copied from Eng. R. T. T. 1 Vic.

(*o*) As to when and in what cases

ment shall be pleaded (*p*) in all cases as near as may be in the following form, *mutatis mutandis*: (*q*) "The defendant, by

Eng. C. L. P. A. 1852, s.71. Such payment how

money may be paid into Court, see preceding section (cxix.) and further, Chit. Arch. 8 Edn. 1178.

(*p*) As a general rule the money should be in truth paid into court before plea, (*Gover* v. *Elkins*, 3 M. & W. 216; *Clark* v. *Dann*, 3 D. & L. 513;) but there may be cases in which the Court will presume that it has been done though it has not in fact been done: (see *Rendell et al* v. *Malleson*, 16 M. & W. 828.) The old mode of payment into Court was by a rule to strike the sum paid into Court out of the declaration which rule it was always necessary to produce at the trial. The plea of payment, which being upon the record, proves itself, is considered a less expensive course, and is, therefore, substituted for the old mode: (*Key* v. *Thimblebeg*, 6 Ex. 692.) If plaintiff's claim be composed of several demands, to some of which he has a defence and to others none, and he wish to plead payment into Court, his proper course is to plead to the demands which he disputes separately and then plead payment into Court as to the residue: (see *Coates* v. *Stevens*, 3 Dowl. P.C. 784; *Sharman* v. *Stevenson*, 3 Dowl. P. C. 709.) The effect of a plea of payment into Court depends much upon the form of action in which it is pleaded. In an action of assumpsit on a special contract the plea admits that contract: (*Seaton* v. *Benedict*, Gaselee, J., 5 Bing. 32; *Drake* v. *Lewin*, 4 Tyr. 730; *Speck* v. *Phillips*, 5 M. & W. 279; *Archer* v. *English*, 1 M. & G. 873;) and the breaches of it as alleged: (*Wright* v. *Goddard*, 8 A. & E. 144,) but not the amount of damages claimed by plaintiff in respect thereof: (see *Attwood* v. *Taylor*, 1 M. & G. 280; *Cooper* v. *Blick*, 2 Q. B. 915; see also *Turner* v. *Diaper*, 2 M. & G. 241; *Mondel* v. *Steele*, 8 M. & W. 858; *Robinson* v. *Harman*, 18 L. J. Ex. 202; *Tugman* v. *Kumler*, 22 L. J. C. P. 143;) but where, as in *indebitatus* assumpsit the demand is made up of several items, the plea admits nothing more than that the sum paid is due in respect of some cause of action: (*Seaton* v. *Benedict*, *ubi supra*; *Bingham* v. *Robins*, 7 Dowl. P. C. 852; *Archer* v. *English*, 1 M. & G. 873; *Goff* v. *Harris*, 5 M. & G. 573.) The admission by payment into Court in an action of tort is something analagous to the admission by payment into Court in *indebitatus* assumpsit. The effect is this—The defendant says he will not dispute what is alleged against him in the declaration, to the extent of £ , leaving the plaintiff all his rights, *intra* the £ pleaded, and not prejudicing himself in his defence *ultra* that sum: (*Story* v. *Finnis*, 6 Ex. 126; *Schreger* v. *Carden*, 11 C. B. 851; *Perrin* v. *Monmouthshire R. Co.*, 11 C. B. 855. See also *Knight* v. *Egerton*, 7 Ex. 407; *Leyland* v. *Tancred*, 16 Q. B. 664.) See further as to the effect of payment into Court as an admission of the cause of action: Chit. Arch. 8 Edn. 1190. In England defendants have been refused permission to plead with payment into Court, a plea denying the whole cause of action alleged in the declaration: (*Thompson* v. *Jackson*, 8 Dowl. P. C. 591; *Dearle* v. *Barrett*, 2 A. & E. 83; *O'Brien* v. *Clement*, 15 M. & W. 435. See also *Thomas* v. *Hawkes*, 8 M. & W. 140: but see s. cxxxiii. of this Act.) Where in an action on a bill of exchange for £40, defendant paid £41 8s. into Court, it was held that evidence of payment of part before action brought was inadmissible: (*Adams* v. *Palk*, 3 Q. B. 2.) If the payment be made and pleaded in an action when it should not be made, plaintiff's course is to move to strike out the plea under s. ci. of this Act. As to the effect of inconsistent pleas when allowed to stand, see *Fischer* v. *Aide*, 6 Dowl. P. C. 594; *Tremlow* v. *Askey*, *Ib.* 597.

(*q*) The form given by this Act must he adopted "as near as may be" in all cases. It is not necessary in the.

pleaded.

"(*r*) E. F., (*s*) his Attorney, (*t*) (*or* in person, &c.,) (*u*) (*if "pleaded to part; (v) say,* as to £ , parcel of the money "claimed,) (*w*) brings into Court the sum of £ , (*x*) and "says the said sum is enough to satisfy the claim of the Plain- "tiff in respect of the matter herein pleaded to." (*y*)

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special cases of justices of the peace and particular officers entitled to pay money into Court by different statutes that the character of the defendant should be stated in the plea. The provision that the plea shall be "*as near as may be*," in the form given, "*mutatis mutandis*," is only to authorize such alterations as may be necessary in order to adapt the plea to the names of the parties, cause of action, sum paid, and the like: (*Thompson* v. *Sheppard*, 4 El. & B. 52; *Aston* v. *Perkes*, 15 M. & W. 385; *Lowe* v. *Steel*, 15 M. & W. 380.)

(*r*) The plea ought of course to be intitled of the Court and of the day of the month and year of pleading the same: (see s. ciii.)

(*s*) See note *f* to s. cxvi.

(*t*) A plea for another by a person not an attorney is not a nullity, but may be set aside on motion: (see note *g* to s. cxvi.)

(*u*) The plea ought to show whether defendant pleads in person or by attorney: (see note *j* to s. cviii.)

(*v*) As to the effect of a plea not limited in its commencement to part of the declaration, see note *h* to s. cxvi. Money may be paid into Court and pleaded as to one or more of several counts: (*Fulwell* v. *Hall*, 2 W.Bl. 837; *Hall* v. *East India Co.*, 2 Burr. 1120.) It has been held that payment made jointly upon two breaches in covenant is good, without showing how it is intended to be applied to each: (*Marshall* v. *Whiteside*, 4 Dowl. P.C. 766.) But where among other counts, there was one on a bill of exchange, it was suggested that the plea of payment into Court should state how much of the money was intended to be applied to the bill: (*Jourdain* v. *Johnson*, 2 C. M. & R. 564; *Armfield* v. *Burgin*, 8 Dowl. P. C. 247; *Tattersall* v. *Parkinson*, 16 M. & W.752; also see *Finleyson* v. *McKenzie*, 3 Bing. N. C. 824; *Harris* v. *Bushell*, 2 Dowl. N. S. 514; *Hills* v. *Mesnard*, 10 Q. B. 266; *Bailey* v. *Sweeting*, 1 D. & L. 653.)

(*w*) A plaintiff may recover less than he claims in his declaration, so the defendant in his plea may allege that less is due than is claimed: (*Tattersall* v. *Parkinson*, Parke B. 16 M. & W. 757.)

(*x*) A payment into Court of a less sum than that admitted by the plea to be due would be bad: (see *Tattersall* v. *Parkinson*, *ubi supra*; *Grimsley* v. *Parker*, 3 Ex. 610.) If plaintiff be entitled to interest on his cause of action, defendant should pay interest —to be reckoned to the date of payment and not merely to the date of the commencement of the action: (*Kidd* v. *Walker*, 1 Dowl. P.C. 331.) A defendant may be allowed to amend his plea by pleading payment of a further sum than that at first pleaded: (*Dunnell* v. *Young*, C. & Marsh, 465.) Where defendant paid into Court the amount claimed and offered to pay costs which plaintiff declined, undertaking to pay them himself: Held that defendant was entitled to succeed on his plea of payment into Court: (*Thame* v. *Boast*, 17 L. J. Q.B. 339.)

(*y*) *And says that the said sum is enough to satisfy*, &c. This is tantamount to the old form of no damages *ultra*, and is a substitution therefor. It is the material and traversable point in the plea. Where to an action for goods sold, money due, &c., defendant pleaded as to part never indebted, and as to the residue payment after action brought, naming the sum, which plaintiff accepted and received in satisfaction of the said *claim* of A, "and of all *damages* accrued in respect thereof," but only proved that the amount so paid was the debt sued for without

CXXI. (*z*) No rule or Judge's Order to pay money into Court shall be necessary, (*a*) except in the case of one or more of several Defendants, (*b*) but the money shall be paid to the proper Officer (*c*) of either Court, (*d*) who shall sign a receipt for the amount in the margin of the plea, (*e*) and the said sum shall be paid out to the Plaintiff, (*f*) or to his Attorney upon a written authority from the Plaintiff, on demand. (*g*)

(App. C. C.) Eng. C. L. P. A. 1852, s. 72.

No rule or order required.

Exception.

CXXII. (*h*) The Plaintiff, after the filing and service (*i*) of a plea of payment of money into Court, shall be at liberty (*j*)

(App. Co. C.) Eng. C. L. P. A. 1852, s. 73.

costs: held plea not proven: (*Cooke* v. *Hopewell*, 26 L. T. Rep. 224.)

(*z*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 72.—Applied to County Courts.—Substantially an enactment of Eng. R. 18 H. T. 4 Wm. IV. which was never in force in Upper Canada.

(*a*) It must be taken, as regards the rule or order, that this act, so far as it declares such rule or order to be unnecessary, supersedes Stat. U. C. 2 Geo. IV. cap. 1 s. 25, and 7 Wm. IV. cap. 3 s. 13, neither of which Acts has been expressly repealed by this Act, but by both which is made a motion necessary before paying money into Court.

(*b*) As to payment into Court by one or more of several defendants, see note *l* to s. cxix.

(*c*) *Proper Officer—Qu.* Is it intended where an action has been commenced in the office of a Deputy Clerk of the Crown, that money may be paid to such deputy as the "proper Officer," and as being the officer with whom the plea is filed?

(*d*) *Either Court, i.e.* Queen's Bench or Common Pleas.

(*e*) This is new in Upper Canada. No receipt on the margin of the plea was required under our old practice: (*Miles* v. *Harwood*, 1 U. C. R. 515). The omission of the receipt may now be held to render the plea irregular, and entitle the opposite party to move to set it aside: (*Harsant* v. *Busk*, 6 Jur. 1110.)

(*f*) Plaintiff will be entitled to the money whatever may be the result of the action. If he die, then his legal representatives only will be entitled to it: (*Palmer* v. *Reiffenstein*, 1 M. & G. 94). And on the other hand, money paid into Court by a defendant who afterwards dies, will, as against the same plaintiff, avail defendant's executors, if sued for the same cause of action: (*Carey* v. *Choate*, M. T. 6 Vic. *M.S.* R. & H. Dig., "Payment into Court," 2.)

(*g*) Plaintiff's signature to the written authority, when produced by the attorney, need not be verified on affidavit, unless so required by the Master: (N. R. 11.)

(*h*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 73.—Applied to County Courts.—Substantially a re-enactment of Rule 18 E. T. 5 Vic. which was copied from Eng. rule 19 of T. T. 1 Vic. The effect of this enactment is to allow plaintiff either to take the money paid into Court with his costs, or to reply damages *ultra*. Whatever may be the result of the cause, plaintiff will be entitled to the amount paid into Court, provided defendant be not a justice of the peace or other person entitled to special protection by statute.

(*i*) *Filing and service.* "Delivering" in Eng. Stat. Pleadings in England instead of being filed and served are merely "delivered" by one party to the other, which delivery is of itself sufficient: (Eng. Rule 7 M. T. 1 Wm. IV. Jervis N. R. 8, 9.)

(*j*) Plaintiff shall be at liberty either to accept or refuse the money paid into Court. Defendant by pleading payment into Court admits plain-

Reply of Plaintiff in to reply to the same, by accepting the sum so paid into Court

tiff's right to recover *some* damages, but contends that he has no right to a sum exceeding that paid into Court and pleaded. This of course the plaintiff may dispute in his replication, and thereupon proceed to trial. The *amount* of damages to which a plaintiff may be entitled is generally a question for the decision of a jury. But there are cases to which certain fixed rules have been applied, and by which all analogous cases must be governed. A review of the most important of these cases will, it is apprehended, be useful to the practitioner.

The distinction between damages liquidated and unliquidated or a penalty seems to be the first and most natural subject of consideration. It is very common for parties in written agreements to incorporate a clause naming a certain sum to be paid as "liquidated damages" by one party to the other, upon the doing or not doing of one thing or several things stipulated to be done or not as specially agreed upon. The intention of the parties to be gathered from the instrument signed by them, in this as in all other cases of written agreements, must prevail. If the sum fixed is in respect of the breach of one stipulation only, and the intention of the parties is otherwise unequivocal, the sum so fixed must be taken as liquidated damages and not as a penalty: (*Galsworthy* v. *Strutt*, 1 Ex. 659; *Alkyns* v. *Kinnier*, 4 Ex. 776; *Fuller* v. *Fenwick*, 16 L. J. C. P. 79; *Gilmour* v. *Hall et al.* 10 U. C. R. 809.) But where the sum is in respect of the doing or not doing several things of various degrees of importance, and notwithstanding the language used it is plain from the whole instrument that the real intention is different, in such a case inquiry must be made as to the actual damage and loss sustained —the sum named being in effect only a penalty and not liquidated damages: (*Davies* v. *Penton*, 9 D. & R. 869; *Kemble* v. *Farren*, 6 Bing. 141; *Boys* v. *Ancell*, 5 Bing. N. C. 394; *Horner* v. *Flintoff*, 9 M. & W. 678; *Price* v. *Green*, 16 M. & W. 846; *Ainslie* v. *Chapman*, 5 U. C. R. 313; *Henderson* v. *Nicholls*, 5 U. C. R. 398; *McLean* v. *Tinsley*, 7 U. C. R. 40; *Brown* v. *Taggart*, 10 U. C. R. 183.

In all actions either for breach of contract or for wrongs committed, as a general rule the actual and ultimate loss or injury to the party aggrieved is the true measure of damages. And a deduction must be made for whatever tends to diminish the extent of such loss or injury. After a plea of payment into Court, the right of the plaintiff to recover *something* having been conceded, it is the duty of the presiding judge upon the issue joined to inform the jury as to the "proper measure of damages." If he neglect to do so the Court will grant a new trial, although the point was not taken by plaintiff's counsel at the trial: (*Knight* v. *Egerton et al.* 7 Ex. 407.)

The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed: (*Robinson* v. *Harman*, Parke, B., 1 Ex. 855.) To this rule an exception has been created in the case of the sale of real estate. Such a contract is only on condition that the vendor has a good title; so that when a party contracts to sell there is an implied understanding that if he fail to make a good title, the only damages recoverable shall be the expenses to which the vendee may be put to by investigating the title, &c.: (*Flureau* v. *Thornhill*, 2 W. Bl. 1078; see also *Hunslip* v. *Padwick*, 5 Ex. 615.) But a person who under these circumstances buys real estate and without ascertaining that he is in a situation to offer *some* title, enters into a contract to resell, without the power to confer even the shadow of a title, must be held responsible for all damages sustained by a breach of his contract: (*Hopkins* v. *Grazebrook*, 6 B. & C. 31.) So where a person contracts

in full satisfaction and discharge of the cause of action in respect such case.

to sell, having full knowledge that he has *no* title: (*Robinson* v. *Harman*, 1 Ex. 850.) If it appear that the purchaser knew the state of the vendors title, the Court, if heavy damages are given, will intend that excessive damages have been given contrary to evidence, and will grant a new trial: (*Emery* v. *Miller*, Tay. U. C. R. 461.) And it has been held if a plaintiff sue a defendant in covenant for breach of title after having paid money upon account of the purchase, that he can recover the purchase money paid and interest; but not damages for improvements, or the increased value of the land: (*McKinnon* v. *Burrows*, 3 O. S. 590.) As to the measure of damages in an action by a vendor against an auctioneer for committing an error in the description of property sold, whereby plaintiff was compelled to return a portion of the money: see *Parker* v. *Farebrother*, 1 N. C. L. Rep. 323. The responsibility of a defendant upon the breach of an ordinary contract must be limited to the reasonable consequences of that breach: (*Black* v. *Baxendale et al*, 1 Ex. 410.) Where the plaintiff sent goods by defendants carriers, to be delivered in the town of B. on a Thursday, in order to be ready for market on Saturday, but did not give notice that they were sent for that purpose, and on Saturday plaintiff's clerk proceeded to B. to sell them, but owing to their non-delivery till the following Monday, he removed them to another place for sale: held in an action for the non-delivery of the goods that the expenses so incurred might be given by the jury as damages: (*Ib.*) And it would seem that if plaintiff declare for a total loss of goods sent by carriers upon which issue is taken, evidence shewing only that the cask in which the goods were packed was injured, and the goods slightly damaged, will not support the declaration: (*Hancock* v. *Bethune*, 3 U. C. R. 47.) In an action by three plaintiffs for a breach of contract in not completing certain works, whereby plaintiffs were prevented from fulfilling a contract made by them with another firm, consisting of two of themselves, plaintiffs were held entitled to recover as special damages the loss of the profits on their contract, although it could not be enforced at law: (*Waters et al* v. *Towers*, 8 Ex. 401) It is a rule that no jury in an action for breach of contract should give mere speculative or vindictive damages: (*Startup* v. *Cortazzi*, 2 C. M. & R. 165.) Where the contract was to deliver a certain quantity of linseed at a certain time, upon which plaintiff paid a sum of money; but previously to the time appointed a notice was given by defendant that he was unable to complete his contract: held that the correct criterion was the repayment of the money advanced, with simple interest upon it and payment of the difference between the contract price and the price of the linseed at the time the cargo would have arrived in due course according to the contract, and when if it had been delivered, plaintiff would have been enabled to sell it: (*Ib.*) So in a case where there was no notice by defendant to plaintiff of his inability to perform the contract, it was laid down that the measure of damages is not merely the amount of the difference between the contract price and the price at which similar goods could be bought at the moment the contract was broken, but a compensation for such profit as might have been made by the purchaser had the contract been duly performed: (*Dunlop* v. *Higgins*, 1 H. L. Cas. 381.) So where a defendant contracted to build and finish an iron vessel on or before August, 1854, but it was not completed until March, 1855, held that the true measure of damages was what the vessel would have made if it had been delivered by the day named: (*Fletcher* v. *Tayleur*, 26 L. T. Rep. 60.) The rule subject to certain modifications appears to be this: The damages due to the plaintiff in such cases consist in general of the loss that he has sustained, and the

of which it has been paid in, and he shall be at liberty in that

profit that he has been prevented from acquiring. The debtor, however, is only liable for the damages foreseen at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. But even in the case of the non-performance of the contract, resulting from the fraud of the defendant, the damages comprise only so much of the loss sustained by the plaintiff, and so much of the profit which he has been prevented from acquiring, as direct and immediate results from the non-performance of the contract: (*Hadley* v. *Baxendale*, Parke B. 9 Ex. 346.) Where the plaintiffs, the owners of a flour mill, sent a broken iron shaft to an office of the defendants, who were common carriers, to be conveyed by them from A. to B., to be used as a pattern for a new one; and the defendants' clerk, who attended the office, was told that the mill had been stopped, that the shaft must be delivered immediately, and that a special entry, if necessary, to hasten its delivery, must be made; and the delivery of the broken shaft to the consignee, who was to manufacture the new one, was delayed for an unreasonable time; in consequence of which the plaintiffs did not receive the new shaft for some days after the time they ought to have received it, and they were consequently unable to work their mill for want of the new shaft, and thereby incurred a loss of profits; held that, under the circumstances, such loss could not be recovered in an action against the defendants as common carriers: (*Ib.* 341; See further, *Valpy* v. *Oakley*, 20 L. J. Q. B. 380.) A railway company that issues time tables, and without changing them continues to circulate them notwithstanding an alteration in the time of the railway, so that the time tables are in fact false representations, is responsible both on the ground of contract and tort to parties who purchase tickets upon the faith of the time tables, and who sustain damage in consequence of the trains not starting as advertised in the time tables: (*Denton* v. *Great Northern R. Co.*, 26 L. T. Rep. 216.) The measure of damages is the amount actually expended in consequence of the breach of contract, besides a sum for nominal damages. It is not for a jury in such a case to award a sum for mere disappointment or in consequence of the non-performance of the contract, unless it is the fair result of the breach of contract. No damage can be recovered ordinarily in an action for breach of contract that is not capable of being stated specifically, proved, and appreciated: (*Hamlin* v. *Great Northern R. Co.*, 28 L. T. Rep. 104.) The case of a contract to marry has always been considered as a sort of exception, in which not merely the loss of an establishment for life, but to a certain extent an injury to a person's feelings in respect to that particular species of contract, may be taken into account: (*Ib.* per Pollock C. B.) In an action for not erecting a house and granting a lease of it, in satisfaction of a debt, as agreed upon, the measure of damages is the value of the lease, not the difference between the value of the lease and the amount of the debt: (*Strutt* v. *Farlar*, 16 L. J. Ex. 88.) But where A. purchased a lease from B., and B. covenanted to re-purchase it at the expiration of three years, for a greater price than he paid: Held in an action on the covenant, that A. was entitled to recover as damages the price agreed upon by B. for the re-purchase: (*Gibson* v. *Cubitt*, E. T. 2 Vic. *M.S.* R. & H. Dig., "Covenant," II. (2) 14.) In an action on a contract for work done, which has not been faithfully performed according to agreement, defendant may give this fact in evidence, and restrict plaintiff to the recovery only of the value of the work done and the materials supplied: (*Chapel* v. *Hickes*, 2 C. & M. 214.) The same principles in regard to mitigation apply to actions for goods sold and delivered with warranty or agreed to be supplied accord-

case to tax his costs of suit, and in case of non-payment thereof

ing to contract: (*Mondel* v. *Steel*, 8 M. & W. 858; *Manworthy* v. *Page*, 8 Jur. 126; *Parson* v. *Sexton*, 4 C. B. 899.) And to the extent that defendant obtains or is capable of obtaining an abatement of price on account of work being improperly done, goods not according to warranty or contract, &c., he must be considered as having received satisfaction for the breach of contract: (*Mondel* v. *Steel*, 8 M. & W. 858.) In an action for breach of agreement to repair, the measure of damages is the difference between the sum for which the reversion would sell if the premises were repaired, and that for which they would sell if not repaired: (*Smith* v. *Peat*, 9 Ex. 161.) So upon the same principle it has been held in an action on the case for pulling down a house in the possession of plaintiff, that the measure of damages is the amount by which the land is lessened in value owing to the defendant's wrongful act: (*Hosking* v. *Phillipe*, 3 Ex. 168.) So in an action by reversioners for a serious injury to their reversionary interest by the erection of a nuisance in a public highway, the jury are not necessarily restricted to a verdict for nominal damages but may give damages commensurate to the injury which the plaintiffs sustain by the possible continuance of the nuisance: (*Drew et al.* v. *Baby*, 1 U. C. R. 433.) So if a defendant covenant to pay a sum of money and make default, the question is—to what extent is plaintiff injured by the default of defendant? The answer would be, in the absence of special damage, that plaintiff is injured to the amount that defendant ought to have paid: (*Loosemore* v. *Radford*, 1 Dowl. N. S. 881.) Where therefore plaintiff as surety joined defendant in a promissory note, and the defendant in consideration thereof by deed covenanted to pay plaintiff the amount of the note on a day certain it was held in an action on the covenant, the note not having been paid by defendant, that the measure of damages was the amount of the note, though it had not been paid by plaintiff: (*Ib.*) But a party suing upon a bond of indemnity cannot recover damage beyond the amount of the penalty fixed in the bond: (*Mc Mahon* v. *Ingersoll*, H. T. 5 Vic. *M. S.* R. & H. Dig. "Indemnity bond," 10.) A Sheriff suing upon a bond to the limits need not prove that he has actually sustained pecuniary damage: (*Kingsmill* v. *Gardiner et al.* 1 U. C. R. 223.)

In actions on contract, as we have seen, the compensation for breach of contract is generally matter of account, and the damages given may be demonstrated to be right or wrong: but in torts a greater latitude is allowed to the jury, and the damages must be excessive or outrageous to warrant the interference of the Court after verdict: (*Sharp* v. *Brice*, De Grey, C. J. 2 W. Bl. 942; see also *Williams* v. *Currie*, 1 C. B. 841; *O'Connor* v. *Hamilton*, 4 U. C. R. 243.) In the case of a wrong, the damages are entirely with the jury, and they are at liberty to take into consideration the injury of the party's feelings, and the pain he has experienced if it was a case of violence or assault. Many topics and many elements of damage find place in an action for tort or wrong of any kind, which certainly have no place whatever in an ordinary action of contract, where plaintiff seeks to recover damages for a breach of contract: (per Pollock C.B. in *Hamlin* v. *Great Northern R. Co.*, 28 L.T. Rep. 104.) In actions for torts the true criterion of damage is the whole injury which the plaintiff has sustained from the wrongs committed: (*Clark* v *Newsam et al*, 1 Ex. 131.) This rule applies, though two persons be sued for a wrongful act. The damages in such a case should not be estimated with reference to the acts or motives of either—the more guilty or the more innocent of the two. Plaintiff is entitled to compensation in proportion to the *whole* injury which he has received. Though the Court may look and see what each has done and

within forty-eight hours, to sign Judgment (*k*) for his costs of

what injury has been sustained from the acts of each, yet the sum of both must be the plaintiff's verdict. Where there are two persons jointly sued who have so conducted themselves as to be jointly liable, each is responsible for the injury sustained by their common act: (*Ib.*) But no plaintiff in tort more than contract is entitled to unconscionable or unreasonable damages. For instance, where a landlord distrained for rent amongst other goods, things not distrainable, and the tenant paid the amount of the distress and costs upon which the distress was altogether withdrawn, held that the tenant in an action of trespass was entitled only to recover the actual damage sustained by the taking of those particular goods and not the whole amount paid under the distress: (*Harvey* v. *Pocock et al.* 11 M. & W. 740.) So if the distress be allowed to remain upon the ground more than five days after seizure, the true measure of compensation is the actual damage sustained, and not the value of the property seized: (*Thompson* v. *Marsh et al.* 2 O. S. 355.) So if goods distrained for rent be sold without appraisement, the measure of compensation is the value of the goods less the rent due: (*Knight* v. *Egerton et al.* 7 Ex. 407.) And although no actual damage be sustained by the neglect to appraise, yet it would seem that the bare fact of there having been no appraisement would entitle plaintiff to at least mominal damages: (*Maguire* v. *Post*, 5 O. S. 1.) The injury sustained by a plaintiff is often made up of the necessary consequences of the wrong committed, and for these consequences the party aggrieved is entitled to be compensated or re-imbursed. Thus, in an action for running down a ship, it appeared that plaintiff had been obliged, in consequence of the injury which his vessel had sustained by the collision, to employ a steam-tug, for which he paid a certain sum of money reasonable in amount, and the doing of which was just what a reasonable man would do under similar circumstances, when he had no judgment to resort to but his own.—plaintiff was held entitled to be re-imbursed: (*Tindall et al* v. *Bell et al.* 11 M. & W. 228.) But in such a case, a plaintiff asking to be re-imbursed must show that he acted as a reasonable man would have done, in settling the amount claimed for service. If instead of paying the amount demanded, he litigate, and then after commencement of action tenders a sum wholly insufficient, in consequence of which a verdict passes against him, he will not be entitled to recover the amount of costs paid by him in that suit: (*Ib.*) Where a sheriff sued a bailiff for negligence, in allowing a prisoner to escape, in consequence of which the sheriff was sued by the creditor, and a verdict recovered against him for nominal damages, it was considered that the sheriff was entitled to recover both the costs of the action against himself and his own costs, although no notice of the former action had been given to the bailiff by the sheriff: (*Ruttan* v. *Shea*, 5 U. C. R. 210.) But no plaintiff entitled to recover damages either for a contract broken or an injury suffered, has a right to inflame his account against defendant by incurring additional expense in the unrighteous resistance of an action which he could not hope to defend: (*Short* v. *Kallerway*, Denman C.J. 11 A. & E. 31.) Upon this point see the following cases: *Neale* v. *Wyllie*, 3 B. & C. 533; *Pennall* v. *Woodburn*, 7 C. & P. 117; *Lewis* v. *Peake*, 7 Taunt. 153. Also *Smith* v. *Compton*, 3 B. & Ad. 407; *Holloway* v. *Turner et al.* 6 Q. B. 928; *Lock* v. *Ashton*, 18 L. J. Q. B. 76. In trespass for cutting plaintiff's land and carrying away the soil, it has been held that the measure of damages is compensation for damage actually sustained, and not the amount which would be required to restore the land to its original condition: (*Jones* v. *Gooday*, 1 Dowl. N. S. 50.) But in trespass for entering plaintiff's mine and taking coal, it has been held that

suit so taxed; (*l*) or the Plaintiff may reply that the sum paid into

the measure of damages is the value of the coal, without deducting the expense of getting it out of the mine: (*Wild* v. *Halt*, 1 Dowl. N. S. 876.) These and similar cases should not be received as authority without reference to s. lxxv. of this Act, which enables plaintiffs in one action, by the joinder of several causes of action, to sue for direct and consequential damages. But before this act, even in trespass, it has been held that a jury might take consequential damages into consideration. Thus, where defendants drove against plaintiff's chaise, the consequence of which was that a person, who sat in the chaise, fell upon the dashing board, the effect of which was to throw the dashing board upon the back of the horse, and the horse in consequence kicked and injured the chaise to the extent of £13: Held that this sum was properly recoverable as the measure of damages: (*Gilbertson* v. *Richardson*, 5 C. B. 502.) In trover, on a bond or other written instrument for the security of money, mutilated by defendant, it would seem that plaintiff is entitled to recover as damages the amount that he might have recovered on the instrument had it not been mutilated: (*Bank of Upper Canada* v. *Widmer*, 2 O. S. 222; *Mc Leod* v. *McGhie*, 2 M. & G. 826.) And in this form of action, if brought for the recovery of a chattel, where special damage is laid and proved, there can be no reason for measuring the damages solely by the value of the chattel converted: (*Bodley* v. *Reynolds*, Denman C. J. 8 Q. B. 779.) Thus in trover for carpenters's tools, special damage was laid, proved, and recovered in respect of plaintiff, a carpenter, being hindered from working: (*Ib.*) As to the effect of a plea of payment into court, as an admission either of the cause of action or amount of damages claimed, see note *p* to s. cxx.

It is still necessary to allege special damage in the declaration where not formerly recoverable without such allegation: (See Sch. B. No. 28 of this Act.) The law of damages will be found ably treated at length in a recent English work by John D. Mayne, and also in an American Treatise by Professor Sedgwicke.

(*k*) Where plaintiff's attorney, by *mistake*, accepted money paid into court, and signed judgment for costs, the judgment upon application of plaintiff and upon payment of costs, was set aside, and plaintiff permitted to proceed with his action: (*Emery* v. *Webster*, 9 Ex. 242.)

(*l*) The *quantum* of costs to be allowed plaintiff will depend upon the form of issue raised by the plea of payment into court. That plea may be either in respect of the whole cause of action, or only of a part selected, and, as it were, isolated by defendant. If the plea be to the whole declaration, plaintiff is undoubtedly entitled to take out of court the amount so pleaded, and to tax his costs of suit, which ends the cause. But if defendant has filed several pleas, of which the plea of payment into court applies only to part of the declaration, and the remaining pleas to the residue, the plaintiff by accepting the money so paid into court is only entitled to the costs of the cause in respect to that part of the declaration to which payment is pleaded: (*Rumbellow* v. *Whalley*, 16 Q. B. 397; also N. R. 12:) and must either reply or enter a *nolle prosequi* as to the residue. If he elect to go to trial, and fail on the residue defendant will be entitled to the costs of the cause in respect of such defence, commencing at "Instructions for plea," but not before: (N.R. 12.) And if plaintiff in such a case neglect either to enter a *nolle prosequi* or to proceed to trial, defendant will have the right, upon proper demand, to sign judgment of *non. pros.*: (See *Emmett* v. *Standen*, 6 Dowl. P. C. 591; *Topham* v. *Kidmore*, 5 Dowl. P. C. 676; *Godee* v. *Goldsmith*, 5 Dowl. P. C. 288; *Coates* v. *Stevens*, 3 Dowl. W. C. 784.)

Plaintiff satisfied. Plaintiff not satisfied.

Court is not enough (*m*) to satisfy the claim of the Plaintiff in respect of the matter to which the plea is pleaded, (*n*) and in the event of an issue thereon being found for the Defendant, the Defendant shall be entitled to Judgment and his costs of suit. (*o*)

(App. Ct. C.) Eng. C. L. P. A. 1852, s. 74.

CXXIII. (*p*) And because certain causes of action may be considered to partake of the character both of breaches of con-

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(*m*) Plaintiff, if he afterwards change his mind, may apply to amend his replication by accepting the money paid into court, upon paying defendant all costs incurred by him subsequently to the payment into court: (*Kelly* v. *Flint*, 5 Dowl. P. C. 293.)

(*n*) This is in lieu of the old form of replication, that the defendant "was and is indebted to plaintiff in a greater sum" than that paid into court: See *Faithful* v. *Achley*, 9 Dowl. P. C. 555.

(*o*) Defendant in this case, it is apprehended, would be entitled to his costs of suit, and not merely those incurred since payment into Court according to the old practice: the costs to be in respect of the whole or a portion (as the case may be) of the plaintiff's cause of action so far as covered by the plea of payment: see *Harrison* v. *Watt*, 16 M. & W. 316; *Thame* v. *Boast*, 12 Q. B. 808; *Rumbelow* v. *Whalley*, 16 Q. B. 397. This rule as to costs will apply, if plaintiff be non-suited: (*Shillibeer* v. *Longwood*, 15 L. T. Rep. 143;) or if defendant be allowed to sign judgment under s. cli. upon a suggestion that plaintiff neglects to proceed to trial: (see *McLean* v. *Phillips*, 7 C. B. 817.) And if part of the demand be paid after action brought and the remainder paid into Court and pleaded, defendant will be entitled to the general costs of the cause: (*Horner* v. *Denham*, 12 Q. B. 813.) But where plaintiff having after plea obtained leave to amend his declaration on payment of costs by increasing the amount of damages, and defendant having after amendment paid money into Court by which one of his pleas became unavailable, held that he was not entitled to the costs of such plea: (*Gould* v. *Oliver*, 5 Bing. N. C. 115.) The phraseology of this section, though apparently contemplating payment pleaded to the whole declaration is clearly like that of the old rules: (see *ante* note *h*), the policy of which was to make each party pay costs in respect of that part of the case in which he was wrong: (per Alderson B., case in Chambers reported in note *a* to p. 520 of 4 D. & L.; see also *Goldee* v. *Goldsmith*, 5 Dowl. P. C. 288; *Amor* v. *Cuthbert et al*, 1 Dowl. N. S. 160; and cases cited in note *l*, *ante*.) Where therefore to debt for goods sold, money lent, &c., defendant pleaded except as to 15s. parcel, &c., never indebted, and as to the sum of 15s. payment into Court, and plaintiff joined issue on the former plea, and accepted the 15s. paid into Court and the issue was afterwards found for the defendant, it was held that plaintiff was entitled to all the costs relating to the 15s. paid into Court: (*Harrison* v. *Watt*, *ubi supra*; see further N. R. 12.) Where in an action of covenant the declaration contained several breaches, and £10 were paid into Court, on one breach, leaving the others to be tried, upon which plaintiff recovered 1s. damages, plaintiff was held entitled to costs, notwithstanding the Judge certified under Stat. 43 Eliz. cap. 6 s. 2, "that the jury in this case found a verdict for 1s. damages and no more:" (*Richards* v. *Bluck*, 6 C. B. 443.)

(*p*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 74.—Applied to County Courts.

tract and of wrongs, and doubts (*q*) may arise as to the form of pleas in such actions, and it is expedient to preclude such doubts; (*r*) any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong. (*s*)

Plea good, though it treat an alleged breach of contract as a wrong, or *vice versa*.

(*q*) It is unnecessary to enumerate any such, as the enactment itself is sufficiently explanatory; but it may be mentioned that in the early case of *Powell* v. *Layton*, (2 N. R. 365,) the question arose and it was held that to a count apparently in case but substantially in contract a plea in abatement for non-joinder (which can only be pleaded in an action on contract) was good: see also *Buddle* v. *Willson*, 6 T. R. 369. A similar plea has been held to be inadmissible in an action clearly founded upon a tort: (*Mitchell* v. *Tarbutt*, 5 T. R. 649; see also *Govett* v. *Radnidge et al.* 3 East. 62; *Elwell* v. *Grand Junction R. Co.*, 5 M. & W. 669.) Where in case against a common carrier for not safely conveying goods according to undertaking, to which defendant pleaded not guilty, held that the plea admitted the goods to have been received as alleged, but denied negligence in the performance of the duty resulting from the contract: (*Webb* v. *Page*, 6 M. & G. 196.) Though this section relieves defendants from the embarrassment of deciding whether a declaration is framed on breach of contract or for a wrong, yet it leaves open to doubt the effect of pleas on contract when pleaded to declarations sounding of tort or *vice versa*, *ex. gr. non assumpsit* to an action on the case or not guilty in an action of *assumpsit*. As to the effect of these and similar pleas in general, see N. Rs. Pl. 6 *et seq.* and in connection therewith the following cases:—*Passenger* v. *Brookes*, 1 Bing. N. C. 587; *Hemming* v. *Parry*, 6 C. & P. 580; *Smith* v. *Parsons*, 8 C. & P. 199; *Spencer* v. *Dawson*, 1 M. & R. 552.)

(*r*) The mode in which the doubts here mentioned are precluded is a necessary consequence of s. c., which enacts "that no pleading shall be deemed insufficient which could heretofore have been objected to on special demurrer only," for a plea though held bad before this Act, for example, *non assumpsit* in case was considered open to objection upon special demurrer only: (*Davison* v. *Moreton*, 1 Chit. R. 715; *Jeremy* v. *Farrant*, 1 Dowl. P.C. 453; *Heyne* v. ——, 1 Chit. R. 716; see also *Smith* v *Jones*, 3 D. & R. 621.) And it has already been enacted by this Act that either party can only object by demurrer to the pleading of the opposite party, on the ground "that such pleading does not set forth sufficient *ground* of action, defence, or reply, &c.: (s. xcix.; see further s. cxl.)

(*s*) It may be necessary to draw attention to the fact that this section only declares that a plea good in substance shall not be objectionable merely because it treats a declaration as framed for a breach of contract which is in fact for a wrong or *vice versa*, but does not render unobjectionable pleas in *assumpsit* to any form of action in which such pleas have heretofore been held or declared to be bad, such, for example, as *non assumpsit* to an action on a bill or note, &c.: (see N. Rs. Pl. 6, *et seq.*; also *Kelly* v. *Villebois*, 3 Jur. 1172; *Masson* v. *Hill et al*, 5 U. C. R. 60; *Sewell* v. *Dale*, 8 Dowl. P.C. 309; *Eddison* v. *Peagram*, 4 D. & L. 277; *Boasfield* v. *Edge*, 1 Ex. 89; *Harvey* v. *Hamilton*, 18 L. J. Ex. 377.) It is presumed that pleas pleaded in contravention of established practice, may be set aside upon application under s. ci. of this Act.

con stat for u.c. ch 22 s 104

(App. Co. C.) CXXIV. (*t*) Pleas of payment (*u*) and set-off, (*v*) and all

(*t*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 75.—Applied to County Courts.

(*u*) A plea of payment is only necessary when there has been a debt incurred. No debt can be said to have been incurred where there has been no credit. Thus, where a man makes a purchase and *eo instanti* pays for the article and takes it and gives the money for it there is no debt—it is an exchange of money for goods and there is no occasion to plead payment, for the man was never indebted. The same principle applies to all transactions that fairly come under the same arrangement, whether a man goes to an inn to eat his dinner, and pays for it immediately, or whether he goes to remain there for more than one meal, or even for a day or several days, where it is never intended that there should be any credit given, except for the moment as it were, while the goods are being handed over to be paid for: (*Wood et ux* v. *Bletcher*, 27 Law T. Rep. 126. See also *Bussey* v. *Barnett*, 9 M. & W. 312; and *Littlechild* v. *Banks*, 7 Q. B. 739.) It has been held in debt on simple contract that where defendant pleads payment of a certain sum of money he must prove payment of *that* sum, (even though it be laid under a *videlicet*) in order to entitle him to a verdict on the whole plea; but that the plea may be taken distributively and the issue found for defendant as to the amount proved to have been paid, and as to the residue for plaintiff: (*Cousins* v. *Paddon*, 2 C. M. & R. 545.) Therefore, where in debt for goods sold and delivered, and work and labor done, the defendant pleaded *first, nunquam indebitatus; secondly*, as to parcel of the sum demanded, to wit, £338, payment of £338 in discharge of that parcel; *thirdly*, a set-off for money paid: the plaintiff proved a special contract for good sound saleable bricks, to be made for him by the defendant, at a certain price per thousand, and delivery of so many as amounted at that rate to £896; the defendant proved payment of £314 and a set-off for £21, and proved also that the bricks were badly made, and the jury found the value of those delivered to be not more than £335; the Court directed the verdict to be entered on the plea of payment as to £314 for the defendant, as to the residue for the plaintiff; on the plea of set-off as to £21 for the defendant, as to the residue for the plaintiff; on the plea of *nunquam indebitatus* as to the whole sum demanded, except £335, for the defendant; so as to give the defendant judgment on the whole record: (*Ib.*)

(*v*) The statutes of set-off are 2 Geo. II. cap. 22 s. 13 and 8 Geo. II. cap. 24 ss. 4-5. It has been held that if defendant plead to the whole cause of action set forth in the declaration a set-off of a sum of money, but do not prove that the amount so pleaded is equal to or greater than the aggregate amount of plaintiff's claim, there must be a verdict on that plea for the plaintiff: (*Moore* v. *Butlin*, 7 A. & E. 597.) It is an advantage to a defendant to be allowed to plead generally that a greater sum is due to him that the amount of the plaintiff's demand; but then defendant has no right to take an unfair advantage of plaintiff by pleading to the whole, and thus taking the chance of proving as much as he can, and claim to be allowed a verdict for as much as he has proved, when he has not proved any set-off equal to that which he has pleaded or to the debt which the plaintiff has established. The general rule must apply, that if a party plead a special plea and fail in proving any part of it, he fails in proving the whole *quoad* the issue raised: (*Tuck* v. *Tuck*, Abinger C.B. 5 M. & W. 108.) But defendant cannot as a general rule for this purpose take into account a defence which arose after the commencement of the suit. The language of the plea of set off is to be understood as applying to the state of the account between the plaintiff and the defendant at the time of the commence-

other pleadings (*w*) capable of being construed distributively, shall be taken distributively, (*x*) and if issue is taken thereon and so much thereof as shall be a sufficient answer to part of

Eng. C. L. P. A. 1852, s. 76. Distributive plea to be construed

ment of the action. The defendant by that plea alleges that the plaintiff was at the time the action brought indebted to him in an amount equal to or greater than that in which he was indebted to plaintiff, and that such debt is still owing to him, defendant: (*Spradbery* v. *Gillam*, Parke B. 2 L. M. & P. 367.) The plea has been held to be so far divisible that if defendant by means of it taken with other pleas on the record, cover the *whole* of plaintiff's demand, he will be entitled on that plea to have a verdict entered in his favor for the amount proved: (*Tuck* v. *Tuck*, Parke B. *ubi supra*; see also *Ford* v. *Beech*, 11 Q. B. 842; *Nicholls* v. *Tuck*, 1 N. C. L. Rep. 532.) But in this as in the case of a single plea to the whole declaration if the amount proved be less than the amount of claim established by plaintiff, the issue must be found for plaintiff: (*Tuck* v. *Tuck*, *ubi supra*; see also *Kilner* v. *Bailey*, 5 M. & W. 382; *Green* v. *Marsh*, 5 Dowl. P. C. 669.) The case of *Tuck* v. *Tuck* is not so correctly reported in 7 Dowl. P.C. 378 as in 5 M. & W. 108. It in effect decides that plaintiff cannot have a verdict on a plea of set-off unless the plea cover plaintiff's demand as it stood originally, or as reduced by some other plea, but is no authority for depriving a defendant of the set-off in *reduction of damages*. Therefore it has been since held that a set off, if pleaded and proved, though it do not cover the whole of plaintiff's claim, may prevail in reduction of damages: (*Rodgers* v. *Maw*, 15 M. & W. 444.)

(*w*) *And all other pleadings.* This enactment seems to embrace all forms of actions and all forms of pleading in any particular action—demurrers included. Demurrers have been held divisible long before this Act: (*Hinde* v. *Gray*, 1 M. & G. 201 note *a*; also *Briscoe* v. *Hill*, 10 M. & *W.* 785; *Yates* v. *Tearle*, 8 Jur. 774.) Whether there be a demurrer upon the record or not, the Courts have laid down the rule that judgment must be given upon the whole record according to the truth. And that where several breaches are assigned in a declaration to the whole of which there is a demurrer, if any breach is well assigned, the plaintiff is entitled to judgment as to that breach: (*Slade* v. *Hawley*, 13 M. & W. 959.)

(*x*) Before the C. L. P. Acts where there was a plea justifying under an alleged right of way with horses, carts, and carriages, for the purpose of fetching water *and goods* from a navigable river, and the jury negatived the right as to the carrying of goods but affirmed it as to the carrying water, the Court directed the verdict to be entered distributively: (*Knight* v. *Woore*, 5 Dowl. P. C. 201.) And where in trespass for breaking and entering *three* closes, defendant pleaded that the closes in which, &c., were the soil and freehold of one L. T., to which plaintiff replied alleging seisin in four other parties who demised to plaintiff, whose seisin the defendant in his rejoinder traversed, and at the trial plaintiff proved a case only as to *two* of the closes, but offered no evidence as to the third, it was held that the issue was distributable, and that plaintiff was entitled to a verdict as to the two closes and defendant as to the third: (*Phythian* v. *White et al.* 1 M. & W. 216; see also *Sharland* v. *Loaring*, 1 Ex. 375; *Vivian* v. *Jenkin*, 8 A. & E. 741; *Routledge* v. *Abbott et al.* 8 A. & E. 592.) On a plea of *liberum tenementum* to an action of trespass *quare clausum fregit*, the defendant is entitled to a verdict if he prove a title to that *part* of the close in which the trespass was committed, and is not bound to prove title to the whole close; (*Smith*

distributively, &c.

the causes of action proved, shall be found true by the Jury, a verdict shall pass for the Defendant in respect of so much of the causes of action as shall be answered, and for the Plaintiff in respect of so much of the causes of action as shall not be so answered; (*y*) and if upon a plea of set-off the Jury shall find a larger sum proved to be due from the Plaintiff to the Defendant

If on set-off Defendant prove more

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v. *Royston*, 8 M. & W. 881.) So as to a plea of leave and license to that action: (*Bracegirdle* v. *Peacock*, 15 L. J. Q. B. 33; *Adams* v. *Andrews*, 20 L.J. Q. B. 33.) Where a declaration was for breaking and entering a close generally and pulling down certain posts and bars standing thereon, to which defendant pleaded that there was a footway over the close, and that defendant, because the posts and bars obstructed the way, pulled them down: replication traversing the footway: Held that on these pleadings defendant was entitled to a verdict on proof of a right of way *in any direction* over the close: (*Webber* v. *Sparkes et al.* 10 M. & W. 485.) But where in case for disturbing the plaintiffs' right of ferry from Greenwich to the Isle of Dogs and back again, to which defendant pleaded, *first*, not possessed of the ferry, *secondly*, that there was no such ferry: and plaintiff at the trial proved only half of what he claimed, *i. e.*, the right *from* but not *to* the Isle of Dogs, it was held that the right alleged was divisible, and that plaintiffs were entitled to have the verdict entered for as much as they proved: (*Giles et al.* v. *Groves*, 12 Q. B. 721; but see *Higham* v. *Rabbet*, 7 Dowl. P. C. 653.) So where to an action for applying water to other purposes than those of an engine defendant pleaded a prescriptive right to use the water for the purposes of a boiler and cistern. Defendant proved his right as to the boiler but not as to the cistern. Held that the verdict should be entered distributively: (*Proprietors of Rochdale Canal Co.* v. *Radnciffe*, 21 L. J. Q. B. 297.) So in trover for certain goods described in which plaintiff succeeded only as to part of the goods claimed, it was held that defendant, who had pleaded amongst other pleas a plea denying plaintiff's property in the goods was entitled to have the verdict entered distributively: (*Williams* v. *the G. W. R. Co.* 8 M. & W. 856; see also *Elliott* v. *Bishop*, 10 Ex. 522.) The same principle has been applied to actions for libel charging several offences, each of which might be separately justified: (*Clarke* v. *Taylor*, 2 Bing. N.C. 654; *Mountney* v. *Watton*, 2 B. & Ad. 673; *McGregor* v. *Gregory*, 11 M. & W. 287.) So in an action on several bills or notes to which there is a plea that they and each of them were and was procured by fraud: (*Wood* v. *Peyton*, 2 D. & L. 172; see also *Loweth* v. *Smith*, 2 D. & L. 212.) It has been clearly held that where a plea is so far distributive that part of it is an answer to the declaration, and the remaining part unnecessary to be proved, that proof of the former part is of itself sufficient to entitle defendant to a verdict: (*Atkinson* v. *Warne*, 1 C. M. & R. 827.)

(*y*) This section seems to apply only to pleas that answer the action by confession and avoidance, not to pleas in denial: (*Wilkinson* v. *Kirby*, Maule, J. 23 L. J. C. P. 222; 26 L. & Eq. 375.) It in effect extends the doctrine of *Cousins* v. *Paddon* and *Tuck* v. *Tuck*, (notes *u* and *v*, *ante*) to all descriptions of pleadings: (*Parr* v. *Jewell*, 16 C. B. 684, 32 L. & Eq. 405; see also *Gabriel et al.* v. *Dresser*, Jervis C.J. 15 C. B. 622.) It does not say that the principle of pleading is to be altered, according to which it is held that a plea which is bad in part is bad altogether (*Crump* v. *Adney*, 1 C. & M. 362; *Clarkson* v. *Lawson*, 6 Bing. 266; *Foulds* v. *Scarfe*, 4 Scott, N. R. 713),

than is proved to be due from the Defendant to the Plaintiff, a verdict shall pass for the Defendant for the balance remaining due to him, (*z*) and the Defendant shall have Judgment to recover such balance and his costs of suit. (*a*)

due from Plaintiff than to him.

CXXV. (*b*) A Defendant may either traverse generally such of the facts contained in the declaration as might have been denied by one plea, (*c*) or may select and traverse separately any material allegation in the declaration, (*d*) although it might

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 76. Traversing facts alleged in declaration.

con stat for u.c. c/l 22 § 105

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the record is still to be taken as a whole record, and the meaning of the section is *that when at the trial the facts of a case can be taken distributively, they are to be so taken:* (*Wilkinson* v. *Kirby*, Jervis, C. J., *ubi supra*).

(*z*) The same in principle as Stat. U. C. 11 Geo. IV. cap. 5, s. 1.

(*a*) The right of a defendant to costs in general depends upon Stat. 23 Hen. VIII. cap. 15 (extended by 4 Jac. I. cap. 3, and see St. U.C. 2 Geo. IV. cap. 1, s. 38,) which Statute as construed in several cases applies, although a defendant cannot have a verdict in his favor on *every part* of the record: (*Elderton* v. *Emmens*, 5 D. & L. 599.) As to apportionment of costs on several issues, see s. CXXX. of this Act and notes.

(*b*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 76.—Applied to County Courts.

(*c*) Such was the practice at common law. One plea only was allowed to be pleaded and that plea true: (*Gully* v. *the Bishop of Exeter*, Best C.J. 5 Bing. 45.) In most of the usual actions there is a fixed and appropriate plea for traversing the declaration, in cases where the defendant means to deny its whole allegations or the principal fact on which it is founded. The form of plea or traverse has usually been denominated the *general* issue in that action. It appears to have been so called because the issue that it tenders, involving the whole declaration or the principal part of it, is of a more general and comprehensive kind than that usually tendered by a simple traverse. But as by the provision of recent rules of Court (H. T. 4 Wm. IV. corresponding to ours of E. T. 5 Vic. of which N. Rs. Pl. 6 *et seq.* are re-enactments,) such issues are now more limited in their effect than formerly, and the term of "general issue" is therefore less appropriate: (see N. Rs. 6 *et seq.* and notes thereto, also Sch. B. No. 30 *et seq.* to this Act.) To review the cases distinguishing what defences may be given in evidence under the general issue and what must be specially pleaded, would demand a treatise on pleading. Reference may be here made to a Digest of the decisions compiled by Richard Charnock of Gray's Inn, London; see also *Blackie* v. *Pidding*, 6 C. B. 196; *Chamley* v. *Grundy*, 2 N. C. L. Rep. 822. If the general issue and special pleas be pleaded by defendant and if it should appear to the Judge in Chambers that a question might arise at Nisi Prius as to the admissibility as evidence of the matter specially pleaded under the general issue, the special pleas may be allowed to stand: (*Lumley* v. *Gye*, 22 L. J. Ex. 9; 14 L. & Eq. 442.)

(*d*) The general rule of law undoubtedly is that a party shall not be allowed to take his traverse in such a form as to make matter which is immaterial, parcel of the issue: (*Colborne* v. *Stockdale*, Stra. 493; *Doctrina Placitandi*, 360; *Goram* v. *Sweeting*, 2 Wms. Saunders 204 a.) But in certain cases in which material and immaterial matters are mixed up in one combined and undivided allegation, the opposite party has been held entitled to traverse the whole compound allegation in the terms in which it is

have been included in a general traverse. (*e*)

made: (*Tatem* v. *Perient*, Yelv. 195; *Seaker case Dyer*, 365; *Smith* v. *Dixon*, 7 A. & E. 1; *Cutts* v. *Surridge*, 11 Jur. 585; *King* v. *Norman*, 4 C.B. 884.) No traverse should be so large as to compel the opposite party to prove more than he otherwise would be bound to do in order to support his claim or defence: (*Eden* v. *Turtle*, 10 M. & W. 635; *Bradley* v. *Bardsley*, 14 M. & W. 873; *Soares* v. *Glyn*, 8 Q. B. 24.) The rules as to traverses are in general terms thus mentioned in Steph. Pl. 241 *et seq.* 1. The traverse must not be taken on an immaterial point. 2. It must not be too large, nor, on the other hand, too narrow. Numerous authorities are referred to by the learned author in support of these rules. The obligation to apply for leave to plead double or else judgment applies as much to traverses as to affirmative pleadings: (*Rosse* v. *Cummings*, Chambers, Oct. 4, 1856, Burns, J.) But there are certain pleas of which any two or more of them may be pleaded together as of course, without leave of the Court or a Judge: (see s. cxxxiii.) In Upper Canada before the rules of 1842, the Court though in many cases acknowledging the right to set side pleas either double or inconsistent with each other, refused to do so merely because they amounted to the general issue, which was also pleaded. As to the effect of subsequent rules see note to s. cxxx.

(*e*) In order that a defendant may not be put in a worse situation than when the general issue in its widest acceptation of the term was permitted, provision has been made for the allowance of several special pleas separately traversing material allegations formerly traversed by one general plea. Instead of one plea only as at common law being allowed, it is not an uncommon thing now to find several upon the record. The strictness has been relaxed for the promotion but not for the perversion of justice: (*Cooling* v. *Great Northern Railway Co.* Campbell C. J. 15 Q.B. 496.) The concluding part of the section under consideration does not apply to the pleading of several matters, as to which generally see s. cxxx. and notes thereto. The express power to traverse specially an allegation contained in the declaration, although it might have been included in a general traverse, is new, and such as has been heretofore refused: (*Sutherland* v. *Pratt*, Parke B. 11 M. & W. 312.) The true principle of pleading several matters is, that if the justice of the case require it, the Court will not prevent it; but it will not allow a party so to plead, merely for the purpose of throwing difficulties in the way of his opponent: (*Gully* v. *Bishop of Exeter*, Gaselee, J., 5 Bing. 48.) The object of pleading is to narrow the matter in dispute to a single point. Therefore a defendant is not permitted to traverse a series of facts wholly immaterial to his defence: (*Ib.* 45.) In criminal cases the law allows a prisoner to put the prosecutor upon proving his case in every material particular; but in civil proceedings the interest of both parties requires that they should be put to as *little expense as possible*. It is an important duty of the Court, in the exercise of its discretion as to pleas, to render justice as cheap and as expeditious as possible: (*Ib.* 46; see also *London & Brighton R. Co.* v. *Wilson*, 6 Bing.N.C. 135; *London & Brighton R. Co.* v. *Fairclough*, *Ib.* 270; *South Eastern R. Co.* v. *Hebblewhite*, 12 A. & E. 497.) If a defendant under colour of this section abuse the powers conferred as to traversing separately material allegations of plaintiff's declaration, not admissible under s. cxxxiii., the course of the latter is (if no leave have been granted to traverse separately under s. cxxx. the several matters,) to sign judgment under s. cxxxv.; but if leave have been given, then plaintiff must apply to the Court or a Judge under the provisions of s. ci. of this Act. Where since this Act, in an action of Crim. Con., defendant applied under s. cxxx. to be al-

CXXVI. (*f*) A plaintiff shall be at liberty to traverse the whole of any plea or subsequent pleading of the Defendant by a general denial, (*g*) or admitting some part or parts (*h*) there- (*App. Co. C.*) Eng. C. L. P. A. 1852, s. 77. Traversing pleas.

lowed to plead,—1st, Not guilty; 2d, that the person whom defendant debauched was not plaintiff's wife; 3d, leave and license of plaintiff; 4th, that before and at the time of the committing of the grievances complained of, plaintiff had relinquished and renounced the society, comfort, and assistance of his wife, and had separated himself from and was living apart from her, and had never since returned to her, Burns J. disallowed the second plea as being included in the first and therefore "unnecessary," and also disallowed the fourth, as affording no answer to the declaration, and therefore "bad in substance": (*Thom* v. *Huddy*, Chambers, Oct. 14, 1856, Burns, J.)

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 77.—Applied to County Courts.

(*g*) The general form of replication intended by this and s. CXXVIII. is in the nature of the replication *de injuria*, and is indeed a substitute for it: (*Glover* v. *Dixon et al*, 24 L. & Eq. 490.) And with respect to the replication *de injuria*, it was a settled rule that it put in issue only the material allegations of the plea: (*Davis* v. *Chapman*, Tindal, C. J., 2 M. & G. 927; *Elkin* v. *Janson*, 13 M. & W. 326; *Froster* v. *Bettes et al*, 5 U. C. R. 599;) and was only pleaded when the plea contained matter of confession or of excuse: (*Cragates Case*, 8 Rep. 67 *a*; *Whitlaker* v. *Mason*, 2 Bing. N. C. 359; *Isaac* v. *Farrar*, 1 M. & W. 65; *Parker* v. *Riley*, 3 M. & W. 230; *Humphreys* v. *O'Connell*, 7 M. & W. 370; *Solly* v. *Neish*, 4 Dowl. P. C. 248; *Jones* v. *Senior*, 4 M. & W. 123; *Noel* v. *Rich*, 4 Dowl. P. C. 228; *Salter* v. *Purchall*, 1 Q. B. 209; *Scott* v. *Chappelow*, 2 Dowl. N. S. 78; *Thompson* v. *Breakenridge et al*, 3 U. C. O. S. 170; *Blair* v. *Bruce*, 5 O. S. 524; *Leonard* v. *Buchanan*, M. T. 6 Vic. *MS.* R. & H. Dig. "*De Injuria*," 4; *Davidson* v. *Bartlett et al*, 1 U. C. R. 50; *Hamilton* v. *Davis et al*, *Ib.* 176; *Vanorman* v. *Leonard*, 2 U. C. R. 72; *Rattray* v. *McDonald*, 3 U. C. R. 354; *Bown* v. *Hawke*, 5 U. C. R. 568; *McCuniffe* v. *Allan et al*, *Ib.* 571; *Macfarlane* v. *Kezar*, *et al*, *Ib.* 580; *Boswell* v. *Ruttan*, 6 U. C. R. 199. *Muttleberry et al* v. *Hornby*, 6 U. C. R. 61; *Brooks* v. *McCausland*, *Ib.* 104; *Richardson* v. *Phippen*, 9 U. C. R. 255; *Parks* v. *Mayby*, 2 U. C. C. P. 257; *Coleman* v. *Sherwood*, 3 U. C. C. P. 359; *Walker et al* v. *Hawke*, *Ib.* 428.) Where the plea contained matter of denial and not of excuse, plaintiff's only course if not otherwise able to put in issue by one general replication, the whole subject matter of the defence was to take issue separately, on independent and material allegations: (*Regil* v. *Green*, 1 M. & W. 328.) This section does not dispense with the necessity for replying specially where that was necessary before the act: (*Glover* v. *Dixon et al*, 24 L. & Eq. 490 9. Ex. 108.) *De injuria* has been held to be a good replication to a general or special plea of fraud: (*Washbourn* v. *Burrows*, 1 Ex. 107.)

(*h*) It is an established rule of pleading that by pleading over, every traversable allegation which is not traversed is admitted: (*Hudson* v. *Jones*, 1 Salk. 90.) But allegations not material are not thereby confessed: (*Rea* v. *Bishop of Chester*, 2 Salk. 560.) In a late case which underwent much discussion in the House of Lords, it was held that the rule as to admissions upon the record applied only to cases in which there was an express admission upon the record, or a pleading in confession and avoidance: (*Gwynne* v. *Burwell*, 6 Bing. N. C. 453.) And that a replication which put in issue part only of a plea, thereby admitted the residue to be true, and that if such residue were true and a good defence, a repleader might be awarded at the instance of defendant: (see *Atkinson* v.

of, to deny (*i*) all the rest or deny any one or more allegations. (*j*)

con stat for u.a. ch 22 §107

(App. Co. C.) Eng. C. L. P. A. 1852, s. 78. And replications, &c.

CXXVII. (*k*) A defendant shall be at liberty in the like manner (*l*) to deny the whole or part of a replication or subsequent pleading of the Plaintiff.

con stat. for u.a. ch 22 § 108.

(App. Co. C.) Eng. C. L. P. A. 1852, s. 79. Joining issue.

CXXVIII. (*m*) Either party may plead in answer to the plea or subsequent pleading of his adversary, that he joins issue thereon, which joinder of issue may be as follows, or to the like effect: (*n*) "The Plaintiff joins issue (*o*) on the Defendant's "first (&c. *specifying which or what part*) (*p*) plea." "The "Defendant joins issue upon the Plaintiff's replication to the "first (&c. *specifying which*) plea," (*q*) and such form of joinder of issue shall be deemed to be a denial of the substance of the plea or other subsequent pleading, and an issue thereon; (*r*) and in all cases where the Plaintiff's pleading is in

Joinder how construed, &c.

Davies, 2 Dowl. N. S. 778; see also R. & H. Dig. "Arrest of Judgment," *passim* and "Repleader." Sometimes an express admission is made of certain facts contained in a pleading with a denial of other facts upon which issue is taken: see *Carnaby* v. *Welby*, 8 A. & E. 872; *Hewitt* v. *Macguire*, 21 L. J., Ex. 30; *Tuckey* v. *Hawkins*, 4 C. B. 655.

(*i*) As to materiality of denial, see note *d* to s. cxxv. and R. & H. Dig. "Pleading," viii.

(*j*) This is applying to plaintiffs, in their replications the rules already enacted as to defendants in their pleas: (s. cxxv.) It has never been doubted that a plaintiff who is at liberty to deny several facts stated in a plea might select some only and traverse them: (*Gazten* v. *Robinson*, Wightman, J., 2 Dowl. N. S. 47.)

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 78—Applied to County Courts.

the 127 Sec extended in effect the decision of Cousins v Paddon 2 C M & R 547. to all Reviewing pleadings see Parr v. Jewell 16 C B 684

(*l*) *In like manner*, &c.—*i. e.* In the manner prescribed in ss. cxxv., cxxvi. As the notes to these sections apply equally to this, it is unnecessary here to do more than refer to them.

(*m*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 79—Applied to County Courts.

(*n*) Compliance with s. ciii. as to the intitling of the pleading is necessary: (see note *m* to that section.)

(*o*) "*Takes issue*" are the words used in Schedule B., No. 43. It is suggested that in practice the plaintiff "joins issue" upon a negative plea, and "takes issue" upon an affirmative one. When he joins issue it is unnecessary to add any further pleading on the part of the defendant, the issue being then completed. But if plaintiff "takes issue," it seems that he ought to add a *similiter* for defendant. This he may do as part of the issue and may at once proceed: (Paterson, Macnamara, & Marshal's Prac. 202.)

(*p*) Plaintiff may traverse any one or more allegations of defendant's plea: (s. cxxvi.)

(*q*) So defendant may traverse any material part of plaintiff's replication: (s. cxxvii.)

(*r*) The object of this new form is merely to enable a party in a compendious manner to traverse all those allegations in a pleading which he could have traversed before the Act: (*Glo-*

denial of the pleading of the Defendant or some part of it, the Plaintiff may add a joinder of issue for the Defendant. (*s*)

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ver v. *Dixon et al*, Pollock C. B. 9 Ex. 159.) The new form only traverses such material facts as could formerly be traversed, but where the plaintiff was bound to new assign, he must still do so: (*Ib.* per Parke B.) For example, if in trespass *quare clausum fregit* defendant having an easement which he pleads, but which in use he exceeded, it is for plaintiff to new assign: (*Colchester* v. *Roberts*, 4 M. & W. 769.) Special provision is by this Act made for new assignments: (s. cxxxvi.) But to return to the text. It is enacted that the new form of joinder of issue "shall be deemed to be a denial of the substance of the plea or other subsequent pleading and an issue thereon." And it is a rule that no new matter foreign to the issue joined shall be admissible in evidence. Such facts therefore as would go to *disprove* the plea or other pleading upon which issue is joined would be proper evidence. New matter, if not disproving anything advanced in the plea, must be specially pleaded: (*Sayre* v. *Rochford*, 2 W. Bl. 1168; *Thompson* v. *Hardinge*, 1 C. B. 940; *Ewer* v. *Jones*, 9 Q. B. 623; *Ryan* v. *Clarke*, 19 L. J. Q. B. 262; *Evans* v. *Ogilvie*, 2 Y. & J. 79; *Cowling* v. *Higginson*, 2 M. & W. 245; *Penn* v. *Ward*, 2 C. M. & R. 338; *Oakes* v. *Wood*, 2 M. & W. 791; *Comshaw* v. *Cheslyn*, 1 C. & J. 48; *Wyland* v. *Pickford*, 8 M. & W. 443; *Baker* v. *Walker*, 8 D. & L. 46; *May* v. *Seylor*, 2 Ex. 563; *Palhurst* v. *Nolley*, 17 L. J. Q. B. 97; *Weeding* v. *Aldrich*, 9 A. & E. 861; *Jones* v. *Jones*, 4 D. & L. 494; *Robertson* v. *Gantlett*, 4 D. & L. 548; *Eyre* v. *Scovell*, 5 D. & L. 516; *Powell* v. *Bradbury*, 7 C. B. 201; *Spotswood* v. *Burrow*, 19 L. J. Ex. 226.)

(*s*) The power of one party to join issue for the other appears to be restricted to plaintiffs. It is usual for plaintiff to add the joinder, make up the issue, and deliver it with notice of trial, all at the same time. But defendant is not conclusively bound by these acts of plaintiff. He may serve upon plaintiff a notice that "he does not receive the issue delivered in this cause, but considers the same as a replication." Thereupon it is open for defendant either to plead or demur in the usual manner. The English practice limits defendant for this purpose to four days: (*Adkins* v. *Anderson*, 1 Dowl. N. S. 877) and our practice is now similar (N. R. 33.) If defendant neither plead nor demur within the time limited, plaintiff's course is to sign judgment for want of a plea: (*Twycross* v. *King*, 6 Q.B. 663.) A demurrer that is frivolous entitles plaintiff to move to set it aside and to enter judgment: (*Talbot* v. *Bulkeley*, 4 D. & L. 306.) But where there are pleas on the record other than that demurred to, judgment so signed would appear to be irregular: (*Ib.*) The rule in such case should be to set aside the *issue*, trial, and subsequent proceedings: (*Ib.*) And where in consequence of a frivolous demurrer plaintiff was prevented from going to trial, the Court notwithstanding the existence of several issues made a rule absolute for plaintiff to sign judgment as for want of a plea unless defendant should consent to the following terms, viz. "that the pleadings ending in the demurrer be struck out, the defendant paying the costs of the application, and of preparing for a trial which had been lost, within four days after application, and taking short notice of trial for the sittings after term": (*Tucker* v. *Barnesley*, 4 D. & L. 292.) But it has been held that if a defendant at any stage of a cause strike out the joinder and demur, and that demurrer is *not set aside as frivolous*, it renders nugatory a notice of trial previously given. Nothing that plaintiff could afterwards do would render such notice good: (*Poole* v. *Pain et al*, Erle, J. 2 L. M. & P. 613; see also *Lock* v. *Wilts R. Co.*, 14 Law T. Rep. 415.)

consid for use ch 22 s 109

(App. Co. C.) Reg. C. L. P. A., 1852, s. 80.

Pleading and demurring at the same time.

CXXIX. (*t*) Either party may, by leave of the Court or a Judge, (*u*) plead and demur to the same pleading at the same time, (*v*) upon an affidavit by such party or his Attorney, if required by the Court or a Judge, to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance, are respectively true in substance and in fact, (*w*) and that he is further advised and believes that the objec-

Affidavit may be required.

(*t*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 80.—Applied to County Courts.—Founded upon 1st Rept. C. L. Com'rs, s. 49.

(*u*) See note *m* to xxxvii.

(*v*) The power of pleading and demurring is placed under the control of the Court in order that it may "not be resorted to for delay." The application is discretionary and may be made to the Court or a Judge in Chambers. If to the latter and he decline to grant it, the Court above will not generally interfere with his decision: (*Thompson* v. *Knowles*, 18 Jur. 1018; 28 L. & Eq. 497.) And if defendant without leave "plead and demur to the same pleading at the same time," it would seem that plaintiff may treat the whole as a nullity and sign judgment: (*Bayley* v. *Baker*, 1 Dowl. N. S. 891.)

(*w*) The privilege given by this enactment is only to be allowed where a man shows by his own affidavit that he has merits in fact as well as in law: (*Lumley* v. *Gye*, 18 Jur. 466; 14 L. & Eq. 444.) *Qu.* Is it necessary for defendant to swear that the allegations proposed to be traversed, when he intends to *traverse*, are untrue? (*Ib.*) Or is not such an affidavit only necessary when defendant proposes to plead in confession and avoidance? (*Price* v. *Hewitt*, Alderson B. 8 Ex. 146.) The Court will not be satisfied with an affidavit following the words of the statute ("he is advised and believed," &c.) where the matters are within the personal knowledge of the party pleading: (*Lumley* v. *Gye*, Parke B. *ubi supra.*) In such a case the affidavit must be positive; but in other cases expression of belief in the words of the statute will be sufficient: (*Ib.*) If a third person be vouched by defendant, it should be shown by him either that he has made inquiry of that person, or that it would be impossible or inconvenient so to do: (*Ib.*) In an action on a contract the Court allowed defendant both to plead and demur to the declaration, though the validity of the contract sued upon had been affirmed on a motion for an injunction in the Court of Chancery, to which the defendant was a party, and in the decision of which Court he had acquiesced: (*Ib.*) So to a declaration alleging that the defendant requested the plaintiff to lend him a sum of money, and falsely, fraudulently, and deceitfully represented to the plaintiff that the defendant had attained the age of twenty-one years, and that the plaintiff confiding in the truth of the said representation and pretence, did lend the defendant a sum of money, &c.; whereas the defendant had not at the time of his making the said representation and pretence, attained the age of twenty-one, but was an infant under that age, as the defendant at the time of his making the said representation well knew, and that the defendant refused to pay the said loan, &c., whereby the plaintiff was damaged, &c.: (*Price* v. *Hewitt*, 8 Ex. 146.) Defendant obtained leave to demur and to plead, first, not guilty, and secondly, a traverse that plaintiff confided in the alleged fraudulent representation upon an affidavit of the defendant's attorney,

are good and valid objections in
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all be first disposed of. (*y*)

demurrer: (*Ib.*)

(*z*) As to which see ss.—c. and ei.—of this Act and notes thereto.

(*y*) The meaning of this provision is that it shall be in the discretion of *the* Court in which the cause is entered to direct which issue shall be first disposed of in *that* Court. Therefore where there were issues in law and in fact in a case, and the former were decided in favor of the plaintiff, the Court in which the decision took place refused to delay the issues in fact until the issues in law were finally disposed of in a Court of Error, where defendant contemplated bringing the case: (*Lumley* v. *Gye*, 2 El. & B. 216, 20 L. & Eq. 168.) The direction as to the trial of the issues will of course always be made with reference to the convenience of the parties. It is often advisable to determine a demurrer first, for if it goes to the whole cause of action and is determined against the plaintiff, it is conclusive and there is no occasion afterwards to try the issue in fact; whereas if the issue in fact is first tried and found for the plaintiff, he must still proceed to the determination of the demurrer, and if that be determined against him, he will not be allowed his costs on the trial of the issue in fact: (William's Saunders, II. 300 (3); *Price* v. *Hewitt*, 8 Ex. 148; *Cruckneil* v. *Trueman*, 9 M. & W. 684.) But if it appear that the decision of the demurrer will not have *any bearing* on the issues in fact the Court may have good reason for directing that the issue in law shall not be tried before the issue in fact: (*Roberts* v. *Taylor*, 7 M. & G. 659.) If the issues are to be tried before the demurrer is argued, the damages are said to be *contingent*, depending upon the event of the demurrer, and it is necessary for the jury to assess contingent damages. The award of *venire* in such a case is as well to try the issue as to inquire of the contingent damages: (William's Saunders, II. 300 (8.) It has been held that where the *venire* was in this form, but the jury without assessing contingent damages on the issue in law, found a general verdict for the defendant upon all the issues in fact, that the plaintiff was not entitled to a *venire de novo*: (*Gregory* v. *Duke of Brunswick et al*, 6 M. & G. 953.) And where leave had been granted to a defendant to plead, and demur and directions were given that the demurrer should be first disposed of, and the parties thereupon proceeded to issue and judgment was given for plaintiff on a demurrer to a surrejoinder, on the ground that the *plea* was bad, the Court afterwards declined at plaintiff's instance, to rescind the judges order, giving to defendant leave both to plead and demur: (*Sheehy* v. *Professional Assurance Co.*, 18 C. B. 787; see also *Hinton* v. *Acraman*, 4 D. & L. 462.) Pending the decision of issues in law the Courts have refused judgment as in case of a non-suit for not proceeding to trial pursuant to notice on issues in fact: (*Connop et al* v. *Levy*, 6 D. & L. 282.) But in a case where defendant had pleaded several pleas to some of which plaintiff demurred and to others joined issue, and the demurrers were argued and judgment given for defendant: but plaintiff not having proceeded to trial upon the issues in fact, defendant obtained a rule nisi for judgment as in case of nonsuit, and on showing cause the plaintiff offered a *stet proces-*

(App. Co. C.) Reg. C. L. P. A., 1852, s. 80.

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tions raised by such demurrer are good and valid objections in law, (*x*) and it shall be in the discretion of the Court or a Judge to direct which issue shall be first disposed of. (*y*)

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which stated that he was advised and believed that the defendant had under the circumstances aforesaid just ground to plead not guilty to the declaration, and also a traverse that plaintiff confided in the alleged fraudulent representation, and that he was also advised and believed that the declaration would be held bad in substance on demurrer: (*Ib.*)

(*x*) As to which see ss.—c. and ci.—of this Act and notes thereto.

(*y*) The meaning of this provision is that it shall be in the discretion of *the* Court in which the cause is entered to direct which issue shall be first disposed of in *that* Court. Therefore where there were issues in law and in fact in a case, and the former were decided in favor of the plaintiff, the Court in which the decision took place refused to delay the issues in fact until the issues in law were finally disposed of in a Court of Error, where defendant contemplated bringing the case: (*Lumley* v. *Gye*, 2 El. & B. 216, 20 L. & Eq. 168.) The direction as to the trial of the issues will of course always be made with reference to the convenience of the parties. It is often advisable to determine a demurrer first, for if it goes to the whole cause of action and is determined against the plaintiff, it is conclusive and there is no occasion afterwards to try the issue in fact; whereas if the issue in fact is first tried and found for the plaintiff, he must still proceed to the determination of the demurrer, and if that be determined against him, he will not be allowed his costs on the trial of the issue in fact: (William's Saunders, II. 300 (3); *Price* v. *Hewitt*, 8 Ex. 148; *Cruckmell* v. *Trueman*, 9 M. & W. 684.) But if it appear that the decision of the demurrer will not have *any bearing* on the issues in fact the Court may have good reason for directing that the issue in law shall not be tried before the issue in fact: (*Roberts* v. *Taylor*, 7 M. & G. 659.) If the issues are to be tried before the demurrer is argued, the damages are said to be *contingent*, depending upon the event of the demurrer, and it is necessary for the jury to assess contingent damages. The award of *venire* in such a case is as well to try the issue as to inquire of the contingent damages: (William's Saunders, II. 300 (3.) It has been held that where the *venire* was in this form, but the jury without assessing contingent damages on the issue in law, found a general verdict for the defendant upon all the issues in fact, that the plaintiff was not entitled to a *venire de novo*: (*Gregory* v. *Duke of Brunswick et al*, 6 M. & G. 953.) And where leave had been granted to a defendant to plead, and demur and directions were given that the demurrer should be first disposed of, and the parties thereupon proceeded to issue and judgment was given for plaintiff on a demurrer to a surrejoinder, on the ground that the *plea* was bad, the Court afterwards declined at plaintiff's instance, to rescind the judges order, giving to defendant leave both to plead and demur: (*Sheehy* v. *Professional Assurance Co.*, 18 C. B. 787; see also *Hinton* v. *Acraman*, 4 D. & L. 462.) Pending the decision of issues in law the Courts have refused judgment as in case of a non-suit for not proceeding to trial pursuant to notice on issues in fact: (*Connop et al* v. *Levy*, 6 D. & L. 282.) But in a case where defendant had pleaded several pleas to some of which plaintiff demurred and to others joined issue, and the demurrers were argued and judgment given for defendant: but plaintiff not having proceeded to trial upon the issues in fact, defendant obtained a rule nisi for judgment as in case of nonsuit, and on showing cause the plaintiff offered a *stet proces-*

Const stat for (App. Ch. C.) u.c. ch 22 s. 110

CXXX. (z) The Plaintiff in any action (a) may, by leave of

sus; at the suggestion of the Court a *nolle prosequi* was entered to so much of the declaration as applied to the issues in fact, the defendant waiving his right to costs upon such *nolle prosequi*: (*Quarrington* v. *Arthur*, 2 Dowl. N.S. 1036.) *Semble* that a *stet processus* cannot be entered to a part of a record: (*Ib.*) As to apportionment of costs if plaintiff succeed upon issues in fact but fail upon issues in law or *vice versa*: see *Bird* v. *Higginson*, 5 A. & E. 83; *Clarke* v. *Allatt*, 4 C. B. 335; *Partridge* v. *Gardiner*, 4 Ex. 303; *Howell* v. *Radford*, 4 Ex. 309; *Williams* v. *Vines*, 9 Jur. 809; *Poole* v. *Grantham*, 2 D. & L. 622; *Davis* v. *Davis*, 5 O. S. 453; *Sheldon* v. *Hamilton*, *M. S.* M. T. 3 Vic. R. & H. Dig. "Costs" III. 3; *Bank B. N. A.* v. *Ainley*, 7 U. C. R. 521. See also N. B. 51 and proviso to s. CXXX. of this Act.

(z) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 81—Applied to County Courts.—Founded upon 1st Rep. C.L. Comrs. s. 59. The provisions of the statute of Anne, which enable a defendant by leave of the Court to plead several matters are by this section extended to plaintiffs, who may in like manner in answer to the plea or subsequent pleading of a defendant reply several matters. The statute of Anne is as follows—"That from and after, &c., it shall and may be lawful for any defendant or tenant in any action or suit or for any plaintiff in replevin, in any Court of record, *with the leave of the same Court*, to plead as many several matters thereto as he shall think necessary for his defence." (4 Anne cap. 16, s. 4.) The practice which for some time prevailed under this Act, required limitation, and was in England restrained by the rules following, excepting the words in italics, "Several counts shall not be allowed (*in taxation of costs*) unless a distinct subject matter of complaint is intended to be established in respect of each, nor shall several pleas or avowries or cognizances be allowed unless a distinct ground of answer or defence is intended to be established in respect of each" (*Reg. Gen.* 5 H. T. 4 Wm. IV. Jervis N. R. 116.) And "Pleas, &c., founded on one and the same principal matter, but varied in statement, description, or circumstances only (and pleas in bar in replevin are within the rule) are not to be allowed:" (same rule, Jervis N. R. 118.) If several counts, pleas, &c., were pleaded contalion of these rules, a Judge had express power upon application to strike out at the costs of the party pleading all pleadings in violation of the rules: (*Reg. Gen.* 6 H. T. 4 Wm. IV. Jervis N. R. 120.) Similar rules were adopted by the Courts in Upper Canada. Our rule 32 of E. T. 5 Vic. (Cam. R. 38) was precisely the same as Eng. Rule 6 above mentioned, excepting that our Court introduced the words in italics "in taxation of costs" mentioned above. It was in consequence of these words held that our rules did not prohibit the use of *several counts* under any other penalty than the *loss of costs upon them*, and this was in effect to permit the use of several counts without leave. But as to *several pleas* it was held that if "founded on one and the same principal matter but varied in statement, &c., should *not be allowed*:" (*Johnson* v. *Hunter*, 1 U. C. R. 280.) It was also held that although in Upper Canada there was no rule like the English rule 6, authorising a Judge to strike out pleas filed in violation of Eng. rule 5, yet that our Judges had the power as to pleas filed in clear violation of our rule 32: (*Ib.*) Our rules of E. T. 5 Vic. will remain in force until Easter Term, 1857, when the new rules of pleading of T. T. 20 Vic. will take effect. (N.R. Pl. 2.)

(a) This section applies to dower in the same manner as to any other form of action: (*Street* v. *Dobson*, Sept. 23, 1856, Burns J. 2 U. C. L. J. 208.) A proceeding by *andita querela* was held to be an "action or suit" within the meaning of the statute of Anne: (*Giles* v. *Hutt et al.* 5 D. & L. 387) but an information of intrusion at the suit of

the Court or a Judge, (*b*) plead in answer to the plea or subsequent pleading of the Defendant as many several matters (*c*) as he shall think necessary to sustain his action, (*d*) and the Defendant in any action may by leave of the Court or a Judge plead in answer to the declaration or other subsequent pleading (*e*) of the Plaintiff, as many several matters as he shall think necessary for his defence, (*f*) upon an affidavit of the

Eng. C. L. P. A. 1852, s. 81.

Several matters may be pleaded by leave of the Court or of a Judge.

See slip on preceding page

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the Crown was held not to be within that Statute: (*Attorney-General* v. *Donaldson*, 9 Dowl. P. C. 319.)

(*b*) See note *m* to s. XXXVII.

(*c*) *Several matters*, &c. This expression when taken in reference to the principles of pleading must mean either distinct answers to the pleading opposed (*Cooling* v. *G. W. R. Co.* 19 L. J. Q. B 529), or distinct answers or traverses to one or more specific and material allegations of such pleading: (ss. CXXV. CXXVI. CXXVII.)

(*d*) The right of a plaintiff to reply double is new, and by this statute for the first time authorised: (see note *z*, *ante*.) It was held on an application by a plaintiff under the Eng. C. L. P. Act for leave to traverse defendant's plea *and* to reply specially upon an affidavit in general terms, that there was reasonable ground to traverse the plea and that the matters proposed to be replied specially were true: the affidavit was held sufficient: (*Penhall* v. *Clarke*, 1 N. C. L. Rep. 703.) But it is in the discretion of the Court or a Judge to require the facts to be set forth at length, in order to determine the necessity for the application: (*Ib.*) Where in an action by assignees of a bankrupt on a covenant by defendant to pay money to the bankrupt, defendant pleaded that on a treaty of marriage between the bankrupt and his wife, it was agreed that he should covenant to pay to trustees £10,000 and interest, and assign the moneys mentioned in the declaration for securing payment of said sum; and that he entered into such covenant and made such assignment and contracted the marriage before his bankruptcy: to this plaintiff made application for leave to reply double—*first*, a traverse of the plea; *secondly*, that the treaty of marriage, the settlement, the assignment, and the marriage were respectively entered into and solemnized, in pursuance of a fraudulent arrangement between the bankrupt and his wife, to defeat creditors, he being at the time in a state of hopeless insolvency: the application was refused on the common affidavit, but granted on an affidavit specially denying the allegations of the plea, and averring that the deeds had been ordered by the Court of Chancery to be delivered up to be cancelled, and affirming the truth of the matter intended to be replied: (*Ib.*) If a plea be divisible in its nature a plaintiff may without leave reply one matter to one part and a different matter to another, the several matters together forming only one replication: (Com. Dig. "Pleader," F. 4.) As to the time within which a plaintiff must reply see s. CII. and notes thereto.

(*e*) An application to *rejoin* several matters was refused where it appeared that the matters proposed to be rejoined would be a departure from the plea and no answer to the replication: (*Lafond* v. *Ruddock*, 13 C. B. 813.)

(*f*) At common law a defendant was allowed to plead one plea only, and it was a principle that pleadings ought to be true, which can rarely be the case where many pleas are pleaded. But as it was sometimes found difficult to comprise the merits of a defence in a single plea, the Statute of Anne permitted a party to plead as many as might be necessary to his defence, provided he obtain the leave of the Court, *thereby confining him* to such as might be deemed *essential to*

the justice of the cause: (*Gully* v. *Bishop of Exeter*, Best, C.J., 5 Bing. 45.) Although it is not in the power of a judge to try the truth or falsity of a plea upon affidavit: (*Johnstone* v. *Knowles*, 1 Dowl. N. S. 30.) yet when called on to exercise his discretion as to certain pleas being allowed he must see to the powers with which he is armed by the Statute of Anne. And it is quite clear that in a case where the pleas are such as not to involve the real justice of the case, *but to lead to great expense and intricacy at the trial*, it is the exercise of a sound discretion not to allow them to be put on the record: (*London and Brighton R. Co.* v. *Wilson*, Tindal, C. J., 6 Bing. N. C. 137; *Same Plaintiffs* v. *Fairclough*, *Ib.* 270.) The allowance of several pleas since the abolition of the old form of general issue is intended for the promotion and not for the perversion of justice, and if a perversion is evident it is the duty of the Judge to reject the plea: (*Cooling* v. *Great Northern R. Co*, 15 Q.B. 496.) It has been found necessary to make the rules of Court and the statute of Anne "a real acting power." There are some traverses which although they might not give an opening for judgment *non obstante veredicto* are clearly so much beside the merits that there is no hardship in obliging the party who has taken them to stand upon others: (*Ib.* Coleridge, J.) The practice of placing numerous and inconsistent pleas upon the record ought to be discouraged: (*Dunmore* v. *Tarleton*, Campbell, C. J., 16 L. & Eq.392.) It is usual for a defendant making application to be allowed to plead several matters, to submit an abstract of the pleas he proposes to plead: (*Dunmore* v. *Tarleton*, *ubi supra*; *Gether* v. *Capper*, 25 L. & Eq. 417.) A variance between the pleas as delivered and the abstract, which is not substantial or calculated to embarrass, will not entitle plaintiff to sign judgment: (*Dunmore* v. *Tarleton*, *ubi supra*; *Wills* v. *Robinson*, 5 Ex. 302.) If the pleas delivered substantially vary from the abstract submitted, plaintiff's proper course is to move to strike them out: (*Flight* v. *Smale*, 4 C. B. 766.) In an action for the infringement of a patent the Court upon the affidavit made necessary by this section allowed defendant to plead, *first*, not guilty; *secondly*, that the patentee was not the inventor; *thirdly*, *non concessit*; *fourthly*, that the invention was not a manufacture; *fifthly*, that the invention was not new; *sixthly*, that no sufficient specification was enrolled; (*Platt et al.* v. *Else et al.* 8 Ex. 364, 20 L. & Eq. 304.) But where to a similar action Platt, B., allowed the defendant to plead that the plaintiff having petitioned for letters patent, his petition was referred to the Solicitor General, to whom he presented in a paper writing (setting forth its terms) that the said invention consisted of the matter therein mentioned, that the Solicitor General confiding in such representation reported to her Majesty that letters patent might be granted; that the plaintiff after the grant of the said letters-patent enrolled his specification, and therein falsely described his invention; and that so much of the said invention as was stated in the specification was not part of the invention for which the said letters-patent had been granted: held on motion to rescind the order and disallow the plea, that it was bad as pleading evidence: (*Hancock* v. *Noyes*, 9 Ex. 388.) A defendant in Upper Canada since the passing of this Act having obtained leave to plead several matters to a declaration for an assault and battery, and having pleaded, *first*, not guilty; *secondly*, justification; *thirdly*, *son assault demesne*, was upon the subsequent application of plaintiff compelled to make an election between "not guilty" and "justification," "these being inconsistent pleas": (*Goldsburgh* v. *Leesor*, Chambers, Sept. 25, 1856, Burns J. 2 U. C. L. J. 209.) In an action of dower leave was granted to plead the following—1st. *Ne unques seizie*; 2d. *Ne unques accouple*; 3d. A release of dower: (*Street* v. *Cathcart*, Cham-

bers, October 5, 1856, Burns, J.) Though the learned Judge at first thought that he ought not to grant leave to plead the third plea he subsequently came to the conclusion that the proper remedy of the plaintiff, if the plea was bad in law, was to demur to it: (*Ib.*) In an action of assumpsit in which the declaration contained a special count alleging that defendant in consideration, &c.: agreed by writing under his hand to make and deliver to plaintiff a good deed in fee simple of a certain lot of land, and that although plaintiff had paid said consideration, yet that defendant had failed to make said deed, and the common indebitatus counts for money paid by plaintiff to defendant, &c., leave was asked by defendant to plead, 1st. That he did not agree as alleged; 2d. That plaintiff did not pay the consideration in first count mentioned; 3d. That the agreement in first count mentioned was obtained by means of fraud and covin; 4th. To residue of declaration, not indebted: Held that the 2d, 3d, and 4th pleas might be allowed, but that defendant should not ask leave to deny his deed, and at the same time to plead in confession and avoidance of it without showing that something material may turn upon the construction of it, and 1st plea therefore disallowed: (*Taylor* v. *McKinlay*, Chambers, Oct. 18, 1856, Burns, J.) The allowance or disallowance of a plea is to be determined on, not by its quality as being good or bad in law (assuming it not to be wholly frivolous), but with reference to any other pleas which may be proposed and especially upon the consideration whether the question which it is desired to raise upon it arises under any other plea: (*Gether* v. *Capper*, 25 L. & Eq. 417.) And *semble*, leave will be granted to plead any pleas necessary to raise every question that can be justly suggested on any fair construction of a contract declared on, even a construction of which the Court wholly disapproves: (*Ib.*) In an action on a charter party, by which a freighter was to pay the highest rate of freight which he could prove to have been paid for ships on the same voyage and averment of general performance, and that the plaintiff was able to prove, as the fact was, that the highest rate of freight was a certain sum which the defendant though he had notice would not pay. To this defendant proposed to plead, *first*, that plaintiff was not able to prove nor was he in fact; *secondly*, that plaintiff did not in fact prove to the defendant that the rate of freight was as alleged. The latter plea having been disallowed at Chambers the Court allowed it, on condition that it might be demurred to at once, and argued on the last day of the then term, that being in three days; intimating an opinion at the same time that it was a bad plea, but that they would not deprive the defendant of the opportunity of placing it on the record to raise the question as to the construction of the contract: (*Ib.*)

A declaration contained three counts of which the *first* was upon the covenant of defendant as Sheriff of the County of Oxford given under St. 3 Wm IV. cap. 8, and alleged that defendant had wilfully misconducted himself in his office of sheriff by voluntarily allowing one Sprague, who had been arrested at the suit of Plaintiff to escape; the *second* alleged that said Sprague being indebted to plaintiff, he placed a writ of capias for his arrest in the hands of the defendant, who, though he had ample opportunity to take said Sprague, yet failed to do so to the injury of plaintiff; the *third* count alleged that Sprague being indebted to plaintiff, he placed a writ of *capias* for his arrest in defendant's hands and that defendant falsely returned that said Sprague was not to be found in his county. Leave to plead the following pleas was granted to defendant. To *first* count. 1st, that Sprague was not indebted to plaintiff; 2d, traverse of arrest; 3d, that defendant did not wilfully misconduct himself in his said office to the damage of plaintiff; 4th, that defendant did not voluntarily permit said Sprague to escape *modo et*

forma. To *second* count, 1st, that Sprague was not indebted to plaintiff; 2d, Not guilty; 3d, that defendant could not arrest Sprague; 4th, plaintiff not damnified. To *third* count. 1st, not guilty; 2d, Sprague not indebted to plaintiff: (*Taylor* v. *Carroll*, Chambers, Oct. 23, 1856, Burns, J.) An affidavit of defendant's attorney was filed which stated the matters required by this section and also the attorney's reasons for believing 1st plea to 1st count, 1st plea to 2d count, and 2d plea to 3d count to be true in substance and in fact: (*Ib.*)

It is presumed that the Courts in disposing of applications made under this section will be guided if not governed by cases decided under the statute of Anne, many of which will be directly in point. They may be conveniently classed as follows—

I.—Pleas disallowed.

First—Pleas substantially the same, for example, pleas calculated to raise a point that might be raised under other pleas on the record: (*Hammond* v. *Teague*, 6 Bing. 197; *Reid* v. *Rew*, 2 Dowl. N. S. 548; *Dawson* v. *McDonald*, 2 M. & W. 26; *Heath* v. *Durant*, 1 D. & L. 571; *Jenkins* v. *Creech*, 5 Dowl. P. C. 293; *Turquand* v. *Hawtrey*, 9 M. & W. 727: *Legge* v. *Boyd*, 9 Dowl. P. C. 39; *Ross* v. *Clifton*, 9 Dowl. P. C. 1033; *South Eastern R. Co.* v. *Hibblewhite*, 12 A. & E. 497; *Beavan* v. *Tanner*, 8 Dowl. P. C. 870; *Alexander* v. *Townley*, 2 Dowl. N. S. 886; *Griffith* v. *Selby*, 9 Ex. 393, 25 L. & Eq. 549.)

Secondly—Pleas grossly inconsistent with each other: (*Maclellan* v. *Howard*, 4 T. R. 194; *Jenkins* v. *Edwards*, 5 T. R. 97; *Dougall* v. *Bowman*, 3 Wils. 145; *Anderson* v. *Anderson*, 2 W. Bl. 1157; *Fox* v. *Chandler*, *Ib.* 905; *Palmer* v. *Wadbrooke*, 2 Stra. 876; *Laughton* v. *Ritchie*, 3 Taunt. 385; *Orgill* v. *Kemshead*, 4 Taunt. 459; *Chitty* v. *Hume*, 13 East. 255; *Shaw* v. *Alvanley*, 2 Bing. 325; *Whale* v. *Lenny*, 5 Bing. 12; *Steel* v. *Sturry*, 1 Scott. 101; *Thompson* v. *Jackson*, 3 M. & G. 621; *London & Brighton R. Co.* v. *Fairclough*, 8 Dowl. P. C. 278; *Ib.* v. *Wilson*, 8 Dowl. P. C. 40; *Griffith* v. *Roberts*, 2 M. & G. 907; *Needham* v. *Law*, 3 Dowl. N. S. 1027; *O'Brien* v. *Clement*, 15 M. & W. 436;) vexatious: (*Gully* v. *the Bishop of Exeter*, 6 Bing. 42; *Cooling* v. *Great Northern R. Co.* 15 Q. B. 486;) or absurd: (*Goodman* v. *Morell*, 1 Dowl. N. S. 283.)

Thirdly—Pleas immaterial and beside the merits, being such as do not involve the real justice of the case: (*Murray* v. *Bouchber*, 9 Dowl. P. C. 537; *Brighton R. Co.* v. *Wilson*, 8 Dowl. P. C. 40; *Phillips* v. *Claggatt*, 10 M. & W. 102; *Steward* v. *Dunn*, 12 L. J. Ex. 213.)

II.—Pleas allowed.

First — Pleas involving distinct grounds of defence: (*Triebuer* v. *Ducer*, 1 Bing. N. C. 266; *Pym* v. *Grazebrook et al.* 1 Dowl. N. S. 489; *Bulley* v. *Foulkes et al.* 7 Dowl. P. C. 839.)

Secondly—Pleas though apparently the same, where it is possible that facts exist under which the pleas raise distinct grounds of defence: (*Hart* v. *Bell*, 1 Hodges 6: *Marse* v. *Appleby*, 8 Dowl. P. C. 203; *Johnstone* v. *Knowles*, 1 Dowl. N. S. 80; *Currie* v. *Almond*, 5 Bing. N. C. 224; *Leuckart* v. *Cooper*, 3 Dowl. P. C. 415; *Hughes* v. *Thorpe*, 5 M. & W. 656; *Wilson* v. *Craven*, 8 M. & W. 584; *Steward* v. *Greaves*, 10 M. & W. 711; *Davidson* v. *Cooper*, 11 M. & W. 778; *Roe* v. *Fuller*, 7 Ex. 220.

Thirdly—Pleas apparently but not necessarily inconsistent and such as involve distinct defences: (*Wilson* v. *Ames*, 5 Taunt. 340; *Wilkinson* v. *Small*, 3 Dowl. P. C. 564; *Cooper* v. *Langdon*, 10 M. & W. 785.)

Fourthly—Pleas showing different legal conclusions arising out of the same state of facts: (*Curry* v. *Arnott*, 7 Dowl. P. C. 249; *Gether* v. *Capper*, 25 L. & Eq. 417.)

Fifthly—Pleas to the several counts of a declaration containing more counts than one: (*Vere* v. *Goldsborough*, 1 Bing. N. C. 353; *Langford* v. *Woods*, 8 Scott N. R. 309.)

Sixthly—Pleas which taken together amount to one entire answer: as

party making such application or his Attorney, (*g*) if required by the Court or a Judge, (*h*) to the effect that he is advised and believes that he has just ground to traverse the several matters proposed to be traversed by him, and that the several matters sought to be pleaded as aforesaid by way of confession and avoidance, are respectively true in substance and in fact; (*i*)

On affidavit if required.

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to a declaration in debt for £80.—1st, "never indebted" as to £40, part thereof; and 2d, a tender as to remaining £40: (*Archer* v. *Gerrard*, 3 M. & W. 63; *Macher* v. *Billing*, 3 Dowl. P. C. 246; *Vere* v. *Goldsborough*, 1 Bing N. C. 353; *Daniels* v. *Lewis*, 1 Dowl. N. S. 844; *Phillips* v. *Claggatt*, 10 M. & W. 102; *Harvey* v. *Hamilton*, 4 Ex. 43; *Rosse* v. *Cummings*, Chambers, Oct. 4, 1856, Burns, J.) It is apprehended that pleas classified under this sixth sub-division may be pleaded together without leave; as they constitute only one answer to the several parts of the declaration and may be pleaded at common law independently of the Statute of Anne: (*Daniels* v. *Lewis*, *ubi supra.*) Where a defendant had pleaded two pleas to the same cause of action, one of which was disallowed by a Judge, and he afterwards separately pleaded them to *different parts* of the same cause of action, the Court refused to set them aside: (*Ib.*)

III.—Doubtful.

If the allowance or disallowance of several pleas under the foregoing rules be a point of doubt or nicety, the practice is to allow them: (*Trickey* v. *Yeandell*, 1 Bing. 66; *Smith* v. *Dixon*, 4 Dowl. P. C. 571; *Bentley* v. *Keightley*, 1 D. & L. 944; *Hayward* v. *Bennett*, 1 D. & L. 916; *Lucan* v. *Smith*, 28 L. T. R. 126.)

(*g*) In general the affidavit may be to the effect that defendant has just ground to traverse the several matters proposed to be traversed by him and that the several matters sought to be pleaded are respectively true in substance and in fact. See *Forms* Chit. F. 7 Edn. 108 *et seq.*

(*h*) It is discretionary with the Judge to whom application is made to grant it without an affidavit, but in England there is little disposition to do so: (*Dunmore* v. *Tarletan*, 16 L. & Eq. 392.)

(*i*) In an action on a bill of exchange drawn by one A. B. directed to defendant, requiring him to pay to the order of said A. B. £750, sixty days after date, accepted by defendant and indorsed by A. B. to plaintiff, defendant obtained a summons for leave to plead. *First*—That the bill was accepted by defendant for the accommodation of plaintiffs and said A. B. without any value or consideration. *Secondly*—That same was accepted for the accommodation of said A. B. without value or consideration, and indorsed by A. B. to plaintiffs without consideration. Defendant's affidavit stated that the bill of exchange in the declaration mentioned was accepted by defendant without any value or consideration received by defendant for said acceptance, and was as deponent believed for the accommodation of plaintiffs and one A. B., the drawer thereof, to take certain bills accepted by plaintiffs, drawn by said A.B.; that deponent was advised and believed that it was material for his defence to the action that he should plead that his said acceptance was either for the accommodation of plaintiff and A. B. jointly, or of said A. B. only, and was without any value received by deponent: summons made absolute no cause having been shown: (*Garrett et al* v. *Cotton*, Chambers, Nov. 7, 1856, Hagarty, J.) A defendant having obtained an order to plead several matters may elect to abandon it, or if before order the summons has been adjourned he may waive it and plead

Proviso. Provided (*j*) that the costs of any issue either of fact or of law,

without the order pleas not requiring leave: (*Holt* v. *Forshall*, Jervis, C. J., 30 L. & Eq. 494.) Although it may be that a mere adjournment requires no order; yet if there be any terms in favor of either party a substantive order should be drawn up: (*Ib.*) There are authorities to show that a party cannot be compelled to draw up an order he has obtained: (*MacDougall* v. *Nicholls*, 3 A. & E. 813; *Edenser* v. *Hoffman*, 2 C. & J. 140; see also *Brown* v. *Millington*, 20 L. & Eq. 383; see further note *m* to s. xxxvii.)

(*j*) The right of a defendant to plead several pleas under the Statute of Anne when exercised necessarily gives rise to several distinct issues. The right extended to plaintiffs as well as defendants by this enactment will have a tendency to multiply issues. Where there are several pleas or replications to the same subject matter, it is probable that some are true and some false, so that some may be found for one party to the suit and the remainder for his opponent. As it is only just that a party pleading false or improper pleadings should be made to bear the expense of them, the Statute of Anne which first gave the right to plead double, instead of single as at common law, provides for the apportionment of costs consequent upon the decision of the several issues raised. The provision is in these words, "That if any such matter (*i. e.* the several matters thought necessary by a defendant for his defence and by leave of the Court pleaded) shall upon a demurrer joined be deemed insufficient, costs shall be given at the discretion of the Court; or if a verdict shall be found upon any issue in the said cause for the plaintiff or defendant, costs shall be also given in like manner, unless the Judge who tried the said issue shall certify that the said defendant had a probable cause to plead such matter, which upon the said issue shall be found against him": (4 Anne cap. 16 s. 5.) This statute being a remedial one ought to be so construed as to advance the remedy. The costs intended to be given appear to be all the costs which attend the unnecessary pleading. This construction is analogous to that which has been put upon the Statute of Gloucester (6 Ed. I. cap. 1, s. 2) by which the costs of the writ only are given to the plaintiff if he succeed, and yet that statute has always been held to give all the costs of the suit: (*Vollum* v. *Simpson*, Heath J. 2 B. & P. 368.) Although a defendant by pleading unnecessary pleas may subject himself to the costs of the issues raised on those pleas, yet if he obtain a verdict on an issue raised by a plea which is an unqualified bar to the action, and which if pleaded alone would clearly entitle him to the general costs of the trial, the postea and general costs of the cause must be adjudged to him: (*Ragg* v. *Wells*, 8 Taunt. 129; *Edwards* v. *Bethel*, 1 B. & A. 254.) But reason and common sense dictate that if the defendant has put the plaintiff to unnecessary expense by pleading that which either in law or in fact turns out to be unfounded, he should pay to plaintiff that expense, although he may be successful upon the general question: (*Spencer* v. *Hamilton*, 4 A. & E. 413.) The principle is clear that plaintiff is entitled to be re-imbursed the expense to which he has been put by defendant pleading unfounded pleas notwithstanding the latter be entitled to the general costs of the cause: (*Mullins* v. *Scott*, 5 Bing. N. C. 423; *Hart* v. *Cutbush*, 2 Dowl. P. C. 456.) And defendant under such circumstances is bound to pay not merely the costs of the pleadings but the costs of preparation of evidence on those pleadings: (*Spencer* v. *Hamilton*, *ubi supra*; *Empson* v. *Fairfax*, 8 A. & E. 296.) The case of *Othir* v. *Calvert*, 1 Bing. 275, which rules the contrary cannot be supported. The practice which it lays down was condemned in *Brooks* v. *Willet*, (2 H. Bl. 435,) and (*Vollum* v. *Simpson*, 2 B. & P. 368.) If the Judge certify under the Statute of Anne defendant need not pay any such costs:

shall follow the finding or Judgment on such issue, and be Costs.

(*Fry* v. *Monckton*, 9 Dowl. P. C. 967.) The Eng. *Reg. Gen.* 7 of H. T. 4 Wm. IV. (Jervis N. R. 121) from which our rule 26 of E. T. 5 Vic. is taken, and which is substantially re-enacted in our N. R. 51, was held not to conflict with the practice decided in *Spencer* v. *Hamilton*. Indeed the rules of Court, and especially the N. R. 51, more firmly establish it. Nor did the old rules affect the Statute of Anne as to the power of the Judge to certify: (*Robinson* v. *Messenger*, 8 A. & E. 606.) The words "at the discretion of the Court" as used in that Statute have been construed as not giving the power to refuse but only to tax costs: (*Dubeley* v. *Page*, 2 T. R. 391.) Great difficulty is frequently experienced in the apportionment of costs under the statute and rules. Many of the cases depend upon the particular circumstances attending them and are in themselves so various that no one case can be taken as an unqualified precedent: (*Lardner* v. *Dick*, 2 Dowl. P. C. 333; *Starling* v. *Cozens et al*, 3 Dowl. P. C. 782; *Staley* v. *Long*, 5 Dowl. P. C. 616; *Benn* v. *Bateman*, 8 M. & W. 666; *Hazlewood* v. *Back*, 9 M. & W. 1; *Anderson* v. *Chapman*, 7 Dowl. P. C. 822; *Mullins* v. *Scott*, 5 Bing. N. C. 423; *Lewis* v. *Holding*, 2 M. & G. 875; *Routledge* v. *Abbott et al*, 8 A. & E. 592; *Paddock* v. *Forrester*, 2 Dowl. N. S. 125; *Newton* v. *Holford*, 2 D. & L. 826; *Freeman* v. *Roscher*, 18 L. J. Q. B. 105; *Davis* v. *Davis*, 5 O. S. 453; *Evans* v. *Kingsmill*, 4 U. C. R. 182; *Taylor* v. *Carr*, *Ib.* 149; *Bank B. N. A.* v. *Ainley*, 7 U. C. R. 521; *Sheldon* v. *Hamilton*, M. T. 2 Vic. *M.S.* R. & H. Dig. "Costs," III. 2.)

Independently of the Statute of Anne questions have arisen as to the right of of the parties to costs when plaintiff succeeds on one of several counts in a declaration, and the defendant as to the others. Whenever a plaintiff succeeds on a trial as to any part of his demand divided into counts whether the defendant plead one plea to all the counts, or plead to the counts separately, plaintiff is entitled to the general costs of the cause. And defendant though not formerly entitled to his costs on the counts or issues upon which plaintiff fails: (*Lloyd* v. *Day*, Barnes, 149; *Butcher* v. *Green*, Doug. 677; *Astley* v. *Young*, Burr, 1232; *Postan* v. *Stanaway*, 5 East. 262) is now clearly entitled to a deduction in respect to such counts or issues: (*Cox* v. *Thomason*, 2 C. & J. 498; *Knight* v. *Brown*, 9 Bing. 643.) This rule applies as much where there is one plea, for instance, general issue to all the counts jointly, which for this purpose is to be taken distributively, as where distinct issues are joined on distinct pleas pleaded to as many separate counts: (*Daniel* v. *Barry*, 4 Q. B. 59; *Nicholson* v. *Dyson*, 1 D. & L. 277; *Williams* v. *Great Western R. Co.*, 1 Dowl. N. S. 16.)

The same principle has been held to apply to a declaration of one count only but containing several material and traversable allegations to which the general issue is pleaded, and some only of the matters alleged, are found in plaintiff's favour: (*Prudhomme* v. *Fraser*, 2 A. & E. 645.) The apportionment of costs as against or between several defendants is regulated by similar equitable principles. It has been held that if one of several defendants suffer judgment by default and the remainder obtain a verdict, that the latter are entitled to costs: (*Price* v. *Harris et al*, 2 Dowl. P. C. 804.) So if some only of several defendants obtain a verdict, the latter are entitled to all their separate costs and *prima facia* to an *aliquot* part of the joint costs of defence: (*Griffiths* v. *Kynaston*, 3 Tyr. 757; *Griffiths* v. *Jones*, 2 C. M. & R. 333; *Gambrell* v. *Earl Falmouth*, 5 A. & E. 403; *Bartholomew* v. *Stevens et al*. 7 Dowl. P. C. 808.) Thus in trespass against three defendants, one was acquitted and the remaining two found guilty, the former was held to be entitled to a *third* part of the costs of the defence, and that such third might be deducted from plaintiff's costs on tax

adjudged to the successful party, whatever may be the result of the other issue or issues.

con stat for ue. ch 22 § 111.

(App. Co. C.) Eng. C. L. P. A. 1852, s. 82. Rule not required.

CXXXI. (*k*) No rule of Court for leave to plead several matters shall be necessary where a Judge's Order has been made for the same purpose. (*l*)

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ation of his costs against the defendants found guilty: (*Norman* v. *Climenson*, 4 M. & G. 243.) It makes no difference as regards the application of this rule whether the several defendants appear by separate attorneys or by the same attorney: (*Ib.*)

Plaintiff, irrespectively of the present statute and Rules of Court, can recover costs only under the Statute of Gloucester, as a part of his damages, or under the Statute of Anne where there are double pleas. If he succeed as to the whole of the causes of action sued upon or one of them, his only claim is under the Statute of Gloucester. If defendant succeed on a plea in bar of the causes of action, plaintiff can claim costs only under the Statute of Anne. To put a case decided as an illustration of these remarks: a declaration for injury to the plaintiff's reversion contained two counts, to which the defendant pleaded—*first*, not guilty; *secondly*, to the first count, no reversion; *thirdly*, a justification, to which there was a replication, demurrer and judgment for defendant; *fourthly*, the Statute of Limitations to both counts; and *fifthly*, to the second count, a plea to which there was a new assignment, and to it a plea of not guilty, and a verdict was found for the plaintiff on the plea of not guilty as to part of the first count, with contingent damages; and as to the residue of the first and the second count, for the defendant, and on the plea of no reversion for the plaintiff as to both counts, and on the fifth plea the jury were discharged by consent, and as to the new assignment, the verdict was for the defendant: held that the plaintiff was not entitled to the costs of the issues as to the part of the first count on which he had succeeded, for he had no right under the Statute of Gloucester, inasmuch as he could not have judgment for the damages assessed, and that he had no right under the Statute of Anne, since he had succeeded on all the issues as to that part of the count. But that as to the other part of the first count, and the second count he was entitled under the Statute of Anne to the costs of one special plea, including a portion of the expenses of briefs and witnesses, inasmuch as the defendant succeeded on the first issue as to that part of the first count, and on the second count; and the plaintiff obtained a verdict on the issues raised on two other special pleas: (*Howell* v. *Rodbard*, 4 Ex. 309.) So where to a declaration in assumpsit the defendant pleaded several pleas upon which issues were joined and also a plea to which the plaintiff demurred, and the issues were tried and found for the plaintiff and afterwards judgment was given for the defendant on the demurrer, the Court holding the declaration insufficient: held that the plaintiff was not entitled under the Statute of Anne to the costs of the issues found for him as no issue in fact had been found for the defendant also: (*Partridge* v. *Gardner*, 4 Ex. 303.) The object of the Statute of Anne is to punish a defendant for improperly pleading pleas which he cannot support; but there are other statutes which punish a plaintiff for bringing a frivolous suit though he succeed: (43 Elizabeth cap. 6, 21 Jac. 1 cap. 16, s. 6; 22 & 23 Car. II. cap. 9, and the section under consideration.)

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 82.—Applied to County Courts.

(*l*) If a Judge in Chambers refuse leave to plead several matters, the party who made the application can

(App. Co. C.) Eng. C. L. P. A. 1852, s. 83. Objections when to be heard.

CXXXII. (*m*) All objections to the pleading of several pleas, replications, or subsequent pleadings, or several avowries or cognizances, on the ground that they are founded on the same ground of answer or defence, shall be heard upon the summons to plead several matters. (*n*)

(App. Co. C.) Eng. C. L. P. A. 1852, s. 84. Certain pleas may be pleaded to-

CXXXIII. (*n*) The following pleas or any two or more of them may be pleaded together as of course, without leave of the Court or a Judge, that is to say: a plea denying any contract or debt alleged on the declaration, (*o*) a plea of ten-

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move the Court *in banc*: (*Johnstone* v. *Knowles*, 1 Dowl. N.S. 30.) In such a case it would seem to be unnecessary for him in his rule to notice the proceedings previously had before the Judge in Chambers: (*Ib.*) And if the Judge to whom application is in the first instance made, though granting leave as to some pleas withholdit as to others, the party dissatisfied may apply to the Court to be allowed to file additional pleas. If the proposed additional pleas be consistent with what the Judge in Chambers has already done, the parties should again apply to him. It is very inconvenient for the Court *in banc*, to be called upon to say what pleas shall or shall not be allowed in a case: (*Smith* v. *Goldsworthy*, Denman, C.J., 2 Q.B. 721.) But if the application to the Court be to allow particular pleas disallowed by the Judge in Chambers, then it would appear that the application should be to rescind the Judge's order: (*Pym* v. *Grazebrook*, 1 Dowl. N. S. 489; see also *The South Eastern R. Co.* v. *Sprot*, 11 A. & E. 167.) And on the contrary if at all consistent with the judges order it would seem unnecessary to notice the previous proceedings when applying to the full Court: (*Smith* v. *Goldsworthy*, *ubi supra*; *Graham* v. *Furber*, 2 N. C. L. Rep. 11 n, *b*.) The application to the Court would be in the nature of an appeal from the decision of the Judge. Such and similar applications should be made in the course of the term next after the decision of the Judge: (*Orchard* v. *Moxsy*, 2 El. & B. 206, affirmed in *Collins* v. *Johnstone*, 16 C. B. 588; see further note *m* to s. xxxvii.) The Court before the C. L. P. Act has allowed a defendant add pleas after a demurrer (*Smart* v. *Sandars*, 3 C. B. 380), and in one case even after a notice of trial and countermand, the trial not being thereby delayed: (*Field* v. *Sawyer*, 5 D. & L. 777; see further s. cxxci. of this Act, and notes thereto.)

(*m*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 83.—Applied to County Courts.

(*n*) From the concluding words of this section the inference might be that no application involving objections to the pleading of several pleas, &c., can be entertained *in banc*; but the Courts in England have given a different construction to the section: (*Griffith* v. *Selby*, 9 Ex. 226, 25 L. & Eq. 549; and see generally the notes to preceding section cxxxi.) If either party consent to the pleading of several matters, he will not be permitted afterwards to move the Court to set aside any of the pleadings pleaded with his consent: (*Howen* v. *Carr*, 5 Dowl. P. C. 305.)

(*n*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 84.—Applied to County Courts.—Substantially a re-enactment, with amendments, of Eng. Rule 13 T.T. 1 Wm. IV.: (Jervis N. R. 46.)

(*o*) In the practical application of this enactment there may be some difficulty experienced. There are contracts consisting of several parts which cannot be denied without as-

gether without leave.

der as to part, a plea of the statute of limitations, set-off, discharge, of the Defendant under the Bankruptcy or Insolvent law, *plene administravit*, *plene administravit præter*, infancy, coverture, payment, accord and satisfaction, release, not guilty, a denial that the property, an injury to which is complained of, is the Plaintiff's, leave and license *son assault demesne*, and any other pleas which the judges of the said Superior Courts, or any four of them of whom Chief Justices of the said Court shall be two, shall, by any rule or order to be from time to time by them made in term or vacation, order and direct.

(*App. Ch. C.*) Eng. C. L. P. A. 1852, s. 85. Signature of Counsel not required.

Con stat from u.c. ch 22 § 90

CXXXIV. (*p*) The Signature of Counsel shall not be required to any pleading. (*q*)

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many distinct pleas. Thus, the contract of the indorser of a promissory note is to pay it, if the maker do not, provided he, the indorser, receive notice of non-payment by the maker. Now the plea of "did not indorse," only puts the fact of indorsement in issue which is only one part of the contract: (see *Marston* v. *Allen*, 8 M. & W. 494; *Adams* v. *Jones*, 12 A. & E. 455; *Hayes* v. *Caufield*, 5 Q. B. 81; *Wood* v. *Connop*, *Ib.* 292; *Broniage et al* v. *Lloyd et al*, 1 Ex. 32; *Bell* v. *Ingestre*, 12 Q.B. 317; *Lloyd* v. *Howard*, 15 Q.B.995; *Palmer* v. *Richards*, 15 Jur. 41.) If defendant do not expressly deny notice of non-payment he will be taken to have admitted it. This latter plea is necessary to the denial of the remaining part of the contract, and by this means the whole contract is denied within the meaning of the enactment. It is apprehended that any number of pleas may be used which in consequence of the peculiarity of the contract sued upon may become necessary for the purpose of denial. It is the peculiarity of the contract of the indorser of a promissory note which renders it necessary to use two pleas in order to deny it. The mere denial of the indorsement will admit the notice and the denial of the notice will admit the indorsement. It is very true if the defendant succeed on either that it affords an answer to the action, but the contract is of a two-fold character and the two pleas do not cover the same ground, but are distinct, applying to two several parts of the contract. *Non-assumpsit*, if allowable, might have traversed both; but the rules of E. T. 5 Vic. compel a defendant in a case like this to traverse the contract severally by distinct answers. Taking s. cxxv. with s. cxxxiii. of this Act, and construing them with the rules of 1842, it has been held that the indorser of a note may deny the indorsement and want of notice without asking permission to do so: (*Rose* v. *Cummings*, per Burns, J., Chambers, October 4, 1856.)

(*p*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 85.—Applied to County Courts.—Substantially a re-enactment of our rule 13 E. T. 5 Vic. (Cam. R. 23.) It has not at any time been the practice in Upper Canada to have pleadings signed by counsel. They have been always signed by the attorney in the cause or party in person as the case might require.

(*q*) In England the Court in one case allowed a *special case* to be set down for argument, which though signed by the counsel for defendant was not signed by the counsel for plaintiff, who intended himself to argue the case in person: (*Udney* v. *East India Co.*, 13 C. B. 732; 24 L. & Eq. 222; see fur-

CXXXV. (*r*) Except in the cases herein specially provided for, (*s*) if either party plead several pleas, replications, avowries, cognizances, or other pleadings, (*t*) without leave of the Court or a Judge, (*u*) the opposite party shall be at liberty to sign Judgment, provided that such Judgment may be set aside by the Court or a Judge upon an affidavit of merits, and such terms as to costs and otherwise as they or he may think fit. (*v*)

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 86.

In other cases, several pleas, &c., shall not be filed without leave.

Penalty.

ther note *f* to s. lxxxi.) The signature of counsel to *motions in Court*, is of course still necessary.

(*r*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 86.—Applied to County Courts.

(*s*) *ante* s. cxxxiii.

(*t*) To a count alleging an agreement by B. to serve A. as a clerk, and not to leave without notice, B. pleaded that whilst he was in A.'s employment, B. without any just cause or provocation insulted and abused him, whereupon he gave him notice that he should forthwith leave his service. And to this plea A. (without obtaining leave to reply double) replied thus—A. takes issue on B.'s plea, and *further* says that the notice intended in the declaration was a reasonable and a proper notice, but that the notice mentioned in B.'s plea was not a reasonable or a proper notice. B. having signed judgment under the section of the Eng. C. L. P. Act, corresponding with the one here annotated, the Court set it aside without costs, but declined to decide whether or not the replication was double or the plea regular: (*Meseiter* v. *Rose*, 13 C. B. 162, 16 L. & Eq. 422.)

(*u*) If a party who having obtained leave to plead several matters by order of a Judge plead contrary to the effect of such order, even though by mistake the opposite party may sign judgment because such pleading is in fact without leave: (*Hills et al.* v. *Hayman*, 2 Ex. 328; *Gabardi* v. *Hazmer*, 3 Ex. 289; *Harvey* v. *Hamilton*, 4 Ex. 43; *Wills* v. *Robinson*, 5 Ex. 302; see also *Bailey* v. *Baker*, 9 M. & W. 769, and *Halliday* v. *Bohn*, 3 M. & G. 115.) But a departure from the order which is not substantial or calculated to embarrass will not entitle the opposite party to sign judgment: (*Dunmore* v. *Tarleton*, 1 N. C. L. Rep. 19; 16 L. & Eq. 391.)

(*v*) In an action on a promissory note defendant without leave pleaded, 1. *non fecit*; 2. denial of presentment; 3. a special plea admitting the note, but avoiding it by showing a want of consideration. Plaintiff signed judgment. Held that as the 1st and 3d pleas were inconsistent and set up two distinct defences to the same cause of action, the defendant should not have pleaded them without leave, and that judgment was rightly signed by plaintiff: (*Le Claire et al.* v. *Pridhouse*, Chambers, Oct. 18, 1856, Burns, J.) The judgment was, however, set aside upon the merits, and defendant admitted to plead upon terms: (*Ib.*) So where to a declaration for a malicious arrest containing only one count defendant without leave pleaded, 1. not guilty; 2. that he did not maliciously cause the plaintiff to be arrested, &c.; 3. that he, defendant, had reason to believe that plaintiff had parted with his property, &c. Plaintiff thereupon signed judgment. Defendant obtained a summons to set aside the judgment with costs, on the ground that "it had been signed after pleas had been filed and served and was consequently irregular," but held that "the pleas should not have been pleaded without leave, and consequently that the judgment was rightly signed": (*Wilkins* v. *Blacklock*, Chambers, Oct. 22, 1856, Burns, J.) But the judgment was set aside on the merits and defendant admitted to plead on terms: (*Ib.*) So where to a declaration by plaintiff as bearer against defendant as maker of a promissory note, defendant without leave

(App. Ch. C.) Eng. C. L. P. A. 1852, s. 87. One new assignment

CXXXVI. (*w*) One new assignment (*x*) only shall be pleaded to any number of pleas to the same cause of action, and such new assignment shall be consistent with and confined

pleaded, 1. plaintiff not bearer of the note; 2. want of consideration; 3. fraud; and the plaintiff thereupon signed judgment: held regular: (*Emery* v. *Wheeler*, Chambers, Nov. 8, 1856, Hagarty, J.) An order, however, was made relieving defendant on the merits and setting aside the judgment on the conditions precedent, that defendant should pay £50 into Court (that sum being sufficient to cover the amount for which judgment was signed) to abide the event of the suit, and upon payment of all costs of signing the judgment and subsequent proceedings thereon and the costs of the application, and further as the cause was in the "inferior jurisdiction," upon the terms of defendant allowing plaintiff to go to trial at the then next sitting of the County Court, taking one day's notice of trial: (*Ib.*) As to affidavit of merits generally, see note *f* to s. xlvii. of this Act.

(*w*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 87.—Applied to County Courts.—Founded upon 1st Report C. L. Com'rs, s. 45. The object of this enactment is to prevent unnecessary prolixity whereby in some cases to several pleas there have been as many distinct new assignments as pleas, and before issue as many replications as pleas both to the declaration and new assignment, so that the same pleading in the same form of words has been repeated over and over again without reason or meaning.

(*x*) The necessity for a new assignment generally arises in two ways—*first*, where the plaintiff complains of one of several trespasses, in a form so general that it is applicable to any of them, and a trespass in respect of which the action is not brought is either by mistake or design, justified by the defendant; *secondly*, where the defendant pleads justification of the trespass complained of, but the plaintiff maintains that there has been an excess beyond what the circumstances justify, of which several examples may be found in subsequent notes to this section: (see further Steph. Pl. 249.) One object of a new assignment is to make certain what the plea has rendered uncertain; as where the defendant mistakes the nature of plaintiff's demand and pleads a good answer to something which is not *the* cause of action sued upon: (*James* v. *Lingham*, Tindal, C. J., 5 Bing. N. C. 557; see also *West* v. *Nibbs*, 4 C B.172.) There may be new assignments in actions on contracts as well as for torts: (Chit. Jr. Pl. 2 Edn. 867.) Though a declaration in debt be very general and though the plea be equally general if there never could be any doubt between the parties that the action is brought for the *balance* of an account there will be no necessity for a new assignment: (*James* v. *Lingham*, *ubi supra.*) Where plaintiff declared in debt for £100 due for work and labor and on an account stated to which defendant pleaded payment of £100 in satisfaction of the causes of action mentioned in the declaration, and plaintiff proved that £96 17s. 11d. was due to him for the balance of his account, after giving credit for the £100 he had received, and that defendant admitted the correctness of his account: Held that plaintiff was entitled to a verdict without a new assignment: (*Ib.* See also *Kenningham* v. *Alison*, 2 Dowl. N. S. 658.) Where the plaintiff's demand is *defined* by a bill of particulars, and it appears that he claims a balance only after giving credit for payments whenever made, the plea of payment applies as to that balance: (*Eastwick* v. *Harman*, 8 Dowl. P. C. 401,) which for the purposes of pleading is taken to be the particular sum for which the action is brought: (*Dite* v. *Hawker*, 1 D. & L. 189.) Thus, plaintiff declared in *indebitatus assumpsit* for work and

by the particulars delivered in the action, if any, (*y*) and shall only to several pleas to

labor done and on an account stated for £16. 3s. 10d: plea except as to £2. 3s. 10d., (paid into court) that the defendant after the accruing of the debt, and before the commencement of the suit, paid to the plaintiff and the plaintiff accepted money to a large amount in full satisfaction of the debt in the declaration mentioned. Replication, denying the payment and acceptance as alleged. It appeared at the trial that the original sum due was £30. 2s. 10d., of which £14 had been paid, leaving the balance claimed in the action of £16. 3s. 10d. Held that the issue raised upon the pleadings was whether the money paid was in satisfaction of the debt in the declaration mentioned and that defendant having failed to show payment beyond £1a, the plaintiff was entitled to a verdict for £14, the balance, less the money paid into Court: (*Ib.* See also *Freeman* v. *Crafts*, 6 Dowl. P. C. 689.) But where the declaration is general and the plea narrows it, stating the demand to be in respect of a claim which it shows to have been satisfied and plaintiff contends that the plea is wrong in so narrowing the declaration, he should new assign: (*Rogers* v. *Custance*, 1 Q. B. 77.) Thus, debt in the common form for work and labor. Particulars of demand for contract work and extra work. Plea, that plaintiff and defendant by consent gave up a contract originally made between them for work, plaintiff agreeing to accept certain work which had been done under the contract at a reduced price; that by virtue of such agreement defendant became indebted to plaintiff in the amount mentioned in the declaration, and that defendant *in pursuance of that agreement* paid plaintiff and he accepted the said amount. Replication traversing the payment and acceptance. Held that on these pleadings the plaintiff could not give evidence of any demand not a subject of the second agreement, and that to enable himself to recover for extra work, he ought to have new assigned: (*Ib.*) In such a case the particulars of demand even if they had been confined to extra work could not aid the plea: (*Ib.*) It may be mentioned that whenever plaintiff goes for a balance of an account whether there be a plea of payment, or credit be given to defendant for a part in the declaration, plaintiff must under the general issue prove the whole account: (*Price* v. *Rees*, 11 M. & W. 576.)

(*y*) A defendant by calling for particulars before pleading may be so informed as to make it impossible for him to mistake the declaration, and thus prevent in a great measure the necessity for a new assignment. The office of a new assignment is practically to explain that which is left ambiguous on the face of the declaration owing to its generality: (*West* v. *Nibbs*, 4 C.B. 172.) Particulars of demand where allowable have the same effect, though they form no part of the record: (*Dempster* v. *Purnell*, 1 Dowl. N. S. 168.) The object of a bill of particulars is to control the generality of the declaration; but, as remarked by a learned Judge, in nine cases out of ten they are applied for to entrap the plaintiff within certain limits, and the Court should be careful not to allow plaintiffs to be tied up too tightly by such means: (*Rennie et al* v. *Beresford et al*, Alderson, B., 3 D. & L. 468.) There is a distinction between the explanation of a charge made in a bill of particulars and the charge itself. For instance, if in a bill by a surveyor for services performed by him, matters such as stationery, travelling expenses, &c., were of themselves and by themselves the distinct subject of a charge; no doubt there ought to be particulars given of each, but usually that is not so, nor is it necessary that it should be so in a surveyor's bill, as such matter is mere explanation of the charge. In such an action particulars claiming certain aggregate sums in respect of the survey stated, number of miles,

the same state that the Plaintiff proceeds for causes of action different

travelling expenses, printers' accounts, stationery accounts, &c., are sufficient particulars without specifying the number of fields surveyed, the time employed, the number of persons engaged, &c.: (*Ib.*; see also *Higgins* v. *Ede et al.* 15 M. & W. 76; *Irving* v. *Baker*, 15 L. J. Q. B. 322; *Boulton* v. *Pritchard*, 4 D. & L. 117.) But in an action on the indebitatus counts by a broker to recover the amount of shares purchased by him for defendant, and commission on the same, the Court obliged him to furnish the dates of the purchases within the compass of a few days and the names of the parties from whom he purchased: (*Berkley* v. *De Vere*, 4 D. & L. 97.) The chief object of particulars is to give substantial information to the defendant of plaintiff's demand, and in order to limit the proof of the latter to the causes of action in the declaration mentioned. The cases have gone great lengths in supporting particulars where they have really varied from the evidence given by plaintiff when the defendants could not under the circumstances have been misled. It is not for the Court to look to the fact of the party having been misled, but whether under the ordinary circumstances in which a man would view the case there might have been an actual misleading. That depends upon the wisdom of the party, and there is no criterion unless the Court adopt this—the whole circumstances being looked at, would a reasonable man be deceived by the form of the particulars? The true criterion therefore is not whether the defendant has been actually misled, but whether the particulars are of such a nature that a reasonable person would be misled by them: (*Law* v. *Thompson et al.* 4 D. & L. 54.) In pursuance of this principle it has been frequently decided that a mistake in a bill of particulars not calculated to deceive or mislead the party to whom the bill is given, will not be held to be material, and will not be allowed as a valid objection at the trial: (*Barney* v. *Simpson*, Sherwood, J., 6 O. S. 96.) Thus an error in the date of a promissory note as given in a bill of particulars has been in one case held immaterial. (*Ib.*) But in an action for work and labor the particulars of the plaintiff's demand stated the action to be brought "to recover from the defendants the sum of £450 claimed by the plaintiff for his service as clerk or manager to the defendants from October, 1837, to October, 1839." An order was made for further and better particulars, when the plaintiff delivered the same with the addition of the words "after the rate of £200 per annum." Held that plaintiff could not give evidence of a claim for commission on the amount of business done by defendants, through his introduction: (*Law* v. *Thompson*, *ubi supra.*) So where plaintiff in his declaration and particulars claimed damages for certain articles deposited with the defendant, which had not been returned, and of which due care had not been taken. Under the former description in his particulars he set out certain articles of glass, which however turned out to have been destroyed. Held that under such particulars he was not entitled to recover damages in respect of those articles: (*Moss* v. *Smith*, 8 Dowl. P. C. 537.) But under a bill of particulars for work and labour, the Court allowed plaintiff to give in evidence an acknowledgment of a specific balance due for work and labour; (*Drummond* v. *Bradley*, Dra. Rep. 254.) The usefulness of particulars as a preventitive of new assignments will be apparent in actions of trespass particularly. In this action it has been held that defendant may obtain particulars of plaintiff's cause of action before declaration: (*Neville* v. *Harvey*, T.T. 3 & 4 Vic. *M.S.* R. & H. Dig. "Particulars of Demand," 8.) The Court will always require some special ground for an application for particulars where none have been given by plaintiff:

from all those which the plea professes to justify, or for an excess over and above what all the defences set up in such pleas justify, or both. (z)

cause of action.

otherwise in every case of trespass it would be a step in the cause to apply for particulars on the affidavit of defendant, who would never know what the grievances complained of were. There ought to be some special statement of the property, and the Court should see some reasons for granting a rule: (*Horlock* v. *Lediard*, Parke B. 2 Dowl. N. S. 277.) The same rule has been applied to special actions for breach of contract: (*Pylie* v. *Stephen*, 8 Dowl. P. C. 771.) Before this Act it has been held that a Court of common law cannot compel a plaintiff to give particulars of matters which he does not claim in his declaration. Thus in an action for the value of goods supplied to a third party, on the false representation of the defendant, the Court would not compel the plaintiff to give a particular of goods supplied to, and bills of exchange, &c., given by such third party, such goods and bills not being claimed by the terms of the declaration: (*Luck et al.* v. *Handley*, 4 Ex. 486.)

(z) A new assignment is in the nature of a new declaration. In effect the plaintiff says—"I do not dispute in this action the truth of your plea; my declaration is for a cause of action differing from that which you have answered," or he may say "I dispute the truth of your plea, but my declaration is also for another cause of action different from that which you have attempted to answer": (*Grove* v. *Withers*, Parke, B., 4 Ex. 881.) To do the latter is to reply and new assign at the same time. A trespass justified may be so far divisible that plaintiff may reply as to part and new assign as to the residue. In trespass for breaking and entering plaintiff's dwelling house, and staying and continuing therein, making a noise and disturbance for a long time, to wit, for four days then next following and seizing his goods, &c. Plea as to the breaking and entering the dwelling house, and staying and continuing therein as in the declaration mentioned, a justification by the leave and license of the plaintiff to take possession of certain goods. Replication traversing the leave and license and new assigning that the plaintiff issued his writ, &c., not only for the breaking and entering the dwelling house and staying and continuing therein as in the plea mentioned, but also for that the defendants, without the license of the plaintiff stayed and continued in the dwelling house, making such noise and disturbance, &c., for other and different purposes than those in the plea mentioned, *and for a much longer time*, to wit, three days longer than was necessary for taking possession of the goods, &c. Held that the replication and new assignment were not bad for duplicity, *time* being in the case of a continuing trespass equally divisible for this purpose as *space*: (*Loweth* v. *Smith*, 12 M. & W. 582, also *Worth* v. *Terrington*, 13 M. & W. 781.) These cases are exactly like the case of a trespass in various parts of a close, where the defendant justifies under a right of way and plaintiff may traverse the existence of such right and new assign trespasses in *another part* of the close: (*Worth* v. *Terrington*, Parke B. *ubi supra*.) The necessity for a new assignment will frequently depend on the distributive character of defendant's plea, as in the case of *Adams* v. *Andrews*, 20 L. J. Q. B. 33, and *Glover* v. *Dixon*, 9 Ex. 158, which see, and as to distributive pleadings generally see s. cxxiv. of this Act and notes thereto. To a declaration in trespass for breaking, &c., a shop, rooms, and apartments of the plaintiff, the defendant pleaded that he was Sheriff, and as Sheriff had a writ of *fi. fa.* against one H, and that by the leave of the plaintiff the outer door being open he entered the same shop in the declaration mentioned (the same

Con stat for w. ch 22 § 116.

(App. Co. C.) Eng. C. L. P. A. 1852, s. 88.

Pleas to new assignment.

CXXXVII. (*a*) No plea which has already been pleaded to the declaration shall be pleaded to such new assignment, (*b*) except a plea in denial (*c*) unless by leave of a Court or Judge, (*d*) and such leave shall only be grounded upon satisfactory

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shop, rooms, and apartments in the declaration mentioned being one and the same shop, and not different rooms and apartments) to inquire, &c. The plaintiff replied *de injuria*, and new assigned that the defendant broke, &c., "two other rooms and apartments, to wit, a room called," &c., being other rooms in the declaration mentioned, besides and different from and other than the said shop in the said plea mentioned. Held new assignment good: (*Harvey* v. *Lankester*, 7 D. & L. 32; see further *Meriton* v. *Coombes*, 19 L. J. C.P. 336.) In actions of trespass to land, the *locus in quo* should be designated by abuttals or other description, as it was at the time of the trespass and not at the time of the declaration. Therefore where in an action by a reversioner the declaration described the *locus in quo* as "abutting on the south and east on a close in the occupation and possession of the defendants," and the defendants, an English railway company, pleaded that they took part of said close abutting on the south on the fence of their railway under the provisions of the Railway Act 8 & 9 Vic. cap. 20 ss. 32-33, which was the trespass complained of, and it appeared at the trial that at the time the trespass was committed the close in question abutted on the fence of the railway, but that afterwards the defendants took possession of and purchased under the provisions of the above act, a small part of it adjoining the railway, so that the plaintiff's description of it was correct at the time of the declaration but not at the time of the trespass. Held that plaintiff could not recover for want of a new assignment: (*Humfrey* v. *the London & N. W. R. Co.*, 7 Ex. 326.) The effect of this section will be to simplify the form and abridge the length of new assignments. The examples Nos. 50, 51, 52, in Sch. B. to this Act, had better be consulted. Further as to the subject of new assignments see Tidd's N. Pr. 430; Bag.Pr. 141; Chit. Arch'd 8 Edn. 279.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 88.—Applied to County Courts.—Founded upon 1st Report C. L. Com'rs, s. 45.

(*b*) This is in accordance with the principles of the preceding section: (cxxxvi.) There it has been enacted that plaintiff instead of new assigning separately to each of several pleas shall be allowed only one new assignment which must state generally that plaintiff proceeds for causes of action different from or beyond those justified. Here it is enacted that defendant shall not without leave plead to the new assignment pleas pleaded to the declaration. The consequence of these enactments will be that "if a defendant pleads one defence only at first and plaintiff new assigns, the defendant may then plead his next defence, and so on putting each defence once and once only on the record; but if the defendant plead all his defences in the first instance, which is the usual course, the plaintiff will new assign once for all, and the defendant will of necessity be driven to deny the causes of action newly assigned, or pay money into Court or suffer judgment by default:" (C. L. Comrs.)

(*c*) Pleas in bar are divided into two classes—pleas by way of traverse and pleas by way of confession and avoidance: (Steph. Pl. 52.) Traverse is the more proper and ancient term. In the modern language of pleading, however, *deny* is often substituted for it; and "pleas in denial" is a term used instead of "pleas by way of traverse."

(*d*) See note *m* to s. xxxvii.

proof (*e*) that the repetition of such plea is essential to a trial on the merits.

CXXXVIII. (*f*) The form of a demurrer (*g*) shall be as follows, or to the like effect: (*h*) (*App. Co. C.*) Eng. C. L. P. A. 1852, s. 89.

Form of demurrer.

"The Defendant, by his Attorney, (*or* Plaintiff, *as the case may be*,) (*or* in person, &c.,) says that the declaration (*or* plea, &c.) is bad in substance." (*i*)

and on the margin thereof some substantial matter of law intended to be argued shall be stated; (*j*) and if any demurrer shall be delivered without such statement, or with a frivolous

(*e*) See note *q* s. XXXV.

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 89—Applied to County Courts.

(*g*) Demurrers for matters of form are by this Act abolished; but demurrers for matter of substance are retained and are intended by this enactment (see note *o* to s. xcix.) The words "except in the cases herein specifically provided for," used in the corresponding section of the English Act are not to be found it will be perceived in our section. The meaning of such an exception was a matter of doubt to the commentators on the English Act, and our Legislature has done wisely in omitting it.

(*h*) It is presumed that a demurrer like any other pleading must be intitled of the proper Court and of the day and year when pleaded: (see s. ciii. of this Act, and in connexion therewith see *Holland* v. *Tealdi*, 8 Dowl. P. C. 320.)

(*i*) As to the distinction between substance and form see notes *o* and *p* to s. xcix

(*j*) The provision following is a substantial re-enactment of Rule 14 E. T. 5 Vic. which was taken from Eng. R. G. 2 H. T. 4 Wm. IV. (2 Dowl. P. C. 304), and which was held not to apply to revenue cases: (*Rex* v. *Woolett*, 2 C. M. & R. 256.) It was held under that rule that a substantial compliance with its terms was in all ordinary cases necessary. A statement that "the matters in the plea contain no answer to the action," was held to be insufficient: (*Ross* v. *Robeson*, 3 Dowl. P. C. 779.) And per Parke B. "the statement in the margin is merely a repetition of the general demurrer, and would suit any other general demurrer to the plea just as well. Some special ground ought to have been stated." It has also been held that if several grounds be stated in the margin it is not necessary for the party demurring to specify on which of those grounds he intends to rely: (*Whitmore* v. *Nicholls*, 5 Dowl. P. C. 521.) And per Williams, J. "It may be that there are several grounds stated in the margin which cannot be sustained when they come to be argued. But that does not vitiate the other points, or render this statement a nullity so as to entitle plaintiff to set aside the demurrer as for want of a plea:" (*Ib.*) For examples of statements of several grounds of demurrer see *Smith* v. *Monleith*, 13 M. & W. 427; *Bozzi* v. *Stewart*, 7 M. & G. 746. If a party demur to several pleas on the same grounds the causes of demurrer to all after the first are sufficiently stated by stating that the plea, &c., is insufficient, "for the like causes and grounds of objection which have been taken to the said (first) plea:" (*Braham* v. *Watkins*, 16 M. & W. 77.) The marginal notes are meant for the information of the Court and not of the parties: (*Scott* v. *Chappelow*, 4 M. & G. 336.)

statement, (*k*) it may be set aside by the Court or a Judge, (*l*) and leave may be given to sign Judgment as for want of a

(*k*) To decide when an objection is frivolous, it will be necessary to bear in mind that the main object of this Act is to make form subservient to matter. Demurrers have been held to be frivolous in the cases following: *Neal* v. *Richardson*, 2 Dowl. P. C. 89; *Curtis* v. *Headfort*, 6 Dowl. P. C. 496; *Underhill* v. *Hurney*, 3 Dowl.P.C. 495; *Chevers* v. *Parkington*, 6 Dowl. P. C. 75; *Knill* v. *Stockdale*, 8 Dowl. P. C. 772; *Deriemer* v. *Fenna*, 7 M. & W. 439; *Pigeon* v. *Osborne*, 9 Dowl. P. C. 511; *Dalton* v. *McIntyre*, 1 Dowl.N.S. 76; *Twight* v. *Prescott*, 2 Dowl. N. S. 4; *Braithwaite* v. *Harrison*, 7 Jur. 888; *Skinner* v. *Lambert*, 4 M. & G. 477. The Court must obviously possess a discretionary power to set aside frivolous demurrers or pleadings, to preserve its own records from abuse, the public time from being wasted, to prevent the useless accumulation of costs to the prejudice of the client, and to the advantage of those only who ought to protect him from these evils, and to the delay, if not the perversion of justice. But it is manifest that all these evils will be aggravated if the exercise of a Judge's discretion is frequently made the subject of an appeal to the Court. When the Court clearly sees an attempt to secure a triumph to falsehood by means of a bad pleading the possibility of a doubt being raised in argument affords no reason for interfering with the Judge's discretion: (*Lane* v. *Ridley*, Denman, C.J. 10 Q.B. 481; *Padwick* v. *Turner*, 11 Q.B. 124.)

(*l*) The mode pointed out by this section for taking advantage of an irregular demurrer is the proper one to be adopted. No objection that might be taken advantage of in this mode can be raised on the argument of the demurrer: (*Lacey* v. *Umbers*, 3 Dowl. P. C. 732.) To entitle a party to set aside a demurrer because of a frivolous statement the objection taken must be clearly tenable. If there be any doubt as to the sufficiency of the objection, the Court will not interfere: (*Tyndall* v. *Ulleshorne*, 3 Dowl. P.C.2; *Underhill* v. *Fuller*, 3 Tyr. 329; *Walker* v. *Catley*, 5 Dowl. P. C. 592; *Chevers* v. *Parkington*, 6 Dowl. P. C. 75.) A frivolous demurrer is not so much an irregularity as an improper proceeding, which the Court in its discretion may set aside at any time: (*Cutts* v. *Surridge*, Denman, C. J., 9 Q. B. 1023.) But an objection to the marginal notes or form of demurrer should not be deferred till after joinder in demurrer, at which time it would be too late: (*Norton* v. *Macintosh*, 7 Dowl. P. C. 529.) A defective marginal note may be amended on payment of costs: (*Ross* v. *Robeson*, 3 Dowl. P. C. 779), and the case postponed until the points of argument are properly stated: (*Parker* v. *Riley*, 3 M. & W. 230.) The rule to set aside a demurrer as frivolous or for any cause contemplated by this section will it is apprehended be *nisi* in the first instance: (*Kinnear* v. *Keene*, 3 Dowl. P.C. 154,) and in the case of a frivolous demurrer should be drawn up "on reading the pleadings:" (*Howorth* v. *Hubbersty*, 3 Dowl. P. C. 455; *Danieli* v. *Lewis*, 1 Dowl. N. S. 542.) A rule that the demurrer be set aside as irregular "unless cause be shown on Thursday next" has been issued: (*Kinnear* v. *Keene*, *ubi supra*.) If the demurrer be set aside all the pleadings connected with it may also be set aside at the same time. In one case a rule was drawn up in the following form, "that the demurrer delivered herein be set aside as irregular, and the pleadings connected therewith be struck out. And that the defendant do pay to the plaintiff, his attorney, or agent, within four days after taxation all costs of and occasioned by the said demurrer, including the costs of preparing for the trial of and attending to try this cause, and of this application,

plea; (*m*) and the form of a joinder on demurrer shall be as follows, or to the like effect: (*n*)

"The Plaintiff (*or* Defendant) says that the declaration (*or* plea, &c.) is good in substance." Form of joinder on demurrer.

CXXXIX. (*o*) Where an amendment of any pleading is allowed, (*p*) no new notice to plead thereto shall be necessary, (App. Co. C.) Eng. C. L. P. A. 1852, s. 90.

to be taxed by one of the Masters. And that the defendant do take short notice of trial for the sittings after term; and in default of payment of such costs within four days after taxation as aforesaid, it is ordered that the plaintiff be at liberty to sign judgment as for want of a plea:" (*Tucker* v. *Barnesley*, 16 M. & W. 54.)

(*m*) Plea &c., here means pleading, and applies to any pleading by either party: (*Cutts* v. *Surridge*, Denman, C. J., 9 Q. B. 1015.)

(*n*) See note *h*, *supra*.)

(*o*) Taken from Eng. C. L. P. Act, 1852, s. 90.—Applied to County Courts.

(*p*) The application for amendment may be either at the instance of the party whose pleading is in fault or at the instance of his opponent who makes objection: (see s. ci. and notes thereto.) This section contemplates amendments before entry of the record for trial. Amendments at the trial may be made under s. ccxci. of this Act. As to amendment after issue joined, see *Warner* v. *Blacklock*, 10 Jur. 717. Except under very special circumstances, a declaration may be amended at any time: (*Tricket* v. *Jarman*, Finl. C. L. P. A. 196.) It has been considered where a declaration was ordered to be amended in the names of one of the parties that an amendment of the original filed without filing amended copy was sufficient: (*Hart et al* v. *Boyle*, 6 O. S. 168.) With respect to the terms of the amendment it as a general rule is only just that the party whose pleading is in fault should pay the costs really occasioned by the correction of such fault. Though this be the general rule, there may be exceptions dependent upon the circumstances of particular cases. The judge to whom application is made is in this respect clothed with ample authority. He may either allow an amendment without costs or upon payment of a certain fixed sum as costs or upon payment of costs to be taxed by the master. The Court will not reverse his exercise of discretion though differing from him on the merits of the particular case: (*Tomlinson* v. *Bollard*, 4 Q. B. 642.) The application to amend should be in the first instance made to a judge in Chambers. This is the most convenient and least expensive mode. Where a defendant applied to the Court in the first instance, in a vexatious and expensive manner and for an amendment that might have been obtained at Chambers, the Court ordered his rule to be discharged with costs unless he would consent to pay the costs of the amendment: (*Duke of Brunswick* v. *Sloman*, 5 C. B. 218.) Though a party obtain a rule or order to amend he may decline to avail himself of it. And will not in such a case be bound to pay the costs of obtaining leave to amend: (*Brown* v. *Millington*, 22 L. J. Ex. 138; *Field* v. *Sawyer*, 6 C. B. 71.) After a general demurrer to a declaratien and leave to plead on the usual terms, the amount of the costs must depend upon the oourse the defendant elects to adopt as to demurring or pleading over to the amended declaration: (*Metcalf* v. *Booth*, 18 L. J. Q. B. 247.) A fatal variance having in the course of a cause been discovered between the declaration and the evidence, the plaintiff applied to the judge to amend the declaration, and the following order was made: "Upon hearing

Time for pleading to an amended pleading, &c.

(*q*) but the opposite party shall be bound to plead to the amended pleading within the time specified in the original notice to plead, (*r*) or within two days after amendment, whichever shall last expire, (*s*) unless otherwise ordered by the Court or a Judge; (*t*) and in case the pleading amended had been pleaded to before such amendment, and is not pleaded to *de novo* within two days after amendment, or within such other time as the Court or a Judge shall allow, (*u*) the pleading

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counsel and by consent it is ordered that the record be withdrawn, and that the plaintiff do have leave to amend the record:" Held that although the order was silent as to costs, the plaintiff was liable to pay the costs of the day: (*Skinner* v. *London and Brighton R. Co.*, 4 Ex. 885; see also *Jackson* v. *Carrington*, 2 C. & K. 750.) Where a plaintiff after notice of a trial (on an issue of not guilty,) and shortly before trial, had leave to amend on payment of costs, and the declaration as amended was re-delivered according to the English practice, and a demurrer was then served, and afterwards costs of the amendment had been taxed, and the master allowed all the costs of preparing for trial, which included almost all the costs of the cause; and the plaintiff had obtained another order to amend on payment of costs upon both amendments, the Court allowed the plaintiff to amend on paying the costs of the latter, and paying into Court the costs of the former; reserving the question of review of taxation until it were seen whether, on the pleadings to the declaration as re-amended the costs of preparing for trial would become thrown away; and if they were not—*semble*, that there would be a review of taxation, and that they would not be allowed as costs of the first amendment: (*Alleson* v. *The Midland R. Co.*, Finl.C.L.P.A. p. 197.)

(*q*) Original notice given under ss. cxi. cxii. of this Act.

(*r*) *i. e.* eight days from the service of the original notice to plead, &c. It has been held where a plaintiff took a summons to amend, that defendant had a right to presume that plaintiff would follow it up, and that after its return it operated as a stay of proceedings for one day at least. Where the defendant's time for pleading was out on the day when the summons was returnable, a judgment signed for want of a plea on the morning of the next day was held irregular: (*Hodgson* v. *Caley*, 8 Dowl. P. C. 318.)

(*s*) The meaning is, that if the time for pleading pursuant to the original notice have expired before order for amendment, or if the time though not expired be within one day of expiring, in either case the party bound to plead shall have two days after amendment, the two days in either of these cases being the time "last to expire." The time allowed under the old practice in such cases may be ascertained upon reference to *Fuller* v. *Hall*, H. T. 5 Vic. *M.S.* R. & H. Dig. "Practice," I. 15; *Commercial Bank* v. *Boulton*, 1 U. C. R. Cham. R. 15.

(*t*) The time to be allowed by the Judge may be less or more than that prescribed by this section. The power of the Judge in such a case is one inherent in the jurisdiction of the Courts. As to the relative powers of Court and Judge see note *m* to s. xxxvii.

(*u*) If a defendant obtain further time to plea upon terms of pleading issuably, and plaintiff afterwards and before plea obtain leave to amend his declaration, and do amend it so as materially to alter it the record is thereby altered and defendant freed from his obligation to plead issuably: (*Hutt et al.* v. *Giles*, 11 M. & W. 756; *Barker* v. *Glaedow*, 5 Dowl. P. C. 134; *Wood-*

originally pleaded thereto shall stand and be considered as pleaded in answer to the amended pleading. (*v*)

And whereas it is desirable that examples should be given of the statements of the causes of action and of forms of pleading: (*w*) Be it enacted as follows:

CXL. (*x*) The forms contained in the schedule (B) to this Act annexed shall be sufficient, and those and the like forms may be used with such modifications as may be necessary to meet the facts of the case, (*y*) but nothing herein contained

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 91. Forms of pleading in Schedule B, if observed

man v. *Goble*, 6 Dowl. P. C. 371; *Children* v. *Mannering*, 8 Dowl. P. C. 120; *Chapman* v. *Giles*, 1 D. & L. 389.) Before this Act it was held that if plaintiff *after* plea pleaded was allowed to amend, defendant was not entitled to plead *de novo* unless leave were given him so to do by the order allowing the amendment or unless the nature of the amendment rendered pleading *de novo* essential: (*Collins* v. *Aaron*, 5 Scott 595; *Smith* v. *Hearne*, 1 D. & L. 992.) Where plaintiff applied to amend his declaration, and the defendant at the same time applied for one month's further time to plead, which he obtained by Judge's order, the month was held to run from the time when the declaration was amended: (*Davies* v. *Stanley*, 8 Dowl. P.C. 433.)

(*v*) This is perfectly in accordance with the old practice: (see *Flagg* v. *Borsley*, 2 Dowl. P. C. 107.) But there is an obvious distinction in principle between the case of a demurrer and a plea; the former cannot stand with the amended declaration, though the latter may: (*Smith* v. *Hearn*, Alderson B. 12 M. & W. 715.) In the case of a plea after the expiration of the two days without a further plea, plaintiff may join issue to the plea filed, treating it as pleaded to the amended declaration. Where a declaration had been amended upon application of defendant under s. ci., and plaintiff immediately afterwards signed judgment as for want of a plea, the judgment being contrary to the enactment here annotated, and for other reasons not necessary to be here mentioned, was set aside without costs: (*Moberley* v. *Baines*, Chambers, Sept. 27, 1856, Burns, J., 2 U.C.L.J. 212.)

(*w*) It is important to note that the forms given in the schedule are intended only as *examples* and not as binding and invariable precedents. These forms state in the fewest words all that is necessary to show a cause of action or ground of defence. They provide for almost every case that usually occurs in practice, but may of course be modified to meet the special circumstances of any particular case: (see *Lowe* v. *Steel*, 15 M. & W. 380; also *Padwick* v. *Turner*, 11 Q. B. 124.) When the Legislature or the Judges draw up stated forms of pleading, parties to suits ought to follow as far as practicable the forms given: (see *Bailey et al.* v. *Sweeting*, 12 M. & W. 616.) The Courts in England have more than once been constrained to call the attention of the profession to the carelessness with which the forms given by the English C. L. P. Acts are followed: (see *Wilkinson* v. *Sharland*, 10 Ex. 724.)

(*x*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 91.—Applied to County Courts.

(*y*) Prolixity seems to have been dreaded by the Legislature when framing this enactment. Nothing concise is bad if it indicate substance. No deviation from the forms given shall be injurious so long as the substance is preserved: (*Fagg* v. *Nudd*, Campbell C. J. 3 El. & B. 650.) If the Act had prescribed forms which were to be

In substance to be sufficient.

shall render it erroneous or irregular to depart from the letter of such forms, so long as the substance is expressed without prolixity.

Judgment by default, &c.

And with respect to Judgment by default, and the mode of ascertaining the amount to be recovered thereon; Be it enacted as follows: (*z*)

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followed in all cases it might be that any deviation from such forms would hurt; but here the Legislature have carefully provided that no deviation from the forms shall be erroneous or irregular, "so long as the substance is expressed without prolixity": (*Ib.* Wightman, J.) And yet it is right to observe that inasmuch as the Act gives forms, it is only proper though not compulsory that such forms should be observed. If the deviation be one of substance the pleading in which it occurs will certainly be bad. Thus a declaration in an action for freight stating "that defendants are indebted to plaintiffs for freight" for the conveyance of goods, &c., has been held bad for not following the form given in the schedule which contains the words "for money payable by defendant to plaintiffs," and for not showing any debt *in præsenti*: (*Place* v. *Potts et al.* 8 Ex. 705, 20 L. & Eq. 505.) The defect held to be demurrable in this case is one that might be cured by pleading over: (*Wilkinson* v. *Sharland*, 10 Ex. 724.) But a deviation not calculated to mislead is clearly not demurrable or otherwise open to objection. Such has been held to be a count for money found to be due from defendant to plaintiff on an account stated between them, though the words "for money payable by defendant to the plaintiff for" contained in the form given in the Schedule were omitted: (*Fagg* v. *Nudd*, 3 El. & B. 650, 25 L. & Eq. 224.) This case proceeded upon the supposition that the defendant had as much information from the form adopted as from the form in the Act, and that the omission to state that "the money is payable" was immaterial, because the law implied as much from its being stated to be *due* on an *account stated*. In other words it was held that the allegation of the money being due on an account stated was equivalent to an allegation of the money claimed being payable, and consequently of a debt *in præsenti*. Though the decision may be sustainable as to an *account stated* it does not follow that a count framed for a money demand other than on an account stated would be good without the words omitted in this case. On an account stated the law raises a promise to pay on request, and no other can be substituted or superadded: (see *Hopkins* v. *Logan*, 5 M. & W. 241; *Lattimare* v. *Garrard*, 1 Ex. 811; *Roscorla* v. *Thomas*, 3 Q. B. 234; *Kaye* v. *Dutton*, 7 M. & G. 807; *Eldecton* v. *Emmens*, 6 C. B. 174; *Belcher* v. *Cook*, 4 U. C. R. 171.) There may be a debt *in præsenti* with a *solvendum in futuro*. And consistently with the form used in *Fagg* v. *Nudd*, if not on an account stated, plaintiff might sue for a debt *not* payable at the time of the commencement of the suit. In reference to this decision a learned Judge in a more recent case remarked that there ought to be no equivalent for an allegation such as was there omitted, for the Act expressly says "these words money payable, &c., shall precede money counts": (Alderson, B., in *Wilkinson* v. *Sharland*, 10 Ex. 724; of the same opinion was Parke, B.) Though a pleading stating in substance all that the forms to the Act contain, may be good, yet it is difficult to conceive how any pleading can be framed that will in *fewer* words state what is necessary either to show a cause of action or ground of defence.

(*z*) The enactments following are founded upon 1st Report C. L. Com'rs s. 64, *et seq.* Their object is to save

CXLI. (*a*) No rule or order to compute shall be used; (*b*) but this shall not invalidate any proceedings already taken or to be taken by reason of any rule or order to compute, made or applied for before the commencement of this Act.

(*App. Ch. C.*) Eng. C. L. P. A. 1852, s. 92. No rule or order to compute required.

CXLII. (*c*) In actions where the Plaintiff seeks to recover a debt (*d*) or liquidated demand in money, (*e*) [the true cause

(*App. Ch. C.*) Eng. C. L. P. A. 1852, s. 93.

expense by simplifying proceedings consequent upon a judgment by default in actions where the cause of action is a money demand. Of such actions is that of debt, in which judgment by default has before this Act been considered final, so as to entitle plaintiff to issue his execution without having recourse to any intermediate or ulterior proceedings. Between this form of action and the actions of assumpsit and covenant when brought for the recovery of a liquidated sum of money there is no real difference. Whatever the difference may have been it is lessened by this Act, which declares that it shall be unnecessary in any writ of summons to state the form of action. In each of these forms of action, in which plaintiff seeks to recover a liquidated sum of money, and in which a reference to compute could formerly be obtained, judgment by default is made final. With respect to actions brought for the recovery of unliquidated sums of money in which often the amount sought to be recovered is substantially a matter of calculation, a new and simple mode of procedure is also enacted in the following sections.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 92.—Founded upon 1st Report C. L. Com'rs, s. 65.—Applied to County Courts.

(*b*) Speaking of the practice which prevailed before this Act and which is remedied herein, the Commissioners remarked that "in every form of action except debt, an interlocutory judgment only is signed, and the amount to which plaintiff is entitled is ascertained by the verdict of a jury on a writ of inquiry or by a rule to compute, the latter of which is allowed only in certain cases of demands liquidated by a written contract, and is in substance an order of the Court that it be referred to the master, to ascertain the amount to be recovered by the final judgment." It was described by the Commissioners as being "an expensive proceeding, purely formal, involving affidavits, briefs to counsel and other costs," and further, as being "useless and injurious," and its abolition was therefore recommended.

(*c*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 93.—Applied to County Courts.—The words in brackets are not in the English Act.

(*d*) Actions of debt within Stat. 8 & 9 Wm. III. cap. 11, are not embraced by this enactment: (s. cxlv.)

(*e*) This is an extension of the practice formerly applicable to actions of debt only. Henceforward actions for any liquidated demand, such, for example, as covenant or assumpsit, when brought for the recovery of a pecuniary demand of a liquidated nature will be governed by that practice.—Questions must arise as to when the amount sought to be recovered in an action, is or is not "a debt or liquidated demand in money." One thing is clear that it must be such a demand as can be computed and specifically indorsed on the writ or mentioned in the declaration. In this respect the section is analagous to s. 17 of Eng. Stat. 3 & 4 Wm. IV. cap. 42, which empowers the Court or a Judge "in any action depending in either of the Superior Courts for any *debt or demand* in which the money sought to be recovered *and indorsed on the writ of summons*, shall not exceed £20," to refer the cause for trial to the Sheriff: (see note *r* to s. lii.) Cases decided under this Statute will greatly aid in

Judgment by default final in certain cases.

and amount of which is stated in the special indorsement on the Writ of Summons (*f*) or in the declaration,] (*g*) Judgment by default shall be final. (*h*)

Eng. C. L. P. A. 1852, s. 94. How the amount of damages shall be as-

CXLIII. (*i*) In actions in which it shall appear to the Court or a Judge (*j*) that the amount of damages (*k*) which ought to (*l*) be recovered by the Plaintiff is substantially a matter of calculation, (*m*) it shall not be necessary to assess

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the construction of the section here annotated and may be conveniently noticed in this place. No case is within the statute unless the *whole* debt or demand of the plaintiff is of such a nature as might be indorsed on the writ of summons: (*Jacquet* v. *Bourra*, 7 Dowl. P. C. 831; *Mansfield* v. *Brearey*, 1 A. & E. 347; *Perry* v. *Patchett*, 2 Dowl. P. C. 667; *Laurence* v. *Willcocks*, 8 Dowl. P. C. 681; *Roffey* v. *Shoebridge*, 9 Dowl. P. C. 957; *Hutton* v. *Macready*, 2 D. & L. 5. See also *Goodman* v. *Pocock*, 19 L. J. Q. B. 410; *Fewings* v. *Tisdal*, 5 D. & L. 196.) Actions for torts in which the damages claimed must necessarily be unliquidated are clearly not within the meaning of the Act: (*Watson* v. *Abbot*, 2 Dowl. P. C. 215; *Smith* v. *Brown*, 2 M. & W. 851.) No claim that is properly and strictly for unliquidated damages can be considered either a debt or demand such as contemplated: (*Collis* v. *Groom*, 1 Dowl. N. S. 496; *Lismore* v. *Beadle*, 1 Dowl. N. S. 566; *Jones* v. *Thomas*, 6 Jur. 462.) But a claim *ejusdem generis*, with a debt, and substantially of the same nature and character, may be considered as falling within the scope of the statute: (*Price* v. *Morgan*, 1 M. & W. 53; *Allen* v. *Pink*, 2 M. & W. 140.) Thus detinue for example, in which the writ is to recover the specific chattel *or the value thereof*, sounding rather of contract than of tort. The sum at which the chattel is valued confined and limited to a specific amount may be indorsed on the writ of summons: (*Walker* v. *Needham*, 1 Dowl. N. S. 320; see also *Legg* v. *Tucker*, L. T. R. 145.) Cases under the English bankruptcy acts as to proof of debts are also in point: see 1 Eden. on Bankrupt Law, 129 *et seq.* In addition to the cases there noted reference may be made to the following:—*Toppin* v. *Field*, 4 Q. B. 386; *Irving* v. *Manning*, 6 C. B. 391; *Earle* v. *Oliver*, 2 Ex. 71; *In re Willis*, 4 Ex. 530; *South Staffordshire R. Co.* v. *Burnside*, 5 Ex. 129; *In re Hall*, 2 Jur. N. S. 1076.

(*f*) No such reference to writs specially indorsed as here made is to be found in the corresponding English enactment. Writs must be specially indorsed pursuant to s. xli. and can only be so indorsed to be effectual in cases where defendant is within the jurisdiction of the Courts

(*g*) *i. e.* Under s. lxi.

(*h*) Actions in which judgment by default is not final are in part provided for by the next following section: (cxliii.)

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 94.—Founded upon 1st Rep. C. L. Comrs. s. 67.—Not applied to County Courts; but as to these Courts there is a similar provision: (Co. C. P. A. 1856, s. 14.)

(*j*) Relative powers, see note *m* to s. xxxvii.

(*k*) The section appears to extend to cases of unliquidated as well as liquidated demands.

(*l*) Eng. Act reads "sought" instead of "ought to be," the words in this Act. The words "*ought* to be recovered" will bring in the consideration as to the proper measure of damages in each case: (see note *j* to s. cxxii.) The distinction between ours and the English Act should be borne in mind when reading decisions under the latter.

(*m*) It is not possible to lay down a

the damages by a Jury, (*n*) but the Court or Judge may direct (*o*) that the amount for which final Judgment is to be signed, (*p*) shall be ascertained—if the proceedings be carried on in the principal Office at Toronto, by the Clerk of the Crown and Pleas of the proper Court (*q*)—or if the proceedings be

certained when the Court shall be of opinion that it is

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rule that will satisfactorily govern all cases as to when a demand sought is "substantially a matter of calculation." The word "substantially" has been introduced into the definition, because it is intended that the enactment shall have a very extended application. An action for damages for the non-repair of a house is put by the Commissioners as an example of their meaning. To such and "the like" cases the Act is designed to apply. There is a discretion that rests in the Court or Judge, to refuse an application under this section, where the claim, though substantially a matter of calculation, is of an intricate nature, involving more than mere computation: (see *Cheltenham* v. *Gt. Western Union R. Co.*, 2 Q.B. 281; see further *Messin* v. *Massarene*, 4 T. R. 493; *Maunsell* v. *Massarene*, 5 T.R. 87; *Nelson* v. *Sheridan*, 8 T. R. 395; *Denison* v. *Mair*, 14 East. 622.)

(*n*) Eng. Act reads "to issue a writ of inquiry," instead of "to assess the damages by a jury." These being the old modes of procedure, are, because of their expense, in a great measure superseded.

(*o*) The power to make the directions here authorized must be invoked upon a proper application supported by affidavit. In a case in Upper Canada decided under this section the affidavit read thus, "that this action is brought to recover the sum of, &c., for goods sold and delivered, and interest thereon: that a writ of summons, copy of declaration (on common counts only), bill of particulars, and notice to plead, have been duly served at intervals: that interlocutory judgment was signed on, &c., for want of a plea: that the amount claimed can be correctly ascertained by a reference thereof to the Judge of the County Court of the County of Hastings," &c.: (*Lewis* v. *Hamden*, Chambers, Oct. 28, 1856, Burns, J.) The order may be as follows, "I do order that the amount for which final judgment is to be signed in this action shall be ascertained by," &c. The application may be made notwithstanding the death of plaintiff after the signing of interlocutory judgment: (s. cxxxv, also 8 & 9 Wm. III. cap. 11 s. 6.) The reason that such is and should be the law is well explained in *Berger* v. *Green*, 1 M. & S. 229, "It is perfectly clear that final judgment may be signed notwithstanding the death of the party, and that the Court will not set it aside on account of his death before it was signed. This is an application (computation) to inform the Court for what damages judgment might be signed, and if this preliminary step were not necessary, the party might at once sign final judgment. If then the Court would permit final judgment to be signed, notwithstanding the death of the party, they will hardly on that account refuse this rule, which is only a means of getting final judgment": (*Ib.* per Le Blanc. J.)

(*p*) To entitle a party to proceed under this section it must appear that interlocutory judgment has been in fact signed. The right of action being thereby admitted the amount of damages sustained in consequence thereof is the only thing to be ascertained. The taking of the inquiry and entering final judgment are only the conclusions and necessary consequences of the interlocutory judgment. The Court itself if so pleased might insist upon entering judgment, assess the damages and give final judgment thereupon: (*Holdipp* v. *Otway*, 2 Wms. Saund. 107, note 2.)

(*q*) *i. e.* Of the Court in which the

substantially a matter of calculation.

carried on in the Deputy Clerk's Office in any County, then by the Judge of the County Court of such County; (*r*) and the attendance of witnesses and the production of documents before such Clerk of the Crown or Judge of the County Court (*s*) may be compelled by subpœna, in the same manner as before a Jury upon a writ of inquiry; (*t*) and it shall be lawful for such Clerk or Judge of the County Court (*u*) to appoint the day for hearing the case, and to adjourn the inquiry from time to time, as occasion may require; (*v*) and such Clerk of the Crown or Judge of the County Court (*w*) shall indorse upon the rule or order for referring the amount of damages to him, the amount found by him, and shall deliver the rule or order with such indorsement to the Plaintiff, (*x*) and such and the like proceedings may hereupon* be had, as to taxation of costs, signing Judgment, and otherwise, as upon the finding of a Jury upon an assessment of damages. (*y*)

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action has been instituted.

(*r*) In an action on a promissory note, commenced in the office of a Deputy Clerk of the Crown to which there was no defence, and interlocutory judgment had been signed before this Act came into force, the matter was referred to the Judge of the County, in which the proceedings had been commenced: (*Allan* v. *Skead*, Chambers, Oct. 2, 1856, Burns, J., 2 U. C. L. J. 213.)

(*s*) "Before such Master," in English Act.

(*t*) The moment the Court has pronounced interlocutory judgment it may award a writ of inqury: (*Russen* v. *Hayward*, 5 B. & Ald. 752.) Consequently there is nothing to hinder an application for a reference under this section being made on the day when interlocutory judgment is signed. It has been held that there cannot be separate rules to compute against joint defendants: (*Field* v. *Pooley*, 3 M. & G. 765.) In such cases therefore, there should be one reference only under this Act. In some respects, particularly as regards the attendance of witnesses or production of documents, the practice under this section will resemble the practice as to arbitrations: (see note *f* to s. lxxvii.)

(*u*) "For such Master," in English Act.

(*v*) It is apprehended that notice of the inquiry must be served: (see s. cxlvi.) The practice governing the County Judge or Clerk of the Crown, &c., acting under this section will also be found in many points to resemble proceedings before arbitrators: (see note *e* to s. lxxxvii.)

(*w*) "Master" in English Act.

(*x*) This manifestly intends references only upon application of plaintiffs after judgment, signed by default.

(*y*) In England there is a rule to the effect that "on a reference to the Master to ascertain the amount for which final judgment is to be signed; the Master's certificate shall be filed when the judgment is signed:" (No. 171 H. T. 1853.) It does not appear to be among our New Rules of Practice.

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* "Thereupon" intended.

CXLIV. (*z*) In all actions where the Plaintiff recovers a sum of money, the amount to which he is entitled may be awarded to him by the Judgment generally, (*a*) without any distinction being therein made as to whether such sum is recovered by way of a debt or damages.

(App. Ch. C.) Eng. C. L. P. A. 1852, s. 95. Sum of money recovered to be awarded generally.

CXLV. (*b*) Notwithstanding anything in this Act contained, the provisions of a certain Act of the Parliament of Great Britain, passed in the Session held in the eighth and ninth years of the Reign of King William the Third, (*c*) intituled,

(App. Ch. C.) Eng. C. L. P. A. 1852, s. 96. Provisions of a certain British Act to remain in force.

(*z*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 95.—Founded upon 1st Report C. L. Com'rs, s. 68.—Applied to County Courts.

(*a*) The substance of this enactment is a necessary consequence of the intended abolition of forms of actions. The reasons for the alterations arise from the form of judgment in use before the Act, varying according to the nature of the action. In the action of debt the judgment was that plaintiff "do recover the debt" with damages, (which were generally nominal) for the detention of the debt and for costs superadded. In other actions on contract the judgment was for damages only. The distinction was more technical than useful, and was open to objection upon many grounds, several of which have been mentioned in the Report of the Commissioners.

(*b*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 96.—Founded upon 1st Rep. C. L. Comrs. s. 68.—Applied to County Courts. This section, though substantially the same as the English enactment whence it is adopted, is not by any means a copy.

(*c*) 8 & 9 Will. III. cap. 11, s. 8, which is as follows, "That in all actions, &c., upon any bond or bonds or on any penal sum for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon trial of such action or actions shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so to be assigned, as the plaintiff upon the trial of the issues shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the Sheriff of that County where the action shall be brought, to summon a jury to appear before the Justice or Justices of assize or *Nisi Prius* of that County, to enquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby, in which writ it shall be commanded to the said Justices or Justice of assize or *Nisi Prius*, that he or they shall make a return thereof to the Court from whence the same shall issue at the time in such writ mentioned; and in case the defendant or defendants after such judgment entred and before any execution executed, shall pay unto the Court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the breaches of such covenants, together with the costs of suit, a stay of execution of the said judg-

An Act for the better preventing frivolous and vexatious suits, as to the assignment or suggestion of breaches, or as to Judgment, shall continue in force in Upper Canada.

Eng. C. L. P. A. 1852, s. 97.

And with respect to notice of trial (*d*) or of assessment of damages, and countermand thereof; Be it enacted as follows:

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ment shall be entred upon record, or if by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid and satisfied all such damages so to be assessed, together with his or their costs of suit, and all reasonable charges and expenses for executing the said execution, the body, lands, or goods of the defendant, shall be thereupon forthwith discharged from the said execution, which shall likewise be entred upon record; but notwithstanding in each case such judgment shall remain, continue, and be as a further security to answer to the plaintiff or plaintiffs, and his or their executors or administrators, such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, deed, or writing contained, upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment against the defendant, or against his heir, terre tenants, or his executors or administrators suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause why execution shall not be had or awarded upon the said judgment, upon which there shall be the like proceeding as was in the action of debt upon the said bond or obligation for assessing of damages upon trial of issues joined upon such breaches or inquiry thereof upon a writ to be awarded in manner as aforesaid, and that upon payment or satisfaction in manner as aforesaid, of such future damages, costs and charges, as aforesaid, all further proceedings on said judgment are again to be stayed, and so *toties quoties*, and the defendant his body, lands or goods, shall be discharged out of execution as aforesaid."

This statute is highly remedial and calculated to advance justice and to give relief to plaintiffs, up to the extent of the *damages sustained* and to protect defendants from the payment of more than is justly due: (*Murray* v. *Stair*, Best, J., 2 B & C. 94.) It tempers the rigor of the common law which held that in debt on bond the judgment for plaintiff should be the amount of the penalty contained in the bond, no matter how small the damage sustained in consequence of a breach however trivial. The statute has been held to be restricted to actions of debt, the reason being that in covenant and assumpsit there is no penalty that can stand as a continuing security for future breaches, but only a breach of an agreement for which adequate damages have been awarded: (1 Wms. Saunder's 5 8, notes *b*, *c*, *d*; *Lowe* v. *Peers*, 4 Burr. 2225.) A bond conditioned for the payment of a sum certain is not within the statute, for in order to ascertain the precise sum due in such a case, computation only is necessary, and the intervention of a jury is unnecessary: (*Murray* v. *Starr*, Abbot, C. J., *ubi supra*.) Bail bonds are not within the statute: (*Moody* v. *Pheasant*, 2 B. & B. 446.) Plaintiffs are obliged in all cases within the statute to proceed under it: (*Dragg* v. *Brand*, 2 Wils. 377; *Hardy* v. *Bern*, 5 T. R. 636; *Roles* v. *Roswell*, *Ib.* 538.) For a review of the cases decided under it, see *Foster's Scire Facias*, 31 *et seq.*

(*d*) It is very proper the Court should see that a written notice of trial is served giving such information as would satisfy any reasonable person that it was intended to be acted upon: (*Fenn* v. *Green*, Campbell, C. J. 27 L. T. R. 170), and that some period

CXLVI. (*e*) Eight days' (*f*) notice of trial or of assess- Notice of

should be fixed as constituting a reasonable notice, instead of leaving the reasonableness or unreasonableness of it to be determined by the circumstance of each particular case. These principles have been at all times recognized and acted upon; but in England the periods fixed for the different notices of trial, &c., have been various. The necessity for the enactment here annotated was not so great in Upper Canada as in England, where there were at least four different periods for four different kinds of notices. The natural consequence of such a variety in a matter so simple was to produce confusion. To remedy this state of things a uniform form period is fixed by this Act "for all cases."

(*e*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 97.—Founded upon 1st Rep. C. L. Comrs. s. 70.—Not applied to County Courts.

(*f*) The period which before this Act obtained in Upper Canada was six days. In England it is now ten days. In Upper Canada it is now eight days. The intention of the enactment as regards time is that no notice for a less period than eight days shall be good. There is no settled form of notice made necessary. It will be sufficient if it apprise defendant with certainty that plaintiff means to proceed to trial and clearly inform him when and where the trial is to take place: (*Ginger* v. *Pycroft*, 5 D. & L. 554; *Cory et al.* v. *Hotson*, 1 L. M. & P. 23.) The terms of the notice will at the hands of the Courts receive a common sense construction. The Courts will not give way to captious objections or stupid mistakes in favour of a defendant, who either pretends to misunderstand or will not understand what any reasonable man might understand from the words of the notice served upon him. In a recent case very strong language was used in reference to the conduct of a defendant who so conducted himself.—Coleridge, J. "As to the affidavit that the defendant believed the notice of trial was intended for Easter Term, 1857, I say I not only disbelieve it but I think it one of the most infamous falsehoods ever presented to a Court:" (*Fenn* v. *Green*, 27 L. T. R. 170) Since this case that of *Benthall* v. *West*, 1 D. & L. 599, would seem to be of doubtful authority if not overruled. If from the misreading of the notice or from any similar cause there be gross and palpable negligence on the part of the attorney or his clerk the Court will not, it seems, interfere, but leave defendant to his remedy by action: (*Nash* v. *Swinburne*, 1 Dowl. N. S 190.) The notice though irregular, if not calculated to mislead, may be waived if defendant lie by without taking objection: (*Bell* v. *Graham*, 2 U. C. R. 37.) Thus a notice naming Friday, 19th May, instead of Friday, 18th May, though irregular, cannot avail defendant unless he *before* the trial give notice of objection to plaintiff's attorney: (*Gordon* v. *Cleghorn*, 7 U. C. R. 171.) But the mere retaining of the irregular notice is not itself a waiver of irregularity, as defendant is not bound to return it: (*Dignam* v. *Mostyn*, 6 Dowl. P.C.547, named *Dignam* v. *Ibbetson*, 3 M. & W. 431; *Wood* v. *Harding*, 3 C. B. 968.) The waiver consists of the retention *and* failure to take objection within proper time: (*Brown* v. *Wildmore*, 1 M. & G. 276; *Yonge* v. *Fisher*, 4 M. & G. 814; *Bell* v. *Graham et al*, 2 U. C. R. 37; *Senior* v. *McEwen et al*, 2 U. C. R. 95.) Defendant by his conduct, such as appearing at the trial of the cause or applying to strike it out of the cause list may be taken to have waived irregularities in the notice: (*Doe d. Antrobus* v. *Jepson*, 3 B. & Ad. 402; *Younge* v. *Fisher*, 2 Dowl. N. S. 637.) But it has been held that a notice of trial in an action against two defendants served with the name of one only therein was a nullity: (*Doe Read* v. *Paterson et al*, 1 U. C. Prac. R. 45,) and therefore could not be waived: (*Ib.*) An ordinary notice may be in this form:—

Title of Court and Cause.—Take no-

trial or assessment (*g*) shall be given, (*h*) and shall be sufficient in all

tice of trial (*or of assessment*) in this cause for the next assizes to be holden at —— in for the County of —— (or United Counties of ——) on, &c.

(*g*) *Notice of trial or of assessment.* A notice of trial served instead of a notice of assessment has been held a fatal objection to an assessment of damages which was in consequence with all subsequent proceedings, set aside: (*Billings et al.* v. *Reid*, 5 O. S. 73.) But where there were issues in fact and in law, a notice of trial only has been held sufficient to enable plaintiff to assess contingent damages: (*Davis* v. *Davis*, M. T. 6 Wm. IV. *M.S.* R. & H. Dig. "Notice of Trial," 7.) And where the notice was to try the issues and assess damages, and there were in fact no issues on the record to be tried, the notice as to the assessment was considered regular: (*Gamble et al.* v. *Rees*, 7 U. C. R. 406.)

(*h*) *Given, i. e.* delivered. It is not sufficient to leave the notice at an attorney's office. It must be shown that it was left with some person in the office and doing business there: (*Brewer* v. *Bacon*, 5 O. S. 343.) Therefore service on a housekeeper of the office is insufficient: (*Peddie* v. *Pratt*, 6 M. & G. 950.) In such cases no notice of an intention to move against the verdict is required. The verdict may be set aside without an affidavit of merits: (*Consumers Gas Co.* v. *Kissock*, 5 U. C. R. 542.) Service on defendant himself if he have an attorney is irregular: (*Ferrie* v. *Tannahill*, Dra. Rep. 340.) Notice if regularly served on the attorney will be good, though the attorney die before the trial, and particularly if plaintiff have no knowledge of his death: (*Ashley* v. *Brown*, 1 L. M. & P. 451.) Where notice of assessment had been sent to the Sheriff for service and was returned by him to the plaintiff's attorney with the following indorsement, "Received a copy of the within for defendant," signed by "E. & G" attorneys, in the handwriting of G. And for the plaintiff it was shown that E. & G. were constantly in the habit of accepting services for defendant, but G. stated that he only consented at the bailiff's request to hand such notice to defendant as soon as he should see him, and that the indorsement was intended not as an acceptance of service but as showing a willingness to hand the notice to defendant; but there was neither a denial that E. & G. were in the habit of accepting services for defendant nor an assertion that G. told the bailiff what he intended by the receipt indorsed. Held a sufficient service: (*Rutledge* v. *Thompson*, 1 U. C. Prac. R. 275.) If defendant do not defend by attorney notice must be served on him personally. Even a request by him that the notice should be put under his door has been held to be no substitute for personal service: (*Fry* v. *Mann*, 1 Dowl. P. C. 419.) Service by taking the notice to defendant's house and throwing it over his fence into his yard telling his son who was present that it was a notice of assessment for his father, and where the son refused to have anything to do with it, and where the father, who was absent from home, knew nothing about it until after the assizes, has been held to be clearly insufficient: (*McGuire* v. *Benjamin*, 1 U. C. Cham. R. 142.) A notice of trial when allowed to be fixed up in the office of a deputy Clerk of the Crown, can only be fixed up in the office of the County in which the action is brought: (*Chase* v. *Gilmour*, 6 U. C. R. 604.) Notice can only be fixed up in the principal office at Toronto when defendant's attorney residing in Toronto has neglected to make an entry of his name and place of business, as directed by N. R. 136, or if residing out of Toronto, has neglected to appoint and enter the name and place of business of his agent in Toronto as directed by N. R. 137. These rules may be held to apply to the case of an attorney being defendant in person: see *Bank of Upper Canada* v. *Robinson*, 7 U. C. R. 478. In practice when plaintiff's replication

cases, (i) whether at Bar or at Nisi Prius. (j) sessment.

or others pleading is in denial of defendant's pleading, the notice of trial may be served at the same time as the replication and without waiting for the joinder (N. R. 36.) A managing clerk in an office has power to bind his principal by accepting a notice of trial as of an earlier date than it was actually delivered, and it will be binding upon all parties unless the principal promptly repudiate the acceptance and give notice thereof to the opposite party: (*Orr* v. *Stabback*, T. T. 3 & 4 Vic. *M.S.* R. & H. Dig. "Notice of Trial," 16.)

(i) It does not seem that this enactment is intended to apply to trials by record, where the party giving the notice is the party to produce the record. There is no analogy between notice of trial in ordinary cases where issues in fact are to be tried the object is to give defendant time to prepare for his defence, and a trial by record when the defendant has nothing for which to prepare. And therefore two days' notice of trial by record has been held to be sufficient: (*Hopkin* v. *Daggett*, 1 L. M. & P. 541.) But a notice on Saturday for Monday has been held insufficient, as the days contemplated are business days: (*McGuire* v. *Kincaird*, 21 L. J. Ex. 264.) N. R. 35, which is as follows, appears to set the doubts at rest. "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." Though a case be made a *remanet* a fresh notice of trial appears to be necessary: (*Gains* v. *Bilson*, 4 Bing. 414); and so if a certain day be fixed by the Court for the trial of the cause and it does not take place on that day: (*Ellis* v. *Trusler*, 2 W. Bl. 798;) unless perhaps when posponed or continued: *Sed qu.* See *Burgess* v. *Royle*, 2 Chit. R. 220; *Forbes* v. *Crow*, 1 M. & W. 465; *Wyatt* v. *Stocken*, 6 A. & E. 803. Where plaintiff's proceedings after notice were stayed by an injunction obtained by defendant, held that so long as it remained in force the proceedings were stayed, but that when it was dissolved the parties were *in statu quo*, and plaintiffs at liberty to proceed in the action without a fresh notice: (*Stockton & Darlington R. Co.* v. *Fox*, 6 Ex. 127.) A fresh notice has been held necessary though plaintiff have entered into a peremptory undertaking because notwithstanding the undertaking he may decline to try the cause: (*Monk* v. *Wade*, 8 T. R. 246 note; *Sulch* v. *Cranbrook*, 1 Dowl. P. C. 148.)

(j) Anciently all causes prosecuted in Court were tried at the bar of that Court. In process of time this practice was found to be highly inconvenient both to the Court and to suitors. To the Court because of the pressure of business; and to suitors because of the necessity of travelling from all parts with witnesses to the place where the Court was held then in one fixed place. Hence a new practice was originated, which was to *continue* the suit from term to term *provided* the Justices in Eyre did not first come to the County where the cause of action arose, and who upon their arrival had power to try the cause, and relieve the Court in *banc.*—administering justice as it were at every man's door. When Justices in Eyre were superseded by Justices in Assize a power was conferred upon the latter by their *Nisi Prius* commissions to try all causes. From that time the frequency of trials at bar began to decline, and at present they can only be had in cases of great difficulty and importance. It is discretionary with the Court to grant or refuse a trial at bar. If granted, a special jury must be summoned for the occasion; and notice of trial must be given to the Clerk of the Crown and Pleas of the Court before giving notice to the opposite party: (N. R. 37.)

Eng. C. L. P. A. 1852, s. 98.

Countermand of notice.

CXLVII. (*k*) A countermand of notice of trial or assessment (*l*) shall be given (*m*) four days before the time mentioned in the notice of trial or assessment, (*n*) unless short notice has been given, (*o*) and then two days before the time mentioned in the notice, (*p*) unless otherwise ordered by the Court or a Judge, or by consent.

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 98.—Founded upon 1st Rep. C. L. Comrs. s. 70.—Not applied to County Courts.

(*l*) *Semble*, a notice of trial or of assessment may be countermanded, though a rule to set aside the notice has been obtained with a stay of proceedings: (*Mullins et al.* v. *Ford*, 4 D. & L. 765.) The countermand may be in this form—Take notice that I do hereby countermand the notice of trial given in this cause.

(*m*) *Given.* See note *h* to preceding section (cxlvi.)

(*n*) It is necessary to observe the peculiar wording of this enactment. The countermand "shall be given four days *before the time mentioned in the notice of trial or assessment.*" It follows that if the cause, be entered and made a *remanet*, there cannot be any countermand of notice: (*Tempany* v. *Rigby*, 10 Ex.476, 28 L. & Eq. 483.)

(*o*) The expression, short notice of trial or short notice of assessment, shall be in all cases taken to mean four days' notice: (N. R. 84.) A defendant who obtains time to plead on the "usual terms," is bound to accept short notice of trial: (*Senior* v. *McEwen et al*, 2 U. C. R. 95.) The conditions, however, are in general expressly stated in the rule. If the rule be on condition of "taking short notice of trial," defendant will not be thereunder obliged to take short notice of assessment: (*Wright* v. *McPherson*, 3 U. C. R. 145; see also *Stephens* v *Pell*, Dowl. P. C. 355.) It is therefore prudent for plaintiff to see these further words added, "*or of assessment of damages in case such notice shall be necessary*: (*Wright* v. *McPherson*, *ubi supra.*) The words "short notice, &c., *if necessary*," deserve attention. Where these words are used, defendant is not bound to take short notice if *not* necessary, or if plaintiff has needlessly delayed giving the notice: (*Nicholl* v. *Forshall*, 15 L.J.Q.B. 203; *Drake* v. *Pickford*, 15 M. & W. 607; *Dignam* v. *Ibbotson*, 3 M. & W. 431.) And yet in a case where the plaintiff took five days to join issue and then gave short notice of trial, it was held sufficient: (*Flowers* v. *Welch*, 9 Ex. 273.) So the words when used, "short notice, &c., if necessary, *for the next assizes at*," &c., which restrict defendant only as to a particular assize. If plaintiff neglect to go to trial at *that* assize, defendant becomes entitled to the usual notice for any subsequent assize: (*Slatter* v. *Pointer*, 8 M. & W. 672; *Dignam* v. *Mostyn*, 6 Dowl. P. C. 547; see also *Abbot* v. *Abbot*, 7 Taunt.452; *White* v. *Clarke*, 8 Dowl. P.C. 730; *Lewis* v. *Henry*, 4 Jur. 579) Plaintiff can easily avoid the effect of such a restriction, by having added to the former words the following, "*or at any future assize.*" If a party avail himself of the terms of a short notice of trial, he cannot afterwards countermand it: (*Doncaster* v. *Cardwell*, 2 M. & W. 390.)

(*p*) Before this Act, it was held that in computing the time for short notice of trial the first day was exclusive and the last inclusive: (*Love* v. *Armour*, T. T. 3 & 4 Vic. *MS.* R. & H. Dig. "Notice of Trial," 5.) Two days' notice of countermand are declared to be sufficient, but it is presumed that these days must be business days, and that a notice on Saturday for Monday would be insufficient: (*Rose* v. *Mac-*

CXLVIII. (*r*) A rule for costs of the day for not proceed- (*App. Co. C.*)

gregor, 1 D. & L. 583.) The notice of countermand, like the original notice, must be served on the defendant's attorney when he has appeared by attorney, and not on himself personally: (*Margetson* v. *Rush*, 9 L. J. Ex. 72.)

(*r*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 99.—Applied to County Courts. Costs of the day are in effect the same as those paid on the withdrawal of a record: (*Walker* v. *Lane*, 3 Dowl. P. C. 504.) The rule for them in Upper Canada was peremptory and absolute in the first instance: (*Chisholm* v. *Simpson*, Dra. Rep. 2;) but in England the practice in this respect differed in the several Courts:—Queen's Bench, (*Alderley* v. *Storey*, 2 Dowl. N. S. 335,) Common Pleas (*Russell* v. *Hill*, 6 Jur. 106,) and Exchequer: (*Scott* v. *Marshall*, 2 C. & J. 60.) However, in all the Courts to obtain the rule a motion in Court by counsel was necessary. It might be made at any time while the cause was in existence, that is, before execution executed, though several terms after default made by plaintiff: (*Redit* v. *Lucock*, 2 C. & M. 337,) and notwithstanding the lapse of four terms without a step in the cause might be made without a term's notice: (*French* v. *Burton*, 2 C. & J. 634.) The object of the section under consideration is to save the expense of a motion in Court. The rule may now be obtained as of course without a motion in Court and as to the *time* within which it can be obtained the practice is the same as before the act. The rule being absolute in the first instance, the opposite party is not bound to show cause, though a notice of motion be served upon him. His course is afterwards to move to discharge the rule: (*Sleeman et al* v. *The Governor and Company of the Copper Miners of England*, 5 D. & L. 451.) It is to be understood that defendant has an election either to proceed under this section for costs of the day by attachment in case of non-payment or under s. cli., and sign judgment for them. Should he proceed under the latter and plaintiff obtain an extension of time defendant may insist upon an undertaking that plaintiff will pay the costs of the day: (*Doe d. Humphrey* v. *Owen*, 1 M. & W. 822.) And notwithstanding what is laid down in text books to the contrary, it has been held that a rule for costs of the day might be granted although a rule for judgment as in case of non-suit had been previously discharged: (*Thomas* v. *Williams*, 4 B. & C. 260.)

The following is the rule made use of in our Court of Queen's Bench—"Upon reading the affidavit of, &c., it is ordered that the attorneys of both parties shall attend the Master, and he shall examine the matter and tax the defendant's costs, for that the plaintiff hath not proceeded to trial pursuant to his notice, which costs when taxed shall be paid by the plaintiff if it shall appear to the Master that costs ought to be paid." The rule will not be granted with a stay of proceedings: (*Eager* v. *Cuthill*, 3 M. & W. 60; *Gibbs* v. *Goles*, 7 Dowl. P. C. 325; *Friden* v. *Bray*, 9 Dowl. P. C. 329.) The defendant's remedy is by attachment. And notwithstanding several defaults made by plaintiff, the Courts have refused to make the payment of costs a condition precedent to further proceedings: (*Shoreditcke* v. *Gilbard et al*, 8 Dowl. P.C. 296.)

The rule in use, it will be noticed, leaves it discretionary to tax the costs "if it shall appear to the Master that costs ought to be paid," which seems equivalent to the common expression, "costs of the day, if any." If the record has not been entered for trial or assessment on the day for which notice was given defendant, showing this, establishes a *prima facie* right to the costs: (*O'Neill* v. *Barnhart*, 5 O. S. 453.) There may be a sufficient excuse for not having proceeded to trial, but it is for plaintiff to show that excuse when moving to discharge the rule: (*Ib.*) And it has been held although plaintiff offered to enter the record

Eng. C. L. P. A. 1852, s. 99.

ing to trial or assessment pursuant to notice, or not counter-

after the commission day of the assize to which defendant objected, yet that the latter was entitled to costs of the day: (*Ib.*) A proposal to refer made after the commission day of the assizes is clearly no sufficient excuse for not having proceeded pursuant to notice: (*Eston* v. *Shuckburgh*, 2 Dowl. P. C. 624.) And where the cause was with consent of defendant entered after the commission day, although no notice of trial had been given, defendant was considered entitled to his costs: (*Doe d. Tenbrook* v. *Cole*, H. T. 5 Vic. *MS.* R. & H. Dig. "Costs," II. 5.) But where plaintiff having given notice did not enter his record in time and defendant agreed to go to trial if he were ready, and after having detained the plaintiff's witnesses more than a week, at last determined not to go to trial, he was refused costs: (*Crawford* v. *Cobbledike*, M. T. 5 Wm. IV. *MS.*, *Ib.* "Costs," II. 3.) Where a cause not ready in its turn was put to the foot of the docket with the consent of defendant and not afterwards tried, costs were refused: (*Bank of Upper Canada* v. *Covert et al.*, *Ib.* "Costs" II. 6.) Costs were allowed to a defendant who by agreement with plaintiff accepted short notice of trial, where the latter did not proceed pursuant to his notice: (*Harris* v. *Hawkins*, 3 O. S. 142.) So where plaintiff's attorney sent notice of countermand to his agent, but it arrived too late for service: (*Spafford* v. *Buchanan*, 4 O. S. 325.) Where after the jury was sworn in an ejectment case, the defendant objected that the *jurata* was defective, and the Judge being of that opinion, and defendant refusing to consent to an amendment, the Judge discharged the jury, the defendant was refused costs of the day: (*Doe d. Crooks et ux.* v. *Cummings*, 2 U. C. R. 380.) In this case though plaintiff failed in proceeding to trial according to notice, it is obvious that the cause of failure arose from the defendant's own objection *after* the jury was sworn and his refusal to consent to an amendment. The defendant did not wish the trial to go on, but strove to frustrate and render abortive the plaintiff's desire to proceed, and having succeeded in his endeavour, it was right to hold that he should not afterwards be allowed to complain of having been put to costs on the occasion: (*Ib.*) Wherever it appears that plaintiff, though ready and willing to try, has been prevented solely by default of defendant, in all probability with a view to costs of the day, the Court will refuse them: (*Pope* v. *Fleming*, 1 L. M. & P. 272; see also *Sleeman et al.* v. *The Copper Miners Co.* 17 L. J. Q. B. 113.) Not only upon the authority of decided cases but upon principle plaintiff ought not to be asked to pay costs not occasioned by his own default: (*Waters* v. *Weatherby*, 3 Dowl. 328; *Brett* v. *Stone*, 3 D. & L. 140.) Although neither party appear when the cause is called on for trial and is in consequence struck out of the docket, still if defendant can show that any costs of the day have been incurred by him he may recover them: (*Allott* v. *Bearcroft*, 4 D. & L. 827.) But the better opinion is contrary to the ruling of this case. It is in fact defendant's fault that he incurred any costs that were fruitless, because if he had been present at the trial he might have non-suited plaintiff, and so ended the proceedings in the action: (*Morgan* v. *Fernyhough*, 1 Jur. N. S. 688.) The cause list is in the discretion of the presiding Judge; he has entire control of it, and may take the cases as he pleases: (*Dunn* v. *Coutts*, 16 L. & Eq. 137, 17 Jur. 1.) and may postpone a trial on the ground of the absence of a material witness of either party or for any other cause sufficient in his opinion: (*Turner* v. *Meryweather*, 7 C. B. 125.) And if plaintiff instead of applying for a postponement withdraw his record, he is bound to pay costs of the day: (*Greenaway* v. *Holmes*, 2 N.C.L. Rep. 745; see also *Skinner* v. *London & Brighton R. Co.* 1 L. M. & P. 191.) The default of plaintiff it would appear

manding in sufficient time, may be drawn up on affidavit without motion made in Court. (*t*) (*s*) Rule for costs of the day, on affidavit.

And with respect to Judgment for default in not proceeding to trial; (*u*) Be it enacted as follows: *Judgment for not proceeding to trial.*

must be a wilful default: (*Ogle* v. *Moffat*, Barnes, 133; *Eastern Union R. Co.* v. *Symonds*, 4 Ex. 502.) Where the jury, unable to agree, were discharged by the presiding Judge from giving a verdict, and plaintiff afterwards discontinued, it was held that defendant was not entitled to costs of the day: (*Wall* v. *London & South Western R. Co.* 25 L. J. Ex. 93.) Nor would plaintiff be entitled to these costs though he succeed on the subsequent trial. Wherever by the fault or defect of finding by the jury, the parties go to trial a second time, the party ultimately successful is entitled only to the costs of the trial in which he succeeds: (*Brown* v. *Clarke*, 12 M. & W. 25.) Failure in proceeding to assessment of damages is, as respects costs of the day, subject to the same rules as failure to proceed to trial: (*The King's College* v. *Maybee*, 2 U. C. R. 94), and has been so considered by the Legislature in framing this enactment. It has been decided that costs of a special jury are not costs of the day but costs of the cause: (*Whitehead* v. *Brown*, 2 O. S. 345.)

(*s*) There is no particular form of affidavit made necessary. It may be as as follows—"1. That issue was joined in this cause on, &c., and notice of trial given thereon for the last assizes holden at, &c. 2. That the above-named plaintiff did not proceed to the trial of the said action, nor countermand such notice in due time according to the practice of the Court:" (Chit. F. 7 Edn. 817.) The affidavit need not *necessarily* show that the costs have been actually incurred by defendant: (*Powell* v. *James*, 1 D. & L. 415), but must at least show that issue was joined, notice of trial given and default made, &c.: (*Ray* v. *Sharp*, 4 Dowl. P. C. 354.)

(*t*) It may be noticed that the English rule declaring that "costs of the day for not proceeding to trial or to execute a writ of inquiry may be obtained by a side bar rule on the usual affidavit:" (39 H. T. 1853) has not been introduced among our new rules. Its omission is not such as to cause any difference in the practice of the two countries, for it is a mere echo of the Statute.

(*u*) From a very early period there has been some rule of practice to enable a defendant to get rid of an action commenced against him which plaintiff does not think proper to bring to trial. The provision at common law was trial by proviso—a mode of procedure so called because of a proviso inserted in the *venire facias*, as follows: "And have then there the names of the persons and this writ, *provided* always that if two writs should thereupon come to you, one of them only you return and execute." And this for a long time was the only mode by which defendant could obtain indemnity for his expenses or have tried an action which was kept unjustly hanging over him. Trial by proviso is still the only means of forcing an actual trial of the matter litigated. As to indemnity for expenses incurred in consequence of plaintiff's neglect to proceed to trial according to notice technically called "costs of the day," a more summary proceeding was enacted by Stat. 14 Geo. II. cap. 17. This statute enabled a defendant in certain cases upon showing the default of plaintiff to move the Court for "judgment as in case of a nonsuit," the effect of which if allowed was to give him costs as if plaintiff had been in fact nonsuited. But this proceeding, though an improvement upon the common law mode of "trial by proviso," has been itself found susceptible of beneficial

Con Stat. for U.C. ch 22 § 223

(App. Co. C.) Eng. C. L. P. A. 1852, s. 100.

A certain British Act not to be in force in U. C.

Exception.

CXLIX. (*v*) The Act of the Parliament of Great Britain, passed in the fourteenth year of the reign of King George the Second, intituled, *An Act to prevent inconveniences from delays of causes after issue joined*, (*w*) so far as the same relates to Judgment as in case of nonsuit, shall no longer be in force in Upper Canada, (*x*) except as to proceedings taken or commenced thereupon before the commencement of this Act. (*y*)

Con Stat for U.C. ch 22 § 226

Town causes and Country causes distinguished.

CL. (*z*) Causes in which the venue (*a*) is or shall be laid in the United Counties of York and Peel, or in the County of York alone, (*b*) when no longer united with the said County of Peel, (*c*) shall be called Town Causes, and all other causes shall be called Country Causes.

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alteration. The enactments following are intended to simplify the mode of procedure in such cases and thus lessen the expense of obtaining judgment as in case of a nonsuit.

(*v*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 100.—Applied to County Courts.

(*w*) Eng. Stat. 14 Geo. II. cap. 17.

(*x*) The provisions of 14 Geo. II. cap. 17, are repealed as to judgment in case of a nonsuit without any exception as to pending actions: (*Doe d. Leigh* v. *Hunt*, Alderson, B., 8 Ex. 130.) And the repeal is absolute and applies to the action of ejectment in the same manner as to all other other actions. A substitute is provided with respect to ordinary actions by s. cli., and with respect to actions of ejectment by s. cclvi. of this Act. The common law right to take down a cause by proviso, is expressly preserved by Eng. C. L. P. A. 1852, s. 116.

(*y*) The word "thereupon," used in this sentence must be understood as having reference to "the Statute," and not to "the case." The object of this section is to put an end to the mode of proceeding prescribed by the 14 Geo. II., except in cases where at the time the C. L. P. A. came into force, (21st Aug., 1856.) that Statute had already been acted upon. Therefore if a rule for judgment as in case of a nonsuit has been in any case *obtained* before 21st Aug., 1856, it would then, and then only, be correct to follow up that mode of procedure: (*Morgan* v. *Jones*, 8 Ex. 128.)

(*z*) This section introduces into Canada a practice which has long prevailed in England, of dividing causes into *town* and *country* causes. The object of the section is to prepare the way for the section following, in which separate provision as regards judgment for not proceeding to trial or assessment pursuant to notice is made for each class of cases.

(*a*) As to the law of venue see ss. vi. and ... and notes *j* and *k* thereto.

(*b*) *i.e.* In accordance with the terms of the Municipal Act, which directs that in laying the venue in any judicial proceedings in which the same may be necessary in any county which may be united to any other County or Counties, the same shall be laid in such county by name, describing it as one of the United Counties of, &c.: (12 Vic. cap. 78 s. 7; see also ss. 21 and 22.)

(*c*) The Governor General is under certain restrictions empowered by proclamation to dissolve the union between these Counties, and thereupon for all purposes they will become separate and independent Counties: (12 Vic. cap. 78 s. 18.)

Eng. C. L. P. A. 1852, s. 101.

If Plaintiff neglects to go to trial within a certain time after issue joined, De-

CLI. (*d*) Where any issue is or shall be joined in any cause, (*e*) and the plaintiff has neglected or shall neglect to bring such issue (*f*) on to be tried, that is to say, in Town Causes (*g*) where issue has been or shall be joined (*h*) in, or in the vacation before Hiliary, Trinity or Michaelmas Term, and the Plaintiff has negected or shall neglect (*i*) to bring the issue on to be tried at or before the second Assizes following such term,

(*d*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 101.—Not applied to County Courts; but as to these Courts there is a similar provision: (Co. C. P. A., s. 16.) A defendant is empowered in the case of the death of plaintiff to compel a continuance or abandonment of the action by his representative, (s. ccxv.) who may, if so disposed, enter a suggestion of the death o' the original plaintiff and continue the suit: (s. ccx.)

(*e*) "Where any issue *is* or shall be &c.," clearly retrospective as well as prospective: (*Dunn* v. *Coutts*, 17 Jur. 947, 16 L. & Eq. 137.)

(*f*) If there be issues in fact and in law to the *same* pleading it is more than probable that directions have been given as to the disposal of such issues under s. cxxix., but if there be issues in fact and in law to different pleadings on the same record, plaintiff as a general rule is not bound to go to trial on the issues in fact until the determination of the issues in law. His default can only be reckoned from the latter date: (*Duberley* v. *Page*, 2 T. R. 391; *Gordon* v. *Smith*, 6 Bing. N. S. 273; *Brewer* v. *Pierpont*, E. T. Ex. 1847, Mor. Dig. 161; *Ferguson* v. *Mahon*, 2 Jur. 820; *Connop et al.* v. *Levy*, 6 D. & L. 282; *Chrisp* v. *Attwell*, 1 L. M. & P. 454. *Contra*—*Leach* v. *Dulmage*, E. T. 3 Vic., *MS.*, R. & H. Dig., "Judgment in case of Nonsuit," II. 2.) But after judgment on demurrer to certain pleas, plaintiff is still bound to proceed to trial on the remaining pleas upon which issues in fact are joined: (*Paxton* v. *Popham*, 10 East. 366; *Martin v. Stone*, 6 Jur. 372.)

(*g*) As to the distinction between town and country causes see s. cl. of this Act.

(*h*) It is probable that in accordance with the old practice as to judgment in case of nonsuit defendant will not be entitled to enter a suggestion for judgment under this section until the issue has been in fact completed by the addition of the *similiter*: (*Rickards et al* v. *Middleton*, 1 M. & G. 58; *Brook* v. *Lloyd*, 1 M. & W. 552; *Martin* v. *Martin*, 2 Bing. N. C. 240; *Gilmore* v. *Melton*, 2 Dowl. P.C. 632; *Jackson* v. *Utting*, 10 M. & W. 640; *Wilson* v. *Westbrooke*, E. T. 4 Vic. *MS.* R. & H. Dig., "Judgment in case of Nonsuit," I. 7; *McLellan et al* v. *Smith*, T.T. 4 & 5 Vic. *MS. Ib.*; *Gibson* v. *Washington*, 1 U. C. R. 410; *Elridge* v. *Boynton*, 1 U. C. R. 279; *Doe d. Anderson* v. *Todd et al*, 1 U. C. R. 279; *McCague* v. *Clothier*, 1 U. C.R. 517.)

(*i*) *Neglect.*—The right of defendant to avail himself of this provision is made to depend upon the neglect of plaintiff. If the cause though regularly brought down for trial by plaintiff, be not tried, owing to no default of plaintiff, there is no power to enter the suggestion: (*Mewburn* v. *Langley*, 3 T. R. 1; *Henkin* v. *Guress*, 12 East. 247; *Ham* v. *Gregg*, 6 B. & C. 125; *Rendell* v. *Bailey*, 2 Dowl. P. C. 113; *Gilbert* v. *Kirkland*, 2 Dowl. P. C. 153; *Ladbrooke* v. *Williams*, 3 D. & L. 368; *Lumley* v. *Dubourg*, 14 M. & W. 295; *Hansby* v. *Evans*, 7 Dowl. P. C. 198; *Spurr* v. *Rayner*, *Ib.* 467; *Rizzi* v. *Folletti*, 5 C.B. 852; *Jackson* v. *Carrington*, 4 Ex. 41; *Laws* v. *Bott*, 16 M. & W. 362; *Rogers* v. *Vandecrom*, 4 D. & L. 102; *Chapman* v. *Heslop*, 12 Q. B. 928; *The Bank of Upper Canada* v. *Covert et al*, M. T. 6 Wm.

Defendant may give notice to Plaintiff to bring issue to trial, &c.

(*j*) or if issue has been or shall be joined in or in the vacation before Easter Term, then if the Plaintiff has neglected or shall nglect to bring the issue on to be tried at or before the first Assizes after Easter Term, (*k*) and in Country Causes where issue has been or shall be joined in, or in the vacation before Hiliary or Trinity Term, and the Plaintiff has negected or shall neglect to bring the issue on to be tried at or before the second Assizes following such Term, or if issue has or shall be joined in or in the vacation before Easter or Michaelmas Term,—then if the plaintiff has neglected or shall neglect to bring the issue on to be tried at or before the first Assizes after such Term, (*l*) whether the plaintiff shall in the meantime have given notice of trial or not, the Defendant may give twenty days' notice to the Plaintiff (*m*) to bring the issue on to be tried at the Assizes (*n*) next after the expiration of the notice; (*o*) and if the Plaintiff afterwards neglects to give notice of trial for such Assizes, (*p*) or to proceed to trial as

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IV. *MS.* R. & H. Dig., "Judgment in case of Nonsuit," I. 2; *Bank of Upper Cnnada* v. *Bethune et al*, M.T. 6 Wm. IV. *Ib.*; *Bradbury* v. *Flint*, M. T. 4 Vic. *MS.* R. & H. Dig. *Ib.* 4; *Penniman* v. *Wince*, 4 O.S. 335; *Doe d. Burnside* v. *Heelar*, T.T. 4 & 5 Vic. *MS.* R. & H. Dig. "Judgment in case of Nonsuit," II. 8; *Doe d. Dodge* v. *Rose*, 4 U. C. R. 174; *Hodgson* v. *Stevens*, 5 U. C. R. 625; *Doe d. Anderson* v. *Todd et al*, 1 U. C. R. 279.) Indeed if plaintiff has once brought his case down for trial though it result in a nonsuit or a verdict for plaintiff, which is subsequently set aside by the Court, it is a question whether defendant can avail himself of this section and so compel plaintiff to try a *second* time: (see *King* v. *Pippett*, 1 T.R. 492; *Ashley* v. *Flaxman*, 2 Dowl. P. C. 697; *Jones* v. *Hows*, 5 Dowl. P. C. 600; *Warren* v. *Smith*, 5 O. S. 728;) and if not then a further question is whether he has any other remedy than that of trial by proviso?

(*j*) The Court, after a peremptory undertaking to try at a particular assize declined to entertain a motion for judgment until the sittings were concluded, because *possibly* the case might still be entered by the sitting Judge: (*Burn* v. *Cook*, 1 L. M. & P. 786.)

(*k*) This part of the section as to the periods fixed within which trials must take place in town causes, varies from the English enactment, in consequence of a difference as to the times of holding the assizes in Upper Canada.

(*l*) As to country causes this provision is a *verbatim* copy of the English enactment.

(*m*) The notice intended is a twenty days' notice *before the assizes*, and not twenty days' notice before the time for plaintiff to give notice of trial for that assizes: (*Judkins* v. *Atherton*, 3 El. & B. 987, 26 L. & Eq. 104.)

(*n*) "Sittings or Assizes, as the case may be," in the English enactment.

(*o*) The defendant's attorney may give the twenty days' notice, although it is only for the purpose of obtaining his own costs: (*Knight* v. *Gaunt*, 22 L. J. Q. B. 167.)

(*p*) "Sittings or Assizes," in English enactment. It may be noticed that under this practice plaintiff's po-

required by the said notice given by the Defendant, (*q*) the Defendant may suggest on the record that the Plaintiff has failed to proceed to trial, although duly required so to do, (*r*) (which suggestion shall not be traversable, but only be subject to be set aside if untrue,) (*s*) and may sign Judgment for his

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altion is a better one than that under the old practice. Before defendant can legally give the twenty days' notice, there must be such a default on the part of the plaintiff in point of time as would have entitled defendant to move for judgment as in case of nonsuit. And after the expiration of that notice plaintiff may now have still *another* assize before judgment can be obtained against him under this section.

(*q*) "In pursuance of the said notice," &c., in English C. L. P. Act. Where a defendant has given the twenty days' notice to proceed to trial the plaintiff may come to the Court, and on satisfactorily explaining the delay obtain an extension of time: (*Farthing* v. *Castles*, 22 L. J. Q. B. 167.) It is not necessary that the rule should specify the particular period for which the extension is required: (*Ib.*) The defendant need not wait until the expiration of the twenty days nor until the defendant has entered a suggestion before applying to the Court or a Judge: (*Ib.*)

(*r*) The suggestion may be in this form—And now on, &c., the defendant suggests and gives this honorable Court to be informed that the plaintiff has failed to proceed to trial, although duly required so to do. Therefore, &c. It is presumed that defendant will not be in a position to enter the suggestion in cases which if decided before this Act, he could not obtain judgment, as in case of non-suit. For example, where there are several defendants and issue joined only as to one: (*Crowther et al.* v. *Duke et al.* 7 Dowl. P.C. 409; *Jackson* v. *Utting*, 2 Dowl. N. S. 548; see also *Spafford* v. *Buchanan et al.* 4 U. C. O. S. 329,) and this although the defendants against whom issue is incomplete are dead, unless that be regularly suggested: (*Pinkus* v. *Sturch et al.* 5 D. & L. 515: see also *Checchi* v. *Powell*, 6 B. & C. 253.) But one of several defendants, where all have pleaded might obtain judgment as in case of nonsuit: (*Jones* v. *Gibson*, 5 B. & C. 768; *Bridgford* v. *Wiseman*, 16 M. & W. 439; *Rhodes et al.* v. *Thomas et al.* 2 D. & L. 558; *Crowther* v. *Brandon*, 7 Scott 344;) though one or more have suffered judgment by default: (*Stuart* v. *Rogers*, 4 M. & W. 649; *Hadrick* v. *Haslap et al.* 16 L.J. Q. B. 442). The death of a co-plaintiff must be suggested, or if not suggested defendant may obtain judgment on affidavits intitled in the original cause: (*Larchin et al.* v. *Buckle*, 1 L. M. & P. 740.)

(*s*) A plaintiff moved to set aside a judgment signed under this section in the Eng. C.L.P.A. upon the ground that plaintiff was prevented from trying the cause by the wrongful act of defendant, and in support of his application showed that in compliance with the defendant's notice to bring the issue on to be tried, he gave notice of trial, and on delivering the record told the associate that he had kept it back in order that his cause might be the last in the list, as his witnesses were in the country, and that he gave defendant's attorney notice that he should not be able to try until the last day of the sittings, but afterwards received a note from the Marshal that it would be taken on that day, and it was accordingly taken, although an application had been made to the presiding Judge for a postponement. And per Coleridge, J. "The grievance complained of is that your case was improperly taken by the officer of Lord Campbell. You applied to Lord Campbell to have it taken in a different

costs; (*t*) Provided that the Court or a Judge, (*u*) shall have power to extend the time for proceeding to trial (*v*) with or

order, and he refused your application. The cause list is in the discretion of the presiding Judge; he has the entire conduct of it, and may take the causes as he pleases. Every case is supposed to be ready when it is placed in the list. I cannot interfere with Lord Campbell's discretion." Rule refused: (*Dunn* v. *Coutts*, 17 Jur. 847, 16 L. & Eq. 137.) The truth or untruth of the suggestion will substantially depend upon the nature and circumstances of plaintiff's default. The presumption of neglect may be combated by showing a sufficient excuse. The following have been held *not* to be sufficient: the absence of a material witness: (*Mussell* v. *Faithful*, 11 Jur. 270); inability to proceed without fresh evidence: (*Draine* v. *Russell et ux.* 10 Jur. 392; *Doe d. Ringer* v. *Blois*, 8 Dowl. P. C. 18.) The following have been held to be *sufficient*: the pendency of a negotiation for settlement only broken off by defendant when too late to proceed to trial: (*Alford* v. *Fellowes*, 9 Dowl. P. C. 826; *Fosbery* v. *Butter et al.* 2 Dowl. N. S. 390; see also *Watkins* v. *Giles*, 4 Dowl.P.C. 14;) the pendency of a case involving the same points of law: (*Handell* v. *Pawsey*, 11 Jur. 849); the pendency of a commission to examine witnesses: (*Waddy* v. *Barnett*, 15 L. J. Q. B. 8; *Bordier* v. *Barnett*, 3 D. & L. 370); delay at the request of defendant: (*Doe d. Steppins* v. *Lord*, 2 Dowl. P. C. 419); stay of proceedings until the delivery of particulars: (*Wilkie* v. *Gibson*, 7 L. J. C. P. 65); or until security for costs: (*Gandell* v. *Motte*, Ex. T.T. 1847, *MS.* Mor. Dig. 167); a summons by defendant to put off the trial taken out at so late a period that plaintiff anticipated being put to inconvenience if he prepared for trial: (*Rendell* v. *Bailey*, 2 Dowl.P.C. 113); proceedings taken against plaintiff by defendant in Chancery: (*Partridge* v. *Sulter*, 5 Dowl. P. C. 68); the threatened insolvency of defendant: (*Truscott* v. *Latour*, 9 Ex. 420.) Upon the latter point reference may be made to *Lettice* v. *Sawyer*, 4 Jur. 74; *Scotland* v. *Henderson*, 4 M. & W. 587; *Frodsham* v. *Rust*, 4 Dowl. P. C. 90; *Smith* v. *Davis*, 9 Dowl. P. C. 50; *Mann* v. *Williamson*, 7 M. & W. 145; *Fisher* v. *Lediard*, 9 Dowl. P. C. 545; *Topping* v. *Brown*, 9 Dowl. P. C. 582; *Featherstone* v. *Bourne*, 2 Dowl. N. S. 389; *Badman* v. *Pugh*, 1 D. & L. 540; *Gavin* v. *Allen*, 21 L. J. Ex. 80.) So in a special jury cause that neither party would pray a tales: (*Phillips* v. *Dance*, 9 B. & C. 769.)

(*t*) The costs will be chiefly composed of costs of the day; as to which see s. cxlviii.

(*u*) Relative powers, see note *m* to s. xxxvii.

(*v*) The Court has no power to extend the time for proceeding to trial *indefinitely* upon application of plaintiff under this proviso: (*Bridgewater* v. *Griffiths*, 17 Jur. 438.) It is apprehended that the practice regulating the extension of time will be in many respects analogous to the old practice of peremptory undertaking. Several of the cases decided under the old, will be in point under the new practice. Whenever before this Act plaintiff, by showing a reasonable excuse for not proceeding to trial might discharge the rule for judgment as in case of nonsuit, upon entering into the peremptory undertaking, he will, as a general rule, have good grounds to resist an application under this Act. Thus where he was prevented by defendant from proceeding to trial: (*Penneman* v. *Wince*, 4 O. S. 335; *Doe d. Anderson et al.* v. *Todd*, 1 U. C. R. 279), where plaintiff's proceedings have been stayed by an injunction from Chancery: (*Doe d. Burnside* v. *Hector*, T. T. 4 & 5 Vic. *M. S.* R. & H. Dig. "Judgment in case of Nonsuit," II. 3), where owing to some special circumstances plaintiff is acting *bona fide* on the advice of counsel: (*Armstrong* v. *Benjamin*, 1 U. C. R.

without terms; and provided also, that no rule for trial by proviso shall thereafter be necessary. (*w*)

And with respect to the holding of Courts of Nisi Prius (*x*)

414); or where the attorney for plaintiff was unable to see his client, who resided some distance from him: (*Richards* v. *Hamar*, 5 C. B. 582), where owing to the misconduct of a former attorney in the cause, plaintiff is unprepared to try: (*Howard* v. *Crofts*, 6 C. B. 620); where defendant has tampered with plaintiff's witnesses: (*Bates* v. *O'Donohue*, 3 U. C. R. 176); or deceived plaintiff as to the production of evidence which he promised to produce: (*Doe d. Rees* v. *Dick*, 6 U. C. R. 621); or keeps out of the way a material witness for plaintiff: (*Appleyard* v. *Todd*, 6 M. & G. 1019); the unexpected want of a particular witness or document: (*Jordan* v. *Martin*, 8 Taunt. 104; *Greenhill* v. *Mitchel*, 6 Taunt. 160; *Wilkinson* v. *Willats*, 6 D. & L. 280; *Montfort* v. *Bond*, 2 Dowl. P. C. 208; *Wyatt* v. *Nicholls*, 9 Dowl. P. C. 327; *Doe d. Reimer* v. *Glass*, 4 U. C. R. 255); or unexpected difficulties in the way of plaintiff's proceeding: (*Draine* v. *Russell*, 10 Jur. 392); and perhaps plaintiff's sudden but temporary inability to meet the expenses necessary to the support of his case: (*Radford* v. *Smith*, 7 Dowl. P. P. 26; *Joyce* v. *Ellis*, 6 M. & G. 691.) It is presumed that even if there be power under this section to grant a second extension of time, that power will be rarely exercised. Under the old practice a rule for judgment after a peremptory undertaking and default was absolute in the first instance: (*Benham* v. *Shaw*, Dra. Rep. 121; *Austin* v. *Garrow*, M. T. 2 Vic. *M. S.* R. & H. Dig. "Judgment in case of Nonsuit," IV. 1); and against this rule plaintiff was seldom relieved: (*Mathewson* v. *Glass*, 1 U. C. R. 516.) In one case after default in proceeding to trial pursuant to a peremptory undertaking where defendant obtained a rule nisi for judgment, which was enlarged to be heard in Chambers, and plaintiff showed cause, stating that "he had given notice of trial in pursuance of his undertaking, but that in consequence of the absence of two material and necessary witnesses in the United States, he was unable to proceed to trial: that both said witnesses are now residing in Toronto, and that he will be able to proceed at the ensuing Toronto assizes—that he made efforts to obtain the presence of said witnesses, but could not succeed, and that if he is compelled to commence a new action many of the claims for which the action is brought he will be barred by the Statute of Limitations," the peremptory undertaking was extended until the then next ensuing Toronto assizes: (*Maitland* v. *Brown*, Chambers, Dec. 8, 1856, Burns, J.)

(*w*) This proviso is new, and not to be found in the English C. L. P. Act. The meaning of it is doubtful. It cannot be to abolish trial by proviso, a right most necessary for the protection of defendants desirous of bringing to final determination the subject matter of pending suits. The judgment to be signed under this section is only for costs and the effect thereof is only, to put an end to the particular suit in which it is signed, without at all disposing of the matter in issue. A rule for trial by proviso is not necessary in any case: (N. R. 38.)

(*x*) The sections following in reference to the holding of Courts of Nisi Prius, &c., are re-enactments with amendments of our old law. In order properly to understand them, a short sketch of the origin and growth of the Nisi Prius Courts may be made. Anciently the King is supposed himself in person to have administered justice to his subjects. In the time of the Saxons a great increase of litigation necessitated a change, which was made by the constitution of a Court having cognizance both of civil and spiritual

and to the Nisi Prius record and to the trial; Be it enacted as follows:

cases. This Court, named the Wittenagemote or General Council, was composed of men whom the King annually summoned both to act as Ministers of Justice and to deliberate upon affairs of State. But William the Conqueror, fearing danger from these annual Parliaments, contrived to deprive them of their power to administer justice, and conferred it upon certain great officers of State, who assembled in his own hall. Hence the Court was styled *Aula regia* or *Aulæ regis*. This Court was presided over by a chief officer of great power, called the Grand Justiciary. As business multiplied, it was found necessary for the relief of suitors to constitute another tribunal. Justices—called Justices in eyre—were accordingly appointed to go *itinera* or circuits throughout the kingdom, whose duty it was to determine pleas in the several counties. They held pleas in all cases, whether civil or criminal, and acted under commissions from the Crown. Owing to the great interval between the circuits, the administration of criminal justice was found to be very defective. In consequence commissions were often issued empowering justices therein named to *deliver* particular *gaols* specified, that is, to examine into the offences of the prisoners, punish such as were guilty, and release such as were not. The exact time when these commissions were first issued is involved in doubt. Whenever either in a civil or in a criminal case a jury was summoned to assist the Justices in determining questions of fact, the trial was said to be *assiza*, either from *assidere*, because the jurors sat with the Justices, or from *assiza*, the name of the law under which trial by jury was held. After a time commissions issued yearly for the more speedy trial of criminal offences. The Judges appointed were termed Judges of assize. With them were *associated* the Knights of the several counties in which the assizes were appointed to be holden. This is the origin of associates. Supplementary to these commissions it was usual when any particular outrage had been committed to issue a writ *ad audiendum et ad triandum* such offence, afterwards called a writ of *Oyer and Terminer*. In the reign of Edward I. it was enacted that these writs should be issued only to the justices of the Bench or in eyre unless in cases of particular enormity, when the King might appoint whom he pleased. During all this time civil suits between subject and subject were as a general rule entered for trial before the *Aula Regis*, *unless* the justices in eyre should first come into the county where the cause of action arose. This was the origin of the *Nisi Prius* commission the principle of which was in the reign of Edward the First, embodied in a Statute: (Westin II., cap. 30.) It was then that the statute of *Nisi Prius* was passed which authorized judges of assizes to try common issues and to return them when tried into the Court above, whereupon judgment would be given. All these commissions when issued are now granted to the ordinary judges of the Superior Courts of Common Law. Though formerly issued before every assizes in Upper Canada, they are not under the present Statute necessary to the validity of proceedings had before the judges on their circuits. The Commissions when issued are the following:

1. Commission of Oyer and Terminer.
2. ——————Gaol Delivery.
3. ——————Assize.
4. ——————Nisi Prius.

For convenience the two former are generally included in one commission, and the two latter in another. The names of the judges of the Superior Courts of Common Law in Upper Canada, are also inserted in all commissions of the peace: (Bla. Com. III. 57; Chit. Crim. Law, I. 142; 2

CLII. (*y*) Courts of Assize and Nisi Prius, of Oyer and Terminer, and of General Caol Delivery, (*z*) shall be held in every County or Union of Counties in Upper Canada (except in that within which the City of Toronto is situate), (*a*) in each and every year, in the vacations between Hilary and Easter Terms and between Trinity and Michaelmas Terms, (*b*) with or without Commissions, as to the Governor of this Province shall seem best, (*c*) and on such days as the Chief Justices and Judges of the Superior Courts of Common Law in Upper Canada shall respectively name; (*d*) and if Commissions are issued, then such Courts shall be presided over by the person or persons named in such Commissions; (*e*) but if no such Commissions are issued, then the Courts of Assize and Nisi Prius (*f*) shall be presided over by one of the Chief Justices or of the Judges of the said Superior Courts of Com-

Courts of Assize and Nisi Prius, &c., to be held in each County or Union (except that including Toronto), and at what periods.

If commissions are issued.

If not.

Hawk. P. C. Book 2, c. 7, p. 33; Introduction to Sellon's Pr.)

(*y*) A re-enactment with amendment of Stat. 12 Vic. cap. 63, s. 20, and 18 Vic. cap. 92, s. 43.—Not applied to County Courts.

(*z*) As to these several Courts, their origin and jurisdiction, see note *x*, *ante*.

(*a*) For which special provision is hereinafter made.

(*b*) The terms of sittings of the Queen's Bench and Common Pleas are as follows:—Hil. Term, 1st Monday in February; East. Term, 1st Monday in June; Trin. Term, last Monday in August; Mich. Term, 3rd Monday in November. Each term beginning on a Monday lasts thirteen days and expires on the Saturday of the week ensuing its commencement: (12 Vic. cap. 63, s. 19.)

(*c*) Commissions were first dispensed with by Stat. 18 Vic. cap. 92, which enacted that "the judges of the several superior courts of common law in Upper Canada, shall and may preside over the Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery, in the same manner and with the same authorities and powers, without the issuing of any commission or commissions, for the holding of the said Courts as they have been accustomed to do under commissions, before the passing of this Act, &c:" (s. 43.)

(*d*) The days are usually fixed and made known during the term next preceding the times appointed for the holding of the assizes.

(*e*) The Commissions of Assize and Nisi Prius are generally directed to all the judges of the Queen's Bench and Common Pleas, by name of whom "any one" is assigned to take "all and all manner of assizes juries and certificates" within particular Counties named; whereas commissions of Oyer and Terminer and General Gaol Delivery are directed, in addition to such judges, to certain persons named as associates, of whom "any two," one of said judges being one, shall inquire, &c., by the oaths of good and lawful men of the particular counties named, &c.

(*f*) Under this description is understood the Courts for the trial of issues joined in the Superior Courts and transmitted through the medium of Nisi Prius Records to be tried at the assizes. The issues may be so joined either in civil causes or in criminal causes en-

mon Law, (*g*) or in their absence, then by some one of Her Majesty's Counsel learned in the Law, and of the Upper Canada Bar, who may be requested by any one of the said Chief Justices or Judges to attend for that purpose, (*h*) or by some one Judge of a County Court who may be so requested; (*i*) and the Courts of Oyer and Terminer and General Gaol Delivery (*j*) shall be presided over by either of the said Chief Justices or Judges, or by any such of Her Majesty's Counsel or any such Judge of a County Court, (*k*) each and every of whom shall be deemed to be of the *quorum*, (*l*) together with any one or more of the persons who shall be named as Associate Justices of the said Courts of Oyer and Terminer and General Gaol Delivery; (*m*) and the said Chief Justices and Judges, and such of Her Majesty's Counsel as aforesaid, and such Judge of a County Court, presiding at any Court of Assize and Nisi Prius, shall and may possess and exercise the like powers and authorities as have been usually expressed and granted in Commissions issued for the holding of such Courts; (*n*) and

And in Courts of Oyer and and Terminer and Gaol Delivery.

Powers of Judge, &c., presiding at Nisi Prius.

tered upon the civil side of the Court, with a view to a new trial, &c., which cannot be obtained on the criminal side of the Courts. (Chit. Crim. Law, 142 *et seq.*)

(*g*) This is in strict accordance with the terms of the commission when issued.

(*h*) Queen's counsel were by Stat. 18 Vic. cap. 92, s. 45, made associates for the despatch of civil or criminal business at any county or place, or upon any circuit in Upper Canada. By the section under consideration they can only act in the *absence* of and upon *request* of the judges.

(*i*) It has been an invariable rule to name county judges as associates, each in his own county; but this enactment goes further by enabling them in the absence of, and upon request of the judge to preside over the Courts of Assize and Nisi Prius.

(*j*) Under this description are understood the courts for the trial of criminal cases, arising upon indictments found by the Grand Jury at the same or some preceding assize: (1 Chit. Crim. Law 143; 4 Bl. Com. 269; Hawk P. C. Book 2, c. 6, p. 28;) or at a Court of Quarter Sessions: (*Witherell's case*, 1 Lew. C. C. 208; 7 Wm. IV. cap. 4, s. 5.)

(*k*) By Queen's Counsel or County Judges it is presumed only in the absence of, and *perhaps* upon request of the Superior Court Judges: for as to the criminal side of the court the last branch of the proposition is doubtful. The provision as to request expressly made as to the civil side of the Court is not repeated.

(*l*) *Ante*, note *x*.

(*m*) Origin of associates, see *ante* note *x*. They must be named by the Governor General and notified in the manner prescribed by the next following section: (cliii.)

(*n*) From what follows it is manifest that Courts of Assize and Nisi Prius only are here meant: the powers usually expressed and granted in the commissions therefor, are "to take all and all manner of assizes juries and certificates," within certain counties named, and that "these assizes juries

the said Chief Justices and Judges and such of Her Majesty's Counsel as aforesaid, and such Judge of a County Court presiding at any Court of Oyer and Terminer and General Gaol Delivery, and the person or persons named as Associate Justices, shall and may possess and exercise the like power and authorities as have been usually expressed and granted in and by Commissions issued for holding such last mentioned Courts, (*o*) and wherein such Chief Justices and Judges and Queen's Counsel and Judges of County Courts would have been named of the *quorum*; (*p*) and such Courts (*q*) shall in like manner (*r*) be held in the County or Union of Counties within which the City of Toronto is situate, three times in each

And in Courts of Gaol Delivery, &c.

Powers of associates.

(*q*) § 4.

Periods of holding such Courts in the County or

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and certificates and all things touching the same," should be taken as well as heard, and "by an inquest of twelve lawful men" of the county or counties named, to "determine all issues that may have been joined" either "in the Court of Queen's Bench or Common Pleas," and "to cause to be done what to justice may appertain according to the law and custom of England" and the laws of Canada.

(*o*) *i. e.* The Courts of Oyer and Terminer and General Gaol Delivery. The powers and authorities usually expressed and granted in the commissions are the following: "To inquire by the oaths of good and lawful men" of the county or counties named, (*i. e.*, by the Grand Jury,) "by whom the truth of the matter may be better known and inquired into, and by other ways and methods and means," whereby they "can or may the better know more fully the truth of all treasons, misprisons of treason, insurrections, rebellions, counterfeitings, clippings, washings, false coinings and other falsities of the monies of Great Britain and Ireland, and of all other kingdoms and dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful assemblies, unlawful uttering of words, misprisions, confederacies, false allegations, tresspasses, riots, routs, retentions, escapes, contempts, falsities, negligencies, concealments, maintenances, oppressions, champerties, deceits and all other misdeeds, offences, and injuries whatsoever; and also the accessories of the same," within the county or counties named, "by whomsoever or howsoever had, done, perpetrated, and committed, and by what person or persons to what person or persons, and when, how, and in what manner, and of all other articles and circumstances whatsoever, any, every, or either of them concerning; and the treasons and other the premises, according to the law and custom of England," and the laws of Canada for the time being, "to hear and determine;" (*i. e.*, by petit juries,) and further, "the gaol" of the county or counties named, "for this time to deliver," and at the time and place aforesaid, to "meet to deliver the gaol" of the county or counties named, "to deliver and to do thereupon what to justice may appertain, according to the law and custom of England and the laws of Canada," saving to the Queen all "amerciaments and other things to her thereupon belonging."

(*p*) See note *x ante*.

(*q*) *i. e.* Courts of Assize and Nisi Prius *and* of Oyer and Terminer and General Gaol Delivery.

(*r*) *i. e.* As to powers and authority, &c.

Union including Toronto.

year, to commence on the Thursday next after the holding the Municipal Elections in January, (*s*) on the second Monday in April, and on the second Monday in October in each year; Provided that nothing herein contained shall restrict the Governor of this Province from issuing special Commissions for the trial of any offenders, when he shall deem it expedient to issue any such Commission. (*t*)

Proviso for special commissions.

Governor to name Associate Justices—Provincial Secretary to notify them, if no commission issues.

CLIII. (*u*) The Governor of this Province shall name the Associate Justices, (*v*) and it shall be the duty of the Provincial Secretary, when no Commissions are issued, (*w*) on or before the first day of the several terms next after which such Courts are to be holden, (*x*) to transmit to the Chief Justices aforesaid, (*y*) and to the Sheriff of each County or Union of Counties, lists of the names of the persons who are so named Associate Justices for each several Court of Oyer and Terminer and General Gaol Delivery, (*z*) and also to give due notice to every such person of his nomination and appointment; (*a*) Provided always, that no greater number of persons than *five* shall be named as Associate Justices for any one Court of Oyer

Proviso: Number limited.

(*s*) The Municipal Elections are held yearly, on the first Monday in January.

(*t*) This is a prerogative of the Crown, though one very rarely exercised.

(*u*) A re-enactment with amendments of Stat. 18 Vic. cap. 92 s. 44.

(*v*) Origin of Associate Justices see note *x* to s. clii.

(*w*) From this section it would appear as regards Courts of Oyer and Terminer and General Gaol Delivery that Associates must be appointed either by commission to be issued pursuant to the previous section (clii.), or in manner directed by this section. The appointment of Associates in the one way or the other appears to be essential to the constitution of the Courts. It is believed that if the practice of appointing associates were altogether abolished the administration of justice would not be in the slightest degree impaired. It is a practice the utility of which has been much questioned.

(*x*) These Courts must be holden in outer counties in the vacation between Hilary and Easter Terms and between Trinity and Michaelmas Terms, on such days as the Chief Justices and Judges shall appoint: (s. clii.) and in the home county three times yearly on the days fixed by the preceding section (clii.)

(*y*) To the Chief Justices of the Queen's Bench and Common Pleas, the only two Superior Courts of common law jurisdiction in Upper Canada.

(*z*) The corresponding provision of the repealed enactment, 18 Vic. cap. 92, s. 44, strangely enough extended to Courts of Assize and Nisi Prius.

(*a*) The duty of the Provincial Secretary thus appears to be, 1st, to transmit to the Chief Justices lists of Associates; 2d, the same to Sheriffs; and 3d, to give notice to the individuals appointed Associates of such their appointment.

and Terminer and General Gaol Delivery; (*b*) and provided also that the Clerk of Assize shall be *ex officio* one of the Associate Justices. (*c*)

Clerk of Assize to be one *ex officio*.

CLIV. (*d*) The record of Nisi Prius shall not be sealed or passed, (*e*) but shall in Country Causes be entered with the Deputy Clerk of the Crown of the proper County or Union of

How and when Records of Nisi Prius shall

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(*b*) Origin of these Courts see note *x* to s. clii.

(*c*) This will be found in practice a most useful provision. The Clerk, who is expected to be at all times present, will by his presence as one of the *quorum* enable the Court at any time when convenient to take up and proceed with the criminal docket, or to open or adjourn the Court.

(*d*) Taken partly from Eng. St. 15 & 16 Vic. c. 76, s. 102, and partly from our own law, and so far as taken from Eng. C. L. P. Act, founded upon 1st Rep. C. L. Com. s. 71.

(*e*) The adaptation of this section to the corresponding section of the Eng. C. L. P. Act has led to a great change in our practice. The entry of Nisi Prius record neither sealed nor passed as required by our former practice, has occasioned the introduction into Upper Canada of the English practice as to making up and delivering paper and issue books (N. R. 33). The issue book is a transcript of the pleadings, with the dates of pleading and the order when pleaded: (*Worthington* v. *Wigley*, 5 Dowl. P. C. 209; see also s. ciii. of this Act.) It concludes ordinarily with the words, "therefore let a jury," &c.: (Form thereof N. R. Sch. No. 1.) But when it is intended to determine questions raised by consent a different form is made necessary: (*Ib.* Sch. No. 3.) It is sometimes expedient to make suggestions on the issue as to the death of one or more of several plaintiffs or defendants when the action survives: (ss. ccviii. and ccix. Chit. Arch. 8 Edn. 139, *et seq.* *Forms* Chit. F. 6 Edn. 625, *et seq.*) The issue book can only be made up when issue has been joined: (see s. cxxviii. and notes thereto), but may in certain cases be made up by plaintiff's attorney before the pleadings are in fact completed: (*Ib.*) The time within which it must be made up is not limited. Defendant may himself, if issue has been completed, make up the issue book and proceed to trial by proviso: (Chit. Arch. 8 Edn. 1293.) When made up by plaintiff's attorney it ought to be delivered either before or at the time of the service of notice of trial, and at least eight days before the commission day of the assizes. But whenever plaintiff's last pleading is in denial of the defendant's pleading, plaintiff's attorney, without joining issue, may give notice of trial at the time of serving his replication or other pleading, and in case of issue being afterwards joined, the notice operates from the time when first given. And of necessity in such a case the issue book would be made up and delivered *after* notice of trial and probably within less than eight days of the assizes: (see N. R. 36.) If there be several defendants appearing by different attorneys, a copy of the issue book should be delivered to each. When delivered it will be presumed to be true, and plaintiff's proceedings in respect thereof to be regular. If any statement therein be untrue, an application should be made to set the issue book aside on the ground that it is untrue: (*Harvey* v. *O'Meara*, 8 Dowl. P.C. 676.) But a mere irregularity, such as the omission of the date of a pleading, &c., may be amended either upon application of plaintiff or of defendant: (*Iken* v. *Plevim et al.*, 5 Dowl. P. C. 594; *Dennett* v. *Hardy*, 2 D. & L. 484.) In such cases plaintiff's proper course is to amend and not to deliver a second issue book: (*Ethersey* v. *Jackson*, 8 T.

be entered in country causes.

Counties, before noon of the Commission or opening day of the Assizes for such County or Union; (f) and the party entering any record shall endorse thereon whether it be an assessment, an undefended issue, or a defended issue; (g) and the Deputy Clerk of the Crown shall make three lists and enter each record in one of the said lists, in the order in which the records are received by him, and on the first list he shall enter all the assessments and undefended issues, and in the second list all defended issues not marked "Inferior Jurisdiction," and on the third list all defended issues marked "Inferior Jurisdiction," (h) and it shall be in the discretion of the Judge at Nisi Prius to postpone the trial of causes in the third list until all the others are disposed of, and to call on the causes in the first list at such time and times as he shall find most convenient for disposing of the business; (i) Provided always, that the Judge

Certain particulars to be indorsed on each.

Three lists to be made by Deputy Clerk of the Crown.

Order of calling causes.

Proviso:

255.) The amendment may be made at any time: (*Farwig* v. *Cockerton*, 5 M. & W. 169.) In some cases of irregularity either in the form of issue or of its delivery, defendant must apply promptly may set it aside: (see *Lycett* v. *Tenant*, 4 Bing. N. C. 168; *Currey et al.* v. *Bowker*, 9 Dowl. P. C. 523; *Coose* v. *Neemeegan*, 1 Dowl. N. S. 429), but he may by appearing at the trial without objecting to irregularities by his conduct waive them: (see *Emery* v. *Howard*, 9 M. & W. 108.) Further as to the practice see Chit. Arch. 8 Edn. 281 *et seq.*; *Ib.* 9 Edn. 275, *et seq.*)

The *Nisi Prius* Record is a copy of the issue book as delivered, and when the latter has neither been set aside nor moved against must be taken to be a true copy: (*Doe* v. *Cotterell*, 1 Chit. Rep. 277); but if the record agree with the original pleadings a variation from the issue book will not materially affect it: (*Shepley* v. *Marsh*, 2 Strange, 1130; *Doe d. Cotterell* v. *Wylde*, 2 B. & A. 472; *Jones* v. *Fatham*, 8 Taunt. 634.) Authenticated in this manner, the necessity for sealing and passing the record does not exist. In England the dispensal with sealing and passing is considered a saving of fifteen shillings in the costs of a suit: (Markham, notes to s. 102 of Eng. C. L. P. Act, 1852.) In Upper Canada whatever the saving may be in consequence of such a step, it is more than balanced by the introduction of the practice as to issue books.

The Court will not suffer a party to retain a verdict upon a record which has been improperly altered by him: (*Suker et al* v. *Neale*, 1 Ex. 468.) As sealing and passing is unnecessary in the first instance, of course it is equally so though the cause be made a *remanet*: (see *Cook* v. *Smith*, 1 Dowl. N. S. 861.) As to issues and records on issues raised on pleas of *Nul tiel Record*: see *Jackson* v. *Oates*, 5 D. & L. 231.

(*f*) Deputy Clerks of the Crown are *ex officio* Clerks of Assize in their several Counties: (14 & 15 Vic. cap. 118 s. 2.)

(*g*) Non-compliance with this direction would, it is presumed, be an irregularity, amendable upon terms.

(*h*) "And the Deputy Clerk of the Crown *shall* make," &c. This is a duty which the Clerk is bound to perform.

(*i*) Every cause is *supposed* to be ready when it is placed in the list, and the cause list itself is entirely in the discretion of the presiding Judge. He

at Nisi Prius may permit a record in any suit to be entered after the time above limited, (*j*) if upon facts disclosed on affidavit, (*k*) or on the consent of both parties, he shall see fit to do so.(*l*)

Judge may allow entry of a Record after time limited.

CLV. (*m*) In Town Causes (*n*) the Records shall be entered with the Clerk of Assize, (*o*) who shall attend at the Court House on the Commission or opening day, for the purpose of receiving and entering the same, from nine in the morning until noon, (*p*) after which he shall not receive any without the order of the presiding Judge, who shall have the same power in this respect as set forth in the preceding section, (*q*) and the Clerk of Assize shall make three lists as aforesaid, which shall be regulated and the business disposed of as in Country Causes. (*r*)

Entry of such Records in Town Causes.

Lists, &c.

CLVI. (*s*) In all actions involving the investigation of long

(*App. Co. C.*) Eng. C. L. P. A.1854, s. 6.

has the entire conduct of it, and may take the causes as he pleases: (*Dunn v. Coutts*, 17 Jur. 337, 16 L. & Eq. 137.) In the exercise of this discretion he will be governed by the enactment here annotated. The exercise of that discretion will not be reviewed by the Court above: (*Dunn* v. *Coutts*, *ubi supra.*)

(*j*) *i.e.* Before noon of the commission day or opening of the assizes.

(*k*) As to affidavits generally see notes to s. xxii. at p. 41 of this work, intitled "Deponent," "Signature of Deponent," "Commissioner," "Jurat."

(*l*) If there be an affidavit disclosing the facts or consent of defendant to enter the record the Judge may still exercise his discretion in allowing the same to be done. In a case where plaintiff had given an undertaking to try at a particular sitting but did not enter his record on the first day of the sittings, the Court above refused to entertain a motion for judgment during that assize, because *possibly* the record might be entered after the first day by order of the presiding Judge: (*Burn* v. *Cook*, 1 L. M. & P. 736.)

(*m*) A re-enactment of our old practice.

(*n*) As to what are town causes see s. cl.

(*o*) *i. e.* With the Marshall and Clerk of Assize (14 & 15 Vic. cap. 118, s. 8,): as there is no Deputy Clerk of the Crown in the Home County, the general law as Deputy Clerks of the Crown being *ex officio* clerks of assize does not apply.

(*p*) This is similar to the rule enacted for country causes: (see s. cliv.)

(*q*) See note *i* to s. cliv.

(*r*) See s. cliv. and note *h* thereto.

(*s*) Partly founded upon Eng. C. L. P. A. 1854, s. 6—but in effect an extension of the principles involved in s. lxxxiv. of this Act. That section empowers the Court or a Judge when satisfactorily shown that the matters in dispute consist wholly or in part of mere matters of account to dispense with trial by jury, but does not apply to causes actually carried down for trial: (see note *y* to s. lxxxiv.) This section begins where the latter ends and enables the presiding Judge at Nisi Prius in his discretion to direct references in whole or in part of actions "involving the investigation of long accounts."—It is applied to County Courts.

In actions involving long accounts Judge may direct a reference as to part and a verdict as to other parts, &c., or leave the whole to the Jury.

accounts (*t*) on either side, (*u*) the Judge at Nisi Prius (*v*) may at and during the trial, (*w*) direct a reference of all issues in fact in the cause, or of such of the said issues and of the accounts and matters involved in all or any such issues as he shall think fit, (*x*) taking the verdict of the jury upon any issue or issues not so referred, and directing a verdict to be entered generally, on all or any of the issues, for either party, subject to such reference, (*y*) or he may leave all or any issues in fact to be found by the Jury, referring only to the amount of damages to be ascertained; (*z*) and if the parties agree upon the Arbitrators, (not more than three) the names of those agreed on shall be inserted in the order of Nisi Prius, (*a*) but if the parties cannot agree, the Judge shall name the Arbitra-

Appointment of arbitrators in referred cases.

(*t*) The words "involving the investigation of *long* accounts, &c.," have not yet received a judicial interpretation. They are if possible more general than those of s. lxxxiv. which are "matters in dispute consisting wholly or in part of *mere* matters of account." Whether any weight is to be attached to the word "long" in the one case in contradistinction to "mere" in the other, is doubtful; for the latter section has been held to authorize a reference not only of matters of mere account but of the *matters in dispute* either in whole or in part, and which may in whole or in part consist of matters of account: (see note *x* to s. lxxxiv.) Both sections are intended to embrace defended actions only. Where judgment by default has been signed and the damages are "substantially a matter of calculation," there is a peculiar mode of procedure laid down: (s. cxliii.)

(*u*) *i. e.* Either of *demand* by plaintiff or of *set-off* by defendant.

(*v*) After entry of the record at Nisi Prius, the Judge presiding and he alone is authorised to refer it: (see note *y* to s. lxxxiv.)

(*w*) "At *and* during," which may mean at any time before verdict rendered.

(*x*) The power is to refer all the issues *or* such of the issues, together with the accounts *and* matters involved in all or any of the issues as the Judge may see fit.

(*y*) It is intended in one way or the other to dispose of *all* the issues on the record. If, in the exercise of a sound discretion, all be referred, then the verdict will be a general one for one or other of the parties subject to the reference. If part only be referred, then as to that part such will be the verdict. As to the remaining part not referred, the verdict of the jury is to be a final determination, so far at least as respects the reference, but without prejudice to the right of either party to move against the verdict. (*Postea*, N. R. Sch. No. 8.) As to the costs of several issues see s. cxxx. and notes thereto; also N.R.51.

(*z*) In which case the verdict of the jury will decide the cause of action, and be in the nature of interlocutory judgment. The cause of action decided the amount of damages to be recovered in respect thereof to be thereupon found by the arbitrators.

(*a*) It is no more necessary now than formerly that the agreement should be in writing. The consent of counsel acting in Court will, it is apprehended be conclusive upon the parties. It may afterwards be reduced to writing.

tor or Arbitrators, and appoint all other terms (*b*) and conditions of the reference to be inserted (*c*) in such order of Nisi Prius, (*d*) and the award may be moved against, as in ordinary cases, (*e*) within the first four days of the Term next after the making of the award. (*f*)

As to motion to set aside award.

CLVII. (*g*) Upon the trial of any cause, (*h*) the addresses to the Jury shall be regulated as follows: the party who

(App. Ch. C.) Eng. C. L. P. A. 1854, s. 18.

(*b*) As to costs generally in such cases, see note *i* to s. lxxxvii.

(*c*) Indorsements would, it is presumed, be a sufficient compliance: (see *Carter* v. *Mansbridge*, Barnes, 55.) The use of the word "insert" negatives the idea of an oral order of reference: (see *Ansell* v. *Evans*, 7 T. R. 1.)

(*d*) As to proceedings upon an arbitration, see notes to s. lxxxvii.

(*e*) See s. lxxxix. and notes thereto.

(*f*) The Court unless restricted by this section might entertain the application after the time limited, but such indulgence will be rarely admitted: (see note *u* to s. lxxxix.) The time is "within the first four days of the term next after the *making of the award*." The time for moving to set aside awards under s. lxxxix., is "within the first *six* days" next following the *publication of the award to the parties*." Between these two modes of expression there is a distinction to be observed. The general rule is, that an award is published and made so soon as the arbitrator has made a complete award and is *functus officio*: (*Henfree* v. *Bromley*, 6 East. 309; *Macarthur* v. *Campbell*, 5 B. & Ad. 518,) and that no express notice of the award *to the parties* is necessary to impose the duty of obedience: (*Child* v. *Horton*, 2 Bulst. 143; *Gable* v. *Mago*, 1 Bulst. 144; *Bell* v. *Twentyman*, 1 Q. B. 766; 2 Saund. 62 (4); *Potter* v. *Newman*, 4 Dowl. P. C. 504; *Brooke* v. *Mitchell*, 6 M. & W. 473.) The words "publication of the award *to the parties*," as used in s. lxxxix., seem to be taken from Eng. St. 9 & 10 Will. III. c. 15: (Watson on Awards, 3rd Edn. 132,) and it appears to be considered that under that statute the time does not begin to run until the party has express notice of the award, (note *w* to s. lxxxix.) It is apprehended that under the section here annotated, *knowledge* of the award having been made would be sufficient notice, though there is certainly a conflict of authority: (see *Brook* v. *Mitchell*, 6 M. & W. 473; *Hemsworth* v. *Brian*, 7 M. & G. 1009; *Macarthur* v. *Campbell*, 5 B. & Ad. 518; *Musselbrook* v. *Dunkin*, 9 Bing. 605.) The distinction necessary to be observed is between the general rule under which the parties must *take* notice of the making of the award and the statute of Will. III., under which notice must be *given* to the parties.

(*g*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125 s. 18.—Founded upon 2d Rep. C. L. Comrs. s. 5.—Applied to County Courts. The change effected by this enactment is one that in the opinion of the Commissioners was necessary to the advancement of justice. The only objection to it is the possibility of a trial being unnecessarily prolonged. This may be averted by the conduct of counsel in the exercise of ordinary circumspection. It is intended that counsel in their opening speeches, conscious of a right of reply in any event, will when opening confine themselves to a brief statement of the case, and avoid as far as possible all observations hitherto made by way of anticipation.

(*h*) *Any cause. Qu.* Does this extend to criminal as well as civil cases? The word "cause" is generally used to mean a civil suit only. But its meaning as used throughout this Act is rendered doubtful, because some few sections are expressly restricted to Courts

Right of ad- begins, or his Counsel, (*i*) shall be allowed, in the event

of civil jurisdiction, whilst the greater number are not so restricted: (see s. clxxiv. and note *r* to s. clviii.) However, the whole tenor of this Act shows that it is intended to apply to civil procedure, unless where the contrary intention plainly appear. The context of the section under consideration points apparently to civil procedure only. "The party who begins," "his opponent," &c., and such like phrases show a relation to civil procedure. In the absence of express authority no positive opinion can be given upon the point suggested.

(*i*) The right to begin is not altered by this Act. The rule which before the Act obtained is still to be observed. It is that the party upon whom the burden of proof lies is the party entitled to begin: (*Rex.* v. *Yeates*, 1 C. & P. 323; *Fowler* v. *Coster*, 3 C. & P. 463; *Williams* v. *Thomas*, 4 C. & P. 234; *Lewis* v. *Wells*, 7 C. & P. 221.) The teste is this—what would be the consequence if no evidence were offered at all? If in such a case the verdict ought to be given for one party, it is manifest that something must be done by the other to prevent that consequence, and he who has to give evidence to prevent that result being against him must begin: (*Geach* v. *Ingall*, Alderson, B. 14 M. & W. 100.) Another teste is to consider—what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the right to begin lies on whichever party would fail if this step were taken: (*Millis* v. *Barber*, Alderson, B. 1 M. & W. 427.) To the rule that the party upon whom the *onus probandi* lies has the right to begin, there are a few exceptions, as in actions for libel, slander, and injuries to the person, in which cases plaintiff shall begin, though the affirmative issue be on defendant: (*Cannam et al.* v. *Farmer*, Parke B. 3 Ex, 698; see also *Mercer* v. *Whall*, 5 Q. B. 447, and the resolutions of the Judges reported in 5 Q. B. 462.) The *onus probandi* is governed by the following rules mentioned by Mr. Best in his work entitled "Right to Begin," to the end of some of which rules the Editor has appended the names of more recent cases:—

First—Generally the burden of proof lies on the party who asserts the affirmative on the record: (Best on "Right to Begin," 3; also *Collier* v. *Clarke*, 5 Q. B. 467; *Booth* v. *Millns*, 4 D. & L. 52.)

Secondly—The affirmative on the record means the affirmative in *substance* and not the affirmative in form: (Best, 5; also *Soward* v. *Leggatt*, 7 C. & P. 615; *Cannam* v. *Farmer*, 3 Ex. 698.)

Thirdly—If there be a presumption of law in favour of the pleading of either party, the *onus probandi* is cast upon his adversary, though he may thereby be called on to prove a negative: (Best, 12; also *Millis* v. *Barber*, 1 M. & W. 427; *Smith* v. *Martin*, 1 Dowl. N. S. 418; *Bingham* v. *Stanley*, 2 Q. B. 117; *Bailey* v. *Bidwell*, 13 M. & W. 73; *Robins* v. *Maidstone*, 4 Q.B. 811; *Elkin* v. *Janson*, 13 M. & W. 655; *Hogarth* v. *Penny*, 14 M. & W. 494; *Doe* v. *Whitehead*, 8 A. & E. 571; *Sutherland et al.* v. *Patterson*, M. T. 6 Vic. *M. S.* R. & H. Dig. "*Onus Probandi*," 7; *The King* v. *Nash*, Tay U. C. R. 259; *McKinnon* v. *Burrowes*, 3 O.S. 114; *Le Mesurier* v. *Willard*, 3 U. C. R. 285; *Doe d. Mackay* v. *Purdy et al*, 6 O.S. 144; *Neill et al.* v. *Leight*, 3 U. C. R. 70; *Doe d. Place* v. *Skae et al.* 4 U. C. R. 369; *Varey* v. *Muirhead*, Dra. Rep. 498; *McCollum* v. *Davis*, 8 U. C. R. 150; *Mair* v. *McLean*, 1 U.C. R. 455.)

Fourthly—When there are conflicting presumptions the *onus probandi* lies on the party who has in his favor the weakest presumption of the two: (Best, 22.)

Fifthly—If the case of a party rest on the proof of some particular fact, of the truth or falsehood of which he must from its very nature be peculiarly cognizant, the *onus* of proving the fact lies on him: (Best, 23; also

of his opponent not announcing, at the close of the case of the party who begins, his intention to adduce evidence, (*k*) to address the Jury a second time at the close of such case, for the purpose of summing up the evidence; (*l*) and the party on

dressing the Jury regulated.

R. v. Turner, 5 M. & S. 206; *Apothecaries Co.* v. *Bentley*, Bailey, J., R & M. 159.)

Sixthly—And this rule holds good, even though there be a presumption of law in favor of his pleading: (Best 23.)

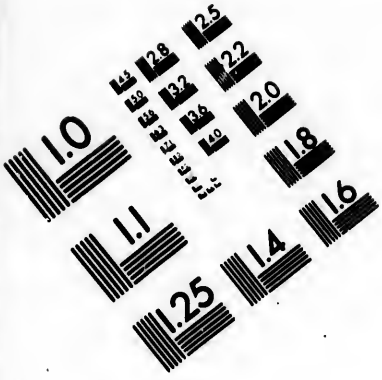
To enumerate and examine the exceptions to these rules, would extend beyond the limits proper to these notes; but reference may be made concerning them to Tay. Ev. 2 Edn. 319. It may be mentioned that after a thorough investigation an important qualification has been established, viz., in actions for damages, when the affirmative of the issue is on the defendant, the latter has the right to begin, provided no proof of the amount of damage sustained is incumbent on plaintiff: (*Mercer* v. *Whall*, 5 Q. B. 465.) If plaintiff is bound and intends to show the amount of damages sustained, he is entitled to begin, notwithstanding the affirmative of the issue is on defendant: (*Ib.* see also *Ashley* v. *Bates*, 4 D. & L. 33.) But if the affirmative of the issue is on defendant, and plaintiff's counsel will not undertake to offer proof of substantial damages, defendant has the right to begin: (*Chapman* v. *Rawson*, 8 Q. B. 678.)

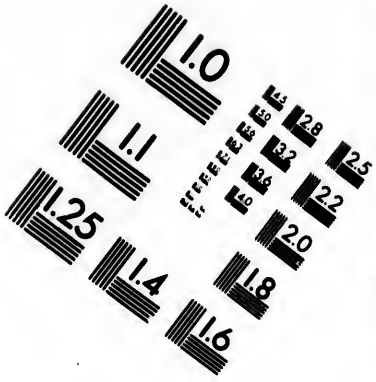
Whenever it is *clear* that a wrong has been done by the ruling of a Judge at Nisi Prius as to which party should begin, and that the *onus* of proof has been thereby placed on the wrong party the Court *in banc.* will interpose to correct the error. On the other hand, they will not interfere if the matter be at all doubtful: (*Huckman* v. *Fernie*, 3 M. & W. 505; *Geach et al.* v. *Ingall*, 14 M. & W. 95; *Ashby* v. *Bates*, 4 D. & L. 33; see also *Edwards* v. *Matthews*, 4 D. & L. 721; *Brandford* v. *Freeman*, 5 Ex. 734; *Doe Bather* v. *Brayne*, 5 C. B. 655; *Hamilton* v. *Davis et al*, 2 U. C. R. 137.)

With respect to arguments *in banc.*, it may be noted that where there are cross demurrers the practice is for the plaintiff to begin: (*Williams* v. *Jarman*, 18 M. & W. 128; *Hallhead* v. *Young*, 27 L. T. Rep. 100.)

(*k*) In a recent case where counsel did not announce his intention to adduce evidence in consequence of which the counsel who began summed up his evidence: held that the case was thereby closed, and that the former could not be allowed afterwards to alter his mind and to adduce evidence: (*Darby* v. *Ouseley*, 2 Jur. N. S. 497.) But where plaintiff's counsel opened the case and called his witnesses and then defendant's counsel addressed the jury and at the close of his address stated that he did not intend to call any witnesses for the defence; thereupon plaintiff's counsel rose to address the jury a second time: held at Nisi Prius under this section, that plaintiff's counsel had no right to reply after defendant's counsel had addressed the jury: (*Gibson* v. *the Toronto Roads Company*, Cobourg Fall Assizes, 1856, before Robinson, C. J., 3 U. C. L. J. 11)

(*l*) Before this Act the party who began a case was not entitled to a reply in cases where his adversary refrained from adducing evidence. Often his adversary to prevent him from having a reply intentionally omitted to call witnesses. In such cases the avowed object was to prevent the party who began from having the last word with the jury, and thereby producing the last impression upon them. The adversary having adduced no evidence, it was always ruled that inasmuch as there was no evidence for the party who began to comment upon, there was no necessity for a reply, and it was upon this ground denied. But when the adversary's counsel in his address to the jury stated facts without intending or attempting





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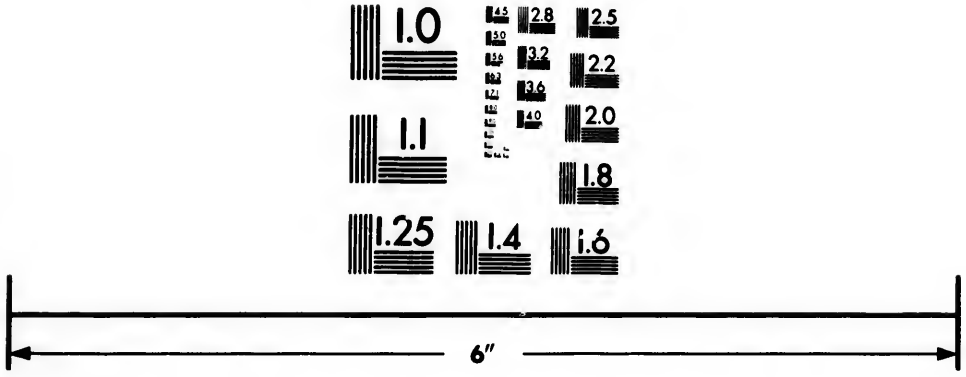

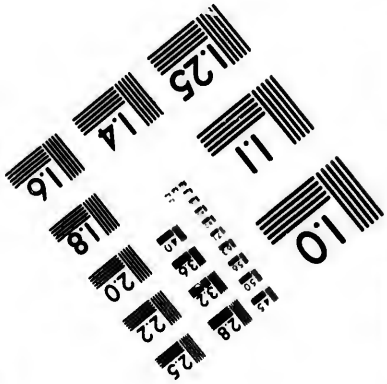

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the other side, or his Counsel, shall be allowed to open the case and also to sum up the evidence (if any), (*m*) and the right to reply (*n*) shall be the same as at present.

to prove them, it was understood that the presiding judge might, in his discretion, permit a reply: (*Crerar* v. *Sodo*, M. & M. 359; *Naish* v. *Brown*, 2 C. & K. 219.) Now, whether the opposing counsel does or does not adduce evidence or state facts without any intention to prove them is quite immaterial as regards the right to reply. The right of the party who begins to reply for the purpose of summing up the evidence which may be merely his own evidence or that adduced on both sides must be allowed in all cases, that is, in all cases where there is evidence to be summed up, which means evidence fit to be submitted to a jury. It is for the presiding judge, at the close of plaintiff's case if he be the party who began, to decide whether there is or is not such evidence. Hence, if his decision be in the negative, there is no evidence to sum up, and consequently no right to plaintiff's counsel to make a second address to the jury. To allow counsel to address the jury on the point as to whether there is evidence or not, would be to permit an appeal from the judge to the jury and would be manifestly improper. It would be wrong to allow counsel to argue at the judge through the jury: (*Hodges* v. *Ancrum et al*, 33 L. & Eq. 355. Platt, B., *dissentiente*.)

(*m*) Under the operation of this enactment there *may* be five speeches to a jury in every case, and if plaintiff make out a case at all there must be three at least: *Sed. qu.* (Thompson's C. L. P. Act, 1854, s. 18.)

(*n*) This means the general reply—that is, the opener's reply upon the whole case as before the jury. The old rule which is still the law is thus stated, "The counsel of the party which doth begin to maintain the issue whether of plaintiff or defendant ought to conclude: (Vin. Abr. "Evidence," S. a.) Plaintiff, if the party to begin, and there are several issues joined, some of which only are upon him, may do one of two things, either anticipating the defence to go into the whole case at once rebutting the anticipated defence as he proceeds, or content himself with establishing a *prima facie* case, reserving his evidence in reply till defendant has established his defence. If he adopt the former course he will not be allowed to add further evidence in reply: (*Browne* v. *Murray*, R. & M. 254.) If he adopt the latter mode and defendant besides impeaching the *prima facie* case, set up an entirely new case which plaintiff controverts by evidence; then defendant is entitled to a special reply to the evidence so produced, and plaintiff to the general reply upon the whole case: (*Meagoe* v. *Simmons*, 3 C. & P. 75.) Thus where in an action on a bill plaintiff's counsel made out a *prima facie* case, and the defendant's counsel proved usury, thereupon plaintiff called a witness in reply to deny the usury. The defendant's counsel was held entitled to address the jury upon plaintiff's evidence in reply, and plaintiff's counsel then to the general reply: (*Ib.*) Where there are several issues the *onus* of proving some of which lies on the plaintiff and others on the defendant, the practice is for plaintiff to begin, and prove such of the issues as are incumbent on him; the defendant then does the same on his side; afterwards the plaintiff is entitled to go into evidence to controvert the defendant's affirmative proofs; the defendant is then entitled to a special reply on the fresh evidence in support of his affirmative, and then plaintiff has a general reply: (Best, Right to Begin, &c., 101.) So where the opposing counsel in his address to the jury raises any point of law, or cites any case, the other side will be allowed to address the Court to the point of law or observe on the case cited without trenching on the facts in question, further than is ne-

CLVIII. (*o*) It shall be lawful (*p*) for the Court (*q*) or Judge at the trial of any cause, (*r*) where they or he may deem it right for the purposes of justice, (*s*) to order an adjourn-

(*App. Ch. C.*) Eng. C. L. P. A. 1854, s. 19. Power to adjourn the trial.

cessarily involved in the discussion of the point or case in question: (*Ib.*) It would seem that if there be only one issue on the record, and it lie upon plaintiff he cannot content himself with a *prima facie* case in the first instance, and after defendant has shaken it, call further evidence. He must put forth his whole evidence in the beginning: (*Jacobs* v. *Tarleton*, 11 Q.B.421; see also *Wright* v. *Wilcox*, 19 L.J.C.P.333.) Evidence in reply will not be allowed merely because it confirms the case of the party who began. It must be confined to rebutting the evidence adduced for the defence: (*R.* v. *Hilditch*, 5 C. & P. 299; *Browne* v. *Murray*, R. & M. 254; *Jacobs* v. *Tarleton*, *ubi supra.*) And yet it must be consistent with the original case: (*Whittingham* v. *Bloxam*, 4 C.& P.597.) It is for the presiding Judge to decide as to the admissibility of evidence offered in reply: (*Wright* v. *Wilcox*, 19 L. J. C. P. 333; see further *Doe* v. *Gosley*, 2 M. & R. 243; *Briggs* v. *Aynsworth*, 2 M. & R. 168; *Osborn* v. *Thompson*, 2 M. & R. 254.)

(*o*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 19.—Applied to County Courts.—Founded upon 2nd Rept. C. L. Com'rs., s. 6. The object of this enactment is to modify the rigorous inflexibility with which a cause commenced was carried on to its close: (*Ib.*)

(*p*) These words confer a power but do not impose an obligation. The context clearly shows that there is a discretion to be exercised when applications are made under this section. The provisions of the section are to be distinguished from the practice of putting off a trial—a step which precedes and defers the trial, whereas the adjournment is a step taken during the pendency of a trial, and delays its progress only during the time of the adjournment.

(*q*) *Court.*—Probably means the Court *in banc.* in trials at bar which are, however, of very rare occurrence. "It shall be lawful for the Court or Judge at the trial of any cause when *they* or *he* may deem it right, &c."

(*r*) *Any cause—Qu.* Does this section extend to criminal cases? The section of the Eng. C. L. P. Act, 1854, corresponding with the section under consideration, as well as the sections corresponding with ss. clix.–clxiv. of this Act, have by the English Legislature been declared to extend to every Court of *Civil* Judicature in England or Ireland. The maxim *expressio unius*, &c., would lead to the conclusion that the practice in Criminal Courts is not to be affected. The section may possibly be held to extend to criminal cases tried at bar or on the civil side of the Court under Nisi Prius records.

(*s*) The discretion to permit adjournments when it is deemed right for purposes of justice is a very wide one. It is one that can only be exercised with advantage by the judge presiding at the trial—he being conversant with the whole complexion of the case, must be the better able to arrive at a correct opinion as to the necessity for an adjournment. The adjournment when applied for after the commencement of a cause will generally be on some ground of surprise. The examples given by the Commissioners are cases where it happens that a party is taken by surprise by his adversary's case or where a witness or a document becomes unexpectedly necessary and is not forthcoming. One useful teste will be to consider whether the circumstances of the surprise are such that upon them the Court *in banc.* if applied to, would grant a new trial. It is probable that if either party be clearly wronged by the refusal of the Judge at Nisi Prius to grant an ad-

ment for such time (*t*) and subject to such terms and conditions, as to costs and otherwise, as they or he (*u*) may think fit.

(App. Co. C.) Eng. C. L. P. A. 1854, s. 22

How far a party may

CLIX. (*v*) A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, (*w*) but he may, in case the witness shall, in the opinion of the Judge, prove adverse, (*x*) contradict him by other evidence, (*y*)

journment, the Court above will grant a new trial: (see *Sainsbury* v. *Mathews*, 4 M. & W. 342;) but that unless in very clear cases the discretion of the judge when exercised upon the facts before him at the trial will not be interfered with.

(*t*) *Qu.*—Is it the intention that the adjournment may be from one assize to another as well as from one day to another? If from one assize to another then the case could not be both begun and ended before the same jury.

(*u*) See note *q*, *ante*.

(*v*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 22.—Founded upon 2d Rep. C. L. Comrs.—Applied to County Courts.—The origin of the enactment appears to be the New York Civil Code, ss. 1845-1848. And the enactment itself settles a question which for a long time has caused great difficulty in the English system of jurisprudence. The law, with attendant difficulties, as it stood before this Act, is thus put by the Commissioners: "It occasionally happens that a witness called by a party in a cause, under a belief that he will prove a certain fact, turns round upon the party calling him and proves directly the reverse. The party is of course not precluded from proving by other testimony what the witness has negatived: (see *Hardwell* v. *Jarman*, Bull N. P. 297; *Goodtitle* v. *Clayton*, 4 Burr 2224; *Bradley* v. *Ricardo*, 8 Bing. 57; *Friedlander* v. *London Assurance Co*, 4 B. & Ad. 193; *Palmer* v. *Trower*, 22 L. J. Ex. 32); but ought he to be allowed to discredit the witness by impeaching his veracity or credit by shewing that he has made previous statements at variance with the evidence he has given in the box? The decisions are conflicting; the weight of authority tends to establish the negative, while the weight of reason and argument appears to be decidedly in favour of the affirmative:" (2d Rept. s. 13.) The latter view has been supported by Starkie, Phillips, and Taylor, in their several Treatises on Evidence, and is the view adopted by the Legislature in this Act.

(*w*) There is reason and authority for this position. If the party producing a witness is prepared to give general evidence of bad character, why does he produce him at all? To produce a witness under such circumstances, if undisclosed, would be a fraud upon the Court and jury. The conduct of the party producing him would be most reprehensible. His object would be to keep secret the infamous character of the witness, so long as that witness served the purpose intended; but to expose him the moment he become intractable. A party producing such a witness should never be allowed to say at one moment that he is a man of good character, and at the next that he is quite the contrary. His veracity is endorsed by his production. His conduct is at the risk of the party producing him, who, if disappointed in his expectations, is justly punished for his attempted deceit: (see *Ewer et al* v. *Ambrose*, 3 B. & C. 746.)

(*x*) A reference to the presiding Judge is here intended. If in *his* opinion the witness prove adverse, then, &c. Adverse it is presumed as to some fact or facts relevant to the matter in issue.

(*y*) This he might do *indirectly* even before the C. L. P. Act. Where a witness called by either party stated

or by leave of the Judge, (*z*) prove that he has made at other times a statement inconsistent with his present testimony; (*a*) but before such last mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the

discredit his own witness.

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facts contrary to his case, it was allowable to call other witnesses to disprove such statements: (see note *v*, *ante*.)

(*z*) *Qu.* Will the Court *in banc.* interfere on an appeal from the Judge's decision? The Court may not feel at liberty to review the exercise of the judge's discretion by a direct appeal, but may, it is apprehended, do so indirectly, by granting new trials. If the Court be dissatisfied with the result of the trial and conceive that the course adopted by the presiding judge in combination with other circumstances has led to that result, they may think it expedient to relieve the party injuriously affected

(*a*) A good example, and the one commented upon by the Commissioners is involved in *Wright* v. *Beckett*, (1 M. & R. 414.) It was an action of trespass *quare cl. fr.* brought to try the question whether the plaintiff had exclusive right to the soil of a piece of land. His counsel adduced four witnesses, whose evidence established that he and his predecessors had exercised immemorial acts of ownership over it. He produced a fifth witness to prove the same fact; but this witness contradicted the previous witnesses. Thereupon the plaintiff's counsel asked him if he had not given a different account of the facts to plaintiff's attorney a few days before. The question was objected to but allowed to be put. The answer was evasive, whereupon plaintiff's counsel called plaintiff's attorney, and asked him whether the witness had upon the occasion referred to given him an account different to that given at the trial. This also was objected to, but allowed to be put. Afterwards a motion for a new trial was made upon the ground that the question ought not to have been allowed; but as the Court was equally divided no rule was granted: see also *R.* v. *Oldroyd*, R. & R. C. C. 88; *Dunn* v. *Aslett*, 2 M. & Rob.122.

The right to contradict witnesses under this section applies only to witnesses produced by a party, who, upon their examination in chief, prove adverse to the party producing them. When produced by the opposite party, the right to contradict them upon cross examination exists independently of this section: (see notes to s. clx. *infra*.) To contradict a witness does not necessarily mean to discredit him in the sense in which the latter word is commonly understood by lawyers. To contradict a witness, it must be shown that his testimony is relevant and that the point upon which his evidence is adverse is material. But to discredit him, that is, to prove his character bad, general evidence may be given of reputation wholly apart from the matter in issue: (s. clxii. note *o*.) The distinction and the reasons of the distinction are noticed in *Prescott* v. *Flinn*, 9 Bing.12; *Tenant* v. *Hamilton*, 7 Cl. & Fin. 122. In cross examining a witness for the purpose of testing his credit great caution is required. If the question put to him be relevant, his answer may be contradicted by independent evidence; but if irrelevant there can be, as a general rule, no contradiction, and his answer is conclusive: (see s. clx.) To admit evidence contradictory of irrelevant statements would lead to inextricable confusion by raising in a suit an endless series of collateral issues: (*Attorney General* v. *Hitchcock*, 1 Ex. 93.) Again, an adverse witness has no right on cross examination to make voluntary statements against the party examining him which he could not give in the examination in chief. Such statements if made, should upon application of the party prejudiced be ex-

particular occasion, (*b*) must be mentioned to the witness, and he must be asked whether or not he has made such statement.

(App. Co. C.) Eng. C. L. P. A. 1854, s. 23.

Proof of contradictory statements

CLX. (*c*) If a witness upon cross examination as to a former statement made by him relative to the subject matter of the cause, (*d*) and inconsistent with his present testimony, does not distinctly admit that he has made such statement,

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punged from the Judge's notes; otherwise the examining party will be bound by them as his own evidence and his opponent entitled to re-examine the witness upon such new or collateral matter: (*Blewett* v. *Tregonning*, 3 A. & E. 554.)

(*b*) As time, place, &c., and other circumstances calculated to refresh the memory of the witness in such a manner as to prepare him for the consequences of mis-statement. The object of laying a foundation for the admission of contradictory evidence is more particularly to enable the witness to explain his previous statement. For this purpose, and for this purpose only, it is apprehended that the witness may be asked whether he ever made such previous statement, and at the same time may be mentioned to him the name of the person to whom or in whose presence he is supposed to have made it: (see *Crowley* v. *Page*, 7 C. & P. 791.) It must be in the knowledge and experience of every man that a slight hint or suggestion of some particular matter connected with a subject, puts the faculties of the mind in motion, and raises up in the memory a long train of ideas connected with that subject, which until that hint or suggestion was given were wholly absent from it. For this reason the proof that at a time past a witness has spoken on any subject does not lead to a legitimate conclusion that such witness, at the time of his examination, had that subject present to his memory. To allow the proof of his former conversation to be adduced without first interrogating him as to that conversation and reminding him of it, would in many cases have an unfair effect upon him and upon his credit, and would deprive him of that reasonable protection, which it is the duty of the Court to afford to every person who appears as a witness: (*The Queen's Case*, Abbott, C. J., 2 B. & B. 300.)

(*c*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 23.—Founded upon 2d Rep. C. L. Com. s. 14.—Applied to County Courts. This enactment sets at rest doubts caused by a conflict of authorities.

(*d*) That is, a statement made at any time previous to his examination in chief, but in reference to the subject matter of the cause. The latter words deserve especial attention. A witness cannot be contradicted as to *any* statement provided it be in *anyway* connected with the subject matter before the jury. Contradiction if allowed on every pretence would involve inextricable confusion by the production of innumerable collateral issues not at all affecting the merits of the cause. The limitation sought to be imposed would appear to be to allow contradiction as to statements not purely collateral. What statements are collateral—what not? In *Attorney General* v. *Hitchcock*, (1 Ex. 100,) Pollock, C. B., observed, "that the statement must be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which if answered in a particular way would contradict a part of the witness's testimony; and if it is neither the one nor the other of these, it is collateral to, though it may be in some sense *connected with*, the subject of inquiry." Now no matter is capable of being distinctly given in evidence that is not relevant to the subject matter in issue,

proof (*e*) may be given that he did in fact make it; (*f*) but before such proof can be given, the circumstances of the sup- by adverse witness.

and this is a principle which extends to the several sections here annotated, with perhaps only one exception, mentioned in note *a* to preceding section: (clix.) The question as to what evidence is relevant to the subject matter at issue of course must depend upon the nature of the cause and the issues raised. Reference may be had to the following cases: *Gilbert* v. *Gooderham*, 6 U. C. C. P. 39; *Calder* v. *Rutherford*, 3 B. & B. 302; *Hey* v. *Moorhouse*, 6 Bing. N. C. 52; *Buckhouse* v. *Jones*, 6 Bing. N. C. 65; *Rowe* v. *Brenton*, 8 B. & C. 758; *Tyrwhitt* v. *Wynne*, 2 B. & A. 54; *Watts* v. *Lyons*, 6 M. & G. 1047; *Gerish* v. *Chartier*, 14 L. J. C. P. 84; *Smithurst* v. *Taylor*, 14 L. J. Ex. 86; *Murray* v. *Gregory*, 19 L. J. 355; *Alcock* v. *Royal Exchange Assurance Co.* 18 L. J. Q. B. 121; *Daines* v. *Hartley*, 3 Ex. 200; *Berry* v. *Alderman*, 13 C. B. 674.)

(*e*) Two things are essential to the admissibility of proof as to a previous statement, first, that it be relevant to the subject matter of the cause, and, secondly, that it be inconsistent with the testimony of the witness at the trial.

(*f*) Of course if the witness admit the previous statement, there will be no necessity to give other evidence of it. If he deny it, evidence to prove it may be given independently of this section. But if he say he does not recollect, and so neither distinctly admit nor deny, then under this enactment the previous statement may be proved by independent evidence. Before this Act the right to do so was doubtful: (see *Pain* v. *Beeston*, 1 M. & Rob. 20; *Crowley* v. *Page*, 7 C. & P. 791; *Long* v. *Hitchcock*, 9 C. & P. 619.) The statement meant appears to be a verbal one, as previous written statements are provided for by the next section (clxi). In applying this section to practice it must be remembered that immediately after asking the witness whether he made any previous statement or representation inconsistent with his present testimony, he should be asked whether he made the statement in writing or by parol: (*The Queen's Case*, 2 B. & B. 292.) If a witness in chief on the part of the plaintiff being asked whether he remembers a quarrel taking place between A. and B., answer that he has heard of a quarrel between them but does not know the cause of it, and such witness is not asked upon his cross examination whether he has or has not made a declaration touching the cause of the quarrel, the counsel for the defendant cannot, in order to prove such witness's knowledge of the cause of the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration to him touching the cause of such quarrel: (*Ib.* 299.) So if he answer that he does not remember it, and is not asked on his cross examination whether he has or not made a declaration respecting such quarrel, the counsel for the defendant cannot, in order to prove that such witness must remember the quarrel, afterwards examine a witness to prove that the other witness has made such a declaration: (*Ib.*) If a witness in support of a prosecution has been examined in chief, and has not been asked on cross examination as to any declaration made by him or acts done by him to procure persons corruptly to give evidence in support of the prosecution, it is not competent to the accused to examine witnesses in his defence to prove such declaration or acts without first calling back such witness in chief to be examined as to the fact whether he ever made such declaration or did such acts: (*Ib* 311.) If a witness is called on the part of the plaintiff or prosecutor, and give evidence against the defendant or accused, and if after cross examination the defendant's or accused's counsel discover that the witness so examined has corrupted or endeavoured to corrupt another person to give false tes-

posed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement. (*g*)

(App. Co. C.) Eng. C. L. P. A. 1854, s. 24.

Cross-examination as to previous statements in writing.

CLXI. (*h*) A witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, (*i*) relative to the subject matter of the cause, (*j*) without such writing being shown to him; (*k*) but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so con-

timony, in such case the counsel for the defendant or accused is not permitted to give evidence of such corrupt act of such witness, without calling him back: (*Ib.*) Where in an action against a company for work done, plaintiff proved by a witness that the directors had at a certain meeting employed him to do it, and the witness was afterwards asked in cross examination whether the chairman had not told the plaintiff on that occasion that whatever he did must be at the risk of himself and others, and that the Company could not pay him, which the witness denied, and defendant having called another witness to contradict him in that respect, it was held that plaintiff might give evidence in reply by way of rebuttal: (*Cope* v. *The Thames Haven & Dock Co.* 12 Jur. 923.)

(*g*) See note *b* to previous section clix.

(*h*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 24—Applied to County Courts.—Founded upon 2d Rep. C. L. Comrs. s. 15. The object of this enactment is to reverse a rule laid down in the Queen's Case (2 B. & B. 286), and condemned by the Commissioners.

(*i*) As to parol statements under similar circumstances see preceding section (clx.)

(*j*) As to these words see note *d* to preceding section.

(*k*) The old rule grounded upon the principle that the best evidence of the contents of a writing is the writing itself, that the best evidence ought to be produced, and that the Court ought to be put in possession of the whole document, in some cases worked unreasonably. The rule was not questioned where the object of the examining counsel was to establish the contents of a written document as a fact material to the merits of a cause. But when the object was merely to test the memory of the witness or to discredit him, the application of the rule though supported by authority, was much doubted by eminent lawyers. Lord Brougham more than once declared that the rule as applied to the latter case could not be defended; but was founded on a gross fallacy. Upon one occasion he thus forcibly expressed himself: "If I wish to put a witness's memory to the test, I am not allowed to examine him as to the contents of a letter or other paper which he has written. I must put the document into his hands before I ask him any questions upon it; though by so doing he at once becomes acquainted with its contents, and so defeats the object of my inquiry. Neither am I in like manner allowed to apply the test to his veracity; and yet how can a better means be found of sifting a person's credit, supposing his memory to be good, than examining him to the contents of a letter written by him and which he believes to be lost?" (Speech on Law Reform, Brougham's Speeches, II. 447.) The reasoning contained in this speech has triumphed. *Macdonell* v. *Evans et al*, 11

tradicting him; (*l*) Provided always, that it shall be competent for the Judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit. (*m*)

Proviso: Judge may require production of the writing, &c.

CLXII. (*n*) A witness may be questioned as to whether he has been convicted of any felony or misdemeanor, (*o*) and upon being so questioned, if he either denies the fact or refuses to answer, (*p*) it shall be lawful for the opposite party to prove

(Imp. Ca. C. Eng. C. L. P. A. 1854, s. 25.)

Proof of previous conviction of a wit-

C.B. 930; and other similar cases, so far as relating to this point are no longer law.

(*l*) This is a limitation engrafted upon the rule enacted in the first part of the section. The reasons upholding the limitation will be found explained in note *b* to s. clix. If the witness wholly deny the document itself or any statement in it, the production of the document would, it is apprehended, be considered fresh evidence, and as evidence produced by the party cross-examining. Should this be the case, then the opposite party would be entitled to re-examine. The question how far evidence produced is to be deemed fresh evidence so as to entitle an adversary to re-examine, is not affected by this section. Where a witness for plaintiff swore that he had never heard of a certain agreement in writing and it was thereupon put into his hands, and he was then asked by defendant's counsel if he had ever seen any agreement respecting the matter, to which he replied, "Never before I came into Court," held that defendant wishing to have it read could only do so by putting it in as his own evidence: (*Keys* v. *Harwood*, 15 L. J. C. P. 207.)

(*m*) To prevent abuse of the facilities given by the former part of this section, this proviso is superadded. Several doubts present themselves upon the construction of the proviso, which may be found discussed in Tay. Ev. 2 Edn. ss. 1301, *et seq.*

(*n*) Taken from Eng. Stat. 17 & 18 Vic, cap. 125, s. 25—Applied to County Courts. Apparently founded upon 2d Rep. C. L. Comrs. s. 16, but goes much further than recommended by the Commissioners.

(*o*) It was proposed by the Commissioners that only questions impeaching the witness's character or standing should be put, with the consequences of denial here enacted, when such questions related to "perjury or any other form of *crimen falsi*." It will be perceived that by virtue of this enactment the questions may be put as to previous convictions for *any* felony or misdemeanor. A denial will let in the proof in contradiction of which the mode is in this section described. In any event the questions authorized to be put are such only as have a tendency to affect the character or credit of witnesses: (Tay. Ev. 2 Edn. ss. 1293, *et seq.*) As such in many cases they may be wholly irrelevant to the subject matter of the cause, and in fact the exception to the general rule mentioned in note *a* to s. clix. Questions tending to degrade the character of the witness by imputing to him misconduct not amounting to legal criminality remain as before the Act: (Tay. Ev. 2 Edn. ss. 1313 *et seq.*; *Reg.* v. *Garbett*, 2 C. & K. 474; *Fisher* v. *Ronalds*, 22 L.J. C.P. 63; *Osborne* v. *London Dock Co*, 24 L. J. Ex. 140.)

(*p*) A witness so interrogated has before him one of three courses:—to admit the crime; deny it; or refuse to answer. If he admit, there will be no necessity for further proceedings to establish it. If he

ness may be given if he denies it on being asked as he may be.

such conviction, (*q*) and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, (*r*) purporting (*s*) to be signed by the Clerk of the Court or other officer having the custody of the records of the Court where the offender was convicted, (*t*) or by the Deputy of such Clerk or Officer (for which certificate a fee of *five shillings* and no more shall be demanded or taken), shall upon proof of the identity of the persons (*u*) be sufficient evidence of the said conviction, (*v*) without proof of the signature or official character of the person appearing to have signed the same. (*w*)

What shall be sufficient proof.

(*App. Co. C.*) Eng. C. L. P. A. 1854, s. 26.

CLXIII. (*x*) It shall not be necessary to prove by the

deny it or refuse to answer, proceedings may be had under this section. No witness can be *excluded* on the ground of crime (16 Vic. cap. 19), but proof of crime may lessen the value of his testimony when admitted. If his testimony be opposed to that of another witness of unblemished character, the question of veracity can be the better estimated by the jury when the character of each witness is fully before them.

(*q*) No man can be said to have been convicted unless the judgment of the Court upon the indictment against him has been pronounced: (see *Rex* v. *Bridger*, 1 M. & W. 145; *Reg.* v. *Whitehead*, 2 Moo. C. C. 181; *Burgess* v. *Boetefeur*, 7 M. & G. 481. See further note *r*, *infra*.)

(*r*) This enactment as to the contents of the certificate is substantially the same as Prov. St. 4 & 5 Vic. cap. 24, s. 27, taken from Eng. St. 7 & 8 Geo. IV. cap. 28, s. 11. And under the latter, a certificate from a clerk of assize setting forth that the prisoner was "tried and convicted" of felony, but not showing that any judgment had been given on the conviction, was held insufficient: (*Reg.* v. *Ackroyd et al.*, 1 C. & K. 158; see further *Burgess* v. *Boetefeur*, *ubi supra*.) At one time the conviction could only be proved by the production of the record of conviction: (*Mc-donnell* v. *Evans et al.*, Creswell, J. 11 C. B. 930.)

(*s*) *Purporting.* The exact meaning to be attached to this word may be gathered from the concluding part of the section, to the effect that the certificate may be produced "without proof of the signature or official character of the person appearing to have signed the same." And this dispensing with proof of signature and official character appears to be a feature which does not prevail in 4 & 5 Vic. cap. 24, s. 27, already noticed (note *r*).

(*t*) This means an officer of the Court where the offender was convicted *or* an officer having the custody of the records of that Court. A certificate from the Clerk of the Crown as to convictions at Courts of Oyer and Terminer and General Gaol Delivery, or from Clerks of the Peace as to convictions at Quarter Sessions would be sufficient.

(*u*) The identity must of course be proved by evidence *aliunde* the certificate. The Clerk who saw the prisoner sentenced or the goaler who had him in custody under the sentence might be called for the purpose.

(*v*) See note *q*, *ante*.

(*w*) See note *s*, *ante*.

(*x*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 26. — Applied to County Courts.—Founded upon 2nd Rep. C. L. Comrs. s. 18.

attesting witness, (*y*) any instrument to the validity of which attestation is not requisite, (*z*) and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto.

Attesting witness need not be called where none was required by law.

(*y*) *i. e.* Proof by the subscribing witness may be made, but shall not be necessary; other modes, if more convenient, may with respect to the writings embraced within this enactment be adopted.

(*z*) The object of this enactment is to qualify the rule "that before an attested document can be received in evidence, the attesting witness or witnesses must be called, or his or their absence accounted for:" (*Cussons* v. *Skinner*, 11 M. & W. 161; *Doe d. McDonald* v. *Twigg et al.* 5 U. C. R. 167; *Bennett* v. *McDonald*, *MS.* E. T. 3 Vic. R. & H. Dig. "Evidence," v. 2; *Tylden* v. *Bullen*, 3 U. C. R. 10; *Fishmongers' Company* v. *Dimsdale*, 12 C. B. 557.) Some documents are often unnecessarily attested. Attestation at common law is unnecessary It is only requisite when made so by some statute, rule of Court, power, or other act passed or made by public bodies or private individua shaving authority to impose the obligation. Such for example, wills under the Eng. St. of Car. II. as amended by our 4 Wm. IV. cap. 1, s. 51; memorials to deeds under our 9 Vic. cap. 34; or appointments to be made in the presence of witnesses, as prescribed in the power creating the right to appoint. But no law makes attestation necessary to the validity of a promissory note or bill of exchange. These and such like documents might be proved with much less expense than by the production of a subscribing witness, whose residence may be difficult to find, or, if found, far from the place of the trial, and who, if produced, in all probability will only be able to speak as to his signature but not as to the circumstances under which the writing was signed. It is now enacted that any instrument, though attested, to the validity of which attestation is not requisite may be proved "by admission or otherwise as if there had been no attesting witness." But even before this Act in an action on an attested promissory note, it was considered repugnant to reason to hold it indispensable to produce the subscribing witness, when the defendant had admitted his signature, under circumstances which precluded him from disputing the note: (*Perry* v. *Lawless*, 5 U. C. R. 514.) Nor was it necessary to call the subscribing witness when the document was proved by secondary evidence, for instance, the production of a copy: (*Poole* v. *Warren*, 8 A. & E. 582.) And it was held where a party refused to produce a deed at a trial, and a copy of it was in consequence duly proved, that the party could not afterwards exclude the copy by producing the original, and requiring it to be proved by the attesting witness: (*Edmonds* v. *Challis*, 6 D. & L. 581.) The test in every case will be—is this document one that requires attestation to make it a valid instrument? It is a question whether an attorney who attests a document (cognovit or warrant of attorney, N. R. 26, or satisfaction piece, N. R. 58) by direction of the Court can be considered an attesting witness within the principle of the cases: (see *Bailey* v. *Bidwell*, 2 D. & L. 245; *Streeter* v. *Bartlett*, 5 C. B. 562; *Pocock* v. *Pickering*, 21 L. J. Q. B. 315.) The principal documents which must still be proved by calling the attesting witnesses are enumerated in Tay. Ev. 2 Edn. ss. 1637, *et seq.* It is doubtful whether a deed can in an *ex parte* case be legally proved except by the subscribing witness when it is attested. In a recent case it was said by Vice-Chancellar Kindersley that it could not be. (*In re Reay*, 1 Jur. N. S. 222), but Mr. Taylor pronounces the decision in this case to be a

(App. Co. C.) Eng. C. L. P. A. 1854, s. 27. Comparison of disputed

CLXIV. (*a*) Comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, (*b*) shall be permitted to be made by witnesses; (*c*) and such writings and the evidence of witnesses respecting the same,

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mischievous doctrine, and hopes that it will not become established law: (Tay. Ev. 2 Edn. s. 1640.)

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 27. — Applied to County Courts.—Founded upon 2nd Rep. C. L. Comrs. s. 19. Before this Act whenever the genuineness of a writing was in dispute, it was not allowable to put in evidence other writings by the same party admitted or proved to be genuine for purposes of comparison when the latter were not directly connected with the subject matter of the cause. A witness might speak from previously having seen the party write, or from having received writings from him, the genuineness of which there was no reason to doubt, but could not at the trial compare any such writing with the one in dispute, so as to pronounce an opinion upon the genuineness of the latter.

(*b*) For convenience of expression the writing here mentioned may be described as the "standard." Before admission it must be "proved to the satisfaction of the *Judge* to be genuine. The mode of proof, it is understood, must be legal proof. The "standard" may be and in most cases will be collateral to the issues between the parties, and as a foundation for future evidence must be established to be genuine. In the case of *Moss* v. *Truscott*, which was tried at the Warwick Summer Assizes, 1856, before the late Chief Justice of the Common Pleas, it was proposed to put in, for the purpose of comparison only, certain documents which were not admitted to be in the handwriting of the defendant. The learned Judge observed that he and not the jury must try in the first instance the collateral question whether those documents were genuine, and he observed that practically the effect would be to leave the whole question to him without the jury. The result was that only such documents as were admitted to be genuine were used for the purpose of comparison: (*Markham's* C. L. P. Act, p. 122.)

(*c*) The reasons that prompted the Commissioners to recommend the changes carried into effect by this section are thus given—"It seems to us indefensible in principle to allow a witness to institute a comparison with the *recollection* of writings which he may have seen long ago, and of which but a faint trace may remain on his mind, and yet to prohibit a fresh comparison with genuine writings, more especially when for the purpose of trying the accuracy of the witness, it is proposed to try the test of requiring his judgment on writing *which is not disputed*. Still less defensible in our view is it to leave the jury to act on the judgment of a witness, who after all can only form that judgment on a comparison of the disputed writing with others, and yet to deny the jury the opportunity of forming their own judgment on the same materials." The real change wrought by this Act is to allow the "standard" to be substantially produced in Court instead of being ideal as formerly. And being produced, proved, and admitted, it is as much tributary to the judgment of the jurors as of the witness. The general wording of the section under consideration may perhaps be held to admit of the production of *experts*, or men whose business it is to compare styles and character of writing, and who in consequence are skilled in that science, if such it may be termed. This description of testimony may, at least, it is conceived, be received as rebutting evidence. All evidence of handwriting, except when the witness sees the document written, is in its nature comparison. It is the belief which a wit-

may be submitted to the Court and Jury, (*d*) as evidence of the genuineness or otherwise of the writing in dispute. writing with genuine.

ness entertains upon comparing the writing in question either with an exemplar in his mind, derived from some previous knowledge, or from an exemplar exhibited to him when testifying. As to the first part, the knowledge of the proposition may have been acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and periods and other circumstances under which the witness has seen the party write: (*Garrells* v. *Alexander*, 4 Esp. 37; *Powell* v. *Ford*, 2 Stark, N. P. C. 164; *Lewis* v. *Sapio*, M. & M. 39); or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which in the ordinary course of transactions induces a reasonable presumption that the letters or documents were the handwriting of the party: (*Ferrers* v. *Shirley*, Fitz. 195; Buller's *Nisi Prius*; *Carey* v. *Pitt*, Peake, Add. Ca. 130; *Tharpe* v. *Gisburne*, 2 C. & P. 21; *Harrington* v. *Fry*, R. & M. 90); evidence of the identity of the party of course being added *aliunde* if the witness be not personally acquainted with him. These were the only two modes of acquiring a knowledge of handwriting which have hitherto been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting: (*Rex* v. *Cator*, 4 Esp. 117; *Doe d. Mudd* v. *Suckamore*, 5 A. & E. 703; *Fitzwalter Peerage Case*, 10 Cl. & Fin. 193; see also *Griffiths* v. *Ivery*, 11 A. & E. 322, *Hughes* v. *Rogers*, 8 M. & W. 125; *Young* v. *Honner*, 2 M. & R. 536.) But as to the second part of the proposition above stated and that which now constitutes a third mode. It is by satisfying the witness by some information or evidence that a written paper is in the handwriting of the party, and then desiring him to study that paper, so as to refresh his knowledge of the handwriting of the party, and fix an exemplar in his mind, and asking his belief respecting it, or perhaps (*sed qu.*) by merely putting certain papers into the witness's hands, without telling him who wrote them, and desiring him to study them and *acquire* a knowledge of the handwriting, and afterwards showing him the writing in dispute and asking his belief whether they are written by the same person: (*Doe d. Mudd* v. *Suckermore*, 5 A. & E. 703.) In an action for a libel charging the plaintiff with having in a letter published a libel on the defendant, to which the defendant pleaded in justification that the plaintiff did in fact publish the libel in question, and it appeared that in the libel thus alleged to have been written by the plaintiff, the name of the defendant was spelt in a peculiar way: Held, in order to prove that the plaintiff wrote the libel, other documents written by him in which the name was so spelt were receivable in evidence: (*Brooke* v. *Titchborne*, 5 Ex. 929.)

(*d*) That proof of handwriting may be submitted to the consideration of a jury, like every other species of evidence, is abundantly clear. From the highest degree of certainty, carrying with it perfect assurance and conviction to the lowest degree of probability upon which it is found to be unsafe to act, it may be and constantly is so submitted: (*Doe d. Mudd* v. *Suckermore*, Williams, J. 5 A. & E. 719.) The writings or "standards" collaterally

Admission of Documents. And with respect to the admission of Documents; (*e*) Be it enacted as follows:

con stat by ue. ch 22 § 198

(*App. Co. C.*) Eng. C. L. P. A.1852,s.117. CLXV. (*f*) Either party may (*g*) call upon the other party, by notice, (*h*) to admit any Document, (*i*) saving all just ex-

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introduce and the evidence of witnesses respecting the same may now both be submitted to the jury. It is for them to exercise an independent judgment upon the testimony of the witnesses, and by a process of reasoning in many respects similar to that of the witnesses, but in view of the whole case submitted of a much more extended and comprehensive character.

(*e*) The law contained in the following enactments is one that has prevailed in Upper Canada for years. Its operation is by deliberate admission made before trial to dispense with the more formal and expensive mode of proving the documents in question. The object being to save expense, each party having an opportunity of preventing, by timely admissions, the cost of proving the documents proposed to be given in evidence against him. The practice is one of a most salutary nature, and in its application should rather be extended than restricted. Both in England and in Upper Canada there have been rules of Court in substance the same as the enactments of this Act. (Rules U.C. 5 & 6 of T. T. 3 & 4 Wm. IV. Cam. R. 7, copied from Eng. Rules 6 & 7 of H. T. 2 Wm. IV. 3 B. & Ad. 392; and Rule U. C. 28 of E. T. 5 Vic.; Cam. R. 32, copied from Eng. Rule 20 of H. T. 4 Wm. IV. 5 B. & Ad. xvii.) One feature of the following enactments is the omission of all mention of either summons or order made necessary by the former practice, and the rendering the notice to admit in itself as effectual as an order. Another feature is the proof of admissions and notices to produce by affidavit, instead of by oral testimony as heretofore: (ss. clxvi., clxvii.) thus effecting a considerable saving of expense in the costs of a suit.

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 117. — Applied to County Courts.—Founded upon 1st Rept. C. L. Comrs., s. 72.

(*g*) *i.e.* In all cases of trials, assessment, or inquisitions *of any kind*, either party may, &c.: (N. R. 30.)

(*h*) A party calling upon his adversary to admit documents must serve the ordinary notice to admit and proceed as directed in N. Rs. 29 and 30: (*Anon.* Chambers, Sept. 22d, 1856, Burns, J.) The notice must be served a reasonable time before trial: (*Tynn* v. *Billingsley*, 3 Dowl. P. C. 810, and see the form prescribed in N. R. 29.)

(*i*) *Any document.* The rule of practice extends to every document which the party proposes to adduce in evidence, and is not confined to documents in his custody or control: (*Rutter* v. *Chapman*, 8 M. & W. 388.) The fact of the document not being in his possession works no hardship upon his adversary, because in order to obviate any mischief or hardship arising from the difficulty of access to it, the Judge at the trial has power to say that the document is not one which the party ought reasonably to be called upon to admit: (*Ib.* per Parke B.) In one case, on plaintiff paying to defendant the expenses of examining a foreign judgment and other documents abroad, an order was made for the defendant to pay the expenses of proving them at the trial (such proof having been satisfactory to the Judge, and so certified by him): (*Smith* v. *Bird et al.* 3 Dowl. P.C. 641.) The practice as to giving notice has been held to be imperative and to apply to all cases, whether the document proposed to be given in evidence was put in issue on the record or not: (*Spencer* v. *Barough*, 9 M. & W. 425; but see note *p*, *infra*.) The fact that the opposite party had in positive terms refused to make any admission was held not in the least to dispense with the necessity of serving the notice: (*Ib.*) But the old rules were held neither to apply to a case where ancient records of a public nature re-

ceptions, (*j*) and in case of refusal or neglect to admit, (*k*) the costs of proving the Document shall be paid by the party so

Calling on parties to

quired not proof but explanation and translation: (*Bastard* v. *Smith et al.* 10 A. & E. 213), nor to original affidavits in the Court of Chancery, which could only be produced by an officer of that Court: (*l b.*)

(*j*) The object of an admission under this section is to dispense with the production of an attesting or other witness, acquainted with the handwriting to be proved. The party called upon to admit sees the document, and does so for the purpose of ascertaining whether there is any ground of objection to it. If he perceive an interlineation, either he objects then, or it must be taken that he dishonestly declines to do so; for in the absence of objection his opponent will not produce the attesting witness, who might be able to explain the interlineation. An admission therefore so far recognises the general character and accuracy of the document, that no objection can afterwards be made to its reception on the ground of interlineation: (*Freeman* v. *Steggall*, 13 Jur. 1030; see also *Poole* v. *Palmer*, C. & Marsh, 69.) The party when served with a notice to admit may inspect if he chooses. If he make the admission, whether he inspect or not, he must bear the consequences. His consent is an admission that there is such a document as that in the notice described: (*Doe d. Wright* v. *Smith*, 8 A. & E. 555.) And in some cases it may be an admission of facts mentioned in the description of the document, for instance, acceptance of a bill when described as accepted by A. B. &c.: (*Wilkes* v. *Hopkins*, 1 C.B. 737; *Chaplin* v. *Levy*, 9 Ex. 531.) However, recent authority seems to militate with this position: (*Pilgrim* v. *Southampton Railway Company*, 8 C. B.25.) Admissions inadvertently made may in certain cases be withdrawn by Judge's order obtained for that purpose: (*Ellon* v. *Larkins*, 5 C. & P. 385); but a mere notice of withdrawal served upon the opposite party is not sufficient: (*Doe* v. *Bird*, 7 C. & P. 6.) When a party is called upon to admit a copy, it involves the power of seeing that *it is* a copy, that is, of seeing the original: (*Rutter* v. *Chapman*, Alderson, B., 8 M. & W. 391.) But an admission of a copy cannot under any circumstances be taken as an admission of the original, and whether the notice do or do not in such a case contain a saving of all just exceptions, the admission of the copy will not entitle plaintiff to put in the copy without first accounting for the original: (*Sharpe* v. *Lamb*, 11 A. & E. 805. See also *Goldie* v. *Shuttleworth*, 1 Camp. 70.) Neither does the admission obviate the necessity of producing the document admitted at the trial: (see *Vane* v. *Whittington*, 2 Dowl. N. S. 757; *Leslie* v. *Leahy*, 5 U.C.O.S.487.) The admission when made is conclusive: (*Langley* v. *The Earl of Oxford*, 1 M. & W. 508.) And when made for any one trial continues to be so for any future trial: (*Ellon* v. *Larkins*, 5 C.& P.385; *Doe Wetherall* v. *Bird*, 7 C.& P.6; see also *Hope* v. *Beadon*, 2 L. M. & P. 593.) A variance in the description of a document not of a nature to mislead, will clearly not release the party who makes an admission from his obligation: (*Field* v. *Flemming*, 5 Dowl. P. C. 450; *Bittleston* v. *Cooper*, 14 M. & W. 399.) It does not appear to be necessary to identify the document produced at the trial with the one admitted: (*Doe* v. *Smith*, 8 A. & E. 265, Coleridge, J.) But prudence will generally dictate the propriety of being prepared with such proof, or at least of having the documents that are to be produced, signed or marked by the party who made the admission: (see *Clay* v. *Thackrah*, 9 C. & P. 47; *Doe d. Tindal* v. *Roe*, 5 Dowl. P. C. 420.)

(*k*) To determine when the party neglects or refuses to admit it is manifest that there must be as regards time, some limit within which the ad-

admit Documents.

neglecting or refusing, (*l*) whatever the result of the cause may be, (*m*) unless at the trial the Judge shall certify that the refusal to admit was reasonable; (*n*) and no costs of proving any Document shall be allowed unless such notice be given, (*o*) except in cases where the omission to give the notice is, in the opinion of the Taxing Officer, a saving of expense. (*p*)

(App. Ch. C.) Eng. C. L. P. A. 1852, s. 118.

Evidence of admissions.

CLXVI. (*q*) An affidavit of the Attorney in the cause, (*r*) or his clerk, (*s*) of the due signature of any admissions made in pursuance of such notice, (*t*) and annexed to such affidavit,

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mission must be made. No limit is specified in this Act. Before the Act the limit was forty-eight hours, which as a convenient period in ordinary cases, it is presumed will be adhered to. The submission may be signed by the attorney or by his managing clerk: (see *Taylor* v. *Willans*, 2 B. & Ad. 845.)

(*l*) Not, it would seem, if the witness called to prove the document in his testimony in chief give evidence on any other fact than the genuineness of the document: (*Straeey* v. *Blake*, 7 C. & P. 404.)

(*m*) If the party neglect or refuse to admit, he must pay the costs though the verdict obtained be set aside, and though before the second trial the admission be made: (*Lewis* v. *Howell*, 6 A. & E. 769.)

(*n*) To entitle either party to the costs of proving a document under the old practice, even after notice, refusal to admit and order, it was necessary for the judge to certify that he was satisfied with the evidence. Now it is the rule that the costs shall be paid, "unless the judge certify that the refusal to admit was reasonable." If the document be one inadmissible in evidence, it stands to reason that no costs can be allowed: (*Phillips* v. *Harris*, Car. & M. 492.)

(*o*) So held in *Goldstone* v. *Tovey*, 6 Bing. N. C. 274.

(*p*) The exceptions thus created may, in some respects, moderate the rigor of the old practice, which made it imperative in every case of a written document, whether denied on the record or not, to give the notice before being entitled to costs. How far in such cases the omission to give the notice can be risked with safety, must be determined as actual cases arise for decision.

(*q*) Taken from Eng. St. 15 & 16 Vic. cap. 76, s. 118.—Applied to County Courts.

(*r*) *Qu.* If after admission there has been a change of the attorney who witnessed the signature of the admission, would he not still be competent to make the affidavit here contemplated? It is only reasonable that he should be.

(*s*) *i. e.* Some clerk connected with the attorney's office, whose duty it is to attend to the business of the office, and who is himself personally cognizant of the particular fact to be proved.

(*t*) The admission may be either as to the whole of the documents specified in the notice or only as to part. In either case it may be indorsed on the notice. In the first case if indorsed it may be in this form: "I hereby make the admissions of the documents specified in the within notice as thereby required, saving all just exceptions." In the second case if indorsed it may be thus: "I hereby make the admissions of the documents marked numbers 1, 2, 3, 6, &c., specified in the within notice as required therein, saving all just exceptions." The admission if not indorsed but written on a separate piece of paper, ought to be intitled in the Court and cause.

(*u*) shall be in all cases sufficient evidence of such admissions. (*v*)

CLXVII. (*w*) An affidavit of the Attorney in the cause, (*x*) or his Clerk, (*y*) of the service of any notice to produce, (*z*) in respect to which notice to admit shall have been given, (*a*) and of the time when it was served, with a copy of such notice to produce, annexed to such affidavit, (*b*) shall be sufficient

(App. Co. C.) Eng. C. L. P. A. 1852, s. 119.

Evidence of service of notice to produce.

(*u*) The affidavit may be to the effect that on &c., A. B. &c., then and still being attorney for the defendant in the cause, did in the presence of deponent sign the admissions annexed and that the name A. B., set and subscribed to the admissions, is of the proper handwriting of the said A. B., and that the admissions were made in pursuance of the notice annexed, upon which the admissions are indorsed. As to affidavits generally, see notes to s. xxii., page 41 of this work.

(*v*) In a case where defendant objected to the proof of admissions which had in fact been made, and plaintiff was in consequence non-suited, a new trial was granted, on the ground of breach of faith, with costs to be paid by defendant: (*Doe Tindal* v. *Roe*, 5 Dowl. P. C. 420.)

(*w*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76 s. 119—Applied to County Courts.

(*x*) See note *r* to preceding section.

(*y*) See note *s* to preceding section.

(*z*) It is usual to serve a notice to produce, whenever it is sought to adduce in evidence a document in the hands of the adverse party. The notice is required in order to give the opposite party a sufficient opportunity to produce the document at the trial, and thereby secure, if he pleases, the best evidence of its contents. If he neglect after such notice to produce it, then the party who served the notice may give secondary evidence of the contents: (see *Dwyer* v. *Collins*, 7 Ex. 639.) The ordinary notice, though served for a particular assize, is good for subsequent assizes without renewal: (*Hope* v. *Beadon*, 2 L. M. & P. 593.) It may be in form as follows:—Take notice that you are hereby required to produce to the Court and jury on the trial of this cause (*here specify the particular documents*), and all other documents, letters, books, papers, or writings whatsoever, containing an entry, memorandum, or minute, or other matter in anywise relating to the matters in question in this cause.—It must be served a reasonable time before trial. The question as to what is a reasonable time, seems to rest with the Judge of assize: (see *James* v. *Mills*, 4 U. C. R. 366; *McRae* v. *Osborne et al*, E. T. 7 Vic. *MS.* R. & H. Dig. "Notice to Produce," 5; *Robertson* v. *Boulton*, *Ib.* same title, 6.) For further information as to the necessity for notice to produce its form and service, reference may be made to Tay. Ev. 2 Edn. ss. 410, *et seq.* and other treatises on Evidence in general use.

(*a*) *i.e.* Under s. clxv. This section impliedly sanctions the rule that a notice to produce served before a notice to admit, is such a document as may be specified in the latter, and be followed with all the consequences attending notice to admit when given as to ordinary documents.

(*b*) The affidavit may be to the effect, 1. That deponent did on, &c., between the hours of, &c., serve A. B., &c., with a notice to produce, a true copy of which is annexed, marked A., by delivering the same to, &c.; 2. That deponent did, pursuant to s. clxv. of the C. L. P. Act, 1856, serve (*here state service of notice to admit*) a true copy of which is annexed, marked B; 3. That the notice to produce mentioned and referred to in the notice to admit,

evidence of the service of the original of such notice, (*c*) and of the time when it was served.

Rules for new trials, &c.

And with respect to rules for new trials or to enter a verdict or non-suit; (*d*) Be it enacted as follows:

(*App. Cb. C.*) Eng. C. L. P. A. 1854, s. 38.

CLXVIII. (*e*) In every rule nisi for a new trial or to enter a verdict or non-suit, (*f*) the grounds upon which such rule

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is the notice to produce, a copy of which is annexed, marked A, as aforesaid. As to affidavits generally, see notes to s. xxii. page 41 of this work.

(*c*) *Qu.* Can an affidavit be received in proof of the service of a notice to admit?

(*d*) The practice as to rules for new trials, or to enter verdicts or nonsuits is altered by the following section. It is now necessary to state in the rule *nisi* the grounds upon which the rule is granted. This is new in Upper Canada. It is the adaptation of this mode of procedure like others to the English practice; but in England the alteration was made with a view to appeals under the operation of Eng. C. L. P. A., 1854, ss. 33-43 inclusive. These sections enact that if a rule nisi for a new trial, &c., be refused or granted, and then discharged or made absolute, the party decided against may appeal. The statement of the grounds upon which the rule was obtained is intended to facilitate the appeal. None of the sections authorizing such an appeal have been embodied in our C. L. P. A. And appeals in Upper Canada can only be made from the "judgment" of either of the Superior Courts: (12 Vic. cap. 63, s. 40.) By the word "judgments" is meant not simply the notes or written opinions of individual judges when granting or refusing an application, but the "Record" of the Court and *quoad* that Court the final determination of the action. Still the change effected by this Act, may be in itself beneficial in Upper Canada, though the cause which mainly originated it does not exist here. It will be a great saving of trouble to the party called upon to show cause to be informed without reference to papers filed, the grounds taken by his adversary. Motions either for a new trial or to enter a verdict or nonsuit, can only be made in that Court in which the suit has been commenced and carried down to trial. So points, if reserved at the trial, can only be reserved for the same Court: (see *Vansittart* v. *Taylor*, Jervis, C. J., 4 El. & B. 910.) And in all such cases the opinion or judgment of that Court is final: (*Hughes* v. *Lumley*, 4 El. & B. 358.) One mode of appeal to a different Court may be through the instrumentality of a bill of exceptions, which now as well as formerly may be tendered to the presiding judge and which he is obliged to sign and seal: (Stat. 13 Edw. I. c. 31.) But this is a mode of procedure which, except in cases of great importance is never adopted. For all ordinary cases motions for new trials, &c., have superseded it: (*Bernasconi* v. *Farebrother*, 3 B. & Ad. 372.)

(*e*) The first part of this section is taken from Eng. St. 17 & 18 Vic. cap. 125, s. 33, founded upon 2nd Rept. C. L. Comrs., s. 25, and the remaining part from same Statute s. 44, founded upon same Rept. s. 27. The section is applied to County Courts.

(*f*) Generally if the motion be for a nonsuit the Court will not grant a new trial: (*Wilkins* v. *Bromhead*, 6 M. & G. 963, Maule, J.) If the verdict be in favor of one of several defendants and against the others, and the latter apply to set it aside, the rule must call upon the successful defendants as well as the plaintiff to show cause: (*Belcher* v. *Magney et al*, 3 D. & L. 70.) The Court has no power to grant a new trial to one of several defendants upon his ap-

shall have been granted shall be shortly stated therein; (*g*) [provided that in case of any omission, the Court may permit the rule to be amended and served again on such terms as shall be deemed reasonable;] (*h*) and when a new trial is

Ground to be stated in rule *nisi* for new trial.

Proviso:

plication only when a verdict has been found in favor of the others unless they assent or be made parties to the rule: (*Doe d. Dudgeon* v. *Martin*, 2 D. & L. 678; *The Queen* v. *Gompertz et al*, 9 Q. B. 824.) *Qu.*—Where a sole defendant has a verdict upon two issues, each of which goes to the whole cause of action, and the verdict upon one of these issues is unsatisfactory, will the Court, at the instance of the plaintiff, grant a new trial upon the whole record, and thereby avoid the verdict on the other issues? (*Baxter* v. *Nurse*, 6 M. & G. 935.) New trials will not be granted merely on the extreme right of the party applying, but only to advance the substantial ends of justice: (*Brown* v. *Street*, 1 U. C. R. 124; *Doe d. Graham* v. *Edmondson*, *Ib.* 265; see also *Nevils* v. *Wilcox*, Tay. U.C.R. 358; *Honeyman* v. *Lewis*, 23 L. J. Ex. 204:) and will not be granted when an expensive litigation would be protracted about a trifling matter: (*Petrie* v. *Taylor*, 3 U. C. R. 457.) Where a fact in issue has been already determined by a jury, a new trial will not be granted upon affidavits disclosing additional evidence, unless it be clearly shown that the opposite party has set up a case of fraud or perjury: (*Pistrucci* v. *Turner*, 28 L.T.Rep.104.) The party moving will in general be restricted to objections taken by him at Nisi Prius: (*Hall* v. *Shannon*, E. T. 2 Vic. *MS.* R. & H. Dig., "New Trial," XI. 5; *Manners* v. *Boulton*, M.T. 7 Vic. *MS. Ib.* same title, 7; *Doe d. Monnough et al* v. *Maybee*, 2 U.C. R. 389.) Time for motions see N. Rs. 40 *et seq.* To entitle plaintiff to move to set aside a nonsuit and enter a verdict for himself, it must be shown that he obtained leave for that purpose from the judge at *Nisi Prius*: (*Treacher* v. *Hinton*, 4 B. & A. 413.) And instead of entering a verdict for him, the Court may in its discretion grant a new trial: (*Doe d. Wyatt* v. *Stagg*, 5 Bing. N. C. 564; *Higgins* v. *Nichols*, 7 Dowl. P. C. 551; *Wilkins* v. *Bromhead*, 7 Scott N. R. 921.) So to entitle a party to enter a nonsuit, leave at Nisi Prius is necessary: (*Minchin* v. *Clement*, 1 B. & A. 252; *Rickets* v. *Burman*, 4 Dowl. P. C. 578.) Where leave is reserved at Nisi Prius to move to enter a verdict, if the Court should be of opinion that there was evidence to go to the jury in support of an issue, reasonable evidence to maintain the issue is meant, and not evidence which would merely lead to conjecture: (*Reid* v. *Hoskins*, 26 L. T. Rep. 149; *Avery* v. *Bowden*, *Ib.* 119; *Avery* v. *Bowden*, 28 L. T. Rep. 145.) There is a distinction between the cases of "a point reserved," and "a bill of exceptions," where, if there be a *scintilla* of evidence, and the case was not left or desired to be left to the jury, a *venire de no novo* must be granted: (*Ib.*)

(*g*) The grounds must be *specifically* stated in the rule. It will be insufficient to state merely "on grounds set forth in affidavits filed:" (*Drayson et al* v. *Andrews*, 10 Ex. 472.) The practice in this respect is made to resemble that of moving to set aside awards: (N. R. 141,) a practice which has existed in Upper Canada from a very early period: (Rule 3 E. T. 6 Geo. IV. Cam.R. 3; also *Grand River Navigation Co.* v. *McDougall et al*, 1 U. C. R. 255.) As to the sufficiency of statement of grounds of objection in cases of awards see Chit. Arch. 8 Edn. 1505.

(*h*) The proviso introduced into this section as to amendment, and placed within brackets, seems to be original; but independently of it the Courts have jurisdiction to amend. Where a rule stated that it was granted "on the grounds disclosed in affidavits filed,"

Court may allow amendment. Costs.

granted on the ground that the verdict is against evidence, the costs of the first trial shall abide the event, unless the Court shall otherwise order.[2](i)

And with respect to procuring affidavits from unwilling persons, and the production of documents generally, and also for the discovery of documents and other matters from the parties to a cause: (j) Be it enacted as follows:

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the Court permitted an amendment by striking out those words, and inserting "that since the trial of this cause the plaintiffs have discovered new and material evidence of a partnership between, &c.:" (*Drayson et al* v. *Andrews*, 19 Ex. 473, note *b*.) It will be prudent to state the grounds fully in the first instance. The Courts are not inclined to grant fresh rules *nisi* containing grounds omitted in the former rules: (*Roberson* v. *Barker*, 2 Dowl. P. C. 89; *Cowne* v. *Garment*, 1 Bing. N. C. 318.)

(i) This provision applies where a wrong has been done through the fault of the jury. It does not extend to cases where a new trial is granted on fresh matter disclosed by affidavits. In such a case the party who succeeds on the rule should pay the costs of his affidavits in any event: (*Abbott* v. *Bull*, 29 L. & Eq. 481.) Interpleader issues appear to come within the meaning of the provision: (*Janes* v. *Whitebread*, 2 L. M. & P. 407.) In cases not coming within the scope of it, as a general rule the costs of the first trial will not be allowed to the party who failed upon it, though he succeed in the second: (N.R. 44.) *Semble*. The enactment is prospective: (*Jenkins* v. *Betham*, 15 C. B. 168.)

(j) The leading steps of an action from summons to verdict having been disposed of, the Act now proceeds to lay down rules for incidental proceedings. Of these the most important because the most common are proceedings by affidavit. In order to satisfy a legal tribunal of the truth or falsity of a fact in dispute, there are two modes in ordinary use, first, affidavits, second, oral testimony. Hitherto the former was almost the only mode allowable in the discussion of incidental proceedings. Whereas the latter was almost the only mode at the trial of an action. To the former many causes of objection have been found to exist, which cannot be urged against the latter. The party who makes an affidavit is not before the Court, the grounds of his belief are not canvassed, his circumstances and character usually unknown, and yet wanting these necessary aids to the discovery of truth, affidavits have been received as absolute testimony. And this was not all. Two other grave and striking objections forced themselves upon the attention of the Commissioners. The Courts not only refused to try disputed questions of fact on affidavit, but actually restricted the party moving to the particulars disclosed in the affidavits filed when he made his motion. This rule placed the party moving entirely at the mercy of an unscrupulous opponent. While the former was tied up the latter had the advantage of swearing last, a privilege that might be and often was abused. Whether from accident or design the result was too often the defeat of truth and the triumph of falsehood. Cases, too, occurred in which the truth was kept back because no person other than an officer of the Court was compellable to give evidence by affidavit. In such cases the effect of a bribe or a threat was strong enough to neutralize the most just applications. To remedy these defects in our judicial system it is enacted in ss. clxix.–clxxxi. following, amongst other things, that depo-

CLXIX. (*k*) Upon motions founded upon affidavits, (*l*) it shall be lawful for either party, with leave (*m*) of the Court or a Judge, (*n*) to make affidavits in answer to the affidavits of the opposite party, (*o*) upon any new matter (*p*) arising out of

(App. Ot. C.) Eng. C. L. P. A. 1854, s. 45.

Affidavits on new matter in answer to affidavits.

nents and other witnesses may be orally examined, that necessary documents may be produced, that property may be inspected, that affidavits in answer to fresh matter may be received, that unwilling witnesses may be compelled to testify, that interrogatories may be administered to either party in the cause, and that discovery may be made of documents in the possession of either when relating to the matter in dispute. These changes have been effected in consequence of the suggestion of the C. L. Comrs. in their 2d Rept ss. 28-42 inclusive.

(*k*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 45. — Applied to County Courts. — Founded upon 2d Rep. C. L. Comrs. s. 30.

(*l*) *Upon motions*, &c. The use of the words "Court or a Judge" in this section, and of "rule or order" in s. clxii. seems to show an intention that the word "motions" shall apply to applications before a single Judge as well as to the full Court. But see the words "motion *or* summons" as used in s. clxx.

(*m*) *With leave, i. e.*, without leave the practice shall be as before the passing of this Act.

(*n*) *Court or a Judge, i.e.* of the Court when motions are made in Court, and of a Judge when motions are made before a Judge. *Qu.* Can there be an appeal from the decision of a Judge in Chambers who declines to receive affidavits in answer to what the party tendering them considers to be fresh evidence? The next following section speaks of "their or his discretion," words which in general exclude a direct appeal from a Judge to full Court, when the former has exercised his discretion. There does not appear to be in this section anything that can be held to prevent a party whose application to a Judge in Chambers has been dismissed from appealing to the full Court in cases where before this Act he might have done so: see *Tilt* v. *Dickson*, 4 C. B. 736; *Peterson* v. *Davis*, 6 C. B. 235; *Ilderton* v. *Burt*, *Ib.* 433; *Hawkins* v. *Akrill*, 14 Jur. 1060; *Dodgson* v. *Scott*, 6 D. & L. 27; see also note *m* to xxxvii.

(*o*) The practice in England under the section which corresponds with this is in a most unsettled state. The three Superior Courts differ as to the time when and the manner in which applications should be made. In the Queen's Bench it appears to have been ruled that a party wishing to file affidavits in answer to new matter must make a substantive motion: (so assumed in *Wood* v. *Cox*, 16 C. B. 494.) In the Common Pleas there has been a distinct refusal to adopt this construction of the Act: (*Wood* v. *Cox*, *ubi supra*); and an opinion was by that Court intimated that the proper mode of carrying the Act into effect must be by an exercise of discretion upon a rule coming on for argument: (*Simpson* v. *Sadd*, 15 C. B. 760 note *b*; see also *Hayne* v. *Robertson*. 16 C. B. 554.) The Queen's Bench and Common Pleas thus differing in opinion, a hope was expressed that the Exchequer, if the question should arise before it, would settle the practice. Afterwards the question did arise before the Court of Exchequer, and Martin, B. said "we cannot lay down any rule on the subject; every case must depend on its own circumstances;" and Pollock, C. B.: "It may turn out that a man who comes with materials sufficient for a rule in the first instance, is met by an ambiguous answer, he may desire to answer that, and one of the benefits of the enactment is that he may do so:" (*Pritchard* v. *Leech*, 2 Jur. N. S. 475.) Thus the matter stands. As a general rule in our Courts the affidavits in

such affidavits, (*q*) subject to all such rules as shall hereafter be made respecting such affidavits. (*r*)

Eng. C. L. P. A. 1854, s. 46.

CLXX. (*s*) Upon the hearing (*t*) of any motion or Summons, (*u*) it shall be lawful for the Court or a Judge, at their

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answer should be shown to the party moving before argument. If thereupon the latter desire to file affidavits in reply he may upon a substantive application obtain leave to do so, and in fact do so before the case comes on to be heard. It is, however, in the discretion of the Court or Judge to grant such leave at the time of argument, and in consequence defer further discussion until some future day.

(*p*) To define by rule what shall be considered "new matter" is quite impossible. Each application must stand or fall upon the circumstances of the case.

(*q*) *Arising out of such affidavits, i.e.* the affidavits of the *opposite* party. The effect of the enactment is only to permit affidavits to be filed in *reply* to affidavits made in *answer* to affidavits first filed by the party seeking to reply. Wherever before this Act a thing might be done as of course upon affidavit, for instance, arrest on a *capias* for debt it is presumed that now no more than formerly will there be any right to deny the material facts on affidavit, for example, the debt or intention to abscond in the case of the *capias:* (*Copeland* v. *Child*, 22 L. J. Q. B. 279; see further *Blewitt* v. *Gordon*, 1 Dowl. N. S. 815.)

(*r*) In consequence of the difference of opinion in England (*ante* note *o*) some general rule is very much needed. None such has been yet made either in England or Upper Canada.

(*s*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 46.—Not applied to County Courts; but as to these Courts there is a similar provision: (Co. C. P. Act, s. 16.) The powers, contained in this section, are such as can only be exercised under it. They are not in any manner exercisable as incident to the jurisdiction of the Court at common law. See the *Queen* v. *The Inhabitants of Upton St. Leonard's*, 10 Q. B. 835.

(*t*) *Upon the hearing, &c.* These words lead to the opinion that no substantive motion is intended. The mode of procedure in view is evidently this —a rule or summons having been obtained is before the Court or a Judge for a hearing. The Court or Judge may require either explanation of affidavits filed or proof additional thereto. This may consist either of the production of documents or of witnesses, with reference to a subject matter under hearing: (*Cockerell* v. *The Van Diemen's Land Co.*, 16 C. B. 255.) The section points out modes of securing evidence for the information of the Court or a Judge, and *not* of the parties. The parties are enabled to obtain similar evidence under ss. clxxvi and cxciii. of this Act. *Qu.* Does this section extend to criminal proceedings? s. clxxiv. is expressly restricted to civil actions or other civil proceedings.

(*u*) "Motion *or* summons." The word motion is here used to embrace applications to the Court, which may not be, strictly speaking, for rules. In other sections "motion" seems to express either a proceeding *in banc.* or before a Judge: (s. clxix.) The powers of the Court and a Judge in Chambers appear to be concurrent. Where an application of a pressing nature for the examination of a witness *in extremis* was not made to a judge in Chambers, because as alleged no order could be there obtained in the first instance but was made directly to the Court for a rule absolute in the first instance the Court said whatever power they had was also vested in the Judge at Chambers, and recommended the application to be made there: (*Thomas* v. *Baron Von Stullerheim*, 28 L. T. Rep. 64.)

or his discretion, (*v*) and upon such terms as they or he shall think reasonable, from time to time (*w*) to order such documents as they or he may think fit to be produced, (*x*) and such witnesses, as they or he may think necessary, to appear and be examined *viva voce*, (*y*) either before such Court or Judge, (*z*) [or before a Judge of any County Court, (*a*) or before any Clerk (*b*) or Deputy Clerk of the Crown], (*c*) and upon hearing such evidence or reading the report (*d*) of the Judge of the County Court, or Clerk or Deputy Clerk of the Crown, to make such rule or order as may be just. (*e*)

Court or Judge may, on hearing any motion or summons, order the production of documents or oral evidence.

(*v*) *Their or his discretion.* A Judge's discretion exercised in cases within his jurisdiction cannot generally be appealed from: (see *Woolmer* v. *Devereux*, 2 M. & G. 758; *Shaw* v. *Holmes*, 3 C. B. 952; see further note *m* to s. xxxvii.)

(*w*) *From time to time.* These words taken in connection with "by such rule or order, or any subsequent rule or order, command, &c.," in the next succeeding section, indicate an intention to allow documents or witnesses to be called for as often as thought necessary during a hearing.

(*x*) Where on showing cause against a rule obtained by a plaintiff to rescind a Judge's order, which directed the Master to review his taxation, it was objected on the part of the defendant that there were no materials before the Court to show what the taxation had been, the defendant's counsel saying he had an answer on the merits, the Court allowed the Master's allocatur to be produced at once without imposing any terms: (*Ashcroft* v. *Foulkes*, 2 Jur. N.S. 448.) Considering the practice authorised by this section as being more for the information of the Court than of the parties, it may be that documents in the possession of either party, though privileged as against his opponent, might be ordered for the purposes of this section to be produced: (see *Wood* v. *Morewood*, 9 Dowl. P. C. 44; *Coates* v. *Birch*, 2 Q. B. 252.)

(*y*) The examination of witnesses is to be *viva voce;* but beyond this as to the proceedings upon an examination no information is given: (see *Cockerell* v. *Van Diemen's Land Co.*, 16 C. B. 286; 32 L. & Eq. 358.) Whether there will be the right to cross-examine and re-examine is not decided. It is presumed that the right exists. "Examined" must mean more than "questioned by one side." It is not clear whether the strict rules of evidence as to leading questions, &c., are applicable. The process for wilful disobedience is attachment: (see s. clxxi.)

(*z*) *i. e.* The Court or Judge before whom the hearing is pending.

(*a*) The Judge intended is, it is presumed, the Judge of the County in which the action is instituted.

(*b*) *i.e.* Either of the Queen's Bench or Common Pleas, according as the action has been commenced in one or other of these Courts.

(*c*) The words in brackets are substituted for the words "before the Master," in the Eng. C. L. P. Act, 1854.

(*d*) *i.e.* Upon *hearing* the evidence when the witnesses have been examined in the presence of the Court or Judge, or upon reading the report when the examination has taken place before one of the officers named.

(*e*) The rule or order to be made in the manner directed by s. clxxi. and to have the effect therein enacted.

Con stat for u.c.o.h 22 § 185-186-

(App. Co. C.) Eng. C. L. P. A. 1854, s. 47.

Power to compel attendance of witnesses or production of documents in such cases.

CLXXI. (*f*) The Court or Judge (*g*) may by such rule or order, (*h*) or by any subsequent rule or order, (*i*) command the attendance of the witnesses named therein for the purpose of being examined, (*j*) or the production of any writings or other documents to be mentioned in such rule or order (*k*) and may direct the attendance of any such witness to be at his own place of abode, (*l*) or elsewhere if necessary or convenient so to do; (*m*) and the wilful disobedience of any such rule or order shall be a contempt of Court, and proceedings may be thereupon had by attachment (the Judge's order being made a rule of Court before or at the time of the applicaation for an attachment) if in addition to the service of the rule or order, an appointment of the time and place of attendance in obedience thereto, signed by the person or persons appointed to take the examination, or by one or more of such persons, shall be also served together

(*f*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 47.—Applied to County Courts.

(*g*) See note *n* to s. clxix. and further note *m* to s. xxxvii.

(*h*) *i. e.* Any rule or order obtainable under the preceding section.

(*i*.) *i. e.* At any future time during the hearing mentioned in s. clxx..

(*j*) *i. e.* Either before the Court or a Judge or before any one of the officers mentioned in the preceding section. This section is, if possible, less explicit as to the mode of examination than the preceding. There it is directed that the examination may be *viva voce*. But neither there nor here is it declared whether in other respects as to cross examination of witnesses, &c., the practice shall be like that of proceedings at Nisi Prius. It may be a question whether the right to cross-examine can exist in cases within these sections in the absence of express provision in the rule or order authorizing the examintion: see *Hargrave* v. *Hargrave*, 5 D. & L. 151; see further *Follett* v. *Delany*, 7 C. B. 775; *Greville* v. *Slultz*, 11 Q. B. 997; *Nicol* v. *Alison*, *Ib.* 1006; *Simms* v. *Henderson*, *Ib.* 1015.)

(*k*) See note *x* to preceding section. It is enacted in the Eng. C. L. P. A., that the rule or order when obtained shall be proceeded upon in the same manner as a rule of Court granted under Eng. St. 1 Wm. IV. cap. 22, a statute not in force in Upper Canada.

(*l*) *At his own place of abode.*—*Qu.* Do the words "his own" relate to the abode of the witness or of the judge? The more immediate antecedent of "his" is "such witness." This part of the section is copied from Eng St. 1 Wm. IV. cap. 22.

(*m*) The examination may be either before the Court or Judge, *or* the Judge of a County Court *or* any Clerk or Deputy Clerk of the Crown: (s. clxx.) The word "elsewhere," may mean the office of one or other of the above named functionaries who alone are empowered to examine. But the words "if necessary and convenient," give to the word "elsewhere" a more extensive signification. In the case of a sick witness an examination at his house might certainly be both necessary and convenient. And *qu.* Can "elsewhere" be held to extend to examinations to be taken without the jurisdiction of the Courts? The penalty for disobedience by attachment seems to negative such a construction, although the Eng. Act of 1 Wm. IV., expressly

with or after the service of such rule or order; (*n*) Provided always, that every person whose attendance shall be so required, shall be entitled to the like payment for attendance and expences as if he been subpœnaed to attend upon a trial; (*o*) Provided also that no person shall be compelled to produce under any such rule or order any writing or other document that he would not be compelable to produce at a trial of the cause; (*p*) Provided lastly, that it shall be lawful for the Court or judge, or person appointed to take the examination, to adjourn the same from time to time as occasion may require. (*q*)

Proviso.

Proviso.

Proviso.

CLXXII. (*r*) Either party shall be at liberty to apply to the Court or a Judge for a rule or order for the inspection by the

admits of examinations abroad. As to witnesses abroad a commission to examine them, issued pursuant to 2 Geo. IV. cap. 1, s. 17, would be the more correct course of proceeding, and unquestionably the one more free from doubt. The Courts have not power to issue these commissions in suits to which the Crown is a party: (*Reg.* v. *Wood*, 7 M. & W. 571; *Attorney General* v. *Bovet*, 15 M. & W. 61.)

(*n*) This part of the section declaring in what manner witnesses shall be punished for disobedience is substantially the same as 1 Wm. IV. cap. 22, s. 5, as to which see Chit. Arch. 8 Edn. 312 *et seq.*, 1516 *et seq.*

(*o*) As to which see Chit. Arch. 8 Edn. 328 *et seq.* If conduct money be given to the witness with the appointment, and he afterwards and before he has done anything in relation to his attendance at the place appointed, receive notice not to attend, the conduct money may, it seems, be recovered back from him: (*Martin* v. *Andrews*, 28 L. T. Rep. 122.

(*p*) As to which see Chit. Arch. 8 Edn. 332 *et seq.*

(*q*) This proviso is from Eng. C. L. P. A. 1854, s. 47. As nothing specific is enacted as to the mode of procedure upon examinations to be had under this section in cases of doubt the rule or order to be made should prescribe the mode: see *McCombie* v. *Anton*, 6 M. & G. 27; *Scott* v. *Van Sandau*, 8 Jur. 114; *Williamson* v. *Page*, 3 D. & L. 147; see further Chit. Arch. 8 Edn. 317 *et seq.* Witnesses when attending, it is apprehended, would be entitled to the privileges of witnesses attending a trial: (note *s* to s. xxiii.,) or an arbitration: (note *f* to s. lxxxvii.)

(*r*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 58. — Applied to County Courts. — Founded upon 2d Rep. C. L. Comrs., s. 42. The first degree of evidence, and that which though open to error and misconception, is obviously most satisfactory to the mind, is afforded by our senses: (Tay. Ev. 2 Edn. s. 498.) In certain cases from an early period either party to a suit was allowed to obtain a view by a jury, the view to be of the "place in question." The origin of the practice is not traceable to any Statute of which we have an account. But the frequency of applications having been found to be an abuse which tended much to the hindrance of justice, the legislature in the course of time endeavoured to circumscribe the practice. One source of abuse was a rule which made it necessary for a cause to be entered for trial before a view could be had. Another, was that the applica-

Inspection of real or

Jury or by himself or by his witnesses of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute, and it shall be lawful

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tions when made at the trial were granted, as of course, without inquiry. These causes combined, and attended with the difficulty of procuring the attendance of the necessary viewers at a future trial, had the effect in many cases of rendering unavoidable, repeated and vexatious postponements of a trial. The remedy applied was that of Stat. 4 & 5 Anne cap. 16, s. 8, which empowered the Courts to grant a view *previous* to the trial, and then only when *proper and necessary*: (1 Burr. 253.) The view being authorized the next inquiry is the manner in which it shall be conducted. This was made to depend upon Eng. St. 8 Geo. II. cap. 25, s. 14, of which our Stat. U.C. 34 Geo. III. cap. 1, s. 14, is a copy. Writs of *venire*, *facias*, and *distringas* were, upon application, issued to the sheriff or other person appointed commanding him to have six or more of the jurors named in the writs or in the panel annexed thereto at the "place in question," to view it at some convenient time before the trial. In every case where a view had been authorised there were two classes of jurors, from which conjointly the jury chosen to try the cause was selected. The first was that class who had their appointment under the special *venire facias* and *distringas*, already noticed. The second, all such jurors as were balloted for at the trial in open Court. The composition of the jury to try the cause was in this manner—Six or more of the jurors who had acted as viewers being in attendance at the trial, were first sworn and then only so many more were added to them from jurors drawn in Court so as in the whole to make the number twelve. The twelve thus chosen were *the* jury sworn to try the cause. In the working of this practice under the Stat. of Geo. II., owing to non-attendance of viewers and other causes not necessary to be mentioned, some dissatisfaction was experienced. However, the great cause of mischief was an opinion which prevailed that the six viewers whose attendance was necessary should be six or more of the first twelve named upon the panel and that in the event of their neglect to attend no trial could take place. The endless delays which arose out of such a construction can well be conceived. Whatever ground might have existed for this opinion at one time, there can be none at the present day. It is enacted "that when a view shall have been allowed, those men who shall have had the view, or *such of them* as shall appear upon the jury to try the issue shall be first sworn," &c.: (13 & 14 Vic. cap. 55, s. 52, taken from Eng. St. 6 Geo. IV. cap. 50, s. 23.) It may be mentioned that the mode of obtaining a view is now regulated by ss. 50 and 51 of 13 and 14 Vic. cap. 55, which for all the purposes of a view by a jury is still the law. The changes effected in the law by the present Act are first, as to the cases in which a view or inspection may be procured, and secondly, the persons by whom it may be had. From the use of the words, "the place in question," in all the former statutes, it was decided that views could be obtained only in proceedings of a local nature, such as trespass *qu. cl. fr.*, nuisances, and the like: (*Stones* v. *Menham*, 2 Ex. 382.) The right of inspection is now extended to "any real or personal property, the inspection of which may be material to the proper determination of the question in dispute." And inspection of property which formerly could only be had by jurors specially selected for that purpose, may now be "by the jury or by himself (the applicant,) or by his witnesses." It is presumed (though not confidently in the absence of authority) that as a general rule inspection by a *jury* under this section will be conducted in the same manner and subject to the same rules as views by

for the Court or a Judge, if they or he think fit, to make such rule or order upon such terms as to costs and otherwise, as such Court or Judge may direct; (*s*) Provided always, that nothing herein contained shall affect the provisions of any previous Acts as to obtaining a view by a Jury. (*t*)

personal property by Jury. parties or witnesses.

Proviso.

CLXXIII. (*u*) It shall be lawful for any Sheriff, Gaoler, or other Officer, (*v*) having the custody of any prisoner, (*w*) to take such prisoner for examination under the authority of this

(*App. Co. C.*)

How prisoner may be brought up

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a *jury* before this Act. In the Eng. C. L. P. Act, 1854, s. 58, there is an express declaration that such shall be the case. Inspection by the applicant or by his witnesses stands more in doubt, first, as to the time when the inspection may be made, secondly, as to the mode of application, thirdly, as to the mode of inspection, fourthly, as to effect of inspection. To dispose of inspection by jury. A rule for a view is first issued, and upon that writs of *venire faciae* and *distringas*: (13 & 14 Vic. cap. 55, s. 50.) In England though not in Upper Canada the rule may be had at side bar: (Eng. R. 49 H. T. 1853.) Both in England and in Upper Canada the party applying must make certain deposits of money, and in other respects comply with rules of Court made for his guidance: (Eng. R. 40 H. T. 1853; N. R. U. C. 39, 1856.) In England the view may be had upon the rule without intermediate writs: (Eng. C. L. P. Act, 1852, s. 114;) but in Upper Canada, the writs are still necessary: (13 & 14 Vic. cap. 55, s. 50.) And in the writs when issued "shewers" must be named, whose duty it will be to show the property to the jurors: (*Ib.*) and unless the showers be so named, there can be no view as required by the Act: (*Taylor* v. *Thompson*, 1 Dowl. P. C. 218.) After view the proceedings may be such as already noted. With respect to inspections by the party or his witnesses, the practice will be found to resemble inspections under the Eng. Patent Act, 15 & 16 Vic. cap. 83, s. 42, the principle of which it was recommended by the Commissioners should be extended to *all* cases, which recommendation is here carried into effect. The practice under the Patent Act is not to grant inspection as of course, but only when shown to be material for the purposes of the cause: (*Ames* v. *Kelsey*, 22 L. J. Q. B. 84; *Shaw* v. *Bank of England*, 22 L. J. Ex. 26) but application may be made before declaration: (*Amies* v. *Kelsey*, *ubi sup.*)

(*s*) *Court or Judge.*—Relative powers see note *m* to s. xxxvii.

(*t*) *i. e.* 13 & 14 Vic. cap. 55, ss. 50, 51, 52: (*ante* note *r.*) In consequence of there being no section in our C. L. P. Act corresponding to s. 114 of Eng. C. L. P. Act, 1852, the concluding part of this section differs from that of Eng. C. L. P. Act, 1854, s. 58.

(*u*) Apparently an original but very necessary provision. Without it there might be no means of securing the attendance of a prisoner whose testimony should be required at examinations authorized by this Act. Though if the intention of the Legislature to be gathered from any particular section be otherwise clear that prisoners should be examined as witnesses, the Courts no doubt would grant the *habeas* in order that that intention might be carried into effect: (see *Graham* v. *Glover*, 33 L. & Eq. 55.) The section is applied to County Courts.

(*v*) *Or other officer. Qu.* Will this embrace the Superintendent of a Lunatic Asylum or any other than officers in the service of the Courts? (see note *y*, *post.*)

(*w*) *Qu.* In execution on final as well as on mesne process—in civil as well as in criminal cases?

to give evidence.

Act, (*x*) by virtue of a Writ of *habeas corpus* to be issued for that purpose, (*y*) which Writ may be issued by the Court or Judge, (*z*) under such circumstances (*a*) and in such manner (*b*)

(*x*) *i.e.* to any examination authorized by this Act?

(*y*) Before this Act upon the subject matter of the section under consideration there are in Canada two Statutes, 3 Wm. IV. cap. 2, s. 8, and 4 & 5 Vic. cap. 24, s. 11,—both of which are substantially the same, the former applying to Upper Canada only and the latter to the whole Province. These Acts read as follows: "That when and so often as the attendance of any person confined in any gaol or prison in this Province or upon the limits thereof shall be required in any *Court of Assize and Nisi Prius*, or *Oyer and Terminer*, or *General Gaol Delivery*, or other Court, it shall be lawful for *the* Court before whom such prisoners shall be required to attend, in its discretion to make an *order* upon the sheriff, gaoler, or other *person* having the custody of such prisoner to deliveer such prisoner to the person named in such order to receive him, which person shall thereupon instantly convey such prisoner to the place where the Court issuing such order shall be sitting, there to receive and obey such further order as to the said Court shall seem meet: Provided always that no prisoner confined for any debt or damages in any civil suit shall be thereby removed out of the District (County) where he shall be confined." A comparison of this section with the one here annotated will show the following distinctions: Under the former—1. An order is sufficient for the removal without a *habeas;* 2. The removal can only be to one or other of the Courts named; 3. That Court only has the power to make the order; 4. The order may be delivered to any "person" having the custody of the prisoner; 5. No prisoner for debt in a civil suit shall be removed by such order without the limits of the County or Union of Counties in which he is confined. But previous to these Statutes and independently of any Statute now extant the Courts granted writs of *habeas corpus ad testificandum:* (*Foster*, 396; *Standard* v. *Baker*, M. T. 26 Geo. III. K. B. Tidd's Pr. 9 Edn. 809; *Gerry* v. *Hopkins*, 2 Rayd. 851; *Leigh* v. *Sherry*, 2 Moore 33;) on an affidavit that the prisoner was a material witness and willing to attend: (*R.* v. *Roddam*, Cowp. 672,) and the writ has been issued to bring up a prisoner before an election committee of the House of Commons: (*Re Price*, 4 East, 587; *Re Pilgrim*, 4 Dowl. P. C. 89;) but refused as to a prisoner of war; (*Furley* v. *Newnham*, Doug. 419; and as to a prisoner confined for high treason: (*Laugton* v. *Cotton*, Pen. Ad. Ca. 21.) The proper course in such cases being an application to the Secretary of State: (*Ib.*) Though as to sailors on board a man of war, if willing to attend the writ might be granted: (*R.* v. *Roddam*, Cowp. 672.) So as to a lunatic in an asylum upon an affidavit that he is not a dangerous lunatic, and that he is in a fit state to be brought up: (Com. Dig. Test. A. i.) So as to prisoners in execution: (*R.* v. *Burbage*, 3 Burr. 1440;) but not where the application is a mere contrivance to remove the prisoner: (*Ib.*) The writ may be to produce the prisoner before a Coroner if there be a strong case of necessity: (*Ex parte Wakeley*, 14 L. J. 188 N.C.)

(*z*) *Court or Judge.*—According as it is intended that the examination shall take place before the one or other. The Court should not be troubled with such applications so long as they can be disposed of by a Judge in Chambers: (see note *m* to s. xxxvii.)

(*a*) See note *y*, *ante*.

(*b*) The application ought generally to be made to a judge in Chambers,. (*Fennell* v. *Tait*, 1 C M. & R. 584; *Gordon's Case*, 2 M. & S. 582; *Browne* v. *Gisborne*, 2 Dowl. N. S. 9 63;) upon on affidavit intitled in the Court and cause, (*R.* v. *Sayer*, Fort, 396) stating

as such Court or Judge may now by law issue the Writ commonly called a *habeas corpus ad testificandum*. (*c*)

CLXXIV. (*d*) Any party to any civil action or other civil proceeding in any of the Superior Courts (*e*) requiring the affidavit of a person who refuses to make an affidavit (*f*) may apply by Summons (*g*) for an order to such person to appear and be examined upon oath before a Judge, or any other person to be named in such order to whom it may be most convenient to refer such examination as to the matters concerning which he has refused to make an affidavit; (*h*) and a Judge may, if he think fit, make such order for the attendance of such person before the person therein appointed to take such examination for the purpose of being examined as aforesaid, (*i*) and

(*App. Co. C.*) Eng. C. L. P. A. 1854, s. 48.

Persons refusing to make affidavit, may be compelled to appear and be examined, or to produce papers, &c.

Con stat for u.c. ch 22 §188.

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the witness to be in custody and willing to attend: (*R.* v. *Murray*, 2 Tidds Pr. 9 Edn. 908—form thereof, Chit. F. 7 Edn. 194.) The writ must be signed by the judge when granted by a judge, (*R.* v. *Roddam*, Cowp. 672; *Gibb* v. *King*, 1 C. B. 1 & 2 Ph. & M. cap. 13, s. 7—Form thereof, Chit. F. 7 Edn. 195,) and be left with the officer, in whose custody prisoner is detained: (2 Tidd Pr. 9 Edn. 810.)

(*c*) See *ante*, note *y*.

(*d*) Taken from Eng. St. 17 & 18 Vic. cap. 125, s. 48.—Founded upon 2d Rept. C. L. Comrs. s. 30.—Applied to County Courts.

(*e*) This enactment is restricted to proceedings in civil cases: (see *Attorney General* v. *Radcliff*, 22 L. J. Ex. 240;) when brought in the Courts of Queen's Bench and Common Pleas: (see title to this Act.)

(*f*) The gist of the application is the refusal to make an affidavit when required of him by any party to an action. The remedy is new and now exists where there was none before.

(*g*) *Summons.* The use of this word denotes the tribunal to which application should be made, viz., to a Judge in Chambers. The subject matter of the section is new. There is no inherent jurisdiction in the Courts to entertain the application, else the section would not have been required: (see remarks of Coleridge, J., in *Harvey* v. *O'Meara*, 7 Dowl. P. C. 735.) It is from this inferred that the Court if disposed to entertain applications at all under this section will not do so in the first instance. The right to entertain an application by way of appeal is yet a question to be decided; (see *Stokes* v. *Grissell*, 2 N. C. L. Rep. 730; and note *m* to s. xxxvii.) The use of the word "summons" also denotes a clear intention that some party should be called upon to show cause. Whether the opponent or applicant, who may be either plaintiff or defendant in an action, or the witness who refuses to make affidavit is not stated. Reason indicates the latter. And if this be the true construction, and an order be obtained, absolute in the first instance as against the witness, it might, upon his application, be set aside.

(*h*) The object of the enactment seems to be to compel a person refusing to make an affidavit to be examined *viva voce*: (*Cockerell* v. *Van Diemen's Land Co.*, Cresswell, J., 16 C. B. 261.) It is somewhat analogous to a subpœna to compel evidence: (Jervis, C. J., *Ib.*)

(*i*) *As aforesaid, i.e.*, upon oath. *Qu.* Is there power to order the examina-

for the production of any writings or documents to be mentioned in such order, (*j*) and may therein impose such terms as to such examination and the costs of the application and proceedings thereon as he shall think just (*k*) [and such order shall be proceeded upon in like manner as the order mentioned in the section of this Act numbered one hundred and seventy-one]. (*l*)

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 50.

CLXXV. (*m*) Upon the application of either party to any cause or civil proceeding in any of the Superior Courts, upon

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tion of a witness without the jurisdiction of the Courts under this section? As in such a case there would be no power to punish for disobedience, it is apprehended there would be no reason for making the order.

(*j*) Before documents can be ordered to be produced the judge must be satisfied that there are documents in the possession of a party, and also probably that the documents are such as the party might be compelled to produce at a trial.

(*k*) The propriety or impropriety of imposing terms is a matter for the consideration of the judge upon the whole circumstances of the case before him. If the witness groundlessly and pertinaciously have refused to make the affidavit required of him, he may be denied conduct money. *Qu*—Would the witness be privileged from arrest *eundo morando et redeundo?* See not *f* to s. lxxxvii.

(*l*) The words in brackets are not to be found in the Eng. C. L. P. A. The connection made between this and sec. clxxi., is a wise provision. Disobedience under this section as much as under that will, it is presumed, subject the party to attachment.

(*m*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 50. — Applied to County Courts.—Founded upon 2nd Rep. C. L. Comrs. s. 5, 33–36 incl. The object of this enactment is to enable either party to a suit at law to obtain inspection and discovery of documents in the possession of his adversary without having recourse to a Court of Equity for that purpose. The principle involved is that which the Commissioners asserted as an indisputable proposition, viz., *that every Court ought to possess within itself the means of administering complete justice within the scope of its jurisdiction.* Powers are conferred upon Courts of common law which before they did not possess. The practice of these Courts as to inspection and discovery of documents is a most important one, and one which in its present efficiency is almost wholly the creature of statute law. Inspection and discovery are not by any means synonymous terms, though sometimes so used. An application for inspection of a document presupposes a knowledge that such documents exists. But an application for discovery presupposes ignorance of the document, a knowledge of which it is sought to obtain. Now, although inspection might in some cases be had upon application to Courts of common law under their common law jurisdiction, discovery as such could not be obtained. Nor could inspection be had except as between parties to some pending cause. Whereas in Equity both inspection and discovery might be had upon a bill of discovery whether there was or was not a suit pending. In truth discovery in Equity was and is often sought as a means to the institution of a suit.

The jurisdiction of the Courts of common law as to inspection and discovery is not well settled. The effect of the recent changes being as yet

an affidavit by such party of his belief that any document to the production of which he is entitled for the purpose of discovery

Provision for the discovery of docu-

only partially understood, in examining the law upon the subject it seems advisable to notice its gradual developement.

1. *Inspection at Common Law.* The power of the Courts at common law is very uncertain. In general it is necessary for the party applying to show that he has a direct interest in the document, as, for example, underlessee in a lease, or that his opponent holds the document under some trust express or implied, as, for example, that the document though executed by both parties is in the possession of one: (*Blakey* v. *Porter*, 1 Taunt. 386; *Bateman* v. *Phillips*, 4 Taunt. 161; *Taylor* v. *Osborne* 4 Taunt. 159; *Ratcliffe* v. *Bleasby*, 3 Bing. 148; *Portmore* v. *Goring*, 4 Bing. 152; *Lawrence* v. *Hooker*, 5 Bing. 6; *Street* v. *Brown*, 6 Taunt. 302; *Morrow* v. *Sanders*, 3 Moo. 671; *Threfall* v. *Webster*, 7 Moo. 559; *Blogg* v. *Kent*, 6 Bing. 614; *Devenoge* v. *Bouverie*, 8 Bing. 1; *Cocks* v. *Nash*, 9 Bing. 723; *Inman* v. *Hodgson*, 1 Y. & J. 28; *Woodcock et al.* v. *Worthington*, 2 Y. & J. 4; *Neale* v. *Swind*, 2 C. & J. 278; *Travis* v. *Collins*, 2 C. & J. 625; *Reed* v. *Coleman*, 2 C. & M. 456; *Doe d. Morris* v. *Roe*, 1 M. & W. 207; *Doe* v. *Slight*, 1 Dowl. P. C. 163; *Evans* v. *Delegal*, 4 Dowl. P. C. 374; *Jones* v. *Palmer*, 4 Dowl. P. C. 446; *Tunzell* v. *Allen*, 7 Dowl. P. C. 496; *Griffin* v. *Smythe*, 8 Dowl. P. C. 490; *Goodliff* v. *Fuller*, 14 M. & W. 4; *Steadman* v. *Arden*, 15 M. & W. 587; *Ley* v. *Barlow*, 5 D. & L. 375; *Bluck* v. *Gompertz*, 7 Ex. 67; *Doe d. Avery* v. *Langford*, 21 L. J. Q. B. 217; *Shaw* v. *Holmes*, 3 C. B. 952; *Powell* v. *Bradbury*, 4 C. B. 541; *Foster* v. *the Bank of England*, 8 Q. B. 689; *Pritchett* v. *Smart*, 7 C. B. 625); or as to documents upon which an action or defence is immediately founded, that there is suspicion of forgery, or that the documents have been improperly dealt with since execution: (*Thomas* v. *Dunn*, 6 M. & G. 274; *Woolner* v. *Devereux*, Tindal, C.J. 9 Dowl. P.C. 672; But see *Chelwind* v. *Marnell*, 1 B. & P. 271; *Jewell* v. *Millingen*, 1 M. & Scott 605; *Hildgard* v. *Smith*, 1 Bing. 451; *Threfall* v. *Webster*, 1 Bing. 161.) In general, it is necessary for the party applying to show himself to be a party to the document: (*Smith* v. *Winter*, 3 M. & W. 309; *Lawrence* v. *Hooker*, 5 Bing. 6.) The Courts in England have, under certain circumstances, upon the application of one party to a suit ordered documents in the possession of the opposite party to be produced, for the purpose of being stamped: (*Gigner* v. *Bayly*, 5 Moore 71; *Rowe* v. *Howlden*, 4 Bing. 539, note; *Neale* v. *Swind*, 1 Dowl. P.C. 314; *Bousfield* v. *Godfrey*, 5 Bing. 418; *Travis* v. *Collins*, 2 C. & J. 625; *Hall* v. *Bainbridge*, 14 L. J.Q. B. 289); but have refused inspection of the title deeds of a party whose title is in dispute: (*Pickering* v. *Noyes*, 1 B. & C. 262.) Now that a party may be examined orally as to all matters touching his own case, the doctrine propounded in the last case may be well questioned: (*Lynch* v. *O'Hare*, U. C. C. P. Novr. 1855, *MS.*; *Horsman* v. *Horsman*, Chambers, Sept. 25, 1856, Burns, J., 2 U.C.L.J.211.) At all events where such documents prove applicant's case affirmatively an exception to the doctrine seems to prevail: (see div. III. *infra.*) Whatever jurisdiction the Courts possess at common law as to inspection is not affected, except so far as extended by recent Statutes: (*Bluck* v. *Gompertz*, 7 Ex. 67; *Doe Avery* v. *Langford*, 21 L. J. Q.B. 217; *Doe d. Child* v. *Rae*, 1 El. & B. 279.)

II. *Inspection under* 16 *Vic. cap.* 19. —This statute enacts "That whenever any action or other legal proceeding shall henceforth be pending in any of the Superior Courts or in any County Court in Upper Canada, such Court and each of the judges thereof in vacation may respectively, on application made for such purpose, by either of the litigants, compel the opposite par-

ments in the possession of the adverse party.

or otherwise, is in the possession or power of the opposite party, it shall be lawful for the Court or a Judge to order that the

ty to allow the party making the application to inspect all documents in the custody or under the control of such opposite party relating to such action or other legal proceeding, and if necessary to take examined copies of the same, in all cases in which previous to the passing of this Act a discovery might have been obtained by filing a bill or any other proceeding in a Court of Equity, at the instance of the party so making application as aforesaid to the said Court or Judge:" (s. 8.) This section appears to have been literally copied from Eng. St. 14 & 15 Vic. cap. 99, s. 6, under which it was held that the Legislature never intended to give Courts of Common Law a power to *compel discovery* by a bill or analagous proceeding, but to *allow an inspection*, by one litigating party, of documents in the custody or under the control of the opposite litigant party, with certain restrictions or limitations. The intention of the Legislature was reduced to this—that inspection might be allowed whenever discovery could be compelled in equity: (*Hunt* v. *Hewitt*, 7 Ex. 236; see also *Rayner* v. *Allhasen*, 21 L. J. Q. B. 68; *Galworthy* v. *Norman*, *Ib.* 70.) This was held to be the legal intendment of the Act; though it is more than possible that the actual intention of the Legislature was to provide a more extensive remedy. The mischief to be remedied was the necessity existing for proceeding in Equity with its attendant trouble, expense, and delay, in order to support proceedings at law. The remedy proper for such a mischief is *complete* relief in one Court. Such is the remedy which has been applied by the Legislature under the C. L. P. A., which next in turn presents itself for consideration.

III. *Inspection and discovery under the C. L. P. A.*, 1856.—It having been held under the previous statute that the Court had no power to compel a discovery—that is, of forcing an adversary to disclose what documents he had in his possession or under his control relating to the matter in dispute, the present Act supplies that necessary power. The section under consideration is the one which applies. It is necessary to examine every word of it with close attention. It is enacted that upon the application of either party to any cause or civil proceeding upon an affidavit by such party of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise, is in the possession or power of the opposite party, it shall be lawful, &c. These are the pre-requisites to a successful application. *First*—There must be a "cause or other civil proceeding." *Secondly*—the party applying must be "a party" to that cause or proceeding. *Thirdly*—his application must be upon "his own" affidavit of belief, &c. *Fourthly*—he must swear that there is "some document" to the production of which he is entitled "for the purpose of discovery or otherwise." *Fifthly*—that document must be shown to be "in the possession or power of the opposite party." To take these separately:—*First*, as to the "cause *or other civil proceeding*" described in 16 Vic. cap. 19, as "an action or *other legal proceeding*." The words "or *other* civil proceeding," superadded to "cause" must mean some proceeding other than a cause.—Probably proceedings by mandamus to enforce civil rights are embraced: (*Reg.* v. *Ambergate Railway Co.*, 17 Q. B. 957; *Reg* v. *York and North Midland Railway Co.*, 19 L. T. Rep. 108; see further *Attorney General* v. *Radloff*, 23 L. J. Ex. 240.) *Secondly*—As to "the party," it is apprehended that upon suggestion of the death of the original party his representative may make the application: (ss. ccx.-ccxi.) The application may be that of "either" plaintiff or defendant, which may be taken to ex-

party against whom such application is made, or if such party is a body corporate, that some officer to be named of such body

tend to one of several plaintiffs or defendants. The time within which application should be made either for inspection or discovery is not limited "*Whenever* any action, &c., shall be henceforth *pending*, &c." (16 Vic. cap. 19, s. 8.) "Upon the application of either party to any cause, &c., *in* any of the Superior Courts, &c.:" (C. L. P A., s. clxxv.) There must be a pending cause which intends a cause commenced. The application if by plaintiff must be after commencement of action, and may be before issue joined: (*Rogers* v. *Turner*, 21 L. J. 808.) And if by defendant, before plea pleaded: (*Forsham* v. *Lewis*, 10 Ex. 712. *Thirdly*—The affidavit must be made by a party to the cause or other proceeding: (*Herschfield* v. *Clark* 25 L. J. Ex. 113.) But where by the act of God an affidavit by the party himself is impossible, it is apprehended that a *cy pres* compliance with the statute may be allowed, for instance an affidavit by the attorney: (*Scott* v. *Macaulay*, 4 Ir. Jur. 40.) And though made by the party himself, if defective, it may be that the Court would receive a supplemental affidavit by another person: (*Hewett* v. *Webb*, 28 L. T. Rep. 121.) The affidavit may be one of belief. If the application be for a discovery no more can be in reason expected. But an affidavit by deponent that he was "*advised*," not expressing belief has been held insufficient: (*Pepper* v. *Chambers*, 7 Ex. 226.) *Fourthly*—An affidavit that the opposite party has in his possession, &c., "certain documents," is insufficient. Some particular document must be signified. "*Any* document," in the Act means "*some* document" to be specified. The Court before granting the application must be informed not only of the question in the cause, but of the nature of the documents in respect of which the application is made: (*Hewett* v. *Webb*, 28 L. T. Rep. 121.) *Fifthly*—It must be sworn that the documents in respect of which application is made are in the "possession *or power*" of the opposite party, which answer to the words "in the custody *or under control*," used in 16 Vic. cap. 19, s. 8.—The documents if in the possession of a third party, an agent, attorney, &c., may be called for as much as if in the possession of the party himself.

These *formulæ* are of course subject to the *right* of the party applying. It must appear that he "is entitled" to the production of the documents "for the purpose of discovery *or otherwise*," which last words may at least include "inspection." *Qu.*—Have these words the effect of allowing applications under this section in cases in which discovery could not be had in equity: (see *Osborne* v. *London Dock Company*, 10 Ex. 698; *Whately* v. *Crawford*, 25 L. Q. B. 163.) Discovery can only be had of documents relating to the matter in dispute and which support the case of the party applying. The rule is that a party is not to be allowed to see the evidence in support of his opponents case: (*Scott* v. *Waller*, 22 L. J. Q. B. 404;) but inspection or discovery of documents may be had, which *bona fide* make out applicant's case, although that may merely be the negative of his opponent's: (*Smith* v. *Duke of Beaufort*, 1 Hare, 507.) Fishing applications are not to be favored; but where the opposite party has in his possession a document which does not constitute his own case and will support that of the party applying, the latter is entitled to an inspection of it: (*Sneider* v. *Mangino*, 7 Ex. 229.) Documents equally support the case of applicant whether they sustain it *prima facie*, or contradict the case set up by his opponent: (*Ib.*) The right to inspect is not limited to documents necessary to make out a *prima facie* case but extends to any documents which tend to strengthen or support it: (*Coster* v. *Baring*, 2

corporate, shall answer on affidavit stating what documents he or they has or have in his or their possession or power relating

N. C. L. Rep. 811.) The documents must relate to a question in the cause: (*Sneider* v. *Mangino*, *ubi supra*.) Applications to procure evidence against a person not a party to the cause will be refused: (*Ib.*) The application must be *bona fide* and for the purpose of the suit. And the suit must be brought *bona fide* and for the purposes other than the discovery of documents to found an action against a third party: (*Temperley* v. *Willett*, 27 Law T. Rep. 103;) and not against the defendants ostensibly to try a question in dispute, but in reality to procure evidence from one against the other: (*Ib.*) Disputes must arise in which the party applying will insist that the documents of which inspection or discovery is sought support his case, which his opponent will resist upon the ground that the documents in question relate exclusively to his case. Rarely, indeed, will the same document be evidence for both parties. It will be evidence either for one party or the other, which is for the Court to determine. The general rule undoubtedly is, that a party has a right to the production of documents sustaining his case affirmatively but not to those which form part of his adversary's case: (*Hill* v. *Philp*, 7 Ex. 232; *Riccard et al.* v. *Blanuri*, 4 El. & B. 329; *Wright* v. *Murray*, 11 Ex. 209. See further *Galworthy* v. *Norman*, 21 L.J. Q. B. 68; *Compton* v. *Earl Grey*, 1 Y. & J. 154; *Bolton* v. *Corporation of Liverpool*, 1 M. & K. 88.) One great object in refusing applications under this section will be to discourage a party who without a case of his own, hopes by an adventure to discover a flaw in that of his adversary: (see *Peppin* v. *Chambers*, 7 Ex. 226; *Scott* v. *Walker*, 2 El. & B. 555; *Wright* v. *Murray*, *ubi sup.*) If the intention of the party applying be plainly to fish something favorable to his case the application will be refused: (*Rayner* v. *Allhusen*, 15 Jur. 1060.) Thus a party is not entitled to say, "if I saw my opponent's books I could find some evidence:" (*Scott* v. *Walker*, Crompton, J., 2 El. & B. 562.) Of necessity the applications must often be merely speculative; but should be strictly watched and great care taken that injustice is not done by granting them: (*Bray* v. *French*, 28 L. T. Rep. 126.) For instance, great injury by the discovery of trade secrets might result if the Courts were to sanction the principle that on the mere *possibility* of discovering matter advantageous to one party, an inspection by him of the other party's books, ranging over a lengthened period of time should be allowed: (*Smith* v. *Great Western R. Co.*, 3 W. R. 68.) The Court or Judge to whom application is made can only judge of the propriety or impropriety of acceding to the application upon the affidavits before him. The contents of applicant's affidavits must be such as to establish upon his part a *prima facie* right to the inspection or discovery in accordance with the principles established in the foregoing cases. The affidavit therefore ought not only to show that a cause or other civil proceeding is pending, but also to state, not a mere suggestion, but circumstances sufficiet to satisfy the Court or Judge that there are in the possession or power of the opposite party certain documents, and that such documents relate to such cause or other civil proceeding. A *prima facie* case, calling for an answer, must at least be stated in this respect, as it must be in the old proceeding to obtain inspection of documents held by a trustee. The judges with a view to settling the practice under the Eng. Stat. of 14 & 15 Vic. cap. 99, to which our St. 16 Vic. c. 19, corresponds, laid down very full rules upon this subject. They declared that applicant in addition to the foregoing "must show that he would by a bill for a discovery or other proceeding be able to obtain a discovery and inspec-

to the matters in dispute, (*n*) or what he knows as to the custody they or any of them are in, and whether he or they objects or object (and if so, on what grounds) (*o*) to the production of such as are in his or their possession or power, and upon such affidavit being made, the Court or Judge may make such further order thereon as shall be just. (*p*)

CLXXVI. (*q*) In all causes (*r*) in any of the Superior (*App. Co. C.*) Eng. C. L. P. A. 1854, s. 51.

tion of these documents," and continued, "under the last head we must follow the rules established in Courts of Equity, within which every plaintiff must bring himself in order to obtain an inspection by bill of discovery; and therefore if the facts be disputed applicant ought to state all that a plaintiff in equity must state in order to entitle himself to a discovery and inspection." The party applying therefore, who is in the same situation as a plaintiff in equity, must show *first*, what is the nature of the suit and of the question to be tried in it; and it seems also that he should depose in his affidavit of his having just grounds to maintain or defend it. *Secondly*, the affidavit ought to state with sufficient distinctness the reason of the application and the nature of the documents in order that it may appear to the Court or Judge that the documents are asked for the purpose of enabling the the party applying to support his case not to find a flaw in the case of his opponent, and also that the opponent may admit or deny the possession of them:" (*Hunt* v. *Hewitt*, 7 Ex. 243.) To this affidavit the opponent may answer by swearing that he has no such documents, or that they relate exclusively to his own case, or that he is, for any sufficient reason, privileged from producing them: or he may submit to show parts covering the remainder, on affidavit that the part concealed does not in anywise relate to applicant's case. The same course would be pursued in equity: (*Hunt* v. *Hewitt*, 7 Ex. 244.) Further see Wigram on Discovery, Hare on Discovery, and Pollock on Discovery. In applications under this section, a place for inspection should be named: (*Rogers* v. *Lewis*, 21 L.J. Ex. 3.) The costs of the inspection ought, as a general rule, to be paid by the party applying: (*Hill* v. *Philp*, 7 Ex. 232;) but are, with the costs of the application, in the discretion of the Court or Judge: (s. cxxxi., and *Smith* v. *Great Western R. Co.*, 25 L.J.Q.B. 79;) and may be provided for in express terms by the rule or order to be obtained.

(*n*) It is this part of the section that leads from inspection to discovery. Applicant having established a *prima facie* case as to some document of which he seeks inspection is upon this foundation allowed to proceed further and to ask *what* documents his adversary has personally or in his power relating to the matter in dispute, &c.

(*o*) Generally where a party can resist the application for inspection he may resist an application for discovery which leads to inspection: (see note *m*, *ante*.)

(*p*) *i. e.* As to the production of further documents relating to the matters in dispute.

(*q*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 51. — Applied to County Courts.—Founded upon 2nd Rep. C. L. Comrs. ss. 37, 38. Discovery may be either of documents in the possession of, or facts within the knowledge of the opposite party. The first class of cases having been provided for by the preceding section, this section provides for the latter.

(*r*) *Causes.* The words "or other civil proceeding," used in the preceding section, have been dropped here. A criminal information is clearly not a

Interrogatories may be served on the opposite party, who shall be required to answer them.

Courts, (*s*) by order of the Court or a Judge, (*t*) the Plaintiff may with the declaration, and the Defendant may with the plea, or either of them by leave of the Court or a Judge may at any other time, (*u*) deliver to the opposite party or his attorney (provided such party, if not a body corporate, would be liable to be called and examined as a witness upon such

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cause within the intention of this section: (*Reg.* v. *Alpin*, 12 Jur. 11.) The use of the words "declaration" and "plea" in a subsequent part of the section indicates the nature of the proceedings intended. Notwithstanding the use of these words interrogatories may be put in actions of ejectment: (*Flitcroft* v. *Fletcher*, 11 Ex. 543; *Chester* v. *Wortley*, 17 C. B. 410.)

(*s*) *i. e.* Queen's Bench or Common Pleas. The word "any" as applied to two Courts is not so correct as "either;" but the use of "any" in our C. L. P. A. arises from a literal adoption of the C. L. P. A. of England, where there are three superior Courts of Common Law.

(*t*) Relative powers see note *m* to s. xxxvii. In every case to entitle a party to file interrogatories an order of the Court or a Judge is made necessary. There is very good reason for this; for otherwise interrogatories would be delivered in all cases, and would be added to every declaration and plea. The power given to the Court or a Judge is to prevent expense being incurred unless the interrogatories are necessary: (*Martin* v. *Hemming*, 10 Ex. 478.) The interrogatories intended should be submitted at the time of application for leave to file them: (*Croomes* v. *Morrison*, 34 L. & Eq. 300, 26 L. T. Rep. 238.) Where a party to a cause has obtained a rule calling upon the opposite party to show cause why interrogatories should not be delivered to him, and the affidavit sworn by the opposite party, for the purpose of opposing the rule, gives the information required, the Court will put the party moving in the same position as if the information had been given upon interrogatories: (*Peck* v. *Revis*, 27 L. T. Rep. 136.) *Semble*, if any other case should be set up at the trial a new trial would be granted on the ground of surprise: (*Ib.*)

(*u*) The time appointed for delivery of interrogatories by plaintiff is with his declaration and by defendant with his plea. If at any "other time," particular attention must be paid to the form of the application. Convenience requires that if interrogatories are delivered before declaration, they should be accompanied with some statement as to the cause of action; it must be shown that they are pertinent. The Court or Judge must be supplied with information in order to see whether the interrogatories are proper or whether they are merely vexatious. The power to admit interrogatories may be abused to annoy the opposite party and to multiply costs, and therefore requires to be carefully watched: (*Croomes* v. *Morrison*, 34 L. & Eq. 299; 26 L. T. Rep. 238.) Leave was granted to a defendant to deliver interrogatories *before* plea pleaded, where the plea was before the Court and the interrogatories modified to have precise reference to the plea: (*Street* v. *Cuthbert*, Chambers, Oct. 6, 1856, III. U.C.L.J. 9.) Leave may, it seems, be granted to a plaintiff even after plea pleaded without a special affidavit: (*James* v. *Barns*, 34 L. & Eq. 434.) But if defendant apply to be allowed to deliver interrogatories *after* plea pleaded, it must be shown that the interrogatories are pertinent to the plea pleaded. Defendant may ask leave to file additional pleas, and then ask leave to put interrogatories for the discovery of matter affecting them: (*Street* v. *Proudfoot*, Chambers, Oct. 3, 1856, II. U. C.L.J. 213.) If issue has been joined

matter), (*v*) interrogatories in writing (*w*) upon any matter (*x*) upon which discovery may be sought, (*y*) and require such party, or in the case or a body corporate, any of the officers of

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the interrogatories must point to the proof of something affecting that issue: (*Ib.*)

(*v*) If a foreigner residing abroad sue in our Courts, he is subject to interrogatories under this section: (*Pohl* v. *Young*, 25 L. J. Q.B. 23; 26 L. T. Rep. 108.)

(*w*) The interrogatories had better be verified by affidavit: (*Croomes* v. *Morrison*, 34 L. & Eq. 300.)

(*x*) Copies of written documents are not such "matter" as may be the subject of interrogatories under this section. Proceedings as to them must be taken for inspection and discovery under the preceding section: (*Scott* v. *Zygomala*, 4 El. & B. 483; 30 L. & Eq. 155.)

(*y*) The right to deliver interrogatories in cases in which discovery could not be obtained in Equity is a vexed question. They may be delivered as to "any matter upon which discovery may be sought." The turning point is upon the word "discovery." It may mean information generally; or only such information as can be had by a bill in Equity. In the first case which arose under the section, the Court abstained from giving any decided opinion upon the point: (*Martin* v. *Hemming*, 10 Ex. 478.) In a later case Parke, B. is reported as follows—"The section says that the party may be interrogated upon any matter as to which a *discovery may be sought*. It does *not* say that the power is limited to cases in which "a bill in discovery will lie:" (*Osborn* v. *London Dock Co.* 10 Ex. 698.) But contrary to this opinion there is that of Campbell, C. J.—"I interpret the meaning of these words to be that interrogatories may be put with reference to any matter as to which discovery may be sought by bill in Equity. The rule is laid down rather widely by the Court of Exchequer in *Osborn* v. *London Dock Co.*, where it is said that the interrogatories may be administered to the same extent as if the party interrogated was a witness under examination at the trial. I think the true rule is that such questions may be put as may reasonably be expected to produce answers tending to advance the case of the party who puts them. Whatever advances the plaintiff's case may be inquired into, though it may at the same time bring out matter which the defendant relies upon for his defence; that which is common to plaintiff and defendant may be inquired into by either. The very object of the section was to obviate the necessity of going for assistance into a Court of Equity, which brought great scandal upon the administration of justice:" (*Whateley* v. *Crawford*, *Carew* v. *Davis*, 26 L. T. Rep. 104, 25 L. J. Q. B. 163; 5 El. & B. 707.) Such also was Lord Campbell's views as expressed in a very late case—"We are disposed to think that the section now under consideration is intended to apply to cases only where the matter inquired into would be evidence in the cause, and it was not intended therefore to give one party the power of asking another how he intends to shape his case. Such an inquiry is a mode of inquiring into particulars upon oath, without the party being compelled to confine himself to particulars. Where the justice of the case requires such particulars to be given, the Court have generally the means of compelling them to be given under such conditions as are reasonable. We think that we ought at all events to hold that the discovery under the 51st section (Eng. C. L. P. Act, 1854) is confined by the words "upon any matter as to which the discovery may be sought," to cases where a discovery would be given at equity, . . and a party should not make a fishing application as to the manner in which his adversary intends to shape his case, and as to the evidence by which he in-

such body corporate, within ten days to answer the questions in writing by affidavit to be sworn and filed in the ordinary way; (*z*) and any party or officer omitting without just cause, (*a*) sufficiently to answer all questions as to which discovery may be sought, within the above time, or such extended time as the Court or a Judge shall allow, shall be deemed guilty of a contempt, and shall be liable to be proceeded against accordingly. (*b*)

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tends to support it:" (*Edwards et al. v. Wakefield*, 27 L. T. Rep. 201.) It was therefore held in an action of trover by the assignees of a bankrupt to recover property that the defendant was not entitled to deliver interrogatories to the plaintiffs, calling on them to show "what case they intended to set up as entitling themselves to recover," or to state "what act or acts of bankruptcy they intend to rely upon in support of their title as assignees:" (*Ib.*) But in an action for money had and received and for non-delivery of goods, where plaintiff's case was that the defendant had professedly sold him goods and received payment for them as broker, while he was really the principal, the plaintiff was allowed to ask whether the defendant was really principal or agent, and if agent for whom and by what authority: (*Thol v. Leaske*, 10 Ex. 704.) And in an action of ejectment, defendant was allowed to ask the plaintiffs whether they claimed as heirs or grantees, and how they traced their pedigree: (*Flitcroft v. Fletcher*, 11 Ex. 543; *Horsman v. Horsman*, Chambers, Sept. 27, 1856, Burns, J., II. U.C.L.J. 211.) Inquiries may be made as to the nature of plaintiff's title, but not as to evidence which exclusively supports it: (*Ib.*)

(*z*) The proper way to answer interrogatories is to give a separate and distinct answer to each question, that is to say, a specific answer to a specific question: (*Chester v. Wortley*, 25 L. J. C. P. 117.) It is not, it is presumed, for the party answering to set out the interrogatories before his answers. The practice which has obtained in Upper Canada as to insolvent debtors would seem to be applicable.

(*a*) *Just cause.* The tendency of a question to criminate is, it seems, a just cause; but that is no reason why the interrogatory should not be put: (*Osborn v. London Dock Co.* 10 Ex. 698; *Chester v. Wortley*, 17 C. B. 410; *James v. Barns*, 17 C. B. 596.) Whether a witness is entitled himself to object to the question upon the ground of its tendency, or is bound to satisfy the Court that such will be its effect, in other words, whether the Court or the witness is to judge of the effect is not settled: (*Fisher v. Ronalds*, 12 C. B. 762; *Osborn v. London Dock Co., ubi supra.*) An affidavit made by the attorney of the party interrogated that in his belief the question proposed will criminate his client if answered, is insufficient. The objection must come from the client himself: (*Ib.*) A witness cannot refuse to be sworn and examined on the ground that the only relevant questions that could be put to him are such as would tend to criminate him. The opposite party has a right to insist on his being sworn, and it is for him then to claim the privilege upon being asked the objectionable questions: (*Boyle v. Wiseman*, 10 Ex. 647.) It is not settled whether a party can refuse to answer an interrogatory on the ground that it has a tendency to render him liable to a forfeiture: (*May v. Hawkins*, 11 Ex. 210; *Chester v. Wortley, ubi supra.*)

(*b*) The Court will not grant an attachment until the time for answering

CLXXVII. (c) The application for such order (d) shall be made upon an affidavit of the party proposing to interrogate, (e) and his attorney or agent, (f) or in the case of a body corporate, of their attorney or agent, (g) stating that the deponents or deponent believe or believes that the party proposing to interrogate, whether Plaintiff or Defendant, will derive material benefit in the cause from the discovery which he seeks, that there is a good cause of action or of defence upon the merits, (h) and if the application be made on the part of the Defendant, that the discovery is not sought for the purpose of delay; (i) Provided that where it shall happen from unavoidable circumstances, that the Plaintiff or Defendant cannot join in such affidavit, (j) the Court or a Judge may, if they or he think fit, (k) upon affidavit of such circumstances by which the party is prevented from so joining therein, allow and order

(*App. Co. C.*) Eng. C. L. P. A. 1854, s. 52.

Affidavit upon which the application for leave to serve such interrogatories must be founded.

Proviso: Where the party is prevented from joining in such affidavit.

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has expired, nor if the party has filed answers before application for attachment, though after the time appointed: (*Curran* v. *Elphinstone*, 4 W. R. 50.)

(c) Taken from Eng. St. 17 & 18 Vic. cap. 125, s. 52.—Applied to County Courts.

(d) *i. e.* Such order as is mentioned in the preceding section.

(e) *i. e.* Either plaintiff or defendant.

(f) It is to be observed that the application must be made upon an affidavit of the party *and* his attorney or agent. It is material that there should in such applications be a responsible officer of the Court. The attorney must in any event be a party to the affidavit. But the objection cannot be taken *in banc.* after an application in Chambers, without objection there: (*Whateley* v. *Crawford*, *Carew* v. *Drew*, 34 L. & Eq. 200.) In case of necessity under circumstances of peculiarity, such for example as the residence of the client in parts abroad, an affidavit in a form other than that here required might be received: (see proviso to this section.) But an affidavit of the attorney it is conceived will be requisite in every case.

(g) In this case an affidavit of the attorney or agent only is made sufficient.

(h) Whether plaintiff or defendant apply there must be an affidavit of merits: (*May* v. *Hawkins*, 1 Jur. N. S. 600, 32 L. & Eq. 595.) And in either case the words "upon the merits," should be incorporated in the affidavit: (Anonymous, 26 L. T. Rep. 197.) It is not in general sufficient to show merits by stating facts in the affidavit: (*Ib.* See further note *f* to s. xlvii.) If the application be *before* declaration a general affidavit under this section would be wholly insufficient. In such case information must be given of the cause of action: (*Croomes* v. *Morrison*, 34 L. &. Eq. 399.) As to affidavits generally see notes to s. xxii. of this Act, p. 41 *et seq.* of this work.

(i) Delay should be negatived in the affidavit.

(j) What may be unavoidable circumstances in the opinion of the Court or Judge can only be determined with reference to the special circumstances of each particular case as it arises for adjudication.

(k) *Court or Judge.*—Relative powers: see note *m* to s. xxxvii.

that the interrogatories may be delivered without such affidavit. (*l*)

(*App. Ch. C.*) Eng. C. L. P. A. 1854, s. 53.

In case of omission to answer, the party may be examined orally, or commanded to produce the documents: and before whom.

CLXXVIII. (*m*) In case of omission, without just cause, to answer sufficiently such written interrogatories (*n*) it shall be lawful for the Court or a Judge, at their or his discretion, (*o*) to direct an oral examination of the interrogated party as to such points as they or he may direct, [before a Judge or any other person to be specially named,] (*p*) and the Court or a Judge, may by such rule or order, or by any subsequent rule or order, command the attendance of such party or parties before the person appointed to take such examination for the purpose of being orally examined as aforesaid, or the production of any writings or other documents to be mentioned in such rule or order, (*q*) and may impose therein such terms as to such examination and the costs of the application and of the proceedings thereon, and otherwise, as to such Court or Judge shall seem just [and such rule or order shall have the same force and effect and may be proceeded upon in like manner as an order made under the one hundred and seventy-first section of this Act]. (*r*)

(*l*) *Such affidavit*—that is—an affidavit of the party applying *and* his attorney. In lieu of it a sufficient affidavit of special circumstances must be filed.

(*m*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 53.—Applied to County Courts.—Founded upon 2nd Rept. C. L. Comrs., s. 39. This section is an extension of the right of one party to put written interrogatories to his opponent.

(*n*) The right orally to examine seems to be restricted to cases where the party interrogated has without just cause *omitted* to answer sufficiently. This is rather more limited than the Commissioners intended it should be. They recommended an oral examination "in case of an insufficient answer, and in any other case in which it may be made to appear essential to justice, subject to the control of the Court." In principle this section is the same as that of s. clxxiv., which allows an oral examination of a witness who declines to make an affidavit. One distinction may be noted, which is, that under the former a judge only seems to have jurisdiction whilst under the section here annotated there is power in the Court or a judge.

(*o*) Relative powers: see note *m* to s. xxxvii.

(*p*) For words in brackets read in English Act the word "Master." The most likely persons to be appointed for the duty under our Act are public officers, such as County Judges, Clerks or Deputy Clerks of the Crown. &c.

(*q*) Though a privilege may exist as to the party himself or as to certain documents, the production of which is required: it is apprehended that the party should in obedience to the order of the Court at least attend, and then claim his privilege.

(*r*) The words in brackets are new

(App. Co. C.) consol. for Eng. C. L. P. A. 1854, s. 55. c.a. ch. 22 §193.

CLXXIX. (*t*) Whenever by virtue of this Act, (*u*) an examination of any party or parties, witness or witnesses, has been taken before a Judge of either of the Superior Courts, or of any County Court, or before any Officer or other person appointed to take the same, (*v*) the depositions taken down by such examiner shall be returned to and kept in the office of the Court (*w*) (principal or Deputy Clerk's office, as the case may be), in which the proceedings are being carried on, (*x*) and office copies of such depositions may be given out, (*y*) and the examinations and depositions certified under the hand of the Judge or other officer or person taking the same, (*z*) shall and may without proof or* the signature, (*a*) be received and read in evidence, (*b*) saving all just exceptions. (*c*)

Examination to be filed in the office of the Court.

May be used in evidence.

and most useful. They correspond to an express enactment in Eng. C. L. P. A. 1854: (s. 54.)

(*t*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 55. — Applied to County Courts.

(*u*) Extends apparently to examinations had under ss. clxxi, clxxiv, and clxxviii.

(*v*) See the several sections under which examinations may be had.

(*w*) Either Queen's Bench or Common Pleas, according as the case is pending in one or other of these Courts. As regards cases sued in County Courts of course these and no other Courts can be intended: (Co. C. P. Act, 1856, s. 2.)

(*x*) All proceedings to final judgment may be carried on in the office whence first process issued: (s. ix.)

(*y*) There is no mention of any charge for this service, but the schedule of fees attached to the New Rules supply the omission. The charge per folio for copying will be 6d, and certificate 2s 6d. If the copy appear to have been delivered out of the office in the due course of business, it will be *prima facie* taken to be correct: (*Duncan* v. *Scott*, 1 Camp. 101.)

(*z*) This means the original examinations or depositions. The meaning cannot be that office copies given out should be certified by the Judge or other officer or person taking the *same;* for the officer takes the original examination and depositions and not office copies.

(*a*) The original depositions only appear to be made receivable as evidence without proof of signature.

(*b*) The effect of this section is to make the depositions or examinations evidence upon their bare production. *Qu.* Are they "public documents" that may be proved by copies certified by the officer in whose custody the originals are entrusted? (13 & 14 Vic. cap. 19, s. 4, 16 Vic. cap. 19, s. 9.)

(*c*) *Saving all just exceptions.* It is difficult to say what would be a "just exception" within the meaning of this section. It may be doubted whether the depositions can be read if the witness be within the jurisdiction of the Court and compellable to attend for oral examination at the assizes: (see *Proctor* v. *Lainson*, 7 C. & P. 629.) Depositions taken under a commission to examine witnesses cannot be read if the witness be within the jurisdiction of the Court and of sound mind, &c: (2 Geo. IV. cap. 1, s. 18.) If there has been any irregularity in proceeding with a commission to examine witnesses, as for instance, if it were executed without any notice to the op-

* "*Or*," appears to be an error; "*of*" is probably intended.

Const stat for U.S. m. 22. § 194

(App. Ch. C.) Eng. C. L. P. A. 1854, s. 56.

Examiner may make a special report to the Court.

Orders thereupon.

CLXXX. (*d*) It shall be lawful for every Judge, [Officer or other person named] (*e*) in any such rule or order as aforesaid, for taking examinations under this Act, (*f*) and he is hereby required to make, if need be, a special report to the Court in which such proceedings are pending, (*g*) touching such examination and the conduct or absence of any witness or other person thereon or relating thereto; (*h*) and the Court is hereby required to institute such proceedings and make such order or orders upon such report as justice may require, and

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posite party to enable him, if he pleased, to put cross interrogatories, such irregularity is a good objection to the admissibility of the depositions: (*Steinkeller* v. *Newton*, 9 C. & P. 313.) Where a witness who had been examined on interrogatories in a foreign country, stated in one of his answers the contents of a letter which was not produced, it was held on the trial of the cause in England that so much of the answer as related to the contents of the letter was not receivable in evidence, although it was urged in support of its admissibility, that there were no means, as the witness was out of the jurisdiction of the Court, of compelling the production of the letter: (*Ib. Sed qu.* See this case differently reported in 2 M. & R. 372.) Where the witness was both examined and cross-examined, the answers to the examinations in chief were held not to be admissible without the answers to the cross-examination: (*Temperley* v. *Scott*, 5 C. & P. 341; see further *Stephens* v. *Foster*, 6 C. & P. 289.) Objectionable questions or answers may be struck out at the trial, so as not to be laid before the jury, but the right to make the application does not extend to the party who produces them: (*Hutchinson* v. *Bernard*, 2 M. & R. 1; *Tufton* v. *Whiteman*, 9 L. J. Q. B. 405; also *Williams* v. *Williams*, 4 M. & S. 497.)

(*d*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 56. — Applied to County Courts. The origin of the enactment seems to be Eng. Stat. 1 & 2 Wm. IV. cap. 22, s. 8.

(*e*) Instead of the words in brackets the Eng. C. L. P. Act reads "Master."

(*f*) *i.e.* Under ss. clxxi, clxxiv, and clxxviii.

(*g*) The officer who takes the examination is "required to make" a special report, "if need be." *Qu.* Who is to judge of the necessity—Can a party to the cause require the officer to make a special report?

(*h*) The matters that may enter into the subject of the special report are here enumerated, viz., the conduct or absence of any witness or other person. If a witness produced improperly conduct himself from bias or other corrupt motives that may be made to appear. If there be reason to believe that a witness absent has been kept away through the influence of either party, that also may be made to appear. So if a party to the cause or any other person upon his behalf, disturb the examination. These and matters of a similar nature that will readily suggest themselves, furnish materials for a special report. No form of report is given. The return to a commission, order, or other document authorising an examination, must generally be in strict accordance with the terms of the document authorising the examination: (see *Atkins* v. *Palmer*, 4 B. & A. 377; *Clay* v. *Stephenson*, 7 A. & E. 185; *Steinkeller* v. *Newton*, 1 Scott N.R.148; 8 Dowl. P. C. 379, 9 C. & P. 313, differently stated by each reporter.)

as may be instituted and made in any case of contempt of the Court. (*i*)

CLXXXI. (*j*) The costs of every application for any rule or order to be made for the examination of parties or witnesses by virtue of this Act, (*k*) and of the rule or order and proceedings thereon, (*l*) shall be in the discretion of the Court or Judge by whom such rule or order is made. (*m*) (*App. Co. C.*) Eng. C. L. P. A. 1854, s. 57. As to costs of rule and examination.

And with respect to Execution; (*n*) Be it enacted as follows: *Execution.*

(*i*) See Chit. Arch. 8 Edn. 332.

(*j*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 57. — Applied to County Courts.

(*k*) Seess. clxxi, clxxiv, and clxxviii.

(*l*) May refer to admissions or other matters incidental to but arising out of the examinations.

(*m*) Though the origin of this enactment appears to be Eng. Stat. 1 Wm. IV. cap. 2, s. 9, it must be borne in mind as a point of distinction, that under the Eng. Stat. of William the costs are made costs in the cause: (*Prince* v. *Samo*, 4 Dowl. P. C. 5.)

(*n*) The description of property seizable under execution in Upper Canada in some respects differs from the laws of England. Personal property commonly described as goods and chattels is, both in England and in Upper Canada, liable to seizure. Real estate, commonly described as lands and tenement, in Upper Canada though not in England may be seized and sold in satisfaction of debts, whether simple contract or specialty in the same manner as goods and chattels. This was a principle that existed in many of the British colonies of North America from an early period. An attempt made in some of the colonies to dispute the principle to the detriment of English creditors led to the passing of Eng. St. 5 Geo. II. cap. 7, intituled "An Act for the more easy recovery of debts in his Majesty's Plantations and Colonies in America." It enacts, as follows: "That from and after, &c., the houses, lands, negroes, and other hereditaments and real estates situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with *all just debts, duties, and demands of what nature or kind soever*, owing by any such person to his Majesty, or any of his subjects, and shall and may be *assets* for the satisfaction thereof, in like manner as real estates are by the law of England liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, process, and proceedings in any Court of Law or Equity in any of the said plantations respectively, for seizing, extending, selling, or disposing of any such houses, lands, negroes, and other hereditaments and real estate towards the satisfaction of such debts, duties, and demands, and in like manner as *personal estates* in any of the said plantations respectively are seized, extended, sold, or disposed of for the satisfaction of debts:" (s. 4.) The construction of this section has been the subject of doubt and of some diversity of opinion. The leading case in Upper Canada upon the statute is *Gardiner* v. *Gardiner*, 2 O S. 520. The perusal of it, particularly the judgments of Robinson, C. J., and Macaulay, J., who, though differing in one very material point, in the main agreed in opinion, will put the reader in possession of the whole law upon the subject. Whatever differences of opinion there were, the law is now settled.

It appears that from 1791, when Upper Canada became a separate co-

(App. Co. C.) Prov. Stat. 16

CLXXXII. (*o*) In all actions brought in either of the said

lony, little use was made of the Act of Geo. II., owing to doubts whether that Statute applied to Upper Canada in consequence of our adoption of the laws of England by the 32 Geo. III. cap. 1. The issuing of writs against lands was obstructed by these doubts till 1804, when the case of *Gray* v. *Willocks* occurred and suspended all the proceedings under the Statute during the several years in which that case was pending. It was ultimately decided in appeal in 1809 in favor of the application of the statute to Upper Canada, and the point being no longer doubtful resort was frequently had to the Statute: (Robinson, C.J., in *Gardiner* v. *Gardiner*, 2 O. S. 547.) And when in course of time the Act in practice was closely examined and its meaning thoroughly sifted, importance was attached to the fact that it not only made real estate liable for and chargeable with the payment of debts of every description but *assets* for their satisfaction. Under the operation of the Statute it was held that real estate in Upper Canada descended to the heir, subject to the payment of debts and liable to be seized and sold therefor in proceedings against an administrator or executor, without making the heir at law a party to such proceedings: (*Gardiner* v. *Gardiner*, *ubi supra.*) This anomaly in consequence presents itself — real estate *quoad* the satisfaction of debts is treated as personalty, and yet for all other purposes retains its character of real estate. It is an anomaly not unknown even in England. Estates *pur autre vie* are turned into personalty for some special purposes, but nevertheless the nature of the estate is unaltered: (29 Car. II. cap. 3, s. 12; 14 Geo. II. c 20, s. 9, per Robinson, C. J., 2 O.S. 556.) The Statute 5 Geo. II. cap. 7, not only declares that real estate shall be assets for the satisfaction of debts, but enacts the manner in which it shall be converted, for the purpose of paying debts, viz., "subject to the same remedy, proceedings, and process for seizing, extending, selling, &c., *in like manner* as personal estates are seized, extended, sold," &c. The remedy with respect to personal estate is by judgment and execution against the debtor, if alive, or against his executor or administrator, if deceased. To sell real estate upon a judgment against an executor or administrator is inconsistent with the law of England. It is a mode of procedure peculiar to the colonies, and one which exists in Upper Canada solely by virtue of St. Geo. II. which applies only to the colonies. The usual form of execution against personal property both in England and Upper Canada is a writ of *fi. fa.*, and this form is in Upper Canada under the operation of the Stat. of Geo. II. also used as regards real estate. The usual form of execution against lands and tenements in England is the *elegit*, which, though not abolished in Upper Canada, is in a great measure superseded by the *fi. fa.* against lands. In most of the British colonies of North America goods and chattels, lands and tenements were at one time included in one and the same writ of *fi. fa.* This was the practice in Upper Canada until 1803, when it was enacted that process should not issue against lands until the return of process against goods: (43 Geo. III. cap. 1, s. 1.) Shares in the capital stock of incorporated companies are deemed personal property and liable as such to seizure in execution: (see 2 Wm. IV. cap. 15; 12 Vic. cap. 23.) Besides real and personal property such as already described, "debts owing to," the judgment debtor may be seized under certain regulations by virtue of the sections following. With respect to executions generally, a number of useful regulations are also enacted, each of which will be considered in its place.

(*o*) Taken from Prov. St. 16 Vic. cap. 175, s. 27, of which it is a verbatim copy, and substantially the same as Eng. St. 1 Wm. IV. cap. 7, s. 2. The Statute is a remedial one, and

Courts, (*p*) or in any County Court, the Judge before whom any issue joined in such action shall be to be tried, or damages to be assessed, (*q*) in case the Plaintiff or Demandant therein shall become non-suit, (*r*) or a verdict shall be given for the Plaintiff or Demandant, Defendant or Tenant, (*s*) may certify under his hand on the back of the Record, at any time before the end of the Sittings or Assizes, that in his opinion, (*t*) execution ought to issue in such action forthwith, (*u*) or at some day to be named in such certificate, and subject or not to any

Vic.c.175,s.27

After verdict or non-suit, Judge may certify that execution ought to issue forthwith.

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meant to protect against frauds and to secure suitors in the fruits of their verdicts. It should therefore receive a liberal construction: (Robinson, C.J, in *Patterson* v. *Hall*, 11 U. C. R. 258.)

(*p*) The English Statute of William was held to apply to actions commenced before it came into operation, but tried afterwards: (*Bell* v. *Smith*, 5 C. & P. 10); and though at first looked upon as limited to actions on contract was afterwards held to apply to all cases where the Judge might think execution ought to issue at an early period: (*Barden* v. *Cox*, 1 M. & R. 203; *Younge* v. *Crooke*, 1 M. & R. 220.)

(*q*) It is in the discretion of a County Judge to make an order for immediate execution in such cases, as he has authority to try, whether instituted in a Superior Court or in his own Court: (*Patterson* v. *Hall*, *ubi supra*.) He can therefore order immediate execution in cases sent down to him by writ of trial under 8 Vic. cap. 13, s. 53: (*Ib.*) The Judge before whom the trial is had is *the* Judge authorised to certify: (see *Carpenter* v. *Lee*, 1 Dowl. N.S. 706.)

(*r*) Where in an action for criminal conversation in consequence of the prevarication of one of plaintiff's witnesses, plaintiff elected to be non-suited. Tindal, C.J, upon deliberation certified for execution for costs to be issued at the expiration of one month: (*Hambridge* v. *Crawley*, 5 C.& P. 9, *n.*)

(*s*) Where in an action for goods sold and delivered, and on an account stated, there was a demurrer to the count on the account stated which had not been argued at the time of the trial when plaintiff had a verdict, the presiding Judge certified for immediate execution upon plaintiff undertaking to enter a *nolle prosequi* to the count demurred to: (*Allsopp* v. *Smith*, 7 C. & P.708.) *Qu.* Can the Judge certify for speedy execution when one of two defendants has tendered a bill of exceptions: (*Dresser* v. *Clarke*, 1 C. & K. 569.)

(*t*) The Statute is more particularly intended to apply when the Judge, on the facts appearing at the trial, thinks there should be execution immediately: (*Le Gervas* v. *Burtchley*, 1 M. & R.150); but affidavits may be received in support of the application: (*Ruddick* v. *Simmons*, 1 M. & R. 184.) Lords Lyndhurst and Tenterden in England are said to have laid it down as a rule that where there was a reasonable ground of defence the case should take the ordinary course: (*Barford* v. *Nelson*, 5 C. & P. 8.) The general object of the English Statute was thought by Parke, J., to be to accelerate execution for all debts where there was really no doubt of the claim upon the record: (*Anon.* 1 M. & R. 167); and he certified for immediate execution in an action of *assumpsit*, though the verdict was taken by consent and though the consent did not contain any stipulation as to the issuing of execution: (*Ib.*)

(*u*) "Forthwith" means as soon as execution can be obtained in the ordinary course of the Court or of the office: (*Snooks* v. *Smith*, 7 M. & G. 528; *Gill* v. *Rushworth*, 2 D. & L. 416; *Alexander* v. *Williams*, 4 D. &

condition or qualification, and in case of a verdict for the Plaintiff, then either for the whole or any part of the sum found by such verdict, (*v*) in all which cases costs may be taxed in the usual manner and judgment entered forthwith, and execution may be issued forthwith or afterwards, according to the terms of such certificate, on any day in vacation or term, and the *postea* with such certificate as a part thereof, shall and may be entered of record as of the day on which the judgment shall be signed; (*w*) Provided always, that the party entitled to such judgment may postpone the signing thereof. (*x*)

Taxing costs.

Execution.

Entering *Postea.*

Proviso.

(*App. Ch. C.*) CLXXXIII. (*y*) Every Judgment to be signed by virtue of the next preceding Section may be entered and recorded as the Judgment of the Court wherein the action shall be pending, though the Court may not be sitting on the day of the signing

Prov. Stat. 16 V. c. 175, s. 78.

Entry and record of judgment.

L. 132.) No rule for judgment is necessary: (N. R. 46.)

(*v*) *Semble.* The costs are incident to the recovery: (*Smith* v. *Dickenson*, 1 D. & L. 155); and plaintiff should issue one writ of execution for the amount of the verdict and costs: (*Smith* v. *Dickenson*, 5 Q. B. 602.) There is nothing to restrain the Judge from preventing the immediate issue of execution for costs, since he may make his certificate subject to any condition or qualification: (*Ib.* Paterson, J, 5 Q. B. 605.) And, *semble*, if he do so the first writ of execution must be a special writ under the statute reciting the Judge's certificate and the direction to the Sheriff in the body of the writ should not be to levy for the whole sum for which judgment was signed, but for a special sum ordered by the certificate: (*Ib.* Wightman, J, 1 D. & L. 158.) And if a second writ of execution become necessary for the costs, the previous writ ought to be recited and it should appear that the second writ, particularly if the first was a *ca. sa.*, is not for the same cause as in the first writ being founded upon the Judge's certificate and the second upon the final judgment: (*Ib.*) If both writs should be *ca. sas.* and it appear upon looking at them that defendant has been twice taken in execution to satisfy the same judgment, he will be discharged: (*Ib.*) Since, however, the damages and costs should be embodied in the original judgment and the execution should follow the judgment, these *dicta* may be open to doubt, unless the judgment itself be entered for the damages and costs separately, so as to warrant and support an execution in the special forms above suggested.

(*w*) When once final judgment has been signed the power of the Judge who presided at the trial is at an end, and the execution follows as of right, according to the terms of the certificate, which the Judge has no power to alter: (*Lander* v. *Gordon*, 7 M. & W. 218.) As to the form of *postea* and judgment when a certificate has been granted for immediate execution, see *Engleheart* v. *Eyre*, 5 B. & Ad. 70, *a*.

(*x*) *Qu.* Has the Judge power after the certificate to alter or amend it before the signing of judgment where the party entitled to do so postpones the entry of judgment?

(*y*) Taken from Prov. Stat. 16 Vic. cap. 175, s. 28, the origin of which is Eng. St. 1 Wm. IV. cap. 7, s. 3.—Applied to County Courts.

thereof, (*z*) and shall be as effectual as if the same had been signed and recorded according to the course of the common law. (*a*)

(App. Co. C.) Prov. St. 16 V. c. 175, s. 29.

Judgment may be set aside, &c.

CLXXXIV. (*c*) Notwithstanding any Judgment signed or recorded or execution issued by virtue of the two next preceding Sections, the Court in which the action shall have been brought, may order such Judgment to be vacated and execution to be stayed or set aside, (*d*) and may enter an arrest of judgment (*e*) or grant a new trial or a new assessment of damages, (*f*) as justice may appear to require, and thereupon (*g*) the party affected by such Writ of Execution shall be restored to all that he may have lost thereby, in like manner as upon the reversal of a Judgment by Writ of Error, (*h*) or otherwise as the Court may think fit to direct; (*i*) Provided that any application to vacate such Judgment must be made within the first four days of the Term next after the rendering of the verdict. (*j*)

Consequence of its being so.

Proviso.

(*z*) In declaring on a judgment signed in vacation, the day of signing judgment should be stated according to the fact, and not laid as of the preceding term: (*Engleheart* v. *Eyre*, 5 B. & Ad. 68.)

(*a*) *i. e.* So as to entitle the successful party forthwith to issue his execution, the fruit of his judgment. Where judgment is to be entered up according to the ordinary practice time is allowed for moving against the verdict before judgment can be entered. The time allowed is the first four days of the term next after the trial. Under the operation of this section, the execution may be issued without waiting the usual period. And under the following section the judgment may be moved against, notwithstanding the issue of execution.

(*c*) Taken from Prov. Stat. 16 Vic. cap. 175, s. 29, the origin of which is Eng. Stat. 1 Wm. IV. cap. 7, s. 29.—Applied to County Courts.

(*d*) See Chit. Arch. 8 Edn. 881, *et seq.*

(*e*) See *Ib.* 1353, *et seq.*

(*f*) See s. clxviii. *et seq.* of this Act.

(*g*) "Thereupon," *i. e.* when judgment *has* been vacated, &c. The Court has no power to order money levied on the execution to be paid over while the rule is under discussion: (*Morton* v. *Burn*, 5 Dowl. P. C. 421.)

(*h*) See Chit. Arch. 8 Edn. 511, *et seq.*

(*i*) Where a Judge at the trial orders that plaintiff shall have execution within a limited time, and judgment is thereupon entered up and execution issued, the defendant is not precluded from applying to the Court above to enter a suggestion to deprive the plaintiff of his costs, where the sum recovered is within the jurisdiction of an inferior Court: (see *Baddley* v. *Oliver*, 1 C. & M. 219.)

(*j*) The spirit of these sections as to speedy execution appears to be this—the Judge at the trial gives a right to speedy execution; he gives that right, however, not *conclusively*; but subject to an application to the Court to be made within the first four days of the next ensuing term, upon any ground upon which an application can be made whether in arrest of judg-

(App. Co. C.) Stat. U. C. 2 Geo. IV. c. 1, s. 15.

On what affidavit writ of *Ca. Sa.* may issue.

CLXXXV. (*k*) In cases which the Defendant has been held to special bail, it shall not be necessary before suing out a *Capias ad satisfaciendum*, (*l*) to make or file any further or other affidavit than that upon which the Writ of *Capias* issued in the first instance, (*m*) but where the Defendant (*n*) has not been held to special bail, (*o*) a Writ of *Capias ad satisfacien-*

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ment or for a new trial or otherwise. In other words, the judgment signed with a view to speedy execution is subject to be questioned within the first four days of the term next after the rendering of the verdict: (*Smith* v. *Temperley*, 4 D. & L. 510.) The Court will not entertain objections to the regularity of the proceedings, where the party has neglected to avail himself of opportunities to urge them at an earlier period, even though they amount to error on the face of the record: see *Graves* v. *Waller*, 1 Scott 310.

(*k*) Taken from Stat. U. C. 2 Geo. IV. cap. 1, s. 15.—Applied to County Courts.

(*l*) A defendant cannot be arrested upon a *ca. sa.* where a *fi. fa.* has been taken out and acted upon but not returned: (*Ross et al* v. *Cameron*, 1 U. C. Cham. R. 21; *Andrews* v. *Sanderson et al*, 28 L. T. Rep. 293;) though after the return of the *fi. fa.* notwithstanding the lapse of several terms plaintiff may issue the *ca. sa.*: (*Glynn* v. *Dunlop*, 4 O. S. 111.) But where defendant had been discharged from custody on a *ca. sa.* by the partner of plaintiff's attorney, under the supposition that the debt for which defendant had been arrested was compromised by the acceptance of securities by plaintiff, though it afterwards appeared that plaintiff had not accepted the securities the Court refused to permit the issue of a new writ of *ca. sa.*: (*Bradbury et al.* v. *Loney*, H. T. 5 Vic. *MS.* R. & H. Dig. "Capias ad Satisfaciendum," 9.) A *ca. sa.* commanding the Sheriff to detain the defendant in custody until he should satisfy the plaintiff without stating the amount of debt to be recovered, is void: (*Henderson* v. *Perry et al*, 3 U. C. R. 252.)

(*m*) Plaintiff will not be warranted in suing out a *ca. sa.* upon an affidavit made in the first instance, if his subsequent proceedings show that he has abandoned the bailable proceedings first adopted: (*Brown* v. *Bethune*, 4 O. S. 331.) Thus where plaintiff sued out a bailable *ca. re.* against defendant, and before its return took a *cognovit* from defendant without using the *ca. re.* at all, and subsequently entered judgment filing common bail for defendant, and without any affidavit of debt other than that on which the *ca. re.* issued, which was for £1500, charged him in execution on a *ca. sa.* for £2500, the Court set aside the arrest on the *ca. sa.* with costs: (*Ib.*) It has been held that a *ca. sa.* cannot be issued since the Insolvent Debtor's Act, 8 Vic. sec. 44, cap. 48, upon an affidavit filed under the former law at the commencement of the suit: (*Sewell* v. *Dray*, 2 U. C. R. 179.) *Qu.* What is plaintiff's proper course in issuing a *ca. sa.* where there are two defendants one of whom only was arrested at the commencement of the suit: see *McIntyre* v. *Sutherland et al.* 5 O. S. 153; *Turner* v. *Williams et al*, 1 U. C. Prac. Rep. 360.

(*n*) A plaintiff who has suffered judgment of *non pros.* may be arrested on a *ca. sa.* issued by defendant for his costs: (*Johnson* v. *Smeadis*, Tay, U. C. R. 174); so as to defendant's costs of defence where defendant succeeds on the trial: (*Thompson* v. *Leonard*, 3 O. S. 151.) The St. U. C. 5 Wm. IV. cap. 3, s. 2, which enacted that no *ca. sa.* should issue upon a judgment recovered for costs only has been repealed by this Act: (cccxviii.)

(*o*) If defendant though arrested on *mesne* process be discharged from cus-

dum may issue after Judgment upon an affidavit in the same form (*mutatis mutandis*) as is hereinbefore required to be made for the purpose of suing out a Writ of *Capias* as aforesaid, (*p*) or upon an affidavit by the Plaintiff, his servant or agent, that he hath reason to believe the Defendant hath parted with his property (*q*) or made some secret or fraudulent conveyance thereof, in order to prevent its being taken in execution. (*r*)

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 121.

CLXXXVI. (*s*) It shall not be necessary to issue any writ directed to the Sheriff of the County or United Counties in which the venue is laid, (*t*) but writs of execution may issue at once into any County [or United Counties,] and be directed to and executed by the Sheriff of any County or United Counties without reference to the Counties or United Counties in which the venue is laid, and without any suggestion of the issuing of a prior writ into such County or United Counties. (*u*)

Writ to Sheriff of the County where the venue is laid, may be dispensed with.

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tody, and the process set aside for irregularity plaintiff may after judgment issue a *ca. sa.* upon filing a new affidavit: (*Gordon* v. *Somerville*, M. T. 7 Vic. *MS.* R. & H. Dig. "Capias ad satisfaciendum," 10.)

(*p*) See s. xxiii. and notes thereto.

(*q*) A *ca. sa.* may be issued against an executor after proper inquiry and upon a return of *devastavit*: (*Willard* v. *Woolcut*, Dra. Rep. 211.)

(*r*) The Court allowed a *ca. sa.* to issue upon an affidavit sworn before a Judge in Lower Canada, whose signature was verified by an affidavit taken before a commissioner in Upper Canada: (*Coit* v. *Wing*, 3 O. S. 439.) It is not necessary in an affidavit made by plaintiff having two Christian names to state the second, where his identity sufficiently appears by the affidavit describing him as "the above named plaintiff:" (*Perkins* v. *Conolly*, 4 O. S. 2.)

(*s*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 121.—Substantially the same as Stat. U. C. 7 Wm. IV. cap. 3, s. 23.—Founded upon 1st Rept. C. L. Comrs., s. 76.—Applied to County Courts.—The words in brackets are not in the English Act.

(*t*) The contrary was the rule that prevailed in England before the passing of the English Common Law Procedure Act, 1852, though in practice often neglected. But in Upper Canada the practice enacted by this section has prevailed since 1837: (Stat. U. C. 7 Wm. IV. cap. 31, s. 33.) The execution, however, should in all cases strictly conform to the judgment upon which it is issued: (see *King* v. *Birch*, 3 Q. B. 425; *Phillips* v. *Birch*, 2 Dowl. N. S. 97.)

(*u*) The writ formerly issued into the County in which the venue was laid, was called the ground writ. That to any other County was grounded upon it and was known as a *testatum*. The former is by this Act and by Stat. 7 Wm. IV. cap. 3, s. 83, abolished, and the latter instead of being a *testatum* becomes in consequence an original writ. Mr. Justice Hagarty refused to disallow the costs of a concurrent writ of execution, where defendant was unable to show that the writ was issued oppressively, and plaintiff swore he had reason to believe that defendant had property in the two counties to which the concurrent writs were

(App. Co. C.)

If the Sheriff go out of office during currency of a writ against land. Proviso.

CLXXXVII. (*v*) If the Sheriff shall go out of office (*w*) during the currency of any writ of execution against lands, (*x*) and before the sale, such writ shall be executed and the sale and conveyance of the lands made by his successor in office, and not by the old Sheriff; (*y*) Provided, that it shall be lawful for any Sheriff, after he has gone out of office, to execute any deed or conveyance necessary to effectuate and complete a sale of lands made by him while in office. (*z*)

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issued: (*McKellar* v. *Grant*, Chambers, III. U.C.L.J. 14.) It is presumed that the practice of suing out execution to charge bail is not affected by this section: (s. cxcii; see also proviso to 7 Wm. IV. cap. 3, s. 33.)

(*v*) This and the following section appears to have been enacted in order to remove doubts upon points concerning which there has been no very decided opinion in the Courts: see *Doe d. Campbell* v. *Hamilton*, 6 O. S. 88; *Doe d. Young* v. *Smith*, 1 U. C. R. 195; *Doe d. Miller* v. *Tiffany*, 5 U.C. R. 79. —The section is applied to County Courts.

(*w*) *Qu.* Is a Sheriff to be deemed in office until the appointment of his successor or until he has been in a formal and legal manner discharged from the office? see *Ross et al.* v. *McMartin*, 7 U. C. R. 179. A writ of *fi. fa.* was delivered to the sheriff on 21st Novemember, 1847, returnable in Hilary Term, 1848. On 9th December, 1847, the sheriff tendered to the government his resignation of office. On 14th of same month it was notified to him that his resignation had been accepted, but his successor was not appointed till after the return of the writ, which had been made in the interval. The deputy sheriff who remained in the office to wind up the old business, made his return to the writ; in an action against the ex-sheriff for a false return it was held under the particular circumstances of the case, that the ex-sheriff must be considered as in office at the return of the writ and liable upon the return made: (*Ib.*)

(*x*) It is well to notice that this section is restricted to executions against lands. There is no doubt that where a sheriff has made a seizure under a *fi. fa.* against goods, he may complete the execution although he has in the meantime gone out of office: (*Clerk* v. *Withers*, 6 Mod. p. 290.) Since writs of execution are not now as formerly made returnable on a day certain, the expression "during the currency of any writ," is open to some doubt.

(*y*) It matters not whether there has or has not been an inception of execution so long as no sale has taken place in which case the successor in office is the proper person to sell and convey the land seized.

(*z*) The latter part of this section is implied in the former, though to avoid question it is well that it should be substantively expressed. If a *sale* has taken place the conveyance shall be made by the sheriff who effected the sale whether he continue to be sheriff or has resigned that office. This is supposing him to be still living. If after sale and before conveyance he die, his deputy may continue in office and execute all things pertaining to it in the name of the deceased: (Stat. U. C. 3 Wm. IV. cap 8, s. 23,) but the power of the deputy ceases upon the appointment of a new sheriff: (*Doe d. Campbell* v. *Hamilton*, 6 O. S. 98.) It is not clear whether if a sheriff go out of office after the return day of a writ and *before* the sale, having taken an incipient step such as an advertisement under the next succeeding section, he can afterwards sell and make a return to the execution.

CLXXXVIII. (*a*) The advertisement in the *Official Gazette*, of any lands (giving some reasonable definite description of them), for sale under a Writ of Execution, during the currency of the Writ, (*b*) shall be deemed and taken to be a sufficient commencement of such execution, to enable the same to be completed after it shall be returnable, by a sale and conveyance of the lands. (*c*)

(App. Ca. C.) Advertisement during currency of writ, sufficient commencement of execution, &c.

CLXXXIX. (*d*) Every Writ of Execution issued after the commencement of this Act, (*e*) shall bear date and be tested on the day on which it is issued, (*f*) and shall remain in force for one year from the teste, (*g*) and no longer if unexecuted, (*h*)

(App. Ca. C.) Eng. C. L. P. A. 1852, s. 124. Duration of writ of execution.

(*a*) This section is in its terms restricted to executions against lands.—It is applied to County Courts.

(*b*) Nothing can be done under an execution after it has ceased to be current, unless for the purpose of perfecting what has been commenced while it was in force: (*Doe d. Greenshields* v. *Garrow*, 5 U. C. R. 237) There must be some act done amounting in law and fact to an incipient step in the execution of the writ: (per Macaulay, J, in *Doe Miller* v. *Tiffany*, 5 U. C. R. 90.) The mere receipt of the writ by the sheriff while in office will not be a sufficient inception of execution: (*Ib.*) There must be something to connect the process with the land: (*Ib.*) It was made a question before this Act, whether an advertisement in the official *Gazette* was a sufficient step: (*Ib.*) It is now enacted that such an advertisement giving some reasonable description of the land shall be sufficient.

(*c*) The sale and conveyance must be taken to be subject to the provisions of the preceding section.

(*d*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 124, from which it differs in some particulars hereafter noted.—Founded upon 1st Rep. C. L. Comrs. s. 78. — Applied to County Courts.

(*e*) i. *e.* After 21st August, 1856.

(*f*) It was enacted by 16 Vic. cap. 175, s. 6, that executions, &c., "*may* be tested and bear date, &c." It is now enacted that every writ of execution "*shall* be tested, &c."

(*g*) This was to some extent the practice in Upper Canada before the passing of this Act. Executions against goods were generally made returnable on the first day of the term next following the teste and executions against lands in twelve months from the teste. After the return day in either case the writ was spent, so that nothing could be done under it unless to perfect that which had been commenced while current: (*Doe d. Greenshields* v. *Garrow et al*, 5 U. C. R. 237.) But no time was fixed within which a Sheriff was bound to complete that which he had commenced under the execution. Long delay was only evidence of abandonment. To repel the inference arising from such delay, satisfactory explanation was required. In England an execution remained in force until executed which might be in one year or in ten, to the great perplexity of sheriffs and wrong of creditors.

(*h*) The object of this section is to secure execution creditors entitled to priority of execution, and at the same time prevent them from committing frauds upon other creditors coming after them. There is no doubt if a sheriff be in receipt of several executions at the suit of different creditors against the same debtor, and all the writs be current, that he is bound to give precedence to the writ

unless renewed in the manner hereinafter provided, (*i*) but

which was first delivered to him for execution: (*Hutchinson* v. *Johnston*, 1 T. R. 729; *Bradley* v. *Wyndham*, 1 Wils. 44; *Kempland* v. *Macauley*, 4 T. R. 436; *Pringle* v. *Isaac*, 11 Price 445; *Smallcomb* v. *Cross*, 1 Ld. Rayd. 251; *Martindale* v. *Booth*, 3 B. & Ad. 498; *Drewe* v. *Lainson*, 11 A. & E. 529.) But if the first writ be delivered with instructions not to levy or be otherwise countermanded, it is not a writ upon which the sheriff can act, and therefore loses its priority: (*Payne* v. *Drewe*, 4 East. 523; *Menshall* v. *Lloyd*, 2 M. & W. 450; *Wintle* v. *Freeman*, 11 A. & E. 539; *Wythers* v. *Hemley*, Cro. Jac. 379; *Jones* v. *Atherton*, 7 Taunt. 56; *Samuel* v. *Duke*, 6 Dowl. P. C. 536; *Hunter* v. *Hooper*, 1 D. & L. 626; *Howard* v. *Cauty*, 2 D. & L. 115.) Directions to the Sheriff not to sell unless he receive another execution, may deprive the party giving them of all benefit of priority: (*Ross et al.* v. *Hamilton*, E. T. 3 Vic. *MS.* R. & H. Dig. "False Return," 8; *Strange* v. *Jarvis*, 6 O. S. 160.) And where goods seized under a *fi. fa.* founded on a judgment fraudulent against creditors, remain in the Sheriff's hands or are capable of being seized by him, he is compellable to sell and seize such goods under a subsequent execution founded on a *bona fide* debt: (*Imray* v. *Magnay*, 11 M. & W. 267; *Christopherson* v. *Burton*, 3 Ex. 160.) If the first writ though *bona fide* remain one year unexecuted, it lapses so as to let in subsequent executions. When a writ can be said to be executed so as to satisfy this section is a question. Nothing, at all events, short of an actual seizure can, it is apprehended, be considered an execution of a writ of *fi. fa.* against goods. Whether a partial levy will be sufficient remains to be decided. Writs of execution in England under St. 3 & 4 Wm. IV. cap. 67, s. 2, are made returnable "immediately after the execution thereof." And under that statute it has been held that partial execution is not the execution intended: (*Jordan* v. *Binckes*, 13 Q. B. 757.) Denman, C. J. "I do not see where the line is to be drawn short of complete execution to limit the force and duration of the writ. The defendant's construction, namely, that the writ is executed as soon as the Sheriff may return *nulla bona* either in whole or in part, requires authority to support it; and such authority as there is, seems to be quite against him." Patteson, J. "I cannot see at what point the sheriff can stop before complete execution. Formerly, if other goods came into his bailiwick after a partial levy, and before the return of the writ, the Sheriff was bound to seize them, and he is equally bound to do so now, until the writ has been completely executed." The reasoning of this decision is obvious. A writ of execution not being made returnable at a fixed day or within a limited period from the teste, but only when executed, it may be well said that a writ only *partially* executed continues current *quoad* the residue because not yet fully executed and consequently not yet returnable. It only remains to be observed that since the C. L. P. A. all executions against goods and chattels issued from our Superior Courts of Common Law are, as in England, made returnable "*immediately after the execution thereof.*" A Sheriff failing to return such writ within a "reasonable time" after receipt thereof, is liable to be ruled in the ordinary manner. To constitute a reasonable time there must be allowed the Sheriff time to travel to the residence of defendant, make an inventory of his goods, return to his office, advertise and sell.

(*i*) The English C. L. P. A. provides two modes of renewal—first, that of a mark with a seal on the writ itself; second, that of a written notice, bearing the seal, to the sheriff. The mode enacted by the section under consideration more resembles the former than the latter.

such writ may, at any time before its expiration, (*j*) be renewed by the party issuing it, for one year from the date of such renewal, (*k*) by being marked in the margin, with a memorandum to the effect following: "Renewed for one year from day of ," signed by the Clerk or Deputy Clerk who issued such writ or by his successor in office; (*l*) and a writ of execution so renewed shall have effect and be entitled to priority according to the time of the original delivery thereof. (*m*) Renewal. Effect of renewal.

CXC. (*n*) The production of a writ of execution marked as renewed in manner aforesaid, shall be sufficient evidence of its having been so renewed. (*o*) (*App. Co. C.*) Eng. C. L. P. A. 1852, s. 125. Evidence of renewal.

CXCI. (*p*) A written order under the hand of the attorney in the cause by whom any writ of *Capias ad Satisfaciendum* shall have been issued, shall justify the Sheriff, Gaoler or person in whose custody the party may be under such writ, in discharging such party, (*q*) unless the party for whom such (*App. Co. C.*) Eng. C. L. P. A. 1852, s. 126. As to order by the Plaintiff or his

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(*j*) *i. e.* Before the expiration of one year from its teste.

(*k*) The English C. L. P. A. here proceeds, "And so on from time to time during the continuance of the renewed writ," evidently intending more than one renewal of the same writ which our C. L. P. A. does not expressly contemplate. Whether it does so *constructively*, remains to be decided.

(*l*) In order that the clerk may mark the writ with the memorandum in the margin it will be necessary to procure the execution from the sheriff, though for all ordinary purposes he is entitled to keep it in his possession. Before this Act there was no method of renewing an execution unless by having the original returned and an *alias or pluries* issued. This let in all intermediate executions; for the original execution lost priority from the time when it became returnable. To avoid this the original is supposed to continue in the possession of and under the control of the sheriff though for a short time for the purposes of renewal he must in fact part with it or else himself take it to the proper officer to be renewed, if willing so to do, upon the request of the party whose execution it is. The renewal when made is a continuation of the original writ and so extends it for a period beyond the time when it would otherwise expire.

(*m*) The practice in this respect will resemble that of renewal writs of summons, as to which see s. xxviii. and notes thereto.

(*n*) Taken from Eng. St. 15 & 16 Vic. cap. 76, s. 125.—Applied to County Courts.

(*o*) This is similar to the practice enacted in respect to renewal writs of summons, as to which see s. xxx. and notes thereto.

(*p*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 126.—Founded upon 1st Rept. C. L. Comrs., s. 79.—Applied to County Courts.

(*q*) The authority of an attorney in general determines with the judgment: (*Tipping* v. *Johnson*, 3 B. & P. 357; *Searson* v. *Small*, 5 U.C. R. 259;) but he may issue execution and receive the money, in which case his receipt

Attorney for discharge of Defendant.

Attorney professes to act, shall have given written notice to the contrary to such Sheriff, Gaoler or person in whose custody the opposite party may be, (*r*) but such discharge shall not be a satisfaction of the debt unless made by the authority of the creditor, (*s*) and nothing herein contained shall justify any Attorney in giving such order for discharge without the consent of his client. (*t*)

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will be the same as that of his client: (*Savory* v. *Chapman*, 11 A. & E. 836, per Littledale, J.; *Brock* v. *McLean*, Tay. U. C. R. 548; *Stocking* v. *Cameron*, M. T. 6 Vic. *MS.* R. & H. Dig. "Escape," 26.) Without receipt of the money or an express authority from the client an attorney before this Act had no power to discharge from custody a defendant arrested under a *Ca. Sa.*: (*Ib.*) The intent of the writ of *Ca. Sa.* is that the defendant should continue in custody until the plaintiff is satisfied his debt: (*Crozer* v. *Pilling*, 4 B. & C. 32.) The authority of the attorney was only to receive the money in satisfaction of the debt: (*Connop* v. *Challis*, 2 Ex. 484.) He had no authority upon receipt of part and security for the balance to discharge the debtor: (*Ib.*) Though as to executions against goods he had under such circumstances full authority to order the sheriff to withdraw from possession: (*Levi* v. *Abbott*, 4 Ex. 588.) His authority as between him and the sheriff both as regards executions against goods and the person, are by this Act placed much upon the same footing.

(*r*) The sheriff is allowed to presume that an attorney professing to act for his client has authority to do so; but this is a presumption which may be disproved by written notice to the contrary from the client. By such notice when given the sheriff must be governed at his peril.

(*s*) The discharge of the debtor before this Act, whether rightfully or wrongfully, if by order of the attorney, was considered a satisfaction of the debt. The client thereby lost all claim as against the debtor and was compelled to fall back upon the sheriff or look to his attorney for damages. Now it is enacted that the discharge shall not be a satisfaction of the debt "unless made by authority of the creditor." This means that if the attorney without authority discharge the debtor the creditor may still hold the debtor responsible. The matter of fact whether the discharge was effected by authority of the creditor or not is a proper question for a jury: (*Ward* v. *Broomhead*, 7 Ex. 726.) Defendant if sued upon the judgment after being discharged may plead the fact of discharge as a defence: (*Viger* v. *Aldrich*, 4 Burr. 2482.)

(*t*) A consent in writing is advisable though not indispensable. The authority of the attorney as between him and his client is not altered by this Act. The general retainer to prosecute does not authorize the attorney to discharge the debtor without express authority so to do or payment in full of the debt. But as between the attorney and the sheriff the authority is presumed when the attorney acts as if authorised. If the latter give orders to the sheriff when unauthorized, he will be liable to his client for the consequences. The measure of damages in such case would be, "the value of the custody of the debtor at the moment of the escape without deduction for anything that plaintiff might have obtained by diligence after the escape:" (see *Arden* v. *Goodacre*, 11 C. B. 371.)

CXCII. (*u*) Writs of execution to fix bail may be tested and returnable in vacation. (App. Or. C.) Eng. C. L. P. A. 1854, s. 90. Teste of writs to fix bail.

CXCIII. (*v*) It shall be lawful for any creditor who has obtained a Judgment (*w*) in any of the Superior Courts (*x*) to Eng. C. L. P. A. 1854, s. 60.

(*u*) Taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 90.—Applied to County Courts. The writ of execution to fix bail is usually a *Ca. Sa.* It is little more than a mere form, and is chiefly designed to intimate to the bail by what species of execution plaintiff intends to proceed: (*Hunt* v. *Coxe*, 3 Burr. 1860.) Leaving it in the sheriff's office is notice to the bail that the plaintiff will proceed against the *person* of their principal. Within four days, the bail may surrender their principal: (*Beattie* v. *McKay*, 2 U. C. Cham. R. 156.) The writ of *Ca. Sa.* must be sued out and, it seems, returned before process can be had against the bail: (*Thackray* v. *Harris*, 1 B. & Ald. 212.) It is incumbent on the bail to search in the sheriff's office as to whether any *Ca. Sa.* was left there or not: (*Hunt* v. *Coxe*, *ubi sup.*) Though in strict practice the writ should be sued out, returned, and filed before the commencement of proceedings against bail, it seems that if the writ be filed before replication to a plea by the bail of no *Ca. Sa.* it will be sufficient: (*Ib.* see also *Rawlinson* v. *Gunston*, 6 T. R. 284.) The *want* of a *Ca. Sa.* is not a mere irregularity but a matter of substance of which the bail can only take advantage by plea: (*Philpot* v. *Manuell*, 5 D. & R. 615.) It is useless to sue out the writ after render of the principal: (*Saunderson et al* v. *Parker*, 9 Dowl. P. C. 495.) The writ when sued out should be tested on the date of issue: (s. clxxxix.) It has been held if defendant consent that plaintiff shall have judgment as of a term previous to the trial, the *Ca. Sa.* may be tested as of the previous term: (*Hovendem* v. *Crawther*, 1 Dowl. P. C. 170.) Notwithstanding the provisions of s. clxxxvi., it is apprehended that the *Ca. Sa.* must be directed to the Sheriff of the county in which the venue is laid: (7 Wm. IV. cap. 3, s. 33; see further *Laporte's Bail*, 4 Dowl. P. C. 639.) Between the teste and return it was at one time held that a period of fifteen days was requisite: (*Ferrie* v. *Mingay*, M. T. 3 Vic. *MS.* R. & H. Dig. Bail, III. 11.) But since 12 Vic. c. 63, and under that statute it has been held that eight days were sufficient: (*Beattie* v. *McKay et al*, 2 U. C. Cham. R. 65.) Whether the time now should be eight or ten days is a question, as ten days are allowed by this Act for a defendant to appear to an ordinary summons. If the teste be irregular the writ may be set aside on motion: (*Gawler* v. *Jolley*, 1 H. Bl. 74; *Laporte's* case, 4 Dowl. P. C. 639.) The *Ca. Sa.* when issued should be left four days in the sheriff's hands: (*Cock* v. *Brockhurst*, 13 East. 588; *Furnell* v. *Smith*, 7 B. & C. 693; *Scott* v. *Larkin*, 7 Bing. 109; *Beattie* v. *McKay*, *ubi sup.*) If any one of the four days be a *dies non* it will not be reckoned: (*Scott* v. *Larkin*, *ubi sup.*; *Howard* v. *Smith*, 1 B. & Ald. 528; *Goodwin* v. *Sugur*, 2 Chit. Rep. 192; *Furnell* v. *Smith*, *ubi sup.*; *Armitage* v. *Rigbye*, 5 A. & E. 76.)

(*v*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 60.—Founded upon 2d Rep. C. L. Comrs. s. 43.—Not applied to County Courts; but as to these Courts there is a similar provision: (Co. C. P. Act, s. 17.)

(*w*) An executor who has neither revived the judgment obtained by his testator nor entered a suggestion upon the roll in pursuance of s. cciii. of this Act, is certainly not a judgment creditor within the meaning of the Act: (*Baynard* v. *Simmons*, 1 Jur. N. S. 657; 24 L. J. Q. B. 253); nor can a plaintiff in ejectment be deemed a judgment *creditor*: (*Challen* v. *Baker*, 26 L. T. Rep. 206.)

(*x*) If a creditor having obtained a

Examination of a judgment debtor, as to what debts are due to him.

apply to the Court or a Judge (*y*) for a rule or order that the judgment debtor should be orally examined as to any and what debts are owing to him, (*z*) before the Judge of any County Court or before any Clerk or Deputy Clerk of the Crown, or any other person to be specially named; (*a*) and the Court or Judge may make such rule or order (*b*) for the examination of

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judgment in one of the Superior Courts of common law afterwards sue upon it in an Inferior Court and obtain judgment upon it in the Inferior Court, he will not be in a position to avail himself of this section: (*Jones* v. *Jones*, 2 Jur. N. S. 574.)

(*y*) Relative powers, see note *m* to s. xxxvii.

(*z*) The subject matter of the examination will be "debts owing," as to which see note *l* to next succeeding question.

(*a*) As to the manner in which the examination should be conducted, see the reference made at the end of this section.

(*b*) The first case in Upper Canada under this section proceeded by summons and order: (*Brown* v. *Bennniger*, Chambers, Sept. 30, 1856, Burns, J, 2 U. C. L. J. 213.) On 16th October, 1856, an *ex parte* application was made to the same Judge upon an affidavit by plaintiff "that on 24th Nov., 1854, he recovered a judgment in this honourable Court against defendant for £109 11s 5d damages and £14 3s 7d costs; that said judgment is still wholly unsatisfied; that one D. of Sidney Yeoman is indebted to defendant in £62 10s; that said D. is within the jurisdiction of this honorable Court; that this action was not commenced or carried on against defendant as an absconding debtor." Whereupon the order to examine defendant was made absolute in the first instance: (*Anonymous*, Burns, J., Chambers; also, *Connor* v. *McBride*, Chambers, October 28, 1856, II. U. C. L. J. 232.) It does not seem necessary, if the application be merely to obtain an oral examination of defendant under this section, that the affidavit should show debts due, and be as precise as that above mentioned, which applies more to s. cxciv. than cxciii: (*Nimmo* v. *Welland*, Chambers, Oct. 3, 1856, Burns, J, 2 U. C. L. J. 113.) Plaintiff is enabled under s. cxciii. to discover, debts and having discovered them is entitled under s. cxciv. to take preceedings to have them attached. The practice as to whether the order under s. cxciii. should be absolute in the first instance is not settled. Care ought to be taken to distinguish between this and the following section, the one being merely auxiliary to the other. As a matter of prudence a party applying under either section should, whenever able to do so, state not only that judgment has been recovered and is unsatisfied but that efforts have been made to collect the money by execution without success. Where an application was made for an *ex parte* order upon affidavit that "plaintiff had recovered a judgment against defendant and that such judgment was wholly unsatisfied." Per Richards, J. "Your affidavit should show that some attempt has been made to make the money by execution. I will not grant an order in the first instance, but if you think your grounds sufficient you may take a summons:" (*Irvine* v. *Mercer et al*, Chambers, Dec. 8, 1856, Richards, J.) And in a later case an order in the first instance was refused, though it was shown that execution had been issued and returned *nulla bona*, the learned Judge being of opinion that "the parties should have an opportunity of showing cause why they should not be examined:" (*Carter* v. *Cary et al*, Chambers, Dec. 9, 1856, Richards, J.) The order under s. cxciv. it is expressly declared, may be

such judgment debtor, and for the production of any books or documents, (*c*) and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party under this Act. (*d*)

CXCIV. (*e*) It shall be lawful for a Judge, (*f*) upon the *ex parte* application of such Judgment creditor, (*g*) either before or after such oral examination, and upon his affidavit or that of his Attorney, (*h*) stating that Judgment has been recovered and that it is still unsatisfied and to what amount, and

(*App. Co. C.*) Eng. C. L. P. A. 1854, s. 61.

Judge may on application and affidavit, order

obtained upon the *ex parte* application of the judgment creditor.

(*c*) As to which generally, see s. clxxv. and notes thereto.

(*d*) As to which see s. clxxviii. and notes. It is a question whether this section extends to corporations. There is no doubt that s. cxciv. and subsequent sections will embrace corporations, so that creditors of corporations can attach the debts due to such debtors. Yet it is difficult to say how the provisions of s. cxciii. for the purpose of discovery as to these debts can be carried out. It is the judgment debtor that is to be examined, and to be examined orally, and the examination is to be conducted in the same manner as the oral examination of an opposite party. This refers to the mode pointed out in s. clxxviii. It is unfortunate if the Legislature intended that the officers of a corporation might be examined in respect of debts due to the corporation, that some such express words as are contained in s. clxxvi. were not introduced in s. cxciii: (*Cameron* v. *Brantford Gas. Co.*, Chambers, Sept. 25, 1856, Burns, J, II. U.C. L. J. 209.). An order for the oral examination of a judgment debtor may be granted, though that debtor has been arrested on final process at the suit of the judgment creditor: (*Brown* v. *Bennings*, II. U. C. L. J. 213.)

(*e*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 61. — Applied to County Courts.

(*f*) *A Judge*, not "*the Court* or a Judge," as in preceding section.

(*g*) See note *w* to preceding section (cxciii.)

(*h*) It is presumed that a party applying under this section is in possession of information as to debts owing to his judgment debtor. That information may have been obtained either from the debtor himself upon his examination under the preceding section, or in some manner independently of that section. The more satisfactory mode is to proceed under it with a view to an application under this section. Where plaintiff applied under this section for an *ex parte* order to attach debts after having proceeded under the preceding section (cxciii.), his application was granted upon an affidavit of the facts: (*Macpherson et al* v. *Kerr*, Chambers, Dec. 10, 1856, Richards, J.) The affidavit which was that of plaintiff's attorney, was as follows, that on, &c., defendant was orally examined before the Judge of the County Court of the County of Simcoe in pursuance of an order bearing date, &c., that defendant upon such examination swore that one A. B. was indebted to him in the sum of &c., and that said A. B. resides within the jurisdiction of this Court, &c.: (*Ib.*)

(*h*) "*Or* that of his attorney." The words used are in the disjunctive, and in this particular differ from the words "and his attorney," used in s. clxxvii. It is unnecessary to do more than draw attention to the distinction—the reasons of the distinction being sufficiently obvious upon a comparison of the two sections.

attachment of such debts;

that any other person (*i*) is indebted to the Judgment debtor, (*j*) and is within the jurisdiction, (*k*) to order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the Judgment debtor shall be attached to answer the Judgment (*l*) and by the same or any subsequent order it may be ordered that the garnishee shall appear

(*i*) A judgment creditor cannot attach a debt due by himself or by a firm of which he is a partner: (*Nonell* v. *Hullett*, 4 B. & A. 646.)

(*j*) "*Is indebted to.*" The affidavit should in general be positive as to the indebtedness of the third party or garnishee more particularly as under the operation of the preceding section materials for a positive affidavit may be discovered: (*Cataraqui Roads Co.* v. *Dunn*, Chambers, Nov. 11, 1856, III. U. C. L. J. 27, Hagarty, J.; *Hazlewood* v. *DeBergue et al*, Chambers, Nov. 26, 1856, McLean, J., III. U. C. L. J. 28;) though there may be circumstances under which an affidavit of belief would be sufficient: (*Jones* v. *DeBergue et al*, Chambers, Dec. 5, 1856, Burns, J., III. U. C. L. 31.) However an affidavit of some kind must be produced on the application: (*Cataraqui Roads Co.* v. *Dunn*, *ubi supra*.)

(*k*) If the garnishee though residing out of the jurisdiction have money in the hands of an agent within the jurisdiction, such money may be attached under this section, provided plaintiff plainly show that there is such an agent in addition to the ordinary contents of the affidavit: (*Brown* v. *Merrills*, Chambers, Dec. 15, 1856, Burns, J., III. U. C. L. J. 31.)

(*l*) The preceding section empowers the Court or a Judge to make an order for the oral examination of a judgment debtor as to "debts owing to him." And this section empowers a judge to make an order attaching "all debts owing or accruing from" the garnishee. The subject matter to be attached is a *debt*. Demands of an unliquidated nature are clearly not embraced: (*Johnson* v. *Diamond*, 11 Ex. 73.) C. having at the request of D. brought an action as nominal plaintiff against J., received from D. a bond whereby the latter agreed that he would pay J. such costs as C. should be liable to pay J. in case C. should discontinue or become nonsuited, and that he would also permit C. during the pendency of the action, or any liability arising therefrom, to retain and apply any money of him, D., that might come into the hands of C. towards the discharge of any costs or liabilities which C. might incur by reason of his permitting the action to be brought and carried on in his name, or from any injury to him from the default of D. C was nonsuited and J. had judgment to recover against C., the costs of such nonsuit: held that the bond did not constitute a debt from D. to C. which might be attached in the hands of D.: (*Ib.*) Neither is a superannuated allowance granted by the East India Co. to a retired servant such a debt as can be attached, because it is more a gratuity than a debt properly so called: (*Innes* v. *East India Co.*, 25 L. J. C. P. 154.) Nor is a legacy in the hands of an executor although the executor have promised to pay it over if ordered so to do: (*MacDowell* v. *Hallister*, 3 N.C.L.Rep. 933.) There must be such an account stated as would sustain an action in order to constitute a legacy a legal debt in the hands of a legal debtor: (*Ib.*) An unsettled balance of account due by one partner to another cannot be attached: (*Campbell* v. *Peden et al*, Chambers, Jan. 26, 1857, Robinson, C.J,) but a balance agreed upon being the result of a settlement may be attached: (*Ib.*) It is not *every* debt due to a judgment creditor that is to be at-

And may order the garnishee to appear, &c.

before the Judge or some officer of the Court to be specially named by such Judge, to show cause why he should not pay the Judgment creditor the debt due from him to the Judgment debtor, or so much thereof as may be sufficient to satisfy the

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tached. The debt may be attended with circumstances that would prevent the judgment creditor from enforcing its immediate payment and where such is the case it is not a debt of the nature contemplated by this Act: (*Kennett* v. *Westminister Improvement Commissioners*, 3 N. C. L. Rep. 1079.) A public body (incorporated by Act of Parliament) borrowed money from time to time on their bonds, some of which had a preference over others, and eventually a general mortgage of their lands was given on the occasion of fresh advances by one class of bondholders, whose security was inferior to that of another class, which by and by an Act confirming the same, all the bondholders were to be paid *pari passu*: held that one of such bondholders having recovered judgment by default against the corporation could not attach a debt due to it from a builder for money advanced under the power of their acts, as the garnishee clauses only apply to personal debts over which the judgment debtor has complete control: (*Ib.*) The Act though it gives a power of execution against property not before subject to it does not in any way affect the priority of charges so as to alter the rights of third parties: (*Ames* v. *Birkenhead Docks Trustees*, 1 Jur. N. S. 529.) An act incorporating a dock company authorized the trustees for the purpose of constructing and maintaining the docks to raise money by mortgage of the rates and tolls. The mortgagees were to have no share in the management nor any priority among themselves. The trustees were empowered to enter into contracts, but they were not to be personally liable, and execution was to issue only against the goods and chattels belonging to them, *virtute officii*. A judgment creditor obtained an order nisi to attach in the hands of the garnishees, rates and tolls due by them to the company. Before this order was made absolute an order for the appointment of the chairman of the trustees receiver of the rates and tolls, was obtained by consent, in a suit instituted by the mortgagees in equity: held first, that the mortgagees of the rates and tolls had priority over a judgment creditor; secondly, that the garnishee clauses of the C. L. P. Act did not affect the priority of the charges; thirdly, that if the mortgagees were not in possession, by their receiver, a judgment creditor might take the tolls in execution under the C. L. P. Act, but that the mortgagees, by entering into possession, might stop further execution: (*Ib.*) Equitable debts are apparently not within the section: (*Clark* v. *Perry*, 26 L. T. Rep. 46.) A judgment creditor obtained an order under the C. L. P. Act attaching all debts owing from the garnishee to the judgment debtor; and a second order directing the garnishee to pay to the judgment creditor the debt due from him (the garnishee) to the judgment debtor, or so much thereof as might be sufficient to satisfy the judgment debt. At the time of these orders the garnishee was indebted to the judgment debtor in respect of, amongst other matters, certain costs in equity to an amount not then ascertained: Held that this debt was not affected by the orders obtained under the garnishee enactments: (*Ib.*) Debts *in præsenti* with a *solvendum in futuro* may, it seems, be attached: (*Harding* v. *Barratt*, Chambers, Dec. 12, 1856, Richards, J. III. U. C. L. J. 31.) The order in such a case will be for the payment of the debts by the garnishee to the judgment creditor so soon as the period of credit has expired: (*Ib.*) However, at present there is a difficulty in carrying out the Act with

Judgment debt; (*m*) Provided always, that this section shall

respect to bills, notes, and floating securities for money. The difficulty arises from the non-existence of any enactment in Upper Canada similar to the Eng. St. 1 & 2 Vic. cap. 110, s. 12, by which a sheriff in England can seize bills, notes, &c., *in specie:* (see *Collinridge* v. *Paxton*, 18 L. T. Rep. 140; *Churchill* v. *Bank of England*, 11 M. & W. 323; *Watts* v. *Jeffreys*, 15 Jur. 435.) It is believed that provisions similar to the Eng. St. 1 & 2 Vic. cap. 110, s. 12, will be enacted during the present session of the Legislature. On an application for an order upon a garnishee to pay over to the judgment creditor the amount of an acceptance due by him to the judgment debtor, it was held necessary for the applicant to show that the acceptance was at the time of the application under the control of the judgment debtor: (*Mellish* v. *B. B. & G. Railway*, Chambers, Nov. 6, 1856, Hagarty, J, II. L. J. U. C. 230.) It is doubtful whether the liability of an endorser on a current note of which the judgment debtor is holder, is, while the note is current, such a debt as can be attached under this Act: see *Lewin* v. *Edwards*, 9 M. & W. 720; also *Powell* v. *Ansell*, 3 Scott, N. R. 344. It is also doubtful whether as to debts for small amounts within the jurisdiction of a Division Court for instance, an order can be properly granted under this section, more especially if the effect of the order would be to bring into a Superior Court innumerable suits for small amounts, and thereby increasing costs to a startling amount: (*Topping et al.* v. *Salt*, Chambers, Dec. 18, 1856, Hagarty, J, III. U. C. L. J. 14.) It is to be hoped the legislature will make provision with respect to this subject during the present session. Debts already assigned by the judgment debtor are clearly not attachable: (*Hersch* v. *Coates*, 27 L. T. Rep. 202.) And per Jervis, C. J, "I think that where the creditor has a judgment and debts are due to his judgment debtor, he has a right to go before a Judge and obtain an *ex parte* order to attach all debts due to his debtor, and that order binds all the debts to the extent of making them alternately available to the execution creditor. After satisfying all equitable claims, and if they are assigned to the full extent, he will get no benefit. Then the proper way is to call the garnishee before the Court, to say whether he admits or disputes the debt (s. cxcvi.), and it must be a debt due with respect to which the judgment debtor has a beneficial interest, and if assigned, then, except as to the resulting interest, no interest will go to the party who obtains the order. According to the strict construction of the statute, he ought to call the garnishee before the Judge, and he will then dispute his liability to pay, because in equity he is bound to pay A. B., and if that is denied, the judgment creditor must have a *scire facias*, calling on the garnishee to show cause why he should not pay, and in my opinion it would be a good plea to say, 'I do not pay you because my creditor has assigned his debt, and equitably I am bound to pay his assignee'": (*Ib.*) The origin of these clauses appears to be the practice by "foreign attachment," which has for a long time prevailed in the City Court of London: (see Com. Dig. "Attachment," A.) By the custom of London money was attachable, provided it were not ordered to be paid by some judicial act: (*Grant* v. *Hawding*, 4 T. R. 313, note; *Coppell* v. *Smith*, 4 T. R. 312; *Caila* v. *Elgood*, 2 D. & R. 193); but neither money nor property could be attached in the hands of a garnishee who had a lien upon it without discharging his lien: (*Giles* v. *Nathan*, 5 Taunt. 558.) A resemblance to the practice as to Extents in chief in the second degree at the suit of the Crown also exists: see West on Extents, 242.

(*m*) The garnishee may either deny the debt or admitting it submit that it

not apply in actions commenced or carried on against a Defendant as an absconding Debtor. (*n*)

CXCV. (*o*) Service of an order (*p*) that debts due or accruing to the Judgment debtor (*q*) shall be attached, or notice thereof to the garnishee in such manner as the Judge shall direct, (*r*) shall bind such debts in his hands. (*s*)

(*App. Co. C.*) Eng. C. L. P. A. 1854, s. 62. Order or notice thereof to bind the garnishee.

CXCVI. (*t*) If the garnishee does not forthwith (*u*) pay into Court (*v*) the amount due from him to the Judgment debtor, (*w*) or an amount equal to the Judgment debt, (*x*) and does not dispute the debt due or claimed to be due from him to the Judgment debtor, (*y*) or if he does not appear upon summons, (*z*) then the Judge (*a*) may (*b*) order execution to issue, and it may be sued forth accordingly without any previous writ or

(*App. Co. C.*) Eng. C. L. P. A. 1854, s. 63. Amount due by garnishee may be levied by execution, if not disputed.

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is not liable to be attached. The rules, orders, writs, and other proceedings against the garnishee must be had in the Court in which the judgment was rendered (N. R. 57.)

(*n*) Against whom adequate remedies have already been enacted (s. lii.)

(*o*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 62. — Applied to County Courts.

(*p*) Hours of service, see N. R. 135.

(*q*) As to these words see note *l* to s. cxciv.

(*r*) As to notice of attachment to a debtor of an absconding debtor see s. lii. and notes.

(*s*) The word "bind" in this section has received the same construction as the word "bind," used in the Statute of Frauds (29 Car. II.) As under the Statute of Frauds the goods are bound in the hands of the Sheriff, so under this section the debt is bound in the hands of the garnishee: (*Holmes* v. *Tutton*, 5 El. & B. 65, 32 L. & Eq. 518.) The debt is at least so far bound that the garnishee cannot pay it to his original creditor or to any one claiming under him: (*Ib.*), but in England such binding is subject to the provisions for the distribution of property under the bankruptcy acts: (*Ib*)

(*t*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 63. — Applied to County Courts.

(*u*) Must mean within a reasonable time after notice. The distance of the garnishee from Court and other like circumstances may well be taken into account when determining the sufficiency of the notice.

(*v*) *Qu.* Would the Clerk of the Court be entitled to charge the percentage allowed under 2 Geo. IV. cap. 1, s. 26?

(*w*) As to what constitutes an "amount due" within the meaning of this section, see note *l* to s. cxciv.

(*x*) In cases where the amount due exceeds the amount of the judgment obtained against the garnishee's creditor, see s. cxciv.

(*y*) The garnishee if not intending to dispute the debt might, it is presumed, indorse an admission on the order or notice served upon him.

(*z*) If he neglect to indorse the order, &c., as mentioned in preceding note, and also neglect to appear, then an order for execution may be made by default.

(*a*) *The Judge.* *Qu.* The Judge to whom application is in the first instance made or any Judge presiding in Chambers for the time being.

(*b*) *May*, not "shall." There is a

process, (*c*) to levy the amount due from such garnishee towards satisfaction of the Jundgment debt. (*d*)

(App. Co. C.) Eng. C. L. P. A. 1854, s. 64.

Proceedings if the garnishee dispute the debt.

CXCVII. (*e*) If the garnishee disputes his liability, the Judge, instead of making an order that execution shall issue, (*f*) may (*g*) order that the Judgment creditor shall be at liberty to proceed against the garnishee, by writ, calling upon him to show cause why there should not be execution against him for the alleged debt, or for the amount due to the Judgment debtor if less than the Judgment debt, and for costs of suit, (*h*) and the proceedings upon such suit (*i*) shall be the same, or as nearly as may be, as upon a writ of revivor issued under this Act. (*j*)

(App. Co. C.) Eng. C. L. P. A. 1854, s. 65.

CXCVIII. (*k*) Payment made by (*l*) or execution levied upon the garnishee, (*m*) under any such proceeding as afore-

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discretion in the Judge even after default: (*Clark* v. *Perry*, 26 L. T. Rep. 46.) Indeed the Judges may use any of the garnishee clauses at their discretion: (*Jones* v. *Jenner*, Martin, B, 27 L. T. Rep. 191.)

(*c*) The execution may be either against the goods or against the body of the garnishee, the latter only, it is apprehended, upon affidavit: see s. clxxxv. As to the forms of execution see N. Rs. Sch. Nos. 45, 46.

(*d*) The direction of the writ will be to levy the amount due from such garnishee "towards satisfaction of the *judgment debt*." No provision is made for the costs of suing out the execution or for Sheriff's poundage. *Qu.* Will such costs be in the discretion of the Judge under s. cc. or will they follow the execution as a matter of right? see note *j* to s. cxcvii. In case garnishee dispute the debt, costs of suit are expressly provided for by the next succeeding section.

(*e*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125. s. 64.—Applied to County Courts.

(*f*) Under preceding section (s. cxcvi.)

(*g*) *May*, see note *b* to s. cxcvi. p. 363

(*h*) Form of writ, see N. Rs. Schd. No. 47. page 704

(*i*) *Proceedings*, &c., *i.e.* Declaration, plea, &c., as to which see N. Rs. Sch. No. 48 *et seq.* page 705

(*j*) See s. ccv. Although the proceedings are directed to be the same as on a writ of revivor, it is only as "nearly as may be," and therefore the Court may add to an order made under this section the restriction that under the special circumstances of the case the costs shall abide the event. But if the Court *give no such direction*, they virtually order costs to the successful party when they order the writ: (*Johnson* v. *Diamond*, 26 L.T. Rep. 137; 33 L. & Eq. 437.)

(*k*) Taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 65.—Applied to County Courts.

(*l*) *i. e.* Under s. cxcvi. According to the practice as to foreign attachment in the City Court of London, the garnishee is only discharged when execution is actually sued out: see *Magrath* v. *Hardy*, 6 Scott, 627.

(*m*) The garnishee may be either an individual or a corporation: (see note *d* to s. cxciii.) In a case in the City Court of London, where process of attachment issued against a railway Company by a corporate name, they being only provisionally registered under the English Statutes, and funds

said, (*n*) shall be a valid discharge to him as against the Judgment debtor to the amount paid or levied, (*o*) although such proceeding may be set aside or the Judgment reversed. (*d*)

Payment by garnishee to be a valid discharge to him.

CXCIX. (*q*) In each of the Superior Courts there shall be kept at [the several offices of the Clerk of the Crown and his deputies], (*r*) a debt attachment book, and in such book entries shall be made of the attachment and proceedings thereon, with names, dates, and statements of the amounts recovered and otherwise; (*s*) and the mode of keeping such books shall be the same in all the offices, and copies of any entries made therein may be taken by any person upon application to the proper officer. (*t*)

(*App. Co. C.*) Eng. C. L. P. A. 1854, s. 66.

Attachment book to be kept in the offices of the Clerk of the Crown and his deputies.

CC. (*u*) The costs of any application for an attachment of

(*App. Co. C.*)

attached but no proceedings taken, another action for the same debt against three of the provisional committee men was allowed to proceed: (*Denton* v. *Morland*, 11 Jur. 40.)

(*n*) Under s. cxcvii.

(*o*) The garnishee, it will be perceived, is by the act of *his* creditor the judgment debtor in the original suit, placed in a situation in which he acquires a good answer to any action that may be brought against him by his creditor. Upon general principles it seems that where such answer arises before judgment, it may be pleaded to the further maintenance of the action or *puis darrein continuance*, if after plea pleaded (s. cxviii.) In both cases the plea is an effectual bar: see *Webb* v. *Hurrell*, 4 C. B. 303. The plea it seems must be special in either case, and may be the same *mutatis mutandis* as that made use of when attachments are issued from the City Court of London: see *Nonell* v. *Hullett et al.*, 4 B. & C. 646; *Crosby* v. *Hetheringion*, 4 M. & G. 933.

(*p*) The process of attachment in the City Court of London could only be resorted to when the cause of action against the original defendant arose within the jurisdiction of the Court from which process issued: (*De Haber* v. *the Queen of Portugal*; *Wadsworth* v. *the Queen of Spain*, 17 Q. B. 171.) And yet it was held that a garnishee paying a debt under a judgment of the Court could not be afterwards compelled to pay it over again to his creditor, upon the ground that the original cause of action arose without the jurisdiction of the Court: (*Westoby* v. *Day*, 2 El. & B. 605.)

(*q*) Taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 66.—Applied to County Courts.

(*r*) Instead of the words in brackets read in Eng. C. L. P. Act "the Master's Office."

(*s*) The form of book sanctioned by the Courts has columns for the following information—1. Name of plaintiff; 2. Name of judgment debtor; 3. Amount of judgment; 4. Date of judgment; 5. Name of garnishee; 6. Date of order for attachment; 7. Amount ordered to be paid by garnishee; 8. Date of such order; 9. Date of order for execution against garnishee; 10. Date of order that judgment creditor may proceed against garnishee: (N. R. 58 and Schedule.)

(*t*) *Proper officer*, *i. e.* the officer having the custody of the particular book from which copies of entries are required.

(*u*) Taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 67.—Applied to County Courts.

Eng. C. L. P. A. 1854, s. 67. Costs of such application.

debt under this Act, (*v*) and of any proceedings arising from or incidental to such application, (*w*) shall be in the discretion of the Court or a Judge. (*x*)

(App. Ch. C.) Eng. C. L. P. A. 1854, s. 78. Specific delivery of a

CCI. (*y*) The Court or a Judge (*z*) shall have power, if he or they shall see fit so to do, (*a*) upon the application of the Plaintiff (*b*) in any action for the detention of any chattel, (*c*)

(*v*) The words of the section thus far comprehend only preliminary proceedings.

(*w*) Whether these words could be taken to apply to proceedings had under the English enactment corresponding to our s. cxcvii. was for some time a question. Recently it has been held that they do not apply to the costs of such proceedings, and that they abide the event: (see note *j* to s. cxcvii.)

(*x*) It would seem that if there be be any proceeding coming within the meaning of this section, and no direction be given as to costs, no costs will be allowed. The practice is analogous to that adopted in Interpleader cases: (7 Vic. cap. 80, s. 6.)

(*y*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 78.—Founded upon 2d Rep. C. L. Comrs. s. 47.—Applied to County Courts. This is a section which in some degree confers equitable jurisdiction upon the Courts of common law. It has been the practice of Courts of law (especially in modern times) where they see that justice requires the interference of a Court, of Equity and that a Court of Equity would interfere, in such a case, to save the parties the expense of proceeding to a Court of Equity, by giving them the aid of the equitable jurisdiction of a Court of common law to enable them to effect the same purpose: (*Phillips* v. *Clagett*, Abinger, C.J., 11 M. & W. 90.)

(*z*) The Court will review the order of a Judge made under this section: (*Chilton* v. *Carrington*, 24 L. J. C. P. 78; 29 L. & Eq. 255; see further note *m* to s. xxxvii.)

(*a*) This section is intended to deal with the ordinary finding of a jury which would in detinue be the finding of so much for value and so much for damages: (Tidd's Pr. 8 Edn. 339, 9 Edn. 321); whereupon the judgment used to be that plaintiff do recover the chattel *or* the sum assessed as the value and also his damages and costs. (Selwyn's N. P. 10 Edn. 658.) In such a case a defendant hitherto though he had the chattel sued for, might retain it, pay the value, and so obtain the chattel for himself, and might detain it from plaintiff though the latter set a much higher value upon it than the value set upon it by the jury. This was a hardship; so recourse was had to that which is fair and reasonable, namely, the investment of the Courts of common law with a discretion which the legislature thought should be exercised. Therefore it is enacted in cases where it would be unjust or improper that defendant should have the option of paying the money or keeping the chattel, the Court or a Judge may make an order *taking away the defendant's option*. But the Act deals with a case of option only and if the value of the chattel be not found by the jury now as formerly that case does not arise: (*Chilton* v. *Carrington*, *ubi supra*.) Thus where at the trial of an action of detinue for a lease deposited as security for £150, the parties agreed that the jury should be discharged from finding the value of the lease, and a judge made an order on the defendant to deliver the lease, the Court rescinded that order: (*Ib.*)

(*b*) The application may be made to "the Court or *a* Judge," *i. e.* any Judge, and not necessarily the Judge who presided at the trial.

(*c*) Formerly detinue was the only

to order that execution shall issue for the return of the chattel detained, (*d*) without giving the Defendant the option of retaining such chattel upon paying the value assessed, (*e*) and that unless the Court or a Judge should otherwise order, the Sheriff shall distrain the Defendant by all his lands and chattels in the said Sheriff's bailiwick, till the Defendant render such chattel, (*f*) or at the option of the Plaintiff, that he cause to be made of the Defendant's goods the value of such chattel; (*g*) Provided that the Plaintiff shall, either by the same (*h*) or by a separate writ or writs of execution to be issued in the ordinary manner, be entitled to have made of the Defendant's goods or lands, the damages, costs, and interest in such action. (*i*)

Chattel may be compelled and how.

Option to the Plaintiff.

Proviso: as to damages, costs, &c.

And with respect to proceedings for the revival of Judgments and other proceedings, by and against persons not parties to the record; (*j*) Be it enacted as follows:

Revival of judgments, &c.

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form of action in which at law a chattel might be recovered *in specie*; but the like remedy may be now had in an action of replevin: (14 & 15 Vic. c. 64.)

(*d*) Form of execution N. R. Schd. No. 57.

(*e*) See note *a*, *ante*.

(*f*) The command contained in the writ of execution closely follows the language of this section.

(*g*) Form of execution in this case, see N. R. Sch. No. 58.

(*h*) Neither of the forms of execution prescribed by the Courts has any provision as to the damages, costs, and interest: (Nos. 57, 58.)

(*i*) In detinue for railway scrip which had been delivered up to the plaintiff under Judge's order after action brought: Held the Judge was warranted in directing the jury at the trial that in estimating the damages they might take into consideration the difference in value of the scrip at the time of the *demand* and at the time of its *delivery* to plaintiff under the Judge's order: (*Williams* v. *Archer*, 5 C. B. 318.) Upon the trial of an action of detinue and trover for shares it was arranged that the damages, £382, found by the jury should be reduced to a nominal amount upon the defendant delivering up the shares. Shares of a like denomination and to an equal amount with those which were the subject of the action were afterwards tendered; but the market value having greatly fallen, plaintiff sought to enforce the verdict: Held that he could not do so, that the bargain was binding upon him; and that it was fulfilled on the part of the defendant by tendering similar shares to those which were the subject of the action: (*Jeffrey* v. *Oliver*, 28 L. T. Rep. 231.)

(*j*) At common law a presumption arose from a plaintiff's delay beyond a year to issue execution that his judgment either had been satisfied or from some supervening cause ought not to be allowed to have its effect. After such delay therefore, plaintiff was not allowed to issue execution as a matter of course; but was driven to bring a new action on the judgment. As this was found to be unnecessarily vexatious and oppressive, the writ of *scire facias*, which had been in use at common law for the purpose of executing judgment in real actions after the delay of a year and a day, was adopted by the Statute Westm. II.: (13 Ed. I.

(App. Co. C.) Eng. C. L. P. A. 1852, s. 128.

Execution without *scire facias* or revival.

CCII. (*k*) During the lives of the parties to a Judgment, or those of them during whose lives execution may at present issue, (*l*) within a year and a day without a *scire facias*, (*m*) and within one year (*n*) from the recovery of

St. 1, c. 45.) This was a less expensive and dilatory course for plaintiff and equally affording protection to defendant if he had any cause to show why execution should not issue: (*Hiscocks* v. *Kemp*, Denman, C.J. 3 A. & E. 679.) The *scire facias* was a writ founded on some matter of record being as regards judgment the original judgment obtained against defendant: (Bac. Abr. *Scire Facias*, 10.) Besides it was a rule that where a new person who was not a party to the judgment derived a benefit by, or became chargeable to the execution, there should be a *scire facias* to make him a party to the judgment: (*Penyeor* v. *Brace*, 1 Ld. Royd. 245.) Thus the writ lay either between the original parties to the judgment, where an execution had not been issued within a year and a day from the signing of the judgment or between either of the original parties and the representatives of the other or the representative of both, when it was sought to make parties to the judgment persons other than the original parties. The end attained by means of *scire facias* in any of these cases may now be attained by a much more simple and speedy mode of procedure. In this respect the sections following are founded upon 1st Rept. C. L. Comrs. ss. 82–85 inclusive.

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 125, s. 128.—Founded upon 1st Rept. C. L. Comrs. s. 82.—Applied to County Courts.

(*l*) This section applies to judgments existing at the time the Act came into force: (*Boodle* v. *Devis*, 22 L. J. Ex. 68, 8 Ex. 351.) Where a judgment more than a year and a day old but less than six years, when the Eng. C. L. P. A., 1852, came into operation had not been revived by *sci. fa.*, it was held that execution, since the C. L. P. A., might issue without any revival of such judgment: (*Ib.*)

(*m*) A *scire facias* to revive a judgment before this Act was either between the original parties to the suit, or between new parties. The present section has reference more particularly to the former. If plaintiff before this Act omitted for a year and a day to issue execution on his judgment, a *sci. fa.* became necessary. But where execution had been taken out though not executed within a year after judgment the *scire facias* was rendered unnecessary: *Simpson* v. *Heath*, 7 Dowl. P. C. 832; *Greenshields* v. *Harris*, 9 M. & W. 774; *Merchant* v. *Frankis*, 3 Q. B. 1; *Frankman* v. *Hodginson*, 3 D. & L. 554; *Ellis* v. *Griffith*, 4 D. & L. 279; *Holmes* v. *Newlands*, 5 Q. B. 634. But see *Sewell* v. *Thompson*, E. T. 2 Vic. *MS.* R. & H. Dig. "Scire Facias," 5; *Wilson* v. *Jamieson*, E. T. 7 Vic. *MS. Ib.*) The Commissioners were of opinion that the limit of a year and a day "was not founded on good reason." They recommended that by analogy to the Statute of Limitations in the case of simple contract debts, six years should be the period within which execution might issue upon a judgment without revival. Such is the limit expressed by the English Legislature in the section of the Eng. C. L. P. A., corresponding with the one here annotated, and it is presumed the period *intended* by our Legislature. The necessity for a *scire facias* or writ of revival, as it is termed in this Act, (s. ccv.) after six years have elapsed, may be waived by oral agreement of the parties or consent of defendant: (*Hiscocks* v. *Kemp*. 3 A. & E. 676; *Morgan* v. *Burgess*, 1 Dowl. N. S. 850.)

(*n*) The expression "one year," as here used, is clearly an error, though

the Judgment, execution may issue without a revival thereof. (*o*)

CCIII. (*p*) In case where it shall become necessary to revive a Judgment, either by reason of lapse of time (*q*) or of a change by death or otherwise of the parties entitled, or liable to execution, (*r*) the party alleging himself to be entitled to execution (*s*) may either sue out a writ of revivor in the form hereinafter mentioned, (*t*) or apply to the Court or a Judge (*u*) for leave to enter a suggestion upon the roll, to the effect that it manifestly appears to the Court that such party is entitled to have execution of the Judgment, and to issue execution thereupon, (*v*) such leave to be granted by the Court upon a rule to show cause, or by a Judge (*w*) upon a

(*App. Ch. C.*) Eng. C. L. P. A. 1852, s. 129.

Application for revival of a judgment and execution thereupon.

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a very awkward one. It is perhaps difficult to say that by the mere use of the word "one," the Legislature intended "six." But a reference to the Eng. C. L. P. A., and the report of the Commissioners upon which it is founded, will support the latter supposition. Whatever was intended, "one year" was not; because this is the period which prevailed before our C. L. P. A., and which it was the design of the Act to extend. It is believed this error will receive the attention of the Legislature during the present session.

(*o*) Execution issued after the time limited without a writ of revivor will be voidable not void: (*Goodtitle* v. *Badtitle*, 9 Dowl. P. C. 1009; *Blanchenay* v. *Burt*, 4 Q. B. 707; *McNally* v. *Stevens*, Tay. U. C. R. 355.)

(*p*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 129.—Founded upon 1st Rept. C. L. Comrs. s. 83.—Applied to County Courts.

(*q*) *i. e.* After the expiration of six years from the recovery of judgment: (s. cciii. note *n*.)

(*r*) See note *j* to s. ccii.

(*s*) An application made at Chambers must be taken to be made on the part of the person who professes to apply, and in the character in which he is described, unless evidence to the contrary be produced: (*Swan* v. *Clelands*, Chambers, Septr. 20, 1856, Richards, J., II. U.C.L.J. 235.) Thus, where application was made under this section by the widow and executrix of a deceased conusee, though a person apparently her husband was joined with her, and it was therefrom argued that she had married a second time, but no affidavit to that effect being produced, the argument was held to be of no avail: (*Ib.*) According to the English authorities the party applying, if an executor, should show that probate has been taken out: (*Vogel* v. *Thompson*, 1 Ex. 60.)

(*t*) *i. e.* in s. ccv.

(*u*) See note *m* to s. xxxvii.

(*v*) Two courses are thus pointed out—either to apply for leave to enter a suggestion that it manifestly appears, &c., *or* to issue a writ of revivor by means of which the right to issue execution must be made to appear. Though the former mode be essayed, if unsuccessful the party applying will be still at liberty to try the latter. As to the form of rule or summons under this section see Schd. A, No. 9.

(*w*) The concurrent jurisdiction of the Court and a Judge in Chambers is here remarkably clear:—"By the *Court* upon a *rule* to show cause or by a *Judge* upon a *Summons*, &c."

Summons to be served according to the present practice, (*x*) or in such other manner as such Court or Judge may direct, (*y*) and which rule or summons may be in the form contained in the Schedule (A) to this Act annexed marked No. 9, or to the like effect. (*z*)

(App. Ch. C.) Eng. C. L. P. A. 1852, s. 130.

If the Court be satisfied;

CCIV. (*a*) Upon such application, (*b*) in case it manifestly appears that the party making the same is entitled to execution, (*c*) the Court or Judge (*d*) shall allow such suggestion as aforesaid (*e*) to be entered in the form contained in the Schedule (A) to this Act annexed, marked No. 10, or to the like effect, (*f*) and execution to issue thereupon, (*g*) and shall order whether or not the costs of such application shall be paid to the party making the same; (*h*) and in case it does not manifestly so appear, the Court or Judge shall discharge the rule or dismiss the Summons with or without costs; (*i*) Provided nevertheless, that in such last mentioned case, the party making such application shall be at liberty to proceed by writ of revivor or action upon the judgment. (*j*)

And if not.

Proviso.

(*x*) "According to the present practice," &c. The practice to which reference is made is not free from doubt. It may be either the present practice as to rules and summonses generally, or rules and summonses to show cause why a party proceeding by *sci. fa.* should not have judgment. The latter seems to be intended. Personal service is not necessary if it can be shown that defendant is purposely avoiding service: (*Dixon* v. *Thorald*, 9 Dowl. P. C. 827,) and the service may, it would seem, be made on a defendant though residing out of the jurisdiction of the Court: (*Stockfort* v. *Hawkins*, 1 D. & L. 204.)

(*y*) This provision will enable the party taking proceedings to continue his proceedings, though defendant be concealed within the jurisdiction, or be resident without the same. Thus, where it was shown that defendant having houses in Liverpool, had left England for America, notice of the sale stuck up in the office of the Court and served on defendant's tenants in Liverpool, was directed to be sufficient service of the rule on defendant: (*Macdonald* v. *Maclaren*, 11 M. & W. 465.)

(*z*) The forms whenever they can be followed should be adopted. The use of the words "to the like effect," is intended to admit of a departure from necessity.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 130.—Applied to County Courts.

(*b*) *i. e.* Application made under the preceding section.

(*c*) *Manifestly appears, &c.* It is for the Court or Judge to decide whether the right of the party applying for execution is "manifest."

(*d*) See note *m* to s. xxxvii

(*e*) *i. e.* As mentioned in the preceding section.

(*f*) See note *z*, *supra*.

(*g*) As to executions generally, see note *n* to s. clxxxii.

(*h*) *Qu.* If the order be silent as to costs, will the party applying be deprived of costs? The general rule is that in such case each party should pay his own costs.

(*i*) See note *w* to s. cciii.

(*j*) See note *j* to s. ccii. A party suing upon a judgment of the Court

CCV. (*k*) The writ of revivor (*l*) shall be directed to the party called upon to show cause why execution shall not be awarded, (*m*) and shall bear teste on the day of its issuing, (*n*) and after reciting the reason why such writ has become necessary, (*o*) it shall call upon the party to whom it is directed to appear within ten days after service thereof (*p*) in the Court out of which it issues, (*q*) to show cause why the party at whose instance such writ has been issued (*r*) should not have execution against the party to whom such writ is directed, and it shall give notice that in default of appearance, the party issuing such writ may proceed to execution; (*s*) and such writ may be in the form contained in the Schedule (A) to this Act annexed marked No. 11, or to the like effect, (*t*) and may be sued out

(App. Ch. C. Eng. C. L. P. Act, 1852, s. 131.)

Writ of revivor and proceedings thereon.

will not be entitled to any costs unless the Court otherwise order: (St. U. C. 49 Geo. III. cap. 4, s. 2; see also R. & H. Dig. "Costs," IV. 2.)

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76. s. 131.—Founded upon 1st Rep. C. L. Comrs. ss. 84-85.—Applied to County Courts.

(*l*) *Writ of revivor.* This is the name of a new writ in many respects partaking of the nature of a *scire fucias*, such as hitherto used. It is indeed the *sci. fa.* under a new name, or more properly an improved *sci. fa.* A *sci. fa.* on a judgment has been held to be not a mere continuation of a former suit, but the origin of a new right: (*Farrell* v. *Gleeson*, 11 Cl. & Fin. 702.) The writ is in the nature of an action, because the defendant may plead to it: (2 Wms. Saund. 6 a.) It lies on a judgment in ejectment: (*Doe d. Ramsbottom* v. *Rae*, 2 Dowl. N.S. 690.)

(*m*) This is a new feature, the *sci. fa.* having been always directed to the Sheriff whose duty it was to make known the writ to defendant. Hence its name.

(*n*) Same as writs of summons (s. xix.)

(*o*) The judgment should be recited: (*Preston* v. *Perton*, Cro. Eliz. 817.) It is sufficient to set out the *recuperavit* in general terms: (*Fowler* v. *Rickerby*, 9 Dowl. P.C. 682; *Phillips* v. *Smith*, 2 Dowl. N. S. 688.) A variance from the judgment, as for example, in the sum recovered is error, if it appear on the face of the record: (*Kilbourn* v. *Trot*, Cro. Eliz. 855; *Mara* v. *Quin*, 6 T. R. 5 per Kenyon, C. J.)

(*p*) Same as summons, see Schedule A, No. 1.)

(*q*) Which must be the Court in which the original action was brought: (2 Wms. Saund. 72 a; see also N.R. 60.)

(*r*) See note *s* to s. cciii.

(*s*) The object of the writ is to enforce a judgment by the issue of execution thereupon after that judgment has for a certain period lain dormant. It is for the party to whom the writ is directed to show cause why the judgment should not be enforced against him. This he is enabled to do by appearing and pleading his defence. If he neglect to appear, judgment may be signed against him for default of appearance. The judgment so signed will carry costs: (St. U.C. 7 Wm. IV. cap. 3, s. 26.) It is ordered that no judgment shall be signed for non-appearance to a *sci. fa.* (*Qu.* writ of revivor) without leave unless defendant has been summoned (N. R. 61), but the judgment may be signed by leave after eight days from the return of one *sci. fa.* (*Ib.*)

(*t*) The writ may in general be

and served in any County or Union of Counties, and otherwise proceeded upon whether in term or vacation, in the same manner as a writ of Summons;[2](u) and the venue in a declaration upon such writ may be laid in the County or Union of Counties in which the writ has been sued out; (v) and the pleadings and proceedings thereupon, and the rights of the parties respectively to costs, shall be the same as in an ordinary action;[3](w) and notice in writing to the Plaintiff, his Attorney or agent, shall be a sufficient appearance to a writ of revivor.[4](x)

Declaration, &c. C. § 306

Costs. [3] § 307

[4] § 308

Con stat for U.C. ch 27 § 311.

(App. Co. C.) Eng. C. L. P. A. 1852, s. 132.

Certain writs of *scire facias* to be proceeded upon in like manner as writs of revivor.

CCVI. (y) All writs of *scire facias* issued out of either the Court of Queen's Bench, or of Common Pleas, against bail on a recognizance, (z) against members of a Joint Stock Company or other body, upon a Judgment recorded against a public officer or other person sued as representing such Company or body, or against such Company or body itself, (a) by

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amended: (*Braswell* v. *Seco*, 9 East. 316: *Perkins* v. *Petit*, 1 B. & P. 275; *Holland* v. *Phillipps*, 10 A. & E. 149), or quashed upon application of plaintiff: (*Oliverson* v. *Latour*, 7 Dowl. P.C. 605), but only upon payment of costs if defendant have appeared: (N.R.59.) A second writ would seem to be necessary if after judgment obtained on the first, six years be allowed to elapse without execution: (*Walker* v. *Thellusson*, 1 Dowl. N. S. 578.)

(u) *Qu.* Is it in the power of the plaintiff in the writ of revivor to issue either a *capias* or *ca. sa.*: see *Agassiz et al.* v. *Palmer*, 5 M. & G. 697.

(v) Same as proceedings on writs of summons, *ante* ss. ix. x.

(w) No party can plead matters which might have been set up as a defence to the original action: (*Allen* v. *Andrews*, Cro. Eliz. 283; *Middleton* v. *Hill*, Cro. Eliz. 588; *West* v. *Sutton*, 1 Salk. 2; *Wheatley* v. *Lane*, 1 Wm. Saund. 219 *c*, n; *Bradley* v. *Eyre*, 11 M. & W. 451; *Holmes* v. *Newlands*, 5 Q. B. 367; *Phillipson* v. *Earl of Egremont*, 6 Q. B. 587); nor can a party who did not avail himself of the opportunity of pleading in bar to the original action afterwards so plead to the writ of revivor founded upon the judgment obtained in the original action: (*Skelton* v. *Hawling*, 1 Wils. 258; *Rock* v. *Leighton*, 1 Salk. 310; *Earle* v. *Hinton*, 2 Stra. 732.) But a defendant may plead anything done under the original judgment that exonerates him from liability: (*Clark* v. *Withers*, 2 Lord Rayd. 1075; *Holmes* v. *Newlands*, 5 Q. B. 370.) Thus, for example, release or payment: (*Holmes* v. *Newlands*, *ubi supra*), and there may be a plea of fraud to the original judgment: (*Dodgson* v. *Scott*, 2 Ex. 457; *Thomas* v. *Williams*, 3 Dowl.P.C. 655; *Bosanquet* v. *Graham*, 6 Q. B. 601 n.)

(x) This provision as to appearance by notice is taken from s. 133 of Eng. C. L. P. Act, 1852, and is repeated in N.R. 62. The notice if by attorney may be in this form—*Title of Court and Cause*—Take notice that I appear for the defendant to the writ of revivor issued in this cause.

(y) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 132.—Applied to County Courts.—This section is so framed as to recognize a distinction between writs of revivor and *scire facias*.

(z) See Foster's *sci. fa.* 303; also N. R. 60. Also see s. cxcii. of this Act and notes.

(a) See Foster's *sci. fa.* 108.

or against a husband to have execution of a Judgment for or against a wife, (*b*) for restitution after a reversal on Error or Appeal, (*c*) upon a suggestion of further breaches after Judgment, for any penal sum pursuant to the Statute passed in the Session holden the eighth and ninth years of the reign of King William the Third, intituled, *An Act for the better preventing frivolous aad vexatious suits*, (*d*)—shall be tested, directed, and proceeded upon in like manner as writs of revivor. (*e*)

(App. Co. C.) Eng. C. L. P. A. 1852, s. 134.

CCVII. (*f*) A writ of revivor (*g*) to revive a judgment less than ten years old, shall be allowed without any rule or order; (*h*) if more than ten years old, not without a rule of Court or Judge's order; (*i*) nor if more than fifteen years old without a rule to shew cause. (*j*)

Age of judgment as respects writs of revivor.

(*b*) See Foster's *Sci. Fa.* 156; also see s. ccxiv. of this Act and notes.

(*c*) See Foster's *sci. fa.* 64.

(*d*) See *Ib.* 32; also s. cxlv. of this Act and notes.

(*e*) Reference is further made in Eng. C. L. P. C. 1852, s. 132, to two modes of procedure by *scire facias*, neither of which is used in Upper Canada, viz.: 1. *Scire facias ad audiendum errores.* 2. *Sci. fa.* for recovery of land under an *elegit.* There are other proceedings by *Sci. fa.* to which neither the Eng. C. L. P. Act nor ours applies, such as, *scire facias* to repeal Letters Patent (Forster's *Sci. Fa.* 236,) on bonds to the Crown, (*Ib.* 330,) and on inquests of office to recover simple contract debts due to the Crown: (*Ib.* 341.) But for these, provision is to some extent made by N. R. 63, and except as to provisions made by the new rules, it is presumed that the old rules as to Crown proceedings will apply.

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 134.—Applied to County Courts.

(*g*) This section provides for the revival of three descriptions of judgments.

First—Those more than six but less than ten years old, as to which the writ may issue without any rule or order.

Second—Those more than ten but less than fifteen years old, as to which a rule of Court or Judge's order may be obtained *ex parte.*

Third—Those more than fifteen years old, as to which a rule to show cause must be obtained.

Whether a judgment more than twenty years old can be revived is a question: (*Williams* v. *Welch*, 3 D. & L. 565, Stat. U. C. 7 Wm. IV. cap 3, s. 3.) Supposing a rule that it cannot, to exist payment of interest within twenty years, would take the case out of such a rule: (*Williams* v. *Welch, ubi sup*) After twenty years have elapsed the Statute of Limitations, *prima facie* applies: (*Loveless* v. *Richardson*, 27 L. T. Rep. 192, 2 Jur. N. S. 7)

(*h*) Upon filing a *precipe*, it is presumed.

(*i*) The words "rule of Court *or* Judge's order," seem to exclude the inference that the rule in this case might be a side bar rule.

(*j*) To obtain a rule under this provision, without doubt an affidavit will be required The affidavit should be that of plaintiff himself, if he be the party applying or that of the person who was his attorney at the time the judgment was obtained: (*The Duke of Norfolk* v. *Leicester*, 1 M. & W. 204.) If the party applying be the representa-

And with respect to the effect of death or marriage upon the proceedings in an action; (*k*) Be it enacted as follows:

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 135.

Death of Plaintiff or Defendant.

CCVIII. (*l*) The death of a Plaintiff or Defendant (*m*) shall not cause the action (*n*) to abate, (*o*) but it may be continued as hereinafter mentioned. (*p*)

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tive of the original plaintiff an affidavit by the attorney seeking to enforce the judgment, though not the attorney of the original plaintiff, may be received: (*Smith* v. *Mee*, 1 D. & L. 907.) And *semble*—the rule that a matter cannot be agitated twice does not apply to the case of an application to issue a *sci. fa.* upon fresh materials: (*Dodgson* v. *Scott*, 2 Ex. 457.) The omission to sue out a *sci. fa.* when made necessary by this section would be a defect so material that it might be taken advantage of at any time: (see *Goodtitle* v. *Badtitle*, 9 Dowl. P. C. 1009.) *Qu.*—Does the rule extend to a second *sci. fa.* when the judgment though once revived has been allowed again to slumber: see *Wright* v. *Maddocks*, 8 Q. B. 119.

(*k*) The amendments introduced by the following sections are intimately connected with the law of reviving judgments, the subject of the preceding sections. The rule is that where a new person, who is not a party to an action, derives a benefit by or becomes chargeable to it, there must be some proceeding to make him a party. On this rule are founded the cases of survivorship, marriage, and death. At common law the death of either party at any time during the pendency of an action, *i. e.* before judgment, abated the action. This was the law, although death happened after judgment by default or a verdict. In like manner, where the action was joint, the death of any one of the parties caused the action to abate. The first remedy applied by statute was to the effect that the death of a party between verdict and judgment should not be alleged for error so as such judgment were entered within two terms after verdict: (17 Car. II. cap. 8.) Of this statute s. ccxii. of this C. L. P. Act is a copy. In furtherance of justice it was afterwards enacted that proceedings might be had by *sci. fa*, either in favour of the representatives of a deceased plaintiff against defendant, or in favour of plaintiff against representatives of a deceased defendant under certain restrictions: (8 & 9 Will. III. cap. 11, s. 6.) Then as to joint actions it was in the same statute enacted that a cause of action should not abate by reason of the death of one of several plaintiffs or defendants, but that upon suggestion of the death the action might be continued: (s. 7.) Of this latter section s. ccix. of the C. L. P. A. is a re-enactment. So if the legal responsibility of either party being a *feme sole* be altered, as by marriage, provision is by this Act made for continuing the action notwithstanding the coverture: (s. ccxiv.) There are other provisions of a similar nature, all of which fully bear out the general intention of the legislature when passing the C. L. P. Act, viz., to simplify and expedite proceedings in the Courts of common law.

(*l*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 135.—Applied to County Courts.

(*m*) Provision is hereinafter made for the death of one or more of several plaintiffs or defendants (s. ccix) of a sole plaintiff (s. ccx) and of a sole defendant (s. ccxi.)

(*n*) *The action, i. e. any* action.

(*o*) The death of either party before judgment at common law caused the action to abate: (see note *k*, *ante*.)

(*p*) There is a method of compelling the continuance or abandonment of an action by the representatives of a deceased plaintiff: see s. ccxv.

CCIX. (*q*) If there be two or more Plaintiffs or Defendants and one or more of them shall die, if the cause of such action (*r*) shall survive to the surviving Plaintiff or Plaintiffs, (*s*) or against the surviving Defendant or Defendants, (*t*) the action shall not be thereby abated, but such death being suggested on the record, (*u*) the action shall proceed at the suit of the surviving Plaintiff or Plaintiffs against the surviving Defendant or Defendants. (*v*)

(*App. Ch. C.*) Eng. C. L. P. A. 1852, s. 136.

consider for a.c.ch 22 § 132

If there be more than one Plaintiff or Defendant and the cause of action survive to the others.

(*q*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 136.—Applied to County Courts.—The origin of the section is 8 & 9 Will. III. c. 11, s. 7.

(*r*) A writ of error was in England held to be an action within the meaning of 8 & 9 Will. III.: (*Clarke* v. *Rippon*, 1 B. & Ald. 586.)

(*s*) Questions will arise in cases where husband and wife are joint plaintiffs and one dies, more frequently than in other cases: (see s. lxxvi. and notes thereto.)

(*t*) A joint contract or obligation may in certain cases be given in evidence against one or more of several joint contractors: (see s. lxxiv. and notes.)

(*u*) If a co-plaintiff die before issue joined, the death should be suggested in making up the issue: (*Far* v. *Denn*, 1 Burr. 362.) If after issue joined, then the death should be suggested on the Nisi Prius record: (*Rex* v. *Cohen*, 1 Stark. N. P. 511.) It was in one case held after a suggestion on the issue roll not to be necessary to transcribe the very words of the suggestion from the pleadings to the *Nisi Prius* record, but only enough to show the Judge what issues he was to try and between whom: (*Far* v. *Denn*, 1 Burr. 362.) The Courts have in furtherance of justice not only allowed suggestions to be amended but to be made *ex post facto*. Thus where one of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both after a motion to set aside the proceedings for this irregularity, the Court permitted the plaintiff to suggest the death as before interlocutory judgment and to amend the execution without paying costs: (*Newnham et al.* v. *Law*, 5 T. R. 577.) But where there were several defendants, some of whom had died before issue joined and the survivors without a suggestion of death moved for judgment as in case of non-suit, it was said by Wilde, C.J. "There is always a roll or the materials for making one up. It is essential that there should be some suggestion of the death before the surviving defendants can move for judgment as in case of non-suit. If they are unable to discover a mode of making up such suggestion, they certainly are not in a position to make the present motion." And per Williams, J, "The Stat. 8 & 9 Will. III. cap. 11 does not say by whom the suggestion shall be entered:" (*Pinkus* v. *Sturch et al*, 5 C. B. 474.) Where one of several co-plaintiffs dies the surviving plaintiffs must if they desire to bring that fact to the knowledge of the Court on any proceeding in the cause, enter a suggestion of it upon the roll: (*Larchin et al.* v. *Buckle*, 1 L. M. & P. 740.) Therefore where the defendant obtained a rule for judgment as in case of non-suit, the Court refused to discharge it, except upon the peremptory undertaking, notwithstanding the production of an affidavit stating the death of one of the plaintiffs subsequently to the delivery of the declaration: (*Ib.*) The affidavit was intitled in the names of all the plaintiffs both deceased and surviving, and *semble* per Maule, J. that it was wrongly intitled: (*Ib.*)

(*v*) The suggestion at Nisi Prius may be entered on the Nisi Prius record immediately after the *jurata*.

(App. Cn. C.) Eng. C. L. P. A. 1852, s. 137.

CCX. (*w*) In case of the death of a sole Plaintiff or sole surviving Plaintiff, the legal representative of such Plaintiff (*x*) may, (*y*) by leave of the Court or a Judge, (*z*) enter a suggestion of the death, and that he is such legal representative, (*a*) and the action shall thereupon proceed; (*b*) and if such sug-

Death of sole plaintiff.

"And now on, &c., before, &c., Justices of our said Lady the Queen appointed to take the assizes in and for the County of, &c., at, &c., in the same county, comes the said A. B. and the said C. D. by their respective attorneys, but the said E. F. comes not, and thereupon the said A. B., according to the Statute in such case made and provided, suggests and gives the said justices here to understand and be informed that after the defendants pleaded to the said declaration, (*according to the fact,*) and before this day, that is to say, on, &c., the said E. F. died, to wit, at, &c., and the said C. D. (the other defendant) there survived him, and which the said C. D. doth not deny but admits the same to be true. Therefore let the said issue so joined as aforesaid be tried between the said A. B. and the said C. D." For forms of all ordinary suggestions, see Tidd's Forms 286 *et seq.*; and Chit. F. 7 Edn. 837 *et seq.* In this case a suggestion merely is made, because as no new person is introduced no writ of revivor is required. But the provisions of our Stat. 1 Vic. cap. 7 must not be passed over without being noticed. This Statute makes liable the representatives of a deceased joint contractor although the other co-contractors be living: (*Ib.* s. 1), and provides for the issuing of a *sci. fa.* after judgment against the representatives of a deceased joint contractor though there may be another defendant still living and against whom the judgment still remains in force: (*Ib.*)

(*w*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 137.—Applied to County Courts.

(*x*) It is apprehended this section only applies to cases where before this Act the cause of action might have been held to survive. There is no intention to extend the law which holds that certain personal actions die with the person. The intention is rather to facilitate the mode of proceeding in actions which survive to the representatives of plaintiffs dying during the progress of such actions. Actions for libel and some other actions for tort do not survive: (*Ireland* v. *Champneys*, 4 Taunt. 884; see further Stat. U. C. 7 Wm. IV. cap. 3, s. 2; 10 & 11 Vic. cap. 6.)

(*y*) *May*, not must. It is in the power of the representatives either to continue or discontinue the action. Defendant has it in his power to force them to do the one thing or the other: (s. ccxv.)

(*z*) See note *m* to. xxxvii. In ordinary cases leave will not be granted without an affidavit, which may be to this effect—1. That this action was commenced by writ of summons on, &c. 2. That the said plaintiff declared therein, &c. (*as the case may be—the state of the cause should be shown.*) 3. That the said plaintiff died on, &c. 4. That the said plaintiff by his last will and testament appointed me the executor thereof, and that I duly proved the same on, &c., and then became his legal representative, &c. (*according to the fact*): Chit. F. 7 Edn. 839.

(*a*) The suggestion may be in this form, "And hereupon, that is to say, on, &c., C. D. by leave of the Court, &c., for this purpose first had and obtained, suggests and gives the Court here to understand and be informed that on, &c., the plaintiff, A. B., departed this life, and that he, the said C. D., is the executor of the last will and testament of the said A. B., (*according to the fact*) and as such is the legal representative of the said B:" (see Chit. F. 7 Edn. 840.)

(*b*) *Thereupon proceed*, *i. e.* after

gestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of the deceased Plaintiff, (*c*) and such Judgment shall follow upon the verdict, in favour of or against the person making such suggestion, (*d*) as if such person were originally the Plaintiff.

(*App. Co. C.*) Eng. C. L. P. A. 1852, s. 138.

Death of sole or sole surviving Defendant.

If there have been pleadings.

CCXI. (*f*) In case of the death of a sole Defendant or sole surviving Defendant where the action survives, (*g*) the Plaintiff may make a suggestion either in any of the pleadings, if the cause has not arrived at issue, or by filing a suggestion with the other pleadings, if it has so arrived, of the death, and that a person named in such suggestion is the executor or administrator of the deceased, (*h*) and may thereupon serve such exe-

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entry of the suggestion, which is made a condition precedent to the further prosecution to the action.

(*c*) In a case where a suggestion was entered upon a Nisi Prius record without any authority from the Court, and in a very informal manner, without any opportunity to the defendants to traverse the facts stated, a new trial was granted upon application of defendants: (*Barnewall* v. *Sutherland et al.* 1 L. M. & P. 159.)

(*d*) Suggestions are of two classes—those that may be traversed and those not traversable. It is a general proposition that matters of fact contained in a suggestion are traversable where the Courts are not authorised to determine them. Suggestions are not traversable where a statute gives the Court cognizance of the matters of fact stated, as for example, a statute declaring that a plaintiff recovering a verdict under a certain sum shall be entitled only to Inferior Court costs, or to no costs, and the fact is made to depend upon the Judge's certificate: (see *Gardner* v. *Stoddard*, Dra. Rep. 101.) Another class of cases where the matter of suggestion belongs to the Court, is where the Court, having a discretionary power over its own proceedings, is called upon to depart from the usual course, on the suggestion of some matter which renders such departure essential or expedient for the purposes of justice, as where the venue is to be changed because an impartial trial cannot be had: (*Watson* v. *Quilter*, 1 D. & L. 244.)

(*f*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 138.—Applied to County Courts.

(*g*) The qualification is deserving of attention. However much causes of action on contracts may be held to survive as against the representatives of a deceased contractor, the Stat. U.C. 7 Wm. IV. c. 3, s. 2 (Eng. Stat. 3 & 4 Wm. IV. c. 42, s. 2) for the first time allowed actions to be brought against executors or administrators in respect of *wrongs* committed by the testator or intestate. The bearing of the section under consideration in connexion with the Statute of William is important to be noticed. It is enacted in the case of the death of a sole defendant or sole surviving defendant, where the action survives, that the plaintiff may on suggestion of the death proceed against the personal representatives. The object of the enactment is to place the personal representative in the cases provided for in the same position as if he had been the original party named upon the record, to substitute the one for the other, and so avoid the necessity for commencing a fresh action: (*Benge* v. *Swaine*, Jervis, C.J, 15 C. B. 792.)

(*h*) See note *d* to section ccx., *supra*.

cutor or administrator with a copy of the writ and suggestion, and of the said other pleadings, (*i*) and with a notice signed by the Plaintiff or his Attorney, requiring such executor or administrator to appear within ten days after service of the notice, (*j*) inclusive of the day of such service, and that in default of his so doing, the Plaintiff may sign Judgment against him as such executor or administrator; (*k*) and the same proceedings may be had and taken in case of non-appearance after such notice as upon a writ against such executor or administrator in respect of the cause for which such action was brought; (*l*) and in case no pleadings have taken place before the death, the suggestion shall form part of the declaration, (*m*) and the declaration, with a notice to plead, and the suggestion, may be served together, and the new Defendant shall plead thereto at the same time, [and within eight days after the service,] (*n*) and in case the Plaintiff shall have declared, but the Defendant shall not have pleaded before the death, the new Defendant shall plead at the same time to the declaration and

If there have been no pleadings.

If Plaintiff have declared and defendant has not pleaded.

(*i*) The suggestion may be to the effect following, "And on, &c., the plaintiff comes and gives the Court, to understand and be informed that the said defendant, on, &c., died since the issuing of the writ of summons in this cause, and that C. D. is his executor, and the said A. B. now sues the said C. D. as such executor as aforesaid." See further Tidd's Forms 284 *et seq.*; Chit. F. 7 Edn. 841.

(*j*) This is consonant with the general rule that wherever a person not a party to the action is to be directly affected by it, there must be a suggestion made, so that such person may either plead or demur before being subjected to execution: (see *Bartlett* v. *Pentland*, 1 B. & Ad. 704.) The time limited in Eng. C. L. P. A. is "*Eight*" not ten days as in this Act.

(*k*) The notice may be in this form: "Take notice that I, on, &c., commenced an action against C. D., since deceased, by a writ of summons issued out of, &c., tested on that day, and that the document hereto annexed marked A, is a true copy of that writ, and that proceedings were taken in that action against the said C. D., and that I have entered a suggestion on the said proceedings of the death of the said C. D., and that you are executor, &c. (*as the fact may be*), and that a copy of the suggestion made therein is hereunto annexed marked B. And further take notice that you are required to appear in the said Court to the said action within ten days after the service of this notice, inclusive of the day of such service, and that in default of your so doing, I, the plaintiff, may sign judgment against you as such executor as aforesaid": (see Chit. F. 7 Edn. 842.)

(*l*) *i. e.* If the writ be specially indorsed judgment under s. xli, but if not then proceedings under s. lx.

(*m*) See note *i*, *supra*.

(*n*) The words in brackets are not in the Eng. C. L. P. Act. The time limited for pleading is similar to that appointed in ordinary cases: (see s. cxii.)

suggestion [within eight days after service of the suggestion]; (*o*) and in case the Defendant shall have pleaded before the death, the new Defendant shall be at liberty to plead to the suggestion only, [and within eight days after the service thereof,] (*p*) by way of denial, or such plea as may be appropriate to and rendered necessary by his character of executor and administrator, unless by leave of the Court or a Judge he should be permitted to plead fresh matter in answer to the declaration; (*q*) and in case the Defendant shall have pleaded before the death, but the pleadings shall not have arrived at issue, the new Defendant, besides pleading to the suggestion [within eight days after the service thereof] (*r*) shall continue the pleadings to issue in the same manner as the deceased might have done, and the pleadings upon the declaration and the pleadings upon the suggestion shall be tried together; (*s*) and in case the Plaintiff shall recover, he shall be entitled to the like Judgment in respect of the debt or sum sought to be recovered, and in respect of the costs prior to the suggestion, and in respect of the costs of the suggestion and subsequent thereto, as in an action originally commenced against the executor or administrator. (*t*)

(4) § 137.

If defendant has pleaded.

If plaintiff recover.

(4) § 138.

(*o*) Words in brackets not in Eng. C. L. P. Act.

(*p*) "

(*q*) The enactment is very explicit. The representative must be governed by the state of the suit when he is made a party. 1. If before decclaration, he will have eight days to plead both to the suggestion and to the declaration, to the latter it is presumed any defence open to the deceased. 2. If after declaration he will be precisely in the same position. 3. But if after plea then he will not be allowed to plead fresh matter to the declaration unless by leave first obtained. 4. Whenever he may plead to the declaration, it is apprehended he may demur if there be ground of demurrer, though the right so to do is not in express words given: see *Bartlett* v. *Pentland*, 1 B. & Ad. 704. 5. The suggestion being traversable, no matter at what stage of the cause made, may be traversed independently of any other pleas pleaded.

(*r*) Words in brackets not in Eng. C. L. P. Act.

(*s*) The proceedings on the suggestion will of course be collateral to the proceedings in the cause, though the latter must necessarily be dependent upon the result of the former. It is not declared that a separate notice of trial shall be necessary for each set of pleadings. The notice of trial being as to the trial of the *cause*, and both sets of pleadings forming only one cause, one notice would it is conceived be sufficient.

(*t*) "And in case the *plaintiff* shall recover," &c. Some difficulty arose upon the construction of the Eng. C. L. P. Act, owing to the absence of all mention in the Act about costs in the event of the *substituted defendant* succeeding on the trial. But upon much consideration it was held that the defendant, when successful, was as much entitled to costs as plaintiff would be if successful: (*Benze* v. *Swaine*, 15 C. B. 784, 26 L. & Eq. 308.) Therefore

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(App. Co. C.) Eng. C. L. P. A. 1852, s. 139.

CCXII. (*u*) The death of either party between the verdict (*v*) and Judgment (*w*) shall not hereafter be alleged for error, (*x*) so as such Judgment be entered within two terms after such verdict. (*y*)

Death between verdict and judgment.

where an administratrix had been made defendant, in an action commenced against the intestate, and she pleaded to the suggestion, the Court would not allow the plaintiff afterwards to discontinue without payment of all the costs of the cause: (*Ib.*)

(*u*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 139.—Applied to County Courts. The origin of the section is 17 Car. II. c. 8, s. 1, which was held not to apply to the case of a party dying after an interlocutory, but before final judgment: (*Ireland* v. *Champneys*, 4 Taunt. 884.) For this provision is made by the following section (ccxiii). The death of either party *before* the assizes is not remedied by the Statute: (*Anonymous*, 1 Salk. 8;) though a death after the commission day of the assizes but before verdict is within the Statute; for the assizes have relation to the first day thereof: (*Jacobs* v. *Miniconi*, 7 T. R. 31.) The English sittings in term are not however considered in the same light: (*Taylor* v. *Harris*, 3 B. & P. 549; *Johnson* v. *Budge*, 3 Dowl. P. C. 207; but see *Cheetham* v. *Sturtevant*, 12 M. & W. 515.)

(*v*) This section, unlike the following one, is not restricted to such actions as executors might prosecute. It extends to verdicts in actions for torts as well as on contracts: (*Palmer* v. *Cohen*, 2 B. & Ad. 966) but does not extend to nonsuits in any action: (*Dowbiggin* v. *Harrison*, 10 B. & C. 480.)

(*w*) The word "judgment" has been held to include a decree in equity: (*Owen* v. *Curzon*, 2 Vern, 237.)

(*x*) A verdict obtained after death of a party cannot under any circumstances be set aside as an irregularity: (Com. Dig. "Abatement," H. 32.) Unless the case be within this section, wherever the fact of death appears upon the record, the remedy is by writ of error or arrest of judgment: (*Ib.*; see also *Berwick* v. *Andrews*, 1 Salk 314.)

(*y*) The judgment to be available must be entered within two terms after verdict. The Courts will not allow the judgment to be entered *nunc pro tunc*, unless the delay be that of the adverse party: (*Bull* v. *Price*, 7 Bing. 242), or of the Court: (*Doe d. Taylor* v. *Crisp*, 7 Dowl. P. C. 584; *Harrison* v. *Heathorpe*, 1 D. & L. 529; *Lanman* v. *Audley*, 2 M. & W. 535; *Blewitt* v. *Tregonning*, 4 A. & E. 1002; *Bridges* v. *Smyth*, 8 Bing. 29; *Vaughan* v. *Wilson*, 4 Bing. N. C. 116; *Miles* v. *Bough*, 3 D. & L. 105; *Freemon* v. *Frank*, 21 L. J. C. P. 214; *Miles* v. *Williams*, 9 Q. B. 47), but certainly not where laches are imputable to the party interested: (*Lawrence* v. *Hodgson*, 1 Y. & J. 368; *Copley* v. *Day*, 4 Taunt. 702; *Wilkins* v. *Cauty*, 1 Dowl. N. S. 855.) The judgment if entered up within the time limited is equivalent to a judgment entered up in the life-time of the party: (*Burnet* v. *Holden*, 1 Lev. 277; *Colebeck* v. *Peck*, 2 Ld. Rayd. 1280; *Saunders* v. *McGowran*, 12 M. & W. 221.) But where the plaintiff dies after verdict, the Court might grant a new trial on the application of the defendant, and would formerly in such case impose terms upon him to prevent his taking advantage of the plaintiff's death: (*Griffith* v. *Williams*, 1 C. & J. 47.) In such cases under the present Statute it is apprehended the executor or administrator of plaintiff would become a party to the judgment. If a cause be referred to arbitration by order of *nisi prius*, it is no ground for setting aside the award that it was made after the death of one of the parties: (see *James al.* v. *Crane et al*, 15 M. & W. 379.) So where after a verdict for plaintiff with leave to move for a non-suit or verdict for defendant, defendant died

(Imp. Ch. C. Eng. C. L. P. A. 1852, s. 140.)

Plaintiff dying between interlocutory and final judgment.

And if defendant so die.

CCXIII. (*z*) If the Plaintiff in any action happen to die after an interlocutory Judgment and before a final Judgment obtained therein, (*a*) the action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executor or administrator of such Plaintiff; (*b*) and if the Defendant die after such interlocutory Judgment and before final Judgment therein obtained, the action shall not abate if such action might be originally prosecuted or maintained against the executor or administrator of such Defendant; (*c*) and the Plaintiff, or, if he be dead after such interlocutory Judgment, his executor or administrator, shall and may have a writ of revivor in the form contained in the Schedule (A) to this Act annexed, marked No. 11, or to the like effect, against the Defendant, if living, after such interlocutory Judgment, or if he be dead then against his executors or administrators, to show cause why damages in such action should not be assessed and recovered by the Plaintiff, or by his executor or administrator; (*d*) and if such Defendant, his executor or administrator, shall appear at the return of such writ, (*e*) and not show

before a motion could be made and the rule *nisi* was afterwards obtained in his name: Held that the rule might be still made absolute to enter a verdict for defendant, it appearing that the executors authorised the motion: (*Freeman* v. *Rosher*, 13 Q. B. 780.)

(*z*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 140.—Applied to County Courts. The origin of the section is 8 & 9 Will. III. c. 11, s. 6.

(*a*) Death before interlocutory judgment *actually* signed is not within the Statute: (*Wallop* v. *Irwin*, 1 Wils. 315.)

(*b*) The operation of this section is restricted to actions which might be originally maintained by an executor or administrator, and in this respect differs from the preceding section: (see note *v* to s. ccxii.) Libel, for example, appears to be an action that cannot be so maintained: (*Ireland* v. *Champneys*, 4 Taunt. 884.) Actions for torts to the person generally die with the person. Certain exceptions are created by a Statute intitled, "An Act for compensating the families of persons killed by accident and for other purposes therein mentioned: (10 & 11 Vic. c. 6.) Actions for wrongs in respect of property real or personal survive under certain limitations: (7 Wm. IV. cap. 3, s. 2.)

(*c*) *Such defendant*, intending a sole defendant, but will, it is apprehended, equally apply to the death of a remaining defendant where the others have previously died. In England and in Upper Canada an action may be continued against a surviving defendant: (8 & 9 Will. III. c. 11, s. 7; Eng. C. L. P. Act, 1852, s. 136; Can. C. L. P. Act, 1856, s. ccix.), but not in England against the representatives of a deceased co-defendant: (*Fort* v. *Oliver*, 1 M. & S. 242), though the contrary rule prevails in Upper Canada: (1 Vic. c. 7.)

(*d*) This is similar in terms to the form of *sci. fa.* under the old practice: (*Smith* v. *Harmon*, 1 Salk. 315.)

(*e*) Within ten days after the service thereof: (see form in Schedule.)

or allege any matter sufficient to arrest the final Judgment,(*f*) or shall make default, the damages shall be assessed, (*g*) or the amount for which final Judgment is to be signed, shall be referred to the proper officer as hereinbefore provided; (*h*) and after the assessment had, or the delivery of the order with the amount endorsed thereon to the Plaintiff, his executor or administrator, final Judgment shall be given for the Plaintiff, his executor or administrator, prosecuting such writ of revivor against such Defendant, his executor or administrator respectively. (*i*)

(*App. Ch. C.*) Eng. C. L. P. A. 1852, s. 141.

Marriage of a woman plaintiff or defendant.

CCXIV. (*j*) The marriage of a woman Plaintiff or Defendant shall not cause the action to abate, but the action may, notwithstanding, be proceeded with to judgment, (*k*) and such judgment may be executed against the wife alone, (*l*) or by suggestion, (*m*) or writ of revivor pursuant to this Act, (*n*) judgment may be obtained against the husband and wife and execution thereon; (*o*) and in case of a judgment for the wife,

(*f*) No defence open to the deceased defendant but not made use of by him would be here admissible.

(*g*) According to the practice in force before this Act, which is not altered by the Act.

(*h*) *i. e.* Under s. cxliii.

(*i*) The fruit of the judgment will be of course the execution, as to which see s. clxxxii. *et seq.*

(*j*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 141.—Applied to County Courts.

(*k*) This is in substitution of the rule at common law which was quite the reverse of this enactment.

(*l*) Unless the wife have separate property, it would be useless to issue an execution against her alone: (*Edwin* v. *Chester*, 6 Dowl. P. C. 140; *Edwards* v. *Martin*, 2 L. M. & P. 669; *Ivens* v. *Butler et ux.* 28 L. T. Rep. 232), but if so issued may be in her maiden name: (*Thorpe* v. *Argles*, 1 D. & L. 831.)

(*m*) Under s. cciii. The suggestion may be in this form—And now on, &c., the plaintiff gives this honorable Court to understand, &c., that on, &c., (*after the giving of judgment herein*) C. D. married one E. F., and that the said plaintiff is entitled to have execution of the judgment aforesaid against the said E. F. and C. D. his wife. Therefore it is considered by the Court that the said plaintiff ought to have execution against the said E. F. and C. D. his wife. *Qu.* Should not the alleged husband have a right to traverse the suggestion?—See notes *c* and *d* to s. ccx.

(*n*) Under s. ccv.

(*o*) The principle that a judgment debt belongs to the husband if he marry a judgment creditor, or is payable by him if he marry a judgment debtor, in either case renders it necessary that he should be made a party to the judgment. The marriage of a *feme sole* never did, it seems, *ipso facto* abate a suit: (*Lee* v. *Maddox*, 1 Leon. 168), but might be pleaded in abatement: (*Morgan* v. *Painter*, 6 T. R. 265; *Hollis* v. *Freer*, 5 Dowl. P. C. 47), and if not pleaded did not affect the suit: (*Walker* v. *Golling*, 11 M. & W. 78.) Still the marriage of a *feme sole* plaintiff after judgment rendered it necessary for her husband to join her in

execution may be issued thereupon by the authority of the husband without any writ of revivor or suggestion; (*p*) and if in any such action the wife shall sue or defend by Attorney appointed by her when sole, such Attorney shall have authority to continue the action or defence, unless such authority be countermanded by the husband, and the Attorney changed according to the practice of the Court. (*q*)

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CCXV. (*r*) Where an action would but for the provisions of this Act have abated by reason of the death of either party and in which the proceedings may be revived and continued hereby, (*s*) the defendant or person against whom the action may be so continued may apply by summons (*t*) to compel the plaintiff or person entitled to proceed with the action to proceed according to the provisions of this Act, within such time as

(App. Co. C.) Eng. C. L. P. A. 1854, s. 92.

Right of Defendant in action which would have abated but for this Act.

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suing out a *sci. fa.* for execution: (*Woodyer* v. *Gresham*, 1 Salk. 116), but the husband alone was entitled if so minded to issue the *sci. fa.*: (*Ib.*) So when a *feme sole* defendant married after judgment a *sci. fa.* might be issued against both husband and wife on the judgment: (*Ib.*) And if after *sci. fa.* the wife died, the husband alone was liable to execution: (*Ib.*) But if the husband were not made a party to the judgment during the life time of his wife he could not and cannot after her death have a *sci. fa.* unless he take out letters of administration to her estate: (*Betts* v. *Kimpton*, 2 B. & Ad. 273.) It was also held that if after the entry of judgment against a woman *dum sola* she married, plaintiff might if so disposed proceed against her without joining the husband: (*Cooper* v. *Hanchin*, 4 East. 521.) So in ejectment against a *feme sole* who married after judgment, plaintiff had the right to issue a writ of possession without noticing her husband: (*Doe Taggart* v. *Butcher*, 8 M. & S. 557.)

(*p*) This is new. It is not stated whether the execution should be in the joint names of husband and wife or in the name of one only. It is only provided that it may issue by the authority of the husband without any writ of revivor, &c. The general rule is that the execution must follow or correspond with the judgment.

It may be mentioned that a warrant of attorney to confess judgment given by a *feme sole* has been held to be revoked by her marriage before judgment: (*Anon.* 1 Salk. 117,) *aliter* if given *to* her: (*Ib.* also *Metcalfe et al* v. *Boote*, 6 D. & R. 46.)

(*q*) No attorney can be changed without the order of a Judge (N. R. 4.)

(*r*) Taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 92.—Applied to County Courts.

(*s*) See ss. lxxvi., ccviii.,–ccxiv., ccxliv.–ccliii. incl.

(*t*) *By summons, i. e.* to a Judge in Chambers. The summons may be in this form—Upon reading, &c., let the plaintiff's attorney or agent (*or if dead*, "Let E. F. of, &c." *the legal representative of the deceased*), attend Judge's Chambers to-morrow at twelve o'clock noon, to show cause why the plaintiff, (*or the said* E. F.) should not proceed with this action according to the provisions of the Common Law Procedure Act, 1856, within — days from the service hereof, or within such other time as may be ordered in that behalf: (Chit. Form. 7 Edn. 843.)

the Judge shall order; (u) and in default of such proceeding the defendant or other person against whom the action may be so continued as aforesaid (v) shall be entitled to enter a suggestion of such default, and of the representative character of the person by or against whom the action may be proceeded with, as the case may be, (w) and to have judgment for the costs of the action against the plaintiff or against the person entitled to proceed in his room, as the case may be, and in the latter case to be levied of the goods of the testator or intestate. (x)

App. Co. C.) Eng. C. L. P. A. 1854, s. 91. Against Executors as to

CCXVI. (y) Proceedings against Executors upon a Judgment of assets in *futuro* (z) may be had in the manner herein

(u) The order may be thus—Upon hearing, &c., I do order that the plaintiff (or E. F. *of*, &c.) do proceed with this action according to the provisions of the Common Law Procedure Act, 1856, within — days from the date hereof.

(v) See note *s*, *supra*.

(w) The suggestion may be as follows—And now on, &c., C. D. suggests and gives the Court here to understand and be informed that the defendant died after the said issue was joined (*according to the fact*), and that on, &c., an order was made by the Honorable, &c., at the instance of the said C. D, that the plaintiff (*according to the fact*) should within, &c., proceed with this action according to the provisions of the Common Law Procedure Act, 1856. And the said C. D. further suggests and gives the Court here to understand and be informed that the plaintiff (*as the fact may be*) did not, pursuant to the said order, within, &c., or at any other time after the making of the same, proceed with this action according to the provisions of the Common Law Procedure Act. 1856, and therein made default, and that the said C. D. is the executor of the last will and testament of the defendant (*as the fact may be*). And the said C. D. prays judgment for the costs of this action and of the said suggestion. Therefore it is considered that the said C. D. do recover against the plaintiff (*as the fact may be*) £— for the costs of the defence to this action and of the said suggestion: (Chit. Forms 7 Edn. 843.)

(x) See preceding note.

(y) Taken from Eng. St. 17 & 18 Vic. c. 125, s. 91.—Applied to County Courts.

(z) In an action against an executor if he plead *plene administravit*, it is for plaintiff, if the plea be sufficient, either to admit or deny it. If he admit it he takes judgment and prays that the debt may be levied of such assets as may "afterwards" come to the hands of the executor to be administered: (2 Wms. Saunders, 219, n. 2.) But if plaintiff deny the plea, and the issue be found against him, he cannot have this form of judgment: (*Ib.* 217, n. 1.) Supposing plaintiff to admit the plea and to enter up judgment *quando acciderint*, if assets do come to the hands of the executor, plaintiff may proceed under this section by writ of revivor. The proof of the executor having received assets is always confined to a period *subsequent* to the judgment: (*Taylor* v. *Holman*, Bull N. P. 169.) It is right that such should be the rule of law, for if the creditor were permitted to litigate a second time, that which has been once settled between the parties either by verdict or admission, an executor would be harrassed and involved in infinite expense and litigation: (*Mara* v. *Quin*, 6 T. R. 1.) However, it was

provided as to Writs of revivor. (*a*)

assets in *futuro*.

(*b*) And with respect to the proceedings upon motions to

observed by Lord Kenyon, that it occured to him on looking into the precedents that the ordinary mode of entering up a judgment of assets *quando acciderint* was not correct, because on the issue of *plene administravit*, no evidence could be given of assets after the writ sued out, and if the judgment were only to affect assets received *after* the judgment, there would be an interval between the commencement of the action and the judgment, in which if the executor received any assets, they could not be taken at all. Therefore it was his opinion that the judgment should be so entered up as to reach all assets received by the executor after the time of suing out the writ. Whereupon Mr. Justice Ashurst observed that as the plea of *plene administravit* was that "the executor hath not nor had at the time of the suing out of the writ, *nor at any time since, any assets, &c.*," he saw no objection to the plaintiff's replying to the latter part of the plea, "*that the executor had assets since, &c.*," if the facts were so: (*Mara* v. *Quin*, *ubi sup.*) If upon the writ of revivor, assets be found in part plaintiff may have judgment to recover that part *instanter*, and the residue of the demand *in futuro*: (*Noel* v. *Nelson*, 2 Wms. Saund. 226.)

(*a*) See ss. cciv.-ccvii. All the proceedings necessary under the old practice, will be found reported at length in *Noel* v. *Nelson*, 2 Wms. Saund., 214.

(*b*) Either party to a suit with reference to the pleading of his adversary is entitled to question its sufficiency in point of fact and in point of law. To do the one is to plead. To do the other demur. A party may now by leave of the Court or a Judge plead and demur at the same time: (s. cxxix.) But demurrer is not the only remedy given to a party who intends to object to the legal sufficiency of his adversary's pleading. It is a well settled principle in pleading that upon the whole record there must be disclosed a legal cause of action and ground of defence. It is in the power of the Court after verdict upon the application of either party to review all the pleadings, and according to their legal sufficiency or insufficiency to arrest, reverse, or sustain the judgment. Often the exercise of this right of review at the instance of one party wrought a serious injustice upon his opponent. The effect of it was to suffer with impunity a party to an action, conscious of a defect in his adversary's case, for the time to pass it by and first raise the objection when that adversary had succeeded in obtaining judgment in his favour. Whereas the objection, if taken before trial, might have saved to both parties the trouble and expense of a trial upon the issues raised. Such a course of procedure was felt to be a reproach to our system of jurisprudence. As a remedy the C. L. Comrs. though recommending the preservation of the right to arrest judgment and to move for judgment *non obstante veredicto*, added the qualification that the motion be allowed "only upon terms of payment of all the costs, including those of trial, incurred since the pleading to which the party takes exception." They further recommended that if the motion were grounded upon the omission of some material statement of fact provision should be made for the suggestion and trial of the fact, though the cause of action had been previously submitted to a jury. These suggestions have been in effect adopted by the Legislature in the three following sections.

Since the law as to arrest of judgment, judgment *non obstante*, and repleader is preserved and necessary to be understood before applying the remedy provided by this Act, it is proposed to make brief allusion to it:

arrest the Judgment and for Judgment *non obstante veredicto*;

First—Arrest of Judgment. This is a proceeding to be had at the instance of an unsuccessful *defendant*. The substance of the application is that the judgment for plaintiff be arrested or withheld on the ground that *there is some error appearing on the face of the record which vitiates the proceedings:* (Steph. Pl. 96.) The error or defect must be one of substance, else the application will not be entertained: (*Craske* v. *Johnson*, 2 Buls. 74; *Musket* v. *Cole*, Cro. Eliz. 133; *Hopkins* v. *Stapers*, *Ib.* 229; *Law* v. *Sanders*, *Ib.* 913; *Talkhorn* v. *Wrigg*, Cro. Jac. 406; *Vivian* v. *Shipping*, Cro. Car. 384; *Buckler* v. *Angil*, 1 Lev. 164; *Lea* v. *Welch*, 2 L. Ray. 1516.) Under certain circumstances the error or defect may be taken to be cured after verdict or by defendant's pleading over. Hence it follows that there may be a pleading which, though clearly bad on general demurrer, cannot be taken advantage of by motion in arrest of judgment. And yet it is not the bare fact of defendant pleading over or of a verdict being given that cures the defect or error. The rule is this: "Where there is any defect, imperfection, or omission in any pleading, which would have been a fatal objection upon demurrer, yet if the issue be such as necessarily required on the trial proof of the facts so imperfectly or defectively stated or omitted and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict:" See *Mornington* v. *Witham*, 1 Vent. 108; *Beele* v. *Simpson*, Lut. 632; *Norden* v. *Fox*, 3 Lev. 393; *Prance* v. *Stringer*, Cro. Jac. 44; *Muscot* v. *Ballet*, *Ib.* 369; *Mathewson* v. *Rowe*, *Ib.* 124; *Slack* v. *Boowal*, *Ib.* 668; *Badcock* v. *Atkins*, Cro. Eliz. 416; *Alston* v. *Buscough*, Carth. 304; *St. John* v. *St. John*, Hob. 78; *Cooke* v. *Petit*, 2 Wils. 5; *Anon.* *Ib.* 150; *Roe* v. *Horsey*, 3 Wils. 275; *Rushton* v. *Aspinall*, 1 Doug. 678; *Collins* v. *Gibbs*, 2 Burr. 899; *Weston* v. *Mason*, 3 Burr. 1725; *Spiers* v. *Parker*, 1 T. R. 145; *Clark* v. *King*, 3 T. R. 147; *Rawson* v. *Johnson*, 1 East. 209; *Ferry* v. *Williams*, 8 Taunt. 62; *MacMurdo* v. *Smith*, 7 T. R. 518; *Jackson* v. *Pesked*, 1 M. & S. 234; *Amey* v. *Long*, 9 East. 473; *Lambert* v. *Taylor*, 4 B. & C. 138; *Dalby* v. *Hirst*, 1 B. & B. 224; *Butt* v. *Howard*, 4 B. & Ald. 655; *Whitehead* v. *Gretham*, 2 Bing. 464; *Farnworth* v. *Chester*, 4 B. & C. 555; *Williams* v. *Germaine*, 7 B. & C. 468; *Whitworth* v. *Hall*, 2 B. & Ad. 695; *Tebbutt* v. *Selby*, 6 A. & E. 786; *Taylor* v. *Devy*, 7 A. & E. 409; *Wright* v. *Goddard*, 8 A. & E. 145; *Ladd* v. *Thomas*, 12 A. & E. 117; *Cambie* v. *Barry*, 5 Ir. L. Rep. 34; *Barrie* v. *Cambie*, 6 Ir. L. Rep. 34; and for decisions in Upper Canada see R. & H. Dig. "Arrest of Judgment.") Of course if the defect or omission be cured after verdict, that fact will be a good answer, as much now as before this Act to an application for arresting plaintiff's judgment. If not cured, then it is for plaintiff to avail himself of this Act by suggesting the omitted fact and having the same tried.

Secondly—Judgment non obstante veredicto. This is a proceeding to be had at the instance of an unsuccessful *plaintiff*. The substance of the application is that judgment be given in in plaintiff's favour *without regard to the verdict obtained by defendant:* (Steph. Pl. 97.) There must be an express confession of the cause of action to entitle a plaintiff to this form of judgment: (*Wilkes* v. *Broadbent*, 1 Wils. 63; *Dighton* v. *Bartholomew*, Cro. Eliz. 778; *Atkinson* v. *Davies*, 11 M. & W. 236; *Pim* v. *Grazebrook*, 2 C. B. 429; *Evans* v. *Kingsmill*, 3 U. C. R. 118.) The confession must be either in the plea said to be insufficient: (*Down* v. *Hatcher*, 10 A. & E. 121; *Negelen* v. *Mitchell*, 7 M. & W. 612; *Jones* v. *Broadhurst*, 9 C. B. 173; *Webb* v. *Spicer*, 13 Q. B. 886; *Milnes* v. *Daw-*

Be it enacted as follows:

sow, 5 Ex. 948; *Manley* v. *Boycott*, 22 L. J. Q. B. 265), or it seems, under peculiar circumstances, in some other plea on the record: (*Goodburne* v. *Bowman*, 9 Bing. 532; *Couling* v. *Coxe*, 6 C. B. 703; *Crossfield* v. *Morrison*, 7 C. B. 286; *McClure* v. *Ripley*, 5 Ex. 140; *Bonar* v. *Mitchell*, 5 Ex. 415.) And the pleading itself must be in confession and avoidance. Though a defendant traverse one of several traversable allegations in a declaration or replication he admits for some purposes those which he does not traverse, yet he does not confess them in the sense which is required to entitle plaintiff to move for judgment *non obstante veredicto*: (*Bennett* v. *Holbeck*, 3 Wms. Saunders 319, *e*; see further, *Wilkes* v. *Broadbent*, 1 Wils. 63; *Lacy* v. *Reynolds*, Cro. Eliz. 214; *Dighton* v. *Bartholomew*, *Ib.* 778; *Rex.* v. *Philips*, Stra. 394; *Cleares* v. *Seevens*, 8 Taunt. 413; *Lewis* v. *Clement*, 3 B. & Ald. 702; *Richards* v. *Bennett*, 1 B. & C. 239; *Drayton* v. *Dale*, 2 B. & C. 293; *Lambert* v. *Taylor*, 4 B. & C. 138; *Gwynne* v. *Burnell*, 6 Bing. N. C. 453; *Harris* v. *Goodwyn*, 2 M. & G. 405; *West* v. *Blakeway*, *Ib.* 729; *Rawdon* v. *Wentworth*, 10 M. & W. 36; *Down* v. *Hatcher*, 10 A. & E. 121; *Wain* v. *Bailey*, *Ib.* 616; *Adams* v. *Jones*, 12 A. & E. 459; *Lewis* v. *Reilly*, 1 Q. B. 349.) If there be no sufficient admission of of the cause of action, it is in the power of the Court to award a repleader: (*Rutland* v. *Bagshaw*, 14 Q. B. 869.) If there be other pleas on the record than that upon which plaintiff has obtained judgment *non obstante veredicto*, and the action be for unliquidated damages, the judgment is interlocutory not final, and plaintiff may without leave of the Court proceed to assess his damages: (*Shephard* v. *Halls*, 2 Dowl. P. C. 453), but if the action be one in which plaintiff is entitled to nominal damages only, the verdict for defendant will be set aside and one entered for plaintiff by the Court: (*Selby* v. *Robinson*, 2 T. R. 758.) After judgment *non obstante veredicto*, a defendant is too late to move for a new trial: (*Pim* v. *Reid*, 6 M. & G. 1.) If the judgment be reversed in a Court of error or appeal defendant will be entitled to the costs of the rule for judgment *non obstante veredicto*: (*Evans* v. *Collins*, 2 D. & L. 989.)

Thirdly—Repleader. This is a proceeding to be had at the instance of *either* plaintiff or defendant when unsuccessful. The application is in substance that the issue joined and found for the successful party was on an immaterial point, and one not proper to decide the action: (Steph. Pl. 98.) In such a case the Court not knowing for whom to give judgment will award a *repleader*, that is, will order the parties to plead *de novo* for the purpose of obtaining a better issue: (2 Wms. Saund. 392, b. n.; *Kent* v. *Hall*, Hob. 113; *Anon.* 2 Ventr. 196; *Stephens* v. *Cooper*, 3 Lev. 440; *Ens* v. *Mohun*, 2 Str. 847; *Plomer* v. *Ross*, 5 Taunt. 385; *Clears* v. *Stephens*, 8 Taunt. 413; *Lambert* v. *Taylor*, 4 B. & C. 138; *Doogood* v. *Rose*, 9 C. B. 132.) It is a rule that a repleader will not be granted except where complete justice cannot be otherwise obtained: (*Goodburne* v. *Bowman*, 9 Bing. 532; 2 Wms. Saunders, 319, b. n.; *Gwynne* v. *Burnell*, 6 Bing. N. C. 453.) Thus it will not be granted because there is one immaterial issue, provided there be others material: (*Negelen* v. *Mitchell*, 7 M. & W. 612; *Crossfield* v. *Morrison*, 7 C. B. 286.) Nor will it be granted in favor of a party who makes the first fault in pleading: (2 Wms. Saunders, 191), but this rule only holds good where the material issue is found against such party: (*Gordon* v. *Ellis*, 2 D. & L. 308.) Defendant in an action of debt pleaded several pleas in bar, to one of which extending to the whole cause of action plaintiff demurred, and on the others issues in fact were taken. De-

con Stat for ue. ch 22 § 254

(App. Co. C.) Eng. C. L. P. A. 1852, s. 143.

Proceedings on motions in arrest of

CCXVII. (*c*) Upon any motion made (*d*) in arrest of Judgment (*e*) or for Judgment *non obstante veredicto*, (*f*) by reason of the non-averment of some material fact or facts, or material allegation (*g*) or other cause, (*h*) the party whose pleading is

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fendant had judgment on the demurrer the Court holding the declaration bad. Th issues of fact were tried and found for the plaintiff, excepting one extending to the whole cause of action which was found for defendant and immaterial. Plaintiff to avoid paying costs on this issue moved for judgment thereon *non obstante veredicto*, or for a repleader: Held that judgment *non obstante* could not be awarded, as it would be inconsistent with the judgment already given that plaintiff should not recover, and that a repleader could not be awarded, as the parties must in that case be ordered to replead from the plea downwards, and such direction would lead to an absurdity on the record, since the court had already held the declaration bad: (*Willoughby* v. *Willoughby*, 6 Q.B. 722.) If on a replication to a plea substantially bad an immaterial issue be found for defendant, and the declaration be good defendant cannot have any judgment: (*Benson* v. *Duncan*, 18 L. J. Ex. 169.)

(*c*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 143.—Applied to County Courts.—Founded upon 1st Rep. C. L. Comrs. ss. 86-87. The enactment is a most useful one, and will enable the Courts to dispose of cases finally upon their merits: (*Manley* v. *Boycot*, Campbell, C. J. 2 El. & B. 59.)

(*d*) No 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 if the cause be tried in term, and there remain four days in term after the trial; 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: (N. R. 40.) This was the old rule: (*Thomas* v. *Jones*, 4 M. & W. 28.) The motion cannot be made after the time limited unless by consent: (*Harris* v. *the Great Northern R. Co.* 21 L. J. C. P. 16.) The motion may be made after a judgment by default as well as an ordinary judgment after defence, but cannot be made after a judgment on demurrer, for any fault that might have been taken advantage of on the demurrer: (*Edwards* v. *Blunt*, 1 Str. 425; *Creswell* v. *Packham*, 6 Taunt. 630.)

(*e*) As to which generally see div. I. of note *b*, *ante*. In the Eng. C. L. P. Act, a reference is here made to Eng. St. 1 Wm. IV. c. 7, as to issuing immediate execution.

(*f*) As to which see div. II. of same note.

(*g*) For examples see *Galloway* v. *Jackson*, 3 M. & G. 960; *Ladd* v. *Thomas*, 12 A. & E. 117; *Ireland* v. *Harris*, 14 M. & W. 432; *Doe Medina* v. *Grove*, 15 L. J. Q. B. 284; *Davies* v. *Williams*, 10 Q. B. 725. It has been held after verdict in the case of several counts in a declaration, some bad and some good, that there cannot be an arrest of judgment but a *venire de novo*: (*Emblin* v. *Dartnell*, 12 M. & W. 880), and that in the case of one count containing several causes of action, some good and some bad, the Court will neither arrest the judgment nor grant a *venire de novo*, inasmuch as it will be intended that the damages were given in respect of the good causes of action only: (*McGregor* v. *Graves*, 3 Ex. 34; *Kitchenman* v. *Skeel*, *Ib.* 49.)

(*h*) The relief may be obtained under this section upon any motion in arrest of judgment by reason of the non-averment of some material fact or facts, &c., "*or other cause.*" *Qu.* Does this mean that in *every case* of a motion to arrest judgment, &c., a suggestion of what is necessary to remedy the defect may be entered? If so, the Act proceeds further than was

alleged or adjudged to be therein defective, (*i*) may, by leave of the Court, suggest the existence of the omitted fact or facts or other matter which if true would remedy the alleged defect; (*j*) and such suggestion may be pleaded to by the opposite party within eight days after notice thereof, (*k*) or such further time as the Court or a Judge may allow, (*l*) and the proceedings for trial of any issues joined upon such pleadings hall be the same as in ordinary actions. (*m*)

judgment, or for judgment *non obstante.*

Suggestion of facts by party whose pleading is objected to.

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recommended by the C.L. Commissioners, who proposed the entry of the suggestion only upon motions "founded on the non-averment of some alleged material fact or facts, or material allegation." They recommended that a suggestion of the truth "of the omitted fact" should be permitted. But there may be motions in arrest of judgment, &c., as well for insufficient allegations or improper allegations, or for legal insufficiency, as for the omission of necessary allegations of fact. The misjoinder of causes of action where general damages have been assessed, as for example, an action for work done for a testator and for work done for his executors, may be mentioned as an instance: (*Kitchenman* v. *Skeel*, 3 Ex. 19; *Bignell* v. *Harpur*, 4 Ex. 773.) Though this section admits of a suggestion of "the omitted facts *or other matter*," it is not easy to perceive what state of facts can be suggested to remedy such a defect as that last above mentioned. The construction will probably be in accordance with the terms of the Report of the Common Law Commissioners.

(*i*) *Alleged or adjudged, &c.* From the use of these words, it would appear that the suggestion may be made either before or after judgment.

(*j*) Wherever a thing is to be done by leave of the Court, the usual and the wise course has been to require proof by affidavit that there is a fit case for the interference of the Court. A party asking for leave under this section must go further than merely raising a doubt. He must go so far as to produce an impression on the mind of the Court that the final decision may probably be in his favor, and this both on the fact and the law: (*Manley* v. *Boycot*, Crampton, J, 2 El. & B. 60.) It is not enough to satisfy the Court that the application is not made for delay. Sufficient probable grounds for the entry of the suggestion must be shown: (*Ib.* per Campbell, C. J.) The affidavit must at least show in clear and unambiguous terms that the fact, the non-averment of which is to be supplied by the suggestion, exists: (*Ib.* Coleridge, J.) To entitle a party to take advantage of this enactment he must lay before the Court a clear and satisfactory case: see *Fisher* v. *Bridges*, Campbell, C. J., 22 L. J. Q. B. 227; also *Macdougall* v. *Paterson*, 2 L. M. & P. 681; *Ricketts* v. *Noble*, 18 L. J. Q. B. 408; *Croke* v. *Powell*, 21 L. J. Q. B. 183; *Parsons* v. *Alexander*, 24 L. J. Q. B. 277.)

(*k*) This unlike the time limited for appearance to an ordinary writ of summons or to suggestions for reviving judgments is eight not ten days: (ss. xvi. ccxi. ccxlii. *et seq.*) The difference deserves to be noted, because as to the former though eight days is the period limited by the Eng. C. L. P. Acts, our Act makes it ten. As to the section here annotated, the period is eight days both in the Canadian and Eng. C. L. P. Acts.

(*l*) *Court or Judge.* Relative powers see note *m* to s. xxxviii.

(*m*) *i.e.* As to plea and all subsequent proceedings to judgment.

(App. Co. C.) Eng. C. L. P. A. 1852, s. 144.

If suggestion be found true.

If untrue.

CCXVIII. (*n*) If the fact or facts suggested be admitted or be found to be true, (*o*) the party suggesting shall be entitled to such Judgment as he would have been entitled to, if such fact or facts or allegations had been originally stated in such pleading, (*p*) and proved or admitted on the trial, together with the costs of and occasioned by the suggestion and proceedings thereon; (*q*) but if such fact or facts be found untrue, the opposite party shall be entitled to his costs of and occasioned by the suggestion and proceedings thereon, in addition to any other costs to which he may be entitled. (*r*)

(App. Co. C.) Eng. C. L. P. A. 1852, s. 145.

Costs on arrest on judgment, or judgment *non obstante*.

CCXIX. (*s*) Upon an arrest of Judgment or Judgment *non obstante veredicto*, the Court shall adjudge to the party against whom such Judgment is given, the costs occasioned by the trial of any issues in fact arising out of the pleading for defect of which such Judgment is given, upon which such party shall have succeeded, (*t*) and such costs shall be set off against any

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(*n*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 144.—Applied to County Courts.

(*o*) These words are of ambiguous import as regards the onus of proof. The affirmative of the issue will generally be upon the party who makes the suggestion.

(*p*) *Such pleading. i. e.* his original pleadings, to remedy a defect in which the suggestion is made.

(*q*) To be awarded, it is presumed, in one and the same judgment roll with the original demand and recovered by one and the same execution.

(*r*) Upon failure of proof of the suggestion, the judgment will be for the party disproving the suggestion either in arrest of judgment or *non obstante veredicto*, as the case may be. As to the costs see s. ccxix. and notes thereto.

(*s*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 145.—Applied to County Courts.

(*t*) Before this Act upon a motion in arrest of judgment, or for judgment *non obstante*, each party paid his own costs: (*Tiffin* v. *Glass*, Barnes, 142; *Cameron* v. *Reynolds*, Cowp. 407; *Goodburne* v. *Bowman*, 9 Bing. 667.) The reason why the successful party was refused costs, was that he ought to have taken his objection at an earlier stage of the proceedings, viz., by demurrer: (*Hodgkinson* v. *Watt*, Patterson, J., 1 D. & L. 672), but if the rule of the party moving was discharged he was compelled to pay the costs of the application to the opposite party: (*Ib.*) Now although he succeed he must pay some costs, viz., the costs occasioned by the trial of any issues in fact, arising out of the pleadings, for defects in which he recovers judgment. Even before this Act, although judgment was arrested on one count of a declaration, but judgment remained in favor of defendant as to others upon which he had succeeded at the trial, he was held to be entitled to the general costs of the cause: (*Elderton* v. *Emmens*, 5 D. & L. 489.) As to judgment *non obstante veredicto*, it has been held that neither party is entitled to costs where the issues are immaterial: (*Goodburne* v. *Bowman*, 2 Dowl. P. C. 206.) And where judgment *non obstante* was entered for plaintiff in the Queen's Bench, England, and afterwards reversed by a Court of error, it

money or costs adjudged to the opposite party, and execution may issue for the balance, if any. (*u*)

And with respect to the action of Ejectment; (*v*) Be it enacted as follows: *Ejectment.*

CCXX. (*w*) The action of ejectment shall be commenced by Writ; (*x*) directed to the persons in possession, by name, (*y*) Eng. C. L. P. A. 1852, s. 168.

was held that defendant was entitled to the costs of opposing the rule for judgment *non obstante veredicto*: (*Evans* v. *Collins*, 2 P. & L. 989.)

(*u*) The effect of this provision will be, as intended, to lessen the frequency of motions either in arrest of judgment or for judgment *non obstante veredicto*. It is apprehended that the set-off of costs here authorised will not be suffered to interfere with an attorney's lien for costs of suit: (see *Doe d. Swinton* v. *Sinclair*, 5 Dowl. P. C. 26.)

(*v*) Ejectment is that form of action by which a party having a right of entry upon land recovers its possession. It is of the class described in treatises on pleading as "mixed." Owing to its anomalous character it is usually treated as a separate and peculiar mode of proceeding. Unlike other forms of action general rules have been made for it alone, and rules extending to other forms of action have been held not to extend to it. The legislature in like manner has in the following sections made separate provision for the action of ejectment. Being for the recovery of land anciently, it was esteemed of too great solemnity to be proceeded with like actions for chattels or personal wrongs. Hence it was clogged with fictions which produced delay and was attended with great expense. Originally it was a mere action of trespass to recover the damages sustained by a lessee for years when ousted of his possession. Afterwards by a fiction this remedy was made use of for the recovery of all possessory rights to corporeal hereditaments. Since the fictions of the action were in Upper Canada abolished by 14 & 15 Vic. cap. 114, it will serve no good purpose further to dwell upon them. Our Statute of 1851 was in advance of legislation in England, and effected to some extent what is here effected to a great extent, viz., the assimilation of ejectment to other forms of action. The origin of both seems to be the Irish Process and Procedure Act, 13 & 14 Vic. cap. 18. The Common Law Commissioners started with the fundamental proposition that "the proceedings in this most important action ought to be simple and speedy." In order thereto they recommended many reforms, each of which is enacted in the following sections. While studying the effect of these sections, it should be kept in view, that the office of ejectment is simply to try title to real estate. The practice of trying titles through the instrumentality of an action trespass *qu. cl. fr.* has never failed to meet with the pointed disapprobation of the Courts.

(*w*) Taken from Eng. Stat. 15 & 16 c. 76, s. 168.—Founded upon 1st Rep. C. L. Comrs. s. 90. This section is prospective: (*Doe d. Smith* v. *Roe*, 8 Ex. 127, 16 L. & Eq. 504.)

(*x*) As under Prov. St. 14 & 15 Vic. c. 114, in lieu of the declaration and notice before then in use.

(*y*) Persons in *actual* possession are intended. Mere constructive possession where the land is in truth vacant will not suffice: (*Doe White* v. *Roe*, 8 Dowl. P. C. 71.) But where a party though removed from off the premises had left beer in the cellar of a house on the premises, he was considered in actual possession: (*Savage* v. *Dent*, 2 Str. 1064.) Not so, however, when he had locked up the house without leaving any property on the premises showing

Ejectment, how commenced. Writ.

and to all persons entitled to defend the possession of the property claimed, (*a*) which property shall be described in the Writ with reasonable certainty (*b*)

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an intention to continue possession: (*Doe d. Darlington* v. *Cock*, 4 B. & C. 259.) A house in fact untenantable and empty cannot be looked upon as being in the actual possession of any body: (*Doe d. Schovell* v. *Roe*, 3 Dowl. P. C. 691.) Where there are several houses on the premises, some occupied and others not, the Court may give special directions as to the latter: (*Doe d. Chippindale* v. *Roe*, 7 C. B. 125.) But proceedings, as on a vacant possession, cannot be had unless it clearly appear that the premises are really vacant: (*Doe d. Burrows* v. *Roe*, 7 Dowl. P. C. 326; *Doe Timothy* v. *Roe*, 8 Scott 126.) As to proceedings on a vacant possession, see s. ccxxiii.

If it can be shown that the parties served were really in possession when served, slight errors in the names or other description will not vitiate the proceedings: (*Doe d. Folkes* v. *Roe*, Dowl. P. C. 567; *Doe d. Frost* v. *Roe*, 3 Dowl. P. C. 563; *Doe d. Price* v. *Roe*, 6 Dowl. P. C. 62; *Doe d. Smith* v. *Roe*, *Ib.* 629.) The Court has power to strike out defences made by persons not in possession by themselves or their tenants: (s. ccxxx)

(*a*) A tenant served with a writ should notify his landlord of the service (s. cclxii). Heretofore the Courts have refused to set aside a judgment in ejectment against a tenant who concealed the proceedings from his landlord, there not being otherwise any evidence of collusion: (*Goodtitle* v. *Badtitle*, 4 Taunt. 820.) It was said to the landlord, "if your tenant has done wrong, that is a matter between you and him:" (*Ib.*) If premises be let to A, and he sublet to B, C, and D, and these latter be in possession, the writ should be directed to them as well as to A: (*Doe d. Darlington* v. *Cock*, 4 B. & C. 259.) It is enacted that the writ shall be directed to the "persons" in possession, &c. Whether a mere servant in possession who claims neither estate nor interest in the premises can be made defendant, is not clear. But this much is clear, viz., that if the person served, though a servant, assent to the character of a tenant, and appear to the action, that assent, coupled with the appearance, will be sufficient evidence to go to the jury: (*Doe d. James* v. *Stanton*, 2 B. & Al. 371.) "It is sufficient to subject a party to the action that he has a visible occupation of the premises, and it is not necessary that he should have such an interest as to enable him to maintain trespass. When a servant is served with a notice of ejectment, it is competent to him to explain his situation, and so to set the other party right or to mislead him. If he adopt the latter course it is very possible that a jury may think that he ought to be considered as the tenant in possession: (per Bayley, J. *Ib.*) If there be several persons in possession there may be an action against all, or an action against each, but if the title of all be identical, plaintiff may be ordered to consolidate: (*Grimstone* v. *Gower*, Barnes, 176; *Thrushout* v. *Jones*, 10 B. & C. 110; *Doe d. Innes* v. *Roe*, 10 Moore 493.)

(*b*) A description sufficient to identify the land the subject of the action with the property described in the writ is all that is required. This it what is meant by reasonable certainty. The want of it will not nullify the writ but only entitle the opposite party to apply for better particulars: (*Doe d. Saunders* v. *Duke of Newcastle*, 7 T. R. 332, *n*; *Doe d. Saxton* v. *Turner*, 11 C. B. 896; also s. ccxxix.) Though the sufficiency or insufficiency of the description in the declaration under the old practice will not be a satisfactory guide, yet being some guide a reference may be made to the principal cases: *Doe d. Marriott* v. *Edwards*, 6 C. & P.

CCXXI. (*c*) The Writ shall state the names of all the persons in whom the title is alleged to be, (*d*) and command the persons to whom it is directed, (*e*) to appear within sixteen days after service thereof, (*f*) in the Court from which it is issued, (*g*) to defend the possession of the property sued for, or such part thereof as they may think fit, (*h*) and it shall contain a notice that in default of appearance they shall be turned out of possession; (*i*) and the Writ shall bear teste on the day on which it issued, (*j*) and shall be issued out of the office in the County or Union of Counties wherein the lands mentioned in such Writ lie, (*k*) and shall be in force for three months, (*l*) and shall be in the form contained in the Sche-

Eng. C. L. P. A. 1852, s. 169. Contents of writ. Where to issue. Duration.

208; *Doe d. Boys* v. *Carter*, 1 Y. & J. 492; *Doe d. Edwards* v. *Gunning*, 7 A. & E. 240.

(*c*) Taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 169.—Founded upon 1st Rep. C. L. Comrs. s. 91.

(*d*) These words correspond with s. 195 of the Irish C. L. P. Act (16 & 17 Vic. c. 113), under which it was held that a husband seized of lands in right of his wife may eject for non-payment of rent in his own name and that the wife is not a necessary party to the record: (*Holmes* v. *Hennegan*, 28 L.T. Rep. 25.) And per Monahan, C. J., "I believe for the last century no one has doubted but that the husband has such an estate in the lands of the wife as to enable him to make a lease of the wife's lands for the purpose of bringing an ejectment. The present statute does not alter the law, and therefore we must allow the cause shown with costs." Under the old law when a doubt arose as to whether the title was in one of several parties, it was usual to insert several demises. There is nothing now to prevent title being alleged in several plaintiffs, "or some or one of them." But although not so alleged, it would seem from the peculiar wording of several sections of this Act agreeing with sections in the repealed Act 14 & 15 Vic. c. 114, that one of several plaintiffs may recover: (*Butler et al.* v. *Donaldson*, 10 U. C. R. 643.) By this section it is made necessary to name in the writ all the persons in whom "title is *alleged*," and under a subsequent section it is made necessary to attach to the writ a notice of the "*nature* of the title": (s. ccxxii.) It is presumed that in cases of nonjoinder and misjoinder amendments might be allowed as in the case of personal actions (ss. lxvii. lxviii.)

(*e*) Who should be the persons described in the preceding section: (s. ccxx.)

(*f*) As to computation of time see note *d* to s. lvii.

(*g*) Mode of appearance see s. ccxxiv.

(*h*) The party appearing may limit his defence to part of the property described in the writ (s. ccxxviii.)

(*i*) *i.e.* Under s. ccxxxi.

(*j*) See note *t* to s. xix.

(*k*) A writ issued from a county other than that in which the lands lie, though not a nullity may be set aside on application to a Judge in Chambers: (*Metropolitan Building Society* v. *McPherson*, Chambers, Oct. 4, 1856, Burns J., II. U. C. L. J. 228.) The venue in ejectment is of course local: (see note *k* to s. vii.) and is shown by the description of the premises in the body of the writ and not by the marginal note: (*Riddell* v. *Briar*, 2 U. C. Cham. R. 198.)

(*l*) *i.e.* Three calendar months: (12

Form, &c.

dule (A) to this Act annexed, marked No. 12, or to the like effect, (*m*) and the name and abode of the Attorney issuing the same, (*n*) (or if no Attorney, the name and residence of the party) (*o*) shall be endorsed thereon, in like manner as hereinbefore enacted with reference to the indorsements on a Writ of Summons in a personal action, (*p*) and the same proceedings may be had to ascertain whether the Writ was issued by the authority of the Attorney whose name was indorsed thereon, and who and what the claimants are, and their abode, and as to staying the proceedings upon Writs issued without authority, as in the case of Writs in personal actions.(a) (*q*)

(a) § 5.

Notice of nature of claimant's title to be attached to the writ.

CCXXII. (*r*) To the Writ and to every copy thereof served on any party, shall be attached a notice of the nature of the title intended to be set up by the Claimant, as for example, by grant from the Crown, or by deed, lease, or other conveyance derived from or under the grantee of the Crown, or by marriage, descent, or devise, stating to or from whom, or by length of possession, or otherwise, as the case may be, according to the nature of the Claimant's title, stating it with reasonable cer-

Not to contain more than one mode of set-

Vic. c. 10, s. v. sub s. 11.) As the service of the writ need not necessarily be personal, no provision is made for the renewal of the writ as in the case of writs of summons in personal actions (s. xxviii.)

(*m*) When the Legislature prescribe a form of procedure it should not be departed from, unless for some good reason.

(*n*) See s. xxi. and notes thereto.

(*o*) See note *a* to s. xxi.

(*p*) The indorsements will be amendable, it is presumed, in the same manner as in personal actions: see s. xxxvii. In ejectment the Courts have always been liberal in allowing amendments: (see *Doe d. Simpson* v. *Hall*, 5 M. & G. 795: *Doe d. Parsons* v. *Heather*, 8 M. & W. 158; *Doe d. Alton* v. *Beck*, 22 L. J. C. P. 6; *Doe d. Bacon* v. *Brydges*, 1 D. & L. 954; *Doe d. Rabbits* v. *Welch*, 4 D. & L. 115; *Doe d. Sinclair* v. *Arnold*, H. T. 4 Vic. *MS.* R. & H. Dig. "Amendment," II. 8; *Doe d. Ausman* v. *Munro*, 1 U.C.R. 160), but now under s. ccxci. the facilities will be very great both before and at the trial. See also s. cclxxiv.

(*q*) See s. xxv.

(*r*) This appears to be a new and original provision, though not new in principle. The object of it is to render it obligatory upon a claimant in ejectment to make known to defendant the title intended to be set up by plaintiff so that defendant may with the least possible expense prepare himself to meet it. A similar principle is involved in s. ccxxiv. which makes it necessary for defendant to inform plaintiff of the grounds of defence intended to be relied upon by the former. The manifest design of both enactments is that neither party to a suit shall be kept in ignorance of the case intended to be set up by his adversary. A writ which informs a defendant that plaintiff claims the land of which he is in

tainty; (s) And such notice shall not contain more than one mode in which title is set up, without leave of the Court or a Judge, and at the trial the Claimant shall be confined to proof of the title set up in the notice; (t) Provided that nothing in this section shall be construed to require any Claimant to set out in such notice the dates or particular contents of any Letters Patent, Deeds, Wills, or other instruments or writings, which show or support his title, or the date of any marriage or death, unless it be specially directed by order of the Court or a Judge. (u)

Setting up title without leave.

Proviso: Certain particulars not required except by order

CCXXIII. (v) The Writ shall be served in the same manner as an Ejectment was formerly served, (w) or in such manner

Eng. C. L. P. A. 1852, s. 170.

possession gives no tangible information. The bare issue of a writ of itself shows that the party issuing it advances some claim. But it is only just that a defendant should be informed not merely that a claim is advanced, but the grounds upon which that claim is based, i.e. claimant's title. In the absence of such information defendant is left to conjecture the probable grounds of claim, against some of which he at great expense prepares to defend himself but which at the trial may turn out to be wholly imaginary. This of itself would be a hardship upon a defendant in any action, but in ejectment where there are no pleadings would be a positive injustice.

(s) In the event of further information than that disclosed in the notice being thought necessary by defendant, it is in his power to administer interrogatories to plaintiff: (s. clxxv.) Though the notice to be annexed to the writ may be very general in its terms, it must be neither vague nor obscure. A compliance with the spirit and intention of the section must be made. Thus, for example, in an action of ejectment for breach of covenant contained in a lease, the notice of claim should set out the particular covenant in the lease which has been broken and the particulars of the breach: (*Kenney* v. *O'Shagnessy*, Chambers, Dec. 21, 1856, Burns, J, III. U.C.L.J. 29; also *Doe d. Birch* v. *Phillips*, 6 T. R. 597.)

(t) This being analogous to well known principles of pleading: (see note *a* to s. ccxxiv.) It is not certain whether at the trial an amendment can be allowed so as to enable a claimant to set up grounds of claim other than such as are specified in his notice. The inference from the wording of the section is against the proposition. It is enacted that "at the trial the plaintiff shall be confined to proof of the title set up in the notice."

(u) It is not intended that a claimant shall as a matter of course disclose more of his title than actually necessary to give defendant a correct idea of the ground of claim.

(v) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 170.—Founded upon 1st Rep C. L. Comrs. s. 92.

(w) It is enacted that the *writ* shall be served in the same manner as an *ejectment* was formerly served. This provision is similar to that of repealed Stat. 14 & 15 Vic. cap. 114, s. 2, which enacted that the writ should be served "in the same manner as a *declaration* is at present served." Of the section here annotated it may be said, as has been said of the repealed enactment, that a good deal of difficulty will and must inevitably arise upon so loose an expression as that already quoted: (*Riddell* v. *Brian*, Burns, J, 2 U. C.

Service of writ. as the Court or a Judge shall order, or in case of vacant posses-

Cham. R. 201.) The repealed Statute declared that the writ should be served "in the same manner" as the "declaration," not "declaration and notice," the latter of which under the former practice required *explanation* at the time of service. It was consequently held under Statute 14 & 15 Vic. cap. 114, that service of the writ without explanation of its contents was sufficient: (*Riddell* v. *Brian, ubi supra.*) Had the section here annotated been a verbatim copy of 14 & 15 Vic. the authority of *Riddell* v. *Brian* would be taken to set at rest a doubt which otherwise exists. It is enacted that the writ shall be served in the same manner as "an ejectment" was formerly served. If "ejectment" mean more than "declaration," it must be understood to mean "declaration and notice," in which case explanation at the time of service would be necessary. And this was in fact what constituted "an ejectment" under the old practice in opposition to a declaration *simpliciter*. The question though raised in England under 15 & 16 Vic. cap. 76, is still undecided: (*Edwards* v. *Griffith*, 15 C. B. 397.) Until a decision to the contrary, the safer and wiser plan will be to explain the writ at the time of service. The words "in the same manner" mean that service upon a wife, child, servant, agent, or other person, which, in the case of a declaration and notice, would have been good service, shall under this Act be a sufficient service of the writ. Thus:

As to a Sole Defendant.

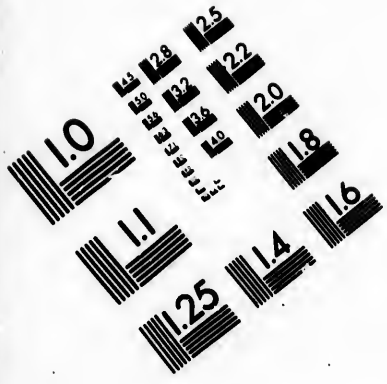
1. *Personal Service.* The object of service in any case is to notify defendant of intended proceedings against him. Personal service when it can be effected is always to be preferred, and is obviously the most satisfactory mode of bringing the proceeding to the notice of the party. Of this fact it is always necessary to satisfy the Court with a view to ulterior proceedings. In ejectment a prominent feature of personal service is that it will be good though not effected upon the premises sought to be recovered: (*Savage* v. *Dent*, 2 Str. 1064; *Doe d. Daniell* v. *Woodroffe*, 7 Dowl. P. C. 494.) There may be personal service, though the writ be not placed in the corporal possession of defendant. Thus if with full notice of the intention of the party trying to effect the service defendant designedly thwart him by refusing to have anything to do with the writ or otherwise misconduct himself with a similar intent: (*Halsal* v. *Wedgwood*, Barnes, 174; *Bagshaw d. Aslan* v. *Toogood*, *Ib.* 185; *Short d. Elmes* v. *King*, *Ib.* 188; *Doe d. Knights* v. *Dean*, *Ib.* 192; *Doe d. Visger* v. *Roe*, 2 Dowl. P. C. 449; *Doe d. Frith* v. *Roe*, 3 Dowl. P.C. 569; *Doe d. Ross* v. *Roe*, 7 Scott 886; *Doe d. Hunter* v. *Roe*, 5 Dowl. P. C. 553; *Doe d. Colson* v. *Roe*, 6 Dowl. P.C. 765; *Doe d. Lowndes* v. *Roe*, 7 M. & W 439; *Doe d. Roberts* v. *Roe*, 8 Scott N. R. 433; *Doe d. Clifton* v. *Roe*, 7 Jur. 701; *Doe d. Hellier* v. *Roe*, *Ib.* 800; *Doe d. Mann* v. *Roe*, 11 M. & W. 77; *Doe d. Hope* v. *Roe*, 3 C. B. 770.) Where personal service has been effected and default is made in appearance, judgment may be signed upon filing the writ together with an affidavit of service: (N. R. 92.) But if the service effected do not amount to personal service, then before signing judgment leave must be obtained by a rule of Court or Judge's order. This requirement is analogous to the old practice of moving for judgment against the casual ejector. Whenever the service was personal the rule for judgment was absolute; in the first instance. In other cases the rule was *nisi* only. It might be a question under this section whether a service not personal must not be authorized by the Court or a Judge before such service is made, in which case the application should be supported by affidavit of inability to effect personal ser-

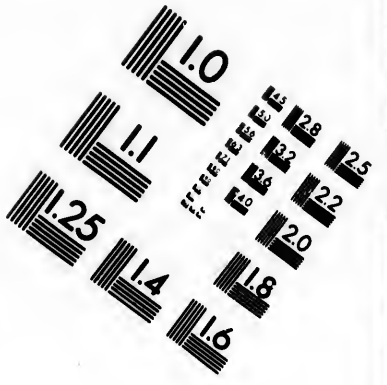
sion, by posting a copy thereof upon the door of the dwelling

vice. There are many analagous rules of practice. Had the Act read "a judge shall approve and by order confirm," there would be no doubt that the order intended ought to be made *after* service. Notwithstanding, it is probable that the latter course will be the one adopted as being consistent with the former practice in ejectment. Further as to what constitutes personal service see note *f* to s. xxxlv. of this Act.

2. *Service upon the wife.* Before moving for an order or rule for judgment it will be necessary to show some service which if not personal would be considered sufficient in the case of an ejectment under the old practice. Service upon the wife of defendant if living with him will be sufficient. And if the wife be living with her husband at the time of service it is immaterial whether she reside upon the premises sought to be recovered or elsewhere. The only test being her residence with her husband. Service under such circumstances raises a very strong presumption that the husband has been made acquainted with the proceeding: In these cases the fact of such residence and place of service should be made to appear on affidavit: (*Doe d. Marland* v. *Bayliss*, 6 T. R. 765; *Goodright* v. *Thrustout*, 2 W. Bl. 800; *Jenny* v. *Coutts*, 1 N. R. 308; *Doe d. Wingfield* v. *Roe*, 1 Dowl. P.C. 693; *Doe d. Boullott* v. *Roe*, 7 Dowl. P. C. 463; *Doe d. Bath* v. *Roe*, *Ib.* 693; *Doe d. Grove* v. *Roe*, 8 Jur. 338; *Doe d. Grange* v. *Roe*, 1 Dowl. N. S. 274; *Doe d. Croley* v. *Roe*, 2 Dowl. N. S. 344; *Doe d. Royle* v. *Roe*, 4 C.B. 258; *Doe* v. *Roe*, 17 L. J. Ex. 176.) If the wife with a full knowledge of the intention of the party to serve her, of her own wrong and by her own misconduct wilfully prevent the service from being completed, the service notwithstanding may be held sufficient: (see *Doe d. Dry* v. *Roe*, Barnes, 178; *Farmer d. Miles* v. *Thrustout*, *Ib.* 180; *Doe d. Courthorpe* v. *Roe*, 2 Dowl.P.C. 441; *Doe d. George* v. *Roe*, 3 Dowl.P. C.541; *Doe d. Nash* v. *Roe*, 8 Dowl. P. C. 305.) Indeed service upon a stranger on the premises with a subsequent acknowledgment from the wife that the papers had come to her hands has been held sufficient: (*Doe d. Greycoat Hospital* v. *Roe*, 7 M. & G. 537.) But service on a stranger found upon the premises and not shown to be a resident there is of itself insufficient: (*Doe d. Story* v. *Roe*, 4 M. & G. [illegible].) Service upon the widow of defendant he being dead in the house at the time, has been held to be insufficient: (*Doe d. Crouch* v. *Roe*, 13 L. J. Q. B. 80.) However, there may be circumstances under which service upon a widow would be clearly sufficient: see *Doe d. Pamphillon* v. *Roe*, 1 Dowl. N. S. 186.

3. *Service on a Son, Daughter, or other member of the family.* This mode of service may be held sufficient, provided it can be shown by admission of the tenant or otherwise that the paper served was served on the premises and and actually reached defendant: (see *Doe d. Cockburn* v. *Roe*, 1 Dowl. P. C. 692; *Doe d. Protheroe* v. *Roe*, 4 Dowl. P. C. 385; *Doe d. Agar* v. *Roe*, 6 Dowl.P.C.624; *Doe d. Read* v. *Roe*, 1 M. & W. 638; *Doe d. Dinorben* v. *Roe*, 2 M. & W. 374; *Doe d. Fowler* v. *Roe*, 11 Jur. 309; *Doe d. Eaton* v. *Roe*, 7 Scott 124; *Doe d. Overy* v. *Roe*, 1 D. & L. 803; *Doe d. Cripps* v. *Walker*, 7 Jur. 745; *Doe d. Harris* v. *Roe*, 1 Dowl. N. S. 704; *Doe d. Jenkins* v. *Roe*, 8 Jur. 39; *Doe d. Gibbard* v. *Roe*, 3 M. & G. 87; *Doe d. Pattison* v. *Roe*, 10 Jur. 34; *Doe d. Farne Combe* v. *Roe*, 10 Jur. 585; *Doe d. Fowler* v. *Roe*, 11 Jur. 309; *Doe d. Chaffey* v. *Roe*, 9 Dowl. P. C. 100; *Doe d. Ginger* v. *Roe*, *Ib.* 336; *Doe d. Threader* v. *Roe*, 1 Dowl.N.S. 261; *Doe d. Margan* v. *Roe*, 1 Dowl. N.S. 543; *Doe d. Taylor* v. *Coutes*, 8 Jur. 20; *Doe d. Royle* v. *Roe*, 4 C.B. 258; *Doe d. Watson* v. *Roe*, 5 C.B.521; *Doe d. Gray* v. *Roe*, 5 U. C. O. S. 483; *Doe d. Hunter et al.* v. *Roe*, 3 U. C. R. 127.)





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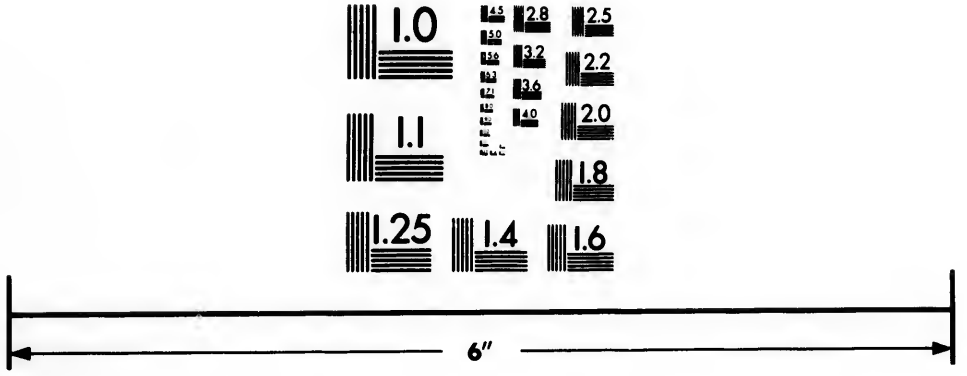

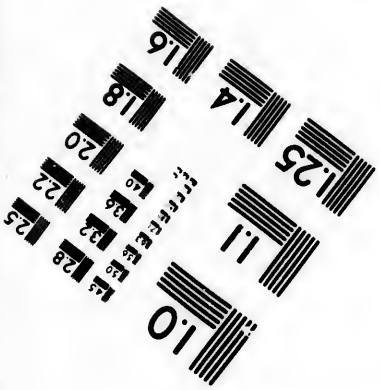

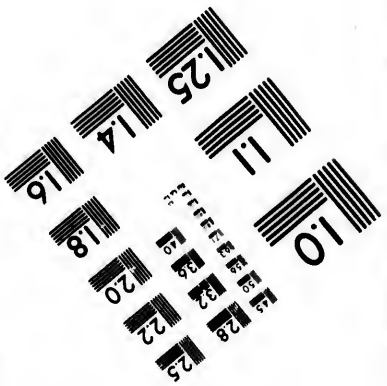

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4. *Service on a servant, agent, clerk, or other employee.* This mode of service if effected on the premises, and if there be reason to believe that the defendant had notice thereof may be held sufficient: (see *Doe d. Baring* v. *Roe*, 6 Dowl. P. C. 456; *Doe d. Fisher* v. *Roe*, 2 Dowl. N. S. 225; *Doe d. Bower* v. *Roe*, *Ib.* 923; *Doe d. Middleton* v. *Roe*, 1 D. & L. 149; *Anon*, 6 Jur. 378; *Doe d. Dobler* v. *Roe*, 2 Dowl. N. S. 333; *Doe d. Harleigh* v. *Roe*, 11 Jur. 18; *Doe d. Reynolds* v. *Roe*, 1 C. B. 711; *Doe d. Watson* v. *Roe*, 5 C. B. 521.) Service upon a person in apparent possession, who professed to be agent of the tenant who was abroad, without circumstances showing facts whence agency might be inferred, was held to be insufficient: (*Doe d. Nottage* v. *Roe*, 1 Dowl. N. S. 750; see also *Doe d. Johnson* v. *Roe*, 12 L. J. Q. B. 97.) If after the decease of defendant a servant, &c., remain in possession, such servant if he refuse to give up possession may be ejected as a tenant in possession: (*Doe d. Atkins* v. *Roe*, 2 Chit. R. 179.) Service on the managing Clerk of the tenant who was an attorney was held to be insufficient: (*Anon.* 11 Jur. 1105; but see *Doe d. Bower* v. *Roe*, 2 Dowl. N. S. 923.) In the case of a lunatic having a committee, service should be made on such committee: (*Anon.* Loft. 461); if not, then on himself, the lunatic, or on a member of his family: (*Doe d. Brown* v. *Roe*, 6 Dowl. P. C. 270; *Doe d.* — v. *Roe*, 7 Jur. 725.)

As to Several Defendants.

Service upon one of two or more joint tenants in possession is sufficient: (*Doe d. Clothier* v. *Roe*, 6 Dowl. P. C. 291; *Doe d. Overton* v. *Roe*, 9 Dowl. P. C. 1039; *Doe d. Worthing* v. *Roe*, 10 Jur. 984; *Doe d. Bennett* v. *Roe*, 7 C. B. 127.) So service was allowed as to three defendants in possession, though made on one of the three only, and though it was not sworn that there was a joint tenanoy: (*Right* v. *Wrong*, 2 Chit. Rep. 175); but such service though sufficient for a rule *nisi* for judgment, might not it is apprehended be sufficient for a rule absolute in the first instance: (*Doe d. Field* v. *Roe*, 2 Chit. Rep. 174.) Service upon one of several joint tenants when the writ is directed to that one only, will not it is apprehended in any event have effect against the others not named: (*Doe d Braby* v. *Roe*, 10 C. B. 663.) Where there were three several tenants, it was held that the *copy* of the notice of ejectment might be directed to each individual tenant for whom it was intended: (*Doe* v. *Roe*, 8 Jur. 360.) If there be nothing to show a joint tenancy of several persons in possession all should be served: (see *Doe d. Darlington* v. *Cock*, 4 B. & C. 259; *Doe d Bell* v. *Roe*, 3 O. S. 64.) But if the service be made on an original tenant who appears, he cannot afterwards object that his sub-tenants are in possession and have not been served: (*Roe* v. *Wiggs*, 2 N. R. 330.) It has been held that where lodgers cannot be served, service on the keeper of the house at the house is sufficient for a rule *nisi* for judgment: (*Doe d. Threader* v. *Roe*, 1 Dowl. N.S. 261.) If service be perfect as to two of three defendants judgment may be obtained as to such as have been regularly served: (*Doe d. Murphy* v. *Moore*, 2 Chit. Rep. 176.) In proceedings against railway and other public companies, service upon the President, Secretary, or other public officer is in general sufficient. This more particularly if there be a provision in the Statute incorporating the company that papers shall be so served: (*Doe d. Bromley* v. *Roe*, 8 Dowl. P. C. 858; *Doe d. Bayes* v. *Roe*, 16 M. & W. 8; *Doe d. Fisher* v. *Roe*, 2 Dowl. N. S. 225; see further *Weeks* v. *Roe*, 5 Dowl. P. C. 405; *Doe d. Fishmonger's Co.* v. *Roe*, 2 Dowl. N.S. 689; *Doe d. Kirschner* v. *Roe*, 7 Dowl. P. C. 97; *Doe d. Dickens* v. *Roe*, *Ib.* 121; *Doe d. Smith* v. *Roe*, 8 Dowl. P. C. 509; *Doe d.* —— v. *Roe*, 1 D. & L. 873.) Service in cases not provided for by any precedent may be made "in such manner as the Court or Judge shall order": (as to which

house or other conspicuous part of the property. (z)

Eng. C. L. P. A. 1852, s. 171.

Defendants, or any of them, may appear within time limited.

Notice to be filed with appearance, stating nature of defendant's title or claim &c.

CCXXIV. (y) The persons named as Defendants in such Writ, or either of them, shall be allowed to appear within the time appointed; (z) and every person so appearing shall, with his appearance, file a notice addressed to the Claimant, stating that the Defendant, besides denying the title of the Claimant, asserts title in himself, or in some other persons (stating whom) under whom he claims, and setting forth the mode in which such title is claimed, in like manner and to the same extent, and subject to the same conditions, rules, and restrictions as are set forth in the two hundred and twenty-second section of this Act, (a) in respect to the notice of a Claimant's title, and the giving proof thereof at the trial.

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see *Doe d. Pope* v. *Roe*, 7 M. & G. 602; *Doe d. Vastien* v. *Roe*, 5 Scott N. R. 174; *Doe d. Haggitt* v. *Roe*, 6 Jur. 950.) Where a tenant underlet part of the premises and deserted the remainder, and his under-tenants were served, it was held that the lessor of the plaintiff was entitled to judgment as to the part of the premises occupied and to take possession of the remainder as upon a vacant possession: (*Doe d. Henson* v. *Roe*, 1 D. & L. 657.)

(x) A party who proceeds on a vacant possession should perform everything he does in such a case more regularly than in the case of a contested possession: (*Anon.* 2 Chit. Rep. 188.) If the premises have been abandoned, proceedings may be had as on a vacant possession: (*Doe d. Laundy* v. *Roe*, 12 C. B. 451); but there may in such a case be circumstances under which the proceedings ought to be as on a contested possession: (*Ib.*) It is not declared in what manner the writ shall be directed in proceeding on a vacant possession. A writ directed to "the assignees and personal representatives of S. B. deceased" (the last occupier) has been held regular: (*Harrington* v. *Bytham*, 2 N. C. L. Rep. 1033; 28 L. & Eq. 443.) And *per cur.* "the writ does very well in its present form, as nobody is thereby made liable for costs."

(y) The first part of this section is taken from Eng. Stat. 15 & 16 Vic. c. 76, s. 171.—Founded upon 1st Rep. C. L. Comrs., s. 93. The remainder is original.

(z) *i. e.* An appearance may be entered as a matter of course "by the persons named in the writ." Any person not named in the writ if in possession may apply to be permitted to defend under the next succeeding section. The time limited for appearance is sixteen days: (s. ccxxi.) The appearance serves the purpose of a plea and is the defence to the action, and the person appearing may limit his defence to part of the premises named in the writ: (s. ccxxviii.) Landlords may in right of their tenants appear under s. ccxxv. pursuant to s. ccxxvii. It was in one case held that to entitle the tenant to move against the declaration, notice, or other proceedings under the old practice, it was necessary for him to appear to the action, because without "appearance there is no *locus standi* in the Court:" (*Doe d. Williamson* v. *Roe*, 3 D. & L. 328; see also *Doe d. Simpson* v. *Roe*, 6 Dowl. P. C. 469.)

(a) The section to which reference is here made (s. ccxxii.) empowers the Court or a Judge to allow a title to be stated in more modes than one. In an action of ejectment since this Act defendant applied *ex parte* for leave to

Eng. C. L. P. A. 1852, s. 135.

CCXXV. (*b*) Any other person not named in such Writ,

state in the notice of his title required by this section not only a paper title from the Crown, through various parties to himself, but also a possessory title by length of possession in himself and others, through whom he claimed, and to set up in his defence both of said modes of trial. The application was founded upon an affidavit of the defendant that he could establish a good possessory title for over tmenty years through the person from whom deponent purchased; that he could also establish a good paper title to the same land from the Crown, through various persons to himself, deponent; that it would tend to the accomplishment of justice if he should be allowed to state in the notice required to be filed with his appearance both of the said modes of making title "he being desirous of establishing the paper title, but lest he should fail in his defence from being unable to procure the witnesses necessary to prove all such paper title, he desires to set up also his title by possession." An order was made absolute in the first instance: (*Todd* v. *Cann et al*, Chambers, Oct. 23, 1856, Burns, J, II. U.C. L. J. 232.) Where an appearance filed altogether omitted the notice made necessary by this section, and plaintiff in consequence applied to be allowed to enter judgment, defendant was permitted to amend upon payment of costs: (*Kane* v. *Kane*, Chambers, Oct. 3, 1856, Burns, J.; *Trust and Land Co. of Upper Canada* v. *Elmer et al.* Chambers, March 1st, 1857, McLean, J.)

(*b*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 172.—Founded upon 1st Rep. C.L.Comrs. s. 94. The principle of this section is not new. It is the same as involved in 11 Geo. II. cap. 19, s. 13, the language of which is as follows: "That it shall and may be lawful for the Court where such ejectment (*i.e.* against a tenant in possession, his landlord not being an occupier) shall be brought to suffer the landlord or landlords to make him, her, or themselves, defendant or defendants, by joining with the tenant or tenants to whom such declaration in ejectment shall be delivered in case he or they shall appear; but in case such tenant or tenants shall refuse or neglect to appear, judgment shall be signed against the casual ejector for want of such appearance; but if the landlord or landlords of any part of the lands, tenements, or hereditaments for which such ejectment was brought shall desire to appear by himself or themselves and consent to enter into the like rule that by the course of the Court the tenant in possession, in case he or she had appeared or ought to have done; then the Court where such ejectment shall be brought shall and may permit such landlord or landlords so to do, and to order a stay of execution upon such judgment against the casual ejector, until they shall make further order therein." It was said by a learned Judge that between this Statute and the C. L. P. Act there is no difference, except that the latter gives to the Court or a Judge powers which the former Statute gives to the Court alone: (*Butler* v. *Meredith*, Parke, B. 11 Ex. 93.) In the construction of the Stat. of Geo. II. it was held that the word "landlord" extended to all persons claiming title consistent with that of the occupant. Thus a mortgagor though out of possession: (*Doe d. Tilyard* v. *Cooper*, 8 T. T. 645), when interested in the result of the action: (*Doe d. Pearson* v. *Roe*, 6 Bing. 613), an heir at law though out of possession: (*Doe d. Hiblethwaite* v. *Roe*, 3 T. R. 783 n), a devisee in trust: (*Lovelock d. Norris* v. *Dancaster*, 4 T. R. 122), but not a *ceste que trust* who had never been in possession: (*Ib.* 3 T. R. 783.) So a person claiming in opposition to the occupant's title was clearly not entitled to defend as landlord: (*Driver d. Oxenden* v. *Lawrence*, 2 W. Bl. 1289; *Doe d. Horton* v. *Roys*, 2 Y. & J. 88.) And where a defendant was by mistake described as "landlord" in

shall, by leave of the Court or a Judge, be allowed to appear and defend, on filing an affidavit showing that he is in possession of the land either by himself or his tenant. (*c*)

Any other person may appear by leave.

the consent rule, it was held that at the trial, he might show that a third party was tenant to the lessor of the plaintiff: (*Doe d. Fellowes* v. *Alford*, 1 D. & L. 470.) If a person whose title is inconsistent with that of the occupant be admitted to defend, plaintiff may, it seems, apply to a Judge in Chambers for the discharge of the rule admitting such person: (*Doe d. Horwood* v. *Lippincote*, Tillinghast's Adam's Ejectment, 260; also s. ccxxx.) And if from any cause the appearance of such party be not struck out, he will not be allowed at the trial to set up a title in opposition to that of the tenant: (*Doe d. Mee* v. *Litherland*, 4 A. & E. 784: *Doe* v. *Challis*, 17 Q. B. 166.) So if a person made landlord has no real interest in the premises, relief may be given to plaintiff: (*Doe d. Carr* v. *Jordan*, 4 Scott 807.) The time within which application for leave to appear should be made by a landlord, is sixteen days after service of the writ, and at least before judgment for non-appearance. It has been held that in the absence of collusion between the plaintiff and occupant the Court will not set aside a regular judgment in order to let in a landlord who had not received any notice of the proceedings: (*Doe d. Thompson* v. *Roe*, 4 Dowl. P. C. 115. See also *Doe Ledger* v. *Roe*, 3 Taunt. 506; *Goodtitle* v. *Badtitle*, 4 Taunt. 820.) But where a landlord defrayed the costs of an ejectment in the name of an illiterate person who gave a cognovit and *retraxit*, the Court set them aside: (*Doe d. Locke* v. *Franklin*, 7 Taunt. 9.) Where owing to ignorance of the party or his attorney, judgment had been signed, leave to defend was given upon terms: (*Doe d. Potter* v. *Roe*, Will. Wall. & Dar. 871.) So where the attorney made affidavit that he had received instructions for entering an appearance which he neglected owing to matters personally affecting himself: (*Doe d. Shaw* v. *Roe*, 13 Price 260. See also *Doe d. Mullarkey* v. *Roe*, 11 A. & E. 833.) So in other cases upon the merits and upon the terms where the step was an advancement of justice without much inconvenience to plaintiff, and especially where no writ of possession had been executed: (*Doe d. Meyrick* v. *Roe*, 2 C. & J. 682; *Doe d. Troughton* v. *Roe*, Burr. 1996. See also *Dobbs* v. *Passer*, 2 Str. 975.) Where collusion can be shown, a landlord may be let in to defend even after a writ of possession executed: (*Doe d. Grocers Company* v. *Roe*, 5 Taunt. 205; *Hunter* v. *Keighley*, Chambers, Feb. 16, 1857, Richards, J.) And where a judgment is set aside and an order made for possession to be restored, that order must be obeyed under penalty of a contempt: (*Corbett d. Clymer* v. *Nicholls*, 2 L. M. & P. 87;) and if necessary a writ of restitution may issue: (*Doe d. Whitesides* v. *Hinds*, 20 L. J. Q. B. 406.) Where the person who made application to defend as landlord was a foreigner, the Court in its discretion, before granting the application under Statute of Geo. II. required him to give security for costs: (*Doe d. Hudson* v. *Jamieson*, 4 M. & Ry. 470.)

(*c*) The possession intended is an actual not a legal possession merely. Thus it has been held that a tenant by *elegit* cannot be admitted to defend: (*Croft* v. *Lumley*, 24 L. J. Q. B. 78.) Much less is a person who has recovered a judgment in ejectment but who has never issued a writ of possession nor taken possession of the premises entitled to make application under this section: (*Thompson* v. *Tomkinson*, 11 Ex. 442, 33 L. & Eq. 487.) But a sufficient *prima facie* right of actual possession will satisfy the Court. It is not desirable on interlocutory motions to decide questions of title. The Court, when it decides upon the application of a landlord or other per-

Entry of appearance and proceedings.

CCXXVI. (*d*) All appearances shall be entered in the Office from which the Writ issued, (*e*) and all subsequent proceedings shall be conducted in the same Office. (*f*)

son sworn to be in possession, that he is entitled to defend, does so without at all deciding upon the rights of the parties: (*Croft* v. *Lumley*, 4 El. & B. 608.) Thus in ejectment to recover an Opera House on the ground that the tenant had committed a forfeiture, application was made for leave to appear and defend the action by a grantee from the lessee of a private box for a term of years, and it was sworn that the applicant was "in possession of the box," the Court granted the leave without coming to any decision on the effect of the instrument under which applicant claimed: (*Ib.*) The intention of the Statute is that whether a landlord be in possession by his own personal and actual possession, or by that of his tenant, he shall be allowed to come in and defend on satisfying the Court or a Judge that he has the possession. There is no power to impose terms on the applicant under such circumstances: (*Butler* v. *Meredith*, 11 Ex. 85, Parke, B., *dissentiente.*) A person who swore she was in possession, and that defendant was not when served with the summons, was allowed to appear, although the defendant named in the writ had previously confessed judgment, upon which a writ of possession issued: (*Harrington* v. *Harrington*, Chambers, Dec. 4, 1856, Burns, J., III. U. C. L.J. 30.) So where applicant disclosed title and swore that he was in possession, though not named in the writ: (*Webster et al* v. *Horsburgh*, Chambers, Dec. 13, 1856, Richards, J., III. U. C. L. J. 32.) So upon an affidavit of defendant's attorney, "that since receiving instructions to defend for defendaut, deponent has discovered that one O. M. is living on the west half of the land sought to be recovered in this action, and that said O. M. claims under the same title as defendant that deponent will not be able to communicate with said O. M. to enable him to obtain his affidavit within the time allowed for appearing to the writ:" a summons granted to show cause why O. M. should not be allowed to appear and defend, was afterwards made absolute: (*Caricaller* v. *Wessells*, Chambers, Oct. 22, 1856, Burns, J.) Where a person not named in the writ, has obtained leave to appear and defend, he shall enter an appearance intitled in the action against the parties named in the writ as defendants, and shall forthwith give notice of such appearance to the plaintiff's attorney or to the plaintiff, if he be suing in person: (N. R. 93.) *Qu.* Is such person bound to secure against costs the parties whose names he uses, *i. e.*, the parties named in the writ, unless they also appear?

(*d*) An original enactment, the design of which is precisely the same as that of s. ix. of this Act.

(*e*) It is the duty of the Clerk or Deputy Clerk of the Crown and Pleas, who shall issue "any writ," to mark in the margin a memorandum stating from what office and in what county "such writ" was issued (s. xx.)

(*f*) The writ of summons in ejectment must show the county where the land sought to be recovered is situate. It must issue out of the office of that county. If issued from any other office the writ will be irregular, if not void. And the error in such a case being one patent upon the face of the writ, defendant may take advantage of it by application to a Judge in Chambers: (see note *k* to s. vii.) The award of *venire* on the Nisi Prius record must correspond with the county in which the land is stated to be situate. The venue must be in that county. The cause cannot, unless by suggestion under s. ccxxxvi. of this Act or s. 14. of Stat. U. C. 7 Wm. IV. cap. 3, be tried in any other county. If the award of *venire* without any such suggestion

CCXXVII. (*g*) Any person appearing to defend as landlord in respect of property whereof he is in possession in person or by his tenant, (*h*) shall state in his appearance that he appears as landlord, (*i*) and such person shall be at liberty to set up any defence which a landlord appearing in an ejectment has heretofore been allowed to set up, and no other. (*j*)

Eng. C. L. P. A.1852, s.173. Con Stat for u.c. ch 27 § 11

Person appearing to defend as landlord.

CCXXVIII. (*k*) Any person appearing to such Writ shall be at liberty to limit his defence to a part only of the property mentioned in the Writ, (*l*) describing that part with reasona-

Eng. C. L. P. A.1852, s.174. Con Stat for u.c. ch 27 § 12

Party appearing may

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be to any other than the county in which the land is described as being situate, plaintiff may be nonsuited: (*Riddell* v. *Briar*, 2 U. C. Cham. Rep. 198.)

(*g*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 173.

(*h*) Instead of "in person or by his tenant," read in Eng. C. L. P. Act "only by his tenant." A tenant served with a writ of ejectment is bound to notify his landlord (s. cclxii), and the landlord may obtain leave to appear and defend under s. ccxxv.

(*i*) The words "as landlord" should be written on the face of the appearance paper. As to the word "landlord" see note *b* to s. ccxxv.

(*j*) The landlord may be allowed to appear either with his tenant or in lieu of him: (see note *b* to s. ccxxv.) In either case he is bound to set up no title inconsistent with that of the tenant when the latter is the occupant: (*Ib*) The theory and principle of a man out of possession defending as landlord is this—that whereas ordinarily the only person who is competent to defend is the person who is in possession of the premises, the law allows one who is in possession by a tenant to come in and defend as if he were himself actually in possession—not in respect of his having a right but in respect of his being actually in possession by a tenant who acknowledges him as his landlord: (*Clarke* v. *Arden*, Maule, J, 16 C.B. 252.) A person who pays rent to another person as his landlord whether rightfully or wrongfully his landlord, the latter is nevertheless his landlord in fact: (*Ib.* Jervis, C. J.) The landlord therefore when admitted to defend may, so long as he sets up a defence consistent with that of the occupant, assert *his* right to the land in dispute as against the plaintiff in the ejectment: (*Doe d. Willis* v. *Birchmore*, 9 A. & E. 662; *Doe* v. *Street*, 4 N. & M. 42; *Doe d. Wawn* v. *Horn*, 8 M. & W. 333.) But where a person defends as landlord, the occupiers having suffered judgment by default, *he* cannot object that *they* have not received notice to quit: (*Doe d. Davies* v. *Creed*, 5 Bing. 327.) Where under the old practice two persons delivered separate consent rules, each claiming to defend as landlord, the one for the whole of the premises claimed in the action, the other for part of them specifically named in the consent rule, under adverse titles, the Court ordered the consent rules to be amended, by confining them respectively to such parts of the premises as were really in the occupation of each party or his tenants: (*Doe d. Lloyd et al.* v. *Roe*, 15 M. & W. 431.) See note *c* to s. cxxv.

(*k*) Taken from Eng. St. 15 & 16 Vic. cap. 76, s. 174.—Founded upon 1st Rept. C. L. Comrs., s. 95.—Substantially a re-enactment of s. 3 of repealed Stat. 14 & 15 Vic. cap. 114.

(*l*) In an action of ejectment under 14 & 15 Vic. cap. 114, for "lot No. 1, in broken front concession of the Township of Escott, in the County of Leeds," the defendant, by his notice, limited his defence "to a part of

Limit his defence to part of the property.

ble certainty, (*m*) in a notice entitled in the Court and cause, and signed by the party appearing, or his attorney, (*n*) such notice to be served within four days after appearance, (*o*) upon the Attorney whose name is endorsed on the Writ, if any, (*p*) and if none, then to be filed in the proper Office; and an appearance without such notice confining the defence to part, shall be deemed an appearance to defend for the whole. (*q*)

Notice of such limitation, &c.

Eng. C. L. P. A. 1852, s. 175.

Want of reasonable certainty.

CCXXIX. (*r*) Want of "*reasonable certainty*" in the description of the property or part of it, (*s*) in the Writ or notice of defence, (*t*) [or in the notice of the title given by

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the said lot mentioned in the said writ, that is to say, &c.:" (setting out such part with metes and bounds.) At the trial defendant admitted that plaintiff was the owner of the lot described in the writ, but contended that the tract for which he defended was not embraced within the patent: Held that having in express terms defended for "a part of lot No. 1, mentioned in the writ," he was not entitled at the trial to contend that what he defended for was not a part of No. 1, and on that account not the property of the plaintiff: (*Darling* v. *Wallace*, 9 U. C. R. 611.) Under the old practice defendants were allowed to limit their defences by describing the property for which they defended in the consent rule: (*Doe d. Lloyd et al.* v. *Roe*, 15 M. & W. 481.) If at present the property be not so described in the writ as to convey to defendant a correct idea of the property sought to be recovered, both as to situation and extent application may be made to a Judge in Chambers, for better particulars: (s. ccxxix.).

(*m*) See note *b* to s. ccxx.

(*n*) The notice may be to this effect. —*Title of Court—Cause.*—Take notice that the defendant, A.B., limits his defence to part only of the property mentioned in the writ—that is to say—to all and singular the parcel described as follows: commencing at a post, &c.

(*o*) Computation of time. See note *d* to s. lvii.

(*p*) Whose name, must be indorsed pursuant to s. ccxxi.

(*q*) The appearance when filed may not, in the first instance, indicate how far, or for what, defendant intends to defend. After the expiration of four days, if there be no notice limiting the defence, plaintiff may assume the appearance to be for the whole property described in the writ: see *Doe d. Devenport* v. *Rhodes*, 11 M. & W. 600.

(*r*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 175.—Founded upon 1st Rept. C. L. Comrs. s. 96.

(*s*) In ejectment for a forfeiture by reason of a breach of covenant, particulars of the *breach* may be obtained: (*Doe d. Birch* v. *Philips*, 6 T. R. 597.)

(*t*) The declaration in ejectment which was the first proceeding in the action when ejectment was a fictitious mode of procedure, gave no information as to the property sought to be recovered. There being in such a case a want of "reasonable certainty" the Court or a Judge had power, upon application of the casual ejector to order particulars to be delivered: (*Doe d. Saxton et al.* v. *Turner*, 11 C.B. 896;) which order might be obtained before appearance: (*Doe d. Vernon*, v. *Roe*, 7 A. & E. 14;) and if obtained but not obeyed for more than four terms, it became necessary for the lessor of plaintiff to give a term's notice of intention to proceed: (*Ib.*) However, the order unless expressly made a stay of

either party,] (*u*) shall not nullify them, but shall only be ground for an application to a Judge for better particulars of the land claimed or defended, [or of the title thereto,] (*v*) which a Judge shall have power to order in all cases. (*w*)

Uncertainty in description, how cured.

CCXXX. (*x*) The Court or a Judge (*y*) shall have power to strike out or confine (*z*) appearances and defences set up by persons not in possession by themselves or their tenants.

Eng. C. L. P. A. 1852, s. 176.

Defence by persons not in possession

Con stat for u. c. ch 27 § 14

CCXXXI. (*a*) In case no appearance shall be entered within the time appointed, (*b*) or if an appearance be entered, but the defence be limited to part only, the Plaintiff shall be at liberty to sign a Judgment that the person whose title is asserted in the Writ shall recover possession of the land, or of the part thereof to which the defence does not apply, (*c*) which Judgment if for all may be in the form contained in the Schedule (A) to

Eng. C. L. P. A. 1852, s. 177.

Judgment if no appearance, or appearance as to part only.

Forms.

Con stat for u. c. ch 27 § 15

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proceedings did not so operate: (*Doe d. Roberts et al.* v. *Roe*, 2 D. & L. 673.) So as to the defendant in ejectment: orders have been made upon application of the lessor of the plaintiff, for defendant to specify the particular property for which he defended: (*Doe d. Webb et al.* v. *Hull*, *Doe d. Saunders* v. *Newcastle*, 7 T. R. 332 n.)

(*u*) The words within brackets are new and not to be found in Eng. C. L. P. A. They have reference to s. ccxxii of our own C. L. P. A. which is original.

(*v*) A want of "reasonable certainty" is, it is presumed, at most an irregularity on the part of either party, which his opponent may waive: (N. R. 106.) Thus, if he take a step, which, in itself, raises a presumption that he is informed of the premises intended and nature of claim or defence in respect thereof respectively: (*Ib.*)

(*w*) The particulars of the claim and defence, and of the notices of claimant and defendant, of their respective titles must be annexed to the *Nisi Prius* Records by claimant: (s. ccxxxiv.)

(*x*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 176.—Founded upon 1st Rep. C. L. Comrs. s. 97.

(*y*) *Relative powers*, see note *m* to s. xxxvii.

(*z*) The verdict in ejectment is general, and unless the defence be limited, plaintiff's right of recovery is as to the whole property described in the writ of which he may take possession at his peril: (*Doe d. Davenport* v. *Rhodes*, 11 M. & W. 600.) It is in the power of any person appearing to a writ of ejectment to limit his defence "to a part only of the property mentioned in the writ" (s. ccxxviii.) The power "to strike out or confine appearances and defences" is one that the Courts have for a long time exercised independently of any statutory enactment: (see *Doe d. Lloyd et al* v. *Roe*, 15 M. & W. 481.)

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 177.—Founded upon 1st Rep. C. L. Comrs. s. 98.—Substantially a re-enactment of 14 & 15 Vic. cap. 114, s. 5. The section applies as well to ejectments on a vacant as on a contested possession: (*Harrington* v. *Representatives of Bytham*, 2 N. C. L. Rep. 1033, 28 L & Eq. 448.)

(*b*) *i.e.* Sixteen days from the service of the writ, (s. ccxxi.) unless there has been an extension of the time by leave of a Judge.

(*c*) If the writ has been personally

this Act annexed, marked No. 13, or to the like effect, and if for part may be in the form contained in the Schedule (A) to this Act annexed, marked No. 14, or to the like effect. (*d*)

Eng. C. L. P. A. 1852, s. 178.

Issue may be made up by Claimant if appearance be entered.

CCXXXII. (*e*) In case an appearance shall be entered, an issue may be made up without any pleadings, (*f*) by the claimants or their attorney, (*g*) setting forth the Writ and stating the fact of the appearance with its date, and the notice limiting the defence, if any, (*h*) of each of the persons answering, so that it may appear for what defence is made, and directing the Sheriff to summon a jury; (*i*) and such issue, in case de-

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served, an affidavit of service must be filed before signing judgment in default of appearance: (N. R. 92.) If not personally served a Judge's order or rule of Court must be obtained to authorize the signing of judgment: (*Ib.*)

(*d*) In an action for *mesne* profits a judgment by default for claimant may be pleaded by way of estoppel against the defendant in the same manner as a judgment by default in any other form of action: (*Wilkinson* v. *Kirby*, 15 C. B. 430, 26 L. & Eq. 371.) The Common Law Procedure Act having put ejectment in the same position as other actions, plaintiff's position being determined the result is the same as in any other action: (*Ib.*) Therefore where in trespass for *mesne* profits to which the pleas were, first, not possessed, and secondly, that before the said time when, &c., one W. was seized in fee and demised for 21 years to T, who demised to the defendant, who entered by virtue of the demise and replication by way of estoppel as to trespass since 26th October, 1853, setting out a writ of ejectment in which the plaintiff was claimant, and dated 26th October, 1853, directed to the defendant as tenant in possession, and judgment thereon by default and entry of plaintiff by virtue of the judgment, the replication was held on demurrer to be good to both pleas: (*Ib.*) Held also that it was not necessary to aver notice of the proceedings to defendant or that the writ of possession had been issued or executed, and that entry by plaintiff if necessary was sufficiently averred: (*Ib.*) Held also that the estoppel was from the date of the writ and that plaintiff's title would be presumed to continue, until by rejoinder it was shown to have been determined: (*Ib.*) It is competent to claimant in ejectment after having established his right to possession, to give evidence of and recover *mesne* profits in the same action: (s. cclxvii.)

(*e*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 178.—Founded upon 1st Rept. C. L. Comrs., s. 99.

(*f*) In ejectment under this Act there is no plea of any kind allowed, and hence defendant will not be allowed to plead an equitable defence: (*Neave* v. *Avery*, 16 C. B. 328.) The claimant by his writ does all that is necessary to assert title in himself and defendant by his appearance does all that is necessary to deny it. Thereupon the parties are at issue. It has been held that the plea of not guilty, under the old form of ejectment was divisible so that claimant might have a verdict as to the part of the property sought to be recovered, to which he proved title, and defendant, as to the residue: (*Doe d. Bowman* v. *Lewis*, 2 D. & L. 667.)

(*g*) *i. e* By claimants, if suing in person, or by their attorney, if suing by attorney.

(*h*) Under s. ccxxviii.

(*i*) This is done by the words "let a jury, &c.," as used in the forms given in the Schedule.

fence is made for the whole, may be in the form contained in the Schedue (A) to this Act annexed, marked No. 15, or to the like effect, (*j*) and in case defence is made for part, may be in the form contained in the Schedule (A) to this Act annexed, marked No. 14, or to the like effect. Forms.

CCXXXIII. (*k*) By consent of the parties and by leave of a Judge, (*l*) a special case may be stated (*m*) [as in other actions]. (*n*) Eng. C. L. P. A.1852, s.179. Special case.

CCXXXIV. (*o*) The Claimants may, if no special case be agreed to, proceed to trial in the same manner as in other actions, (*p*) and the particulars of the claim and defence, (*q*) [and of the notices of Claimant and Defendant of their respective titles], (*r*) if any, or copies thereof, (*s*) shall be annexed to Eng. C. L. P. A.1852, s.180. Questions to be tried if no special case be agreed upon.

(*j*) When a Statute enacts that a proceeding shall be in a given form, that form must be followed: see *Warren* v. *Love*, 7 Dowl. P. C. 602; *Codrington* v. *Curlewis*, 9 Dowl. P. C. 968.

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 179.—Founded upon 1st Rep. C. L. Comrs. s. 100.

(*l*) Whenever a thing is directed to be done by leave of a Judge, an application to that Judge is intended. Applications to a Judge should generally be supported by affidavit. The proceedings under this section will be by summons and order. The summons should be intitled in the Court and cause, and be "to show cause why a special case should not be stated in this cause pursuant to s. 233 of C. L. P. A. 1856."

(*m*) For precedents of special cases in ejectment, see *Doe d. Kimber* v. *Cafe*, 7 Ex. 675; *Armstrong* v. *Bowdige*, 16 C. B. 358.

(*n*) Instead of the words in brackets read in Eng. C. L. P. Act, "according to the practice heretofore used." The "special case" intended is, it is apprehended, that for which provision is made in s. lxxxi. as to questions of law. In what manner and to what extent ss. lxxvii. *et seq.* as to special cases in matters of fact will apply to actions of ejectment has not been determined.

(*o*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 180.—Founded upon 1st Rep C. L. Comrs. s. 101.

(*p*) It is directed that claimants "may" proceed to trial in the same manner as in other actions, and of course serve notice of trial and take other steps necessary before a trial in ordinary actions: (see ss. cxlvi. *et seq.*) Whether claimants in ejectment *must* proceed to trial as in other actions or be subject to be proceeded against under s. cli. in case of neglect remains to be decided.

(*q*) The "particulars of claim" "if any" here mentioned in contradistinction to notice of the nature of claimant's title, may mean the "better particulars," for which provision is made in s. ccxxix. So "particulars of defence" "if any," may mean the notice limiting the defence, under s. ccxxviii.

(*r*) The words in brackets are original, and have reference to ss. ccxxli.-ccxxiv. of this Act.

(*s*) It should be observed that copies may be annexed to the record, whether apparently the originals be or be not forthcoming.

the record by the Claimants; (*t*) and the question at the trial shall, except in the cases hereinafter mentioned, (*u*) be whether the statement in the Writ of the title of the Claimants is true or false, and if true, then which of the Claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question; (*v*) and the entry of the verdict may be made in the form contained in the Schedule (A) to this Act annexed, marked No. 16, or to the like effect, with such modifications as may be necessary to meet the facts. (*w*)

Form of entry of verdict.

(*t*) The delivery of particulars of the claim or defence will not require to be proved when they are appended to the record: (*Macarthy* v. *Smith*, 8 Bing. 145.) If they materially vary from the particulars delivered, claimant's right to recover may be placed in jeopardy. Should claimants go to the jury, and recover upon any ground varying from the particulars proved to have been delivered, defendant might be entitled to move for a new trial: (see *Morgan* v. *Harris*, 2 C. & J. 461.) Should, however, defendant at the trial be in a position to prove the variance he might have the point reserved and afterwards in the event of claimant's recovering, move the Court to enter a nonsuit: (*Ib.*) In either case it would be in the discretion of the Court to order the attorney for the claimant to pay the costs of the first trial: (*Ib.*) But under s. ccxci. of this Act the presiding Judge will be liberal in allowing amendments whenever it is made to appear that defendant either has not been or ought not to have been misled by any such variance.

(*u*) The cases to which reference is made are, it is believed, such as are mentioned in s. ccxliii, which provides for the case of claimant being a joint tenant, tenant in common, or coparcener, in which, the jury, to entitle claimant to a verdict, must find an actual ouster.

(*v*) This section seems to sanction the principle of the issue being divisible either as to the property sought to be recovered, or the number of parties appearing as claimants. If so, costs will follow the result of the finding and be so distributed: (see *Doe d. Bowman* v. *Lewis*, 13 M. & W. 241; *Doe d. Hellyer* v. *King*, 2 L. M. & P. 493; see also *Doe d. Errington* v. *Errington*, 4 Dowl. P. C. 602; *Doe Smith* v. *Webber*, 2 A. & E. 448; and generally N. R. 51, and note *j* to s. cxxx;) but the form of judgment given in the schedule, it may be observed, of itself does not bear out this opinion. Under the 14 & 15 Vic. cap. 114, it was held in a case where the jury found a general verdict for plaintiff, though defendant was in fact entitled to a part of the land mentioned in the writ: the Court held that this was not a ground for a new trial but for an application to restrain plaintiff from taking possession of such part: (*Ferrier* v. *Moodie*, 12 U. C. R. 379.) Under the C. L. P. A. execution may issue "for the recovery of possession of the property *or of such part thereof* as the jury shall find claimant entitled to:" (s. ccxxxix.) In ejectment under the 14 & 15 Vic. cap. 114, one or more of several plaintiffs might recover: (*Butler et al* v. *Donaldson*, 10 U. C. R. 643.)

(*w*) If it appear that claimant though having had a right to possession when he issued and served his writ, has none at the time of trial, the verdict may be entered according to the fact: (s. ccxxxv.) If defendant appear and claimant do not, the latter may be nonsuited, (s. ccxxxvii.,) in which case defendant will be entitled to judgment for his costs: (N. R. Pl. 24.) So if claimant appear, but de-

CCXXXV. (*x*) In case the title of the Claimant shall appear to have existed as alleged in the Writ, and at the time of service thereof, (*y*) but it shall also appear to have expired before the time of trial, (*z*) the Claimant shall, notwithstanding, be entitled to a verdict according to the fact, (*a*) that he was entitled at the time of the bringing the action and serving the Writ, and to Judgment for his costs of suit.

Eng. C. L. P. A. 1852, s. 181. If Claimant was entitled at service of writ, but not afterwards.

CCXXXVI. (*b*) The Court or a Judge (*c*) may, on the application of either party, on ground shown by affidavit, (*d*) order that the trial (*e*) shall take place in any County other

Eng. C. L. P. A. 1852, s. 182. Court may alter place of

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fendant do not, the former shall be entitled to recover without any proof of title (ccxxxvii), and be entitled to his costs as in other cases: (N. R. 94.)

(*x*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 181.

(*y*) The writ should be directed to the persons in possession of the land sought to be recovered, "to the possession whereof claimant is entitled." The writ alleges a right of claimant to possession, but does not show any title. Upon this ground exception has been taken by several legal writers to the language of that part of the Eng. C. L. P. Act which corresponds with the section here annotated. But under our C. L. P. Act there is a distinction to be observed, in this, that in addition to the allegations of the writ, there must be a notice annexed to the writ disclosing "the nature of claimant's title": (s ccxxii.)

(*z*) Which fact in general can only be established by testimony given at the trial.

(*a*) This was always the law. Upon a special verdict in ejectment under the old practice, it appeared that the lessor of plaintiff claimed as tenant for life. And upon an affidavit of his death it was moved that all proceedings might be stayed, since it would be useless to contest the suit upon the merits. *Sed per curiam*, "Though the possession cannot be obtained, yet the plaintiff has a right to proceed for damages and costs; all we can do is to oblige him to give security for costs, now that the lessor is dead, as we do in the case of infant lessors, who cannot enter into the consent rule:" (*Thrustout dem. Turner* v. *Grey et al*, 2 Str. 1056.)

(*b*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 182.—Substantially the same as Stat. U. C. 7 Wm. IV. cap. 3, s. 14, which is taken from Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 22, and which extends to all local actions.

(*c*) *Relative powers.*—See note *m* to s. xxxvii.

(*d*) The application must be grounded upon an affidavit showing a necessity for the change intended. It is not declared what shall be a sufficient ground for the application. Under the Act of William any cause would be sufficient, which showed that *delay* or *expense* would be avoided, and that it would be more *convenient* to have the trial take place in the County to which a change was desired: (see *Doe Baker* v. *Harmer*, H. & W. 80.) If the ground be that an *impartial* trial cannot be had in the county in which the venue is laid, that ground must be made out in a most satisfactory manner to induce the Court to interfere: (see *Briscoe* v *Roberts*, 3 Dowl. P. C. 434.)

(*e*) The power conferred by the Act of William is to order the "issue" to be tried in any other county than that in which the venue is laid. Hence it was held that no application under that statute could be made until issue joined: (*Bell* v. *Harrison*, 4 Dowl. P. C. 181.)

trial on affidavit.

than that in which the venue is laid, (*f*) and such order being suggested on the record, the trial may be had accordingly. (*g*)

consol for u.c. ch 27 § 24.

Eng. C. L. P. A.1852, s.183.

Defendant appearing and Claimant making default, and *vice versa*.

CCXXXVII. (*h*) If the defendant appears, and the Claimant does not appear at the trial, the Claimant shall be nonsuited, (*i*) and if the Claimant appear and the Defendant does not appear, the claimant shall be entitled to recover (*j*) without any proof of his title.

consol for u.c. ch 27 § 25

Eng. C. L. P. A.1852, s.184.

CCXXXVIII. (*k*) The Jury may find a special verdict, (*l*)

(*f*) The summons may be "to show cause why the trial in this cause should not be had in the County of B., and not in the County of A., in which the venue is laid; and why, for that purpose, a suggestion should not be entered on the record, that the trial may be had in the said county of B., according to the Common Law Procedure Act, 1856." The order may be easily prepared upon this summons: the only difference being that it should be directory and not to show cause.

(*g*) The suggestion may be to this effect:—And the plaintiff (*according to the fact*) gives the Court here to understand and be informed that on &c, the honorable &c., one of the Justices &c., did order that the trial in this cause should take place in the County of B., instead of the County of A.

(*h*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 183.

(*i*) And defendant shall be entitled to judgment and his costs of the cause: (N. R. Pl. 24.)

(*j*) *i. e.* To recover possession of the property sought to be recovered. If claimant seek to recover mesne profits whether defendant appear or not, evidence must be offered of the mesne profits: (s. cclxvii.)

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 184.—Founded upon 1st Rep. C. L. Comrs. s. 102.

(*l*) The origin of a special verdict is the Statute of Westminster II. (13 Ed. I. cap. 30. s. 2.) It is when during the trial of a cause any difficult question of law arises the determination of which is necessary to a finding either for plaintiff or defendant, the jury instead of finding generally for the one or the other, find specially the facts disclosed upon the evidence before them, and conclude to the effect "that they are ignorant upon which side they ought upon these facts to find the issue; that if upon the whole matter the Court shall be of opinion that the issue is proved for the plaintiff, they find for the plaintiff accordingly and assess the damages at such sum, &c. (*according to the nature of the case*), but if the Court are of a contrary opinion then *vice versa*." However, as on a general verdict the jury do not themselves actually frame the *postea*, so they have in fact nothing to do with the formal preparation of a special verdict. When it is agreed that a verdict of this kind shall be given the jury merely declare their opinion as to any facts remaining in doubt; and then the verdict is adjusted without their further interference. It is settled under the correction of the Judge by the counsel on either side, according to the state of the facts as found by the jury, with respect to all particulars on which they have delivered an opinion; and with respect to other particulars according to the state of the facts which it is agreed they *ought* to find upon the evidence before them. The special verdict, when its form is thus settled, is together with the whole proceedings on the trial then entered *on record*, and the question of law arising on the facts found is argued before the Court *in*

or either party may tender a bill of exceptions. (*m*)

Special verdict, &c.

banco and decided in that Court as in the case of a demurrer: (Steph. Pl. 91.) The special verdict is in principle the same as a special case (s. ccxxxiii), but with this difference—the special case is not entered *on record*. The jury must find facts and not merely the evidence of facts: (see *Bird* v. *Appleton*, 1 East. 111.) The Court cannot draw from other statements in a special verdict any inference of facts necessary to the determination of the case; such facts must be expressly found one way or the other, and if they be not found the Court will award a *venire de novo*: (*Tancred et al.* v. *Christy*, 12 M. & W. 316.) The Judge ought to make a note of the verdict at the trial, upon which note the special verdict is afterwards prepared in form. Amendments of the special verdict, when in accordance with this note, may be made: (*Manners* v. *Postan*, 3 B. & P. 343; *Bowers* v. *Nixon*, 12 Q. B. 546), provided, however, the alterations be such as to carry out the intention of the jury: (*Williams* v. *Breedon*, 1 B. & P. 329; *Richardson* v. *Mellish*, 3 Bing. 334.) No alteration of substance can it seems be made: (*Spencer* v. *Goter*, 1 H. Bl. 78.) In one case an amendment was allowed upon an affidavit of what had been proven at the trial: (*Mayo* v. *Archer*, 1 Str. 514.) The special verdict when drawn up may be set down for argument without *concilium* (N. R. 15), upon request of either party four days before the day on which the same is intended to be argued: (*Ib.*) The party setting it down must four days before the day appointed for argument deliver a copy of the special verdict to each of the Judges of the Court in which it is set down to be heard: (N. R. 17.) Notice of argument should thereupon be forthwith given to the opposite party: (N.R. 15.)

(*m*) The origin of a bill of exceptions is Stat. of Westminister II., (13 Ed. I. cap. 31.) It is the province of the judge at *Nisi Prius* to superintend the conduct of a case and to direct the jury upon all matters of law arising out of the case. If the judge in his direction mistake the law the counsel on either side may require him to seal a bill of exceptions stating the point or points in which he is supposed to err. If the statement be truly made the judge is bound to seal it in confession of its accuracy: (Steph. Pl. 89.) The cause then proceeds to verdict as usual. The opposite party, for whom the verdict is given, is entitled, as in common course to judgment upon such verdict in the Court in *banc.*, for that Court takes no notice of the bill of exceptions. But the whole record being afterwards removed by writ of error, the bill of exceptions is then taken into consideration in the Court of Error and there decided: (*Ib.*) Thus a bill of exceptions is in the nature of an appeal from the Court out of which the record issued for trial after judgment given in that Court to one of Superior jurisdiction. The points of exception must be in fact taken at the trial: (*Doe* v. *Fisher*, 2 Bligh. N.S. 9; *Wright* v. *Sharp*, 1 Salk. 288; *Cully* v. *Doe d. Taylerson*, 11 A. & E. 1008 n.) But the bill is usually settled, drawn up, signed and sealed afterwards: (see *Gardner* v. *Baillie*, 1 B. & P. 32.) It ought to contain the exceptions made to the directions and ruling of the judge, together with so much of the evidence given at the trial as is necessary to make the exceptions intelligible to the Court in error, and furnish grounds for the allowance or disallowance of the exceptions: (*Davis et ux* v. *Downdes*, per Tindal, C. J., 1 M. & G. 482.) It is unnecessary that the bill should contain the statement of a verdict within it, although it more commonly does so; for it may be appended to the judgment roll which contains the pleadings, the issue joined, the jury process, the verdict, and the judgment of the Court below: (*Ib.*) It is *misdirection*, and not *non*-direction that is the proper subject of a bill of exceptions: (*McAlpine* v. *Magnall*, per Parke, B., 3

Eng. C. L. P. A. 1852, s. 185.

Judgment if Claimant recover.

Execution and costs.

CCXXXIX. (*n*) Upon the finding for the Claimant, (*o*) Judgment may be signed (*p*) and execution issue for the recovery of possession of the property or of such part thereof as the Jury shall find the Claimant entitled to, (*q*) and for costs, (*r*) within such time not exceeding the fifth day in Term, after the verdict, as the Court or Judge before whom the cause is tried, shall order, (*s*) and if no such order be made, then on the fifth day in Term after the verdict. (*t*)

C. B. 517.) The bill may be amended after it is sealed: (*Richardson* v. *Mellish*, 3 Bing. 334. See also *Doe d. Church* v. *Perkins*, 3 T. R. 749.) The party who tenders a bill of exceptions is not thereby precluded from moving in arrest of judgment for defects apparent on the face of the original record: (*Enfield* v. *Hills*, 2 Lev. 236.) A party cannot select one point to go into error, and apply to the Court in *banc.* on another. He must elect to take all the points on which he relies into error or none. But if there be any point which could not in any way be taken into error he may apply to the Court in *banc.* for a new trial upon that point without abandoning his bill of exceptions: (*Adams* v. *Andrews*, 15 Q. B. 1001; *Gregory* v. *Slowman*, 1 El. & B. 860. See also *Fabrigas* v. *Mostyn*, 2 W. Bl. 929.)

(*n*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 185.—Founded upon 1st Rep. C. L. Comrs. s. 103.—Substantially a re-enactment of Stat. 14 & 15 Vic. cap. 114, s. 8.

(*o*) The finding must be upon the question whether "the statement in the writ of the title of the claimants is true or false, and if true, then which of the claimants is entitled, and whether to the whole or part, and if to part then to which part of the property in question:" (s. ccxxxiv.; see also note *y* to s. ccxxxv.)

(*p*) Which judgment ought to be signed pursuant to s. cclx. Form thereof see Sch. A, No. 16, to this Act.

(*q*) See note *o*, *supra*.

(*r*) There may be either one writ of execution or separate writs for the recovery of possession and costs at the election of claimant: (s. cxli.) It will be observed that the costs are made to follow the judgment as in other actions. But since the C.L. P. A, as before it, the Court in an action of ejectment has jurisdiction to order by rule the parties who really defend to pay the costs of claimant though such parties be strangers to the record: (*Hutchinson et al.* v. *Greenwood*, 4 El. & B. 324.) However, to entitle claimant to call upon such third parties being strangers to the record to pay the costs of the action, it must be clearly shown that the defence was conducted by such third parties and was really *their* defence and not that of the party who ostensibly defended: (*Anstey et al.* v. *Edwards*, 16 C. B. 212.)

(*s*) *Qu.* Is it intended that the Court or Judge shall have power in ejectment to issue speedy execution under s. clxxxii? In England there is an express provision to this effect: (1 Wm. IV. cap. 70. s. 88.) Authority is given to the Judge who may try an ejectment cause, in his discretion "to order that judgment may be entered and execution issue in favor of claimant at the expiration of six days next after the giving of the verdict:" (s. cclxviii.)

(*t*) The Eng. C. L. P. Act here continues, "or within fourteen days after such verdict whichever shall first happen," which expression has reference to s. 120 of Eng. C. L. P. Act, 1852, not adopted by our Legislature, allowing execution in all cases to issue in fourteen days after verdict under certain regulations.

CCXL. (*u*) Upon a finding for the Defendants or any of them, (*v*) Judgment may be signed and execution issue for costs against the Claimants named in the Writ, (*w*) within such time not exceeding the fifth day in Term after the verdict, as the Court or a Judge before whom the cause is tried shall order, (*x*) and if no such order is made, then on the fifth day in Term after the verdict. (*y*)

Eng. C. L. P. A.1852, s.186. Costs to Defendant if Claimant fail

Consol. for U.C. ch 27. § 27.

CCXLI. (*z*) Upon any Judgment in ejectment for recovery of possession and costs, there may be either one Writ or separate Writs of Execution for the recovery of possession, (*a*) and for the costs, at the election of the Claimant. (*b*)

Eng. C. L. P. A.1852, s.187. One or more writs of Execution may issue.

Consol. for U.C. ch 27 § 28.

CCXLII. (*c*) In case of such an action being brought by some or one of several persons entitled as joint tenants, tenants in common or coparcenery, any joint tenant, tenant in common or coparcener in possession, may, (*d*) at the time of appearance

Eng. C. L. P. A.1852, s.188. As to defendants being joint ten-

Consol. for U.C. ch 27 § 29

(*u*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 186.—Founded upon 1st Rep. C. L. Comrs. s. 140.

(*v*) It is pre umed that if one of several defendants succeed as against plaintiff, such defendant will be entitled to his costs, being an aliquot proportion of the whole costs of the cause.

(*w*) The effect of the judgment is declared to be the same as that of the judgment in ejectment heretofore used (s. cclxi.)

(*x*) See note *s* to preceding section.

(*y*) The section corresponding with this in Eng. C. L. P. A. concludes in the same manner as mentioned in note *t* to the preceding section and for the reasons assigned in that note.

(*z*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 187.

(*a*) The judgment in ejectment entitles claimant to possession of the land described in the writ; but he cannot take possession by force.—His remedy is by writ of *habere facias possessionem*: (*Doe d Stevens* v. *Lord*, 6 Dowl. P. C. 256.) There may be circumstances under which a writ of restitution would be more proper than a writ of *hab. fac. poss.*: (see *Doe d. Pitcher* v. *Roe*, 9 Dowl. P.C. 971; *Doe Whittington* v. *Hords*, 20 L. J. Q. B. 406.)

(*b*) All writs of execution must be directed to the sheriff of some particular county. The writ to deliver possession of land must of course be directed to the sheriff of that county in which the land is situate. And if in that county there be sufficient goods and chattels or other property liable to execution there would not seem to be any good reason for issuing two separate writs where one might suffice, viz., *hab. fac. pros.* and *fi. fa.* On the other hand, if in such county there be no available property, then the execution for costs may forthwith issue into any other county: (s. clxxxvi.) A sheriff cannot, under an ordinary writ of *fi. fa.*, break outer doors: (*Semaynes* case, 5 Rep. 92; *Burdett* v. *Abbott*, 14 East. 157; *Launock* v. *Brown*, 2 B. & Ald. 592,) but if having a writ both for possession and costs, may, it is presumed, open outer doors to give possession, and then levy for costs.

(*c*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 188.—Founded upon 1st Rep. C. L. Comrs. s. 105.

(*d*) *May*. If the notice made necessary by this section be not given, the

ants, tenants in common, &c., admitting right of Claimant to an undivided share, &c.

or within four days after, give notice in the same form as the notice of a limited defence, (*e*) that he or she defends as such and admits the right of the Claimant to an undivided share of the property (stating what share), but denies any actual ouster of him, from the property, (*f*) and may within the same time file an affidavit, stating with reasonable certainty, that he or she is joint tenant, tenant in common or coparcener, and the share of such property to which he or she is entitled, and that he or she has not ousted the Claimant, (*g*) and such notice shall be entered in the issue in the same manner as the notice limiting the defence, and upon the trial of such an issue, the additional question of whether an actual ouster has taken place shall be tried. (*h*)

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possession of defendant will be considered adverse, and the action maintainable against him without proof of actual ouster.

(*e*) See s. ccxxviii.

(*f*) At common law the possession of one joint tenant, coparcener, or tenant in common is presumed to be the possession of all: (*Ford* v. *Gray*, 1 Salk. 285; *Smales* v. *Dale*, Hob. 120; *Doe d. Barnett* v. *Keen*, 7 T. R. 386), and this presumption is only removed by proof of circumstances indicative of an adverse holding. It is clear law that one joint tenant &c., may so conduct himself as to oust his co-tenants and hold in severalty. Such conduct in law and in fact amounts to an actual ouster, to constitute which, actual force is quite unnecessary. Proof of any circumstances indicating an intention on the part of the tenant in possession to hold to the exclusion of his co-tenants, establishes an actual ouster. Thus thirty-six years sole and uninterrupted possession by a tenant in common without any account to or demand made by or claim set up by his co-tenant, was before Stat. 4 Wm. IV. cap. 1, s. 24, held to be a sufficient ground for a jury to presume an actual ouster: (*Doe d. Fishar et ux.* v. *Prosser*, Cowp. 217.) So proof that one joint tenant ordered another out of possession of a house occupied in common and that the latter quitted possession: (14 Vin. Abr. 572.) So proof of a demand of possession by one tenant in common, and a refusal by the other tenant in common, and proof that the latter stated he claimed the whole property: (*Doe d. Hellings* v. *Bird*, 11 East. 49.) So where one of several joint tenants authorised a railway company to take possession of the property, which the company did: (*Doe d. Wawn* v. *Horn*, 5 M. & W. 564.) The Statute 4 Wm. IV. c. 1, s. 24, has materially altered the rule of the common law on the subject of constructive possession, and should in all cases arising under this section, be carefully consulted.

(*g*) In ejectment by one joint tenant, &c., to recover land in the possession of a co-tenant when the action was a fiction, the consent rule confessed only lease and entry but not ouster.

(*h*) Thus it appears that the right of one joint tenant, &c., to maintain ejectment against another depends entirely upon proof of an actual ouster. Wanting this, the suit must fail; otherwise the absurdity would arise of a man bringing an action to recover possession of land of which in the eye of the law he is legally possessed: (see next section, ccxliii.)

CCXLIII. (*i*) Upon the trial of such issue as last aforesaid, if it shall be found that the Defendant is joint tenant, tenant in common, or coparcener with the Claimant, then the question whether an actual ouster has taken place shall be tried, and unless such actual ouster shall be proved, the Defendant shall be entitled to Judgment and costs; (*j*) but if it shall be found either that the Defendant is not such joint tenant, tenant in common, or coparcener, or that an actual ouster has taken place, then the Claimant shall be entitled to such Judgment for the recovery of possession and costs. (*k*)

Eng. C. L. P. A.1852, s.189. Question to be tried, if such joint tenancy, &c., with Claimant, be found &c., and the contrary.

CCXLIV. (*l*) The death of a Claimant or Defendant shall not cause the action to abate, (*m*) but it may be continued as hereinafter mentioned.

Eng. C. L. P. A.1852, s.190. Death of either party not to abate the action.

CCXLV. (*n*) In case the right of the deceased Claimant shall survive to another Claimant, a suggestion may be made

Eng. C. L. P. A.1852, s.191.

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 189.

(*j*) The provisions of this section necessarily arise out of the preceding one. If it be not proved that the party in possession being a joint tenant, &c., is holding adversely to claimant, then a recovery in ejectment would be most harassing, and such as the law would never tolerate. On the contrary, under these circumstances, a verdict would pass for defendant and he would be entitled under this section to judgment and costs.

(*k*) This proposition is the converse of that enacted in the first part of the section and supported by similar principles. In the event of a recovery by claimant, then defendant would be ejected in the ordinary manner and be liable to payment of claimant's costs of suit under this section. See also s. ccxxxix.

(*l*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 190.

(*m*) The abolition of all fictions in the action of ejectment has resulted in this and the following enactments. This section is a mere echo of s. ccviii. The same may be said of each of the following sections, in so far as they have reference to the revival or continuation of proceedings either before or after judgment. A general clause declaring that ejectment should be conducted as near as may be in the same manner, as personal actions might have saved much useless repetition. When John Doe, a legal myth, was plaintiff in ejectment, he never died, and the death of his lessor, who was the real plaintiff, did not affect the proceding: (*Doe d. Egremont* v. *Stephen*, 10 Jur. 570.) But now that the real claimant must be the actual plaintiff in this as in other forms of action the application of like rules as to reviving or continuing the action as are applied to ordinary actions, is both just and reasonable. The right to costs or liability to them is also a natural result of the same change. Costs formerly in ejectment being only recoverable under the consent rule, which was enforceable by attachment, established a personal liability determinable with the death of the party liable: (*Doe d. Harrison* v. *Hampson*, 4 C. B. 745.)

(*n*) Taken from Eng. Stat. 15 & 16 Vic. cap. 75, s. 191, in effect the same as s. ccix.

Right of one Claimant surviving to another.

of the death, (*o*) which suggestion shall not be traversable, but shall only be subject to be set aside, if untrue, (*p*) and the action may proceed at the suit of the surviving Claimant; and if such a suggestion shall be made before the trial, (*q*) then the surviving Claimant shall have a verdict and recover such Judgment as aforesaid, (*r*) upon it being made to appear that he was entitled to bring the action either separately or jointly with the deceased Claimant. (*s*)

con stat for u.c. ch 27 §33

Eng. C. L. P. A. 1852, s. 192.

If the right of the deceased Claimant does not survive to another, &c.

CCXLVI. (*t*) In case of the death before trial of one of several Claimants, whose right does not survive to another or others of the surviving Claimants, (*u*) when the legal representative of the deceased Claimant shall not become a party to the suit in the manner hereinafter mentioned, (*v*) a suggestion may be made of the death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, (*w*) and the action may proceed at the suit of the surviving Claimant for such share of the property as he is entitled to (*x*) and costs. (*y*)

(*o*) The entry of the suggestion necessary to the continuance of the suit may be made at any time during the progress of the suit and before verdict. If at Nisi Prius it may be substantially the same as that in note *v* to s. ccix.

(*p*) The application to set aside a suggestion because of its untruth must be grounded upon an affidavit. The proceedings will be by summons and order. The summons may be "to show cause why the suggestion of the death of C. D. &c., should not be set aside with costs, the same being untrue."

(*q*) It is not clear that under this section a suggestion can be made after trial. Upon a suggestion being made it is enacted in the early part of the section "that the action may proceed," &c. The doubt is as to the peculiar language of the part of the section here annotated, "and if such suggestion shall be made *before* the trial," &c. See further, note *b* to s. ccxlvii.

(*r*) See s. ccxxxix.

(*s*) This section appears to provide for the death of one of two or more claimants during the pendency of a suit, "in case the right of the deceased claimant shall survive to another claimant," and yet at the end of the section enacts that the surviving claimant shall have a verdict if it be made to appear that he was entitled to bring the action "either separately or jointly with the deceased claimant." It is intended that the survivor shall recover, whether entitled in his own right, independently of the deceased, or by survivorship. The next section explicitly provides for the death of one of several claimants whose right does not survive.

(*t*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 192.

(*u*) See note *s* to s. ccxlv.

(*v*) Under s. ccxlviii.

(*w*) See note *p* to s. ccxlv.

(*x*) This section is not like the last, applicable to the death of one of several joint tenants. It applies rather to the death of one of several tenants in common.

(*y*) See s. ccxli.

CCXLVII. (*z*) In case of a verdict for two or more Claimants, if one of such Claimants die before execution executed, (*a*) the other Claimant may, whether the legal right to the property shall survive or not, (*b*) suggest the death in manner aforesaid, (*c*) and proceed to Judgmont and execution for the recovery of possession for the entirety of the property and the costs; (*d*) but nothing herein contained shall affect the right of the legal representative of the deceased Claimant, or the liability of the surviving Claimant to such legal representative, and the entry and possession of such surviving Claimant under such execution shall be considered an entry and possession on behalf of such legal representative in respect of the share of the property to which he shall be entitled as such representative, (*e*) and the Court may direct possession to be delivered accordingly. (*f*)

Eng. C. L. P. A. 1852, s. 193. One or more of several Claimants dying after verdict for them, but before execution.

CCXLVIII. (*g*) In case of the death of a sole Claimant, or before trial of one of several Claimants whose right does not survive to another or others of the Claimants, the legal representative of such Claimant (*h*) may, by leave of the Court or a Judge, (*i*) enter a suggestion of the death, and that he is such

Eng. C. L. P. A. 1852, s. 194. Death of sole Claimant, or one whose right does

(*z*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 193.

(*a*) There may be execution to recover possession of the property and execution to recover costs of suit: (s. ccxli.) This section has reference exclusively to the former. An execution to recover possession of property cannot be said to be "executed" until there has been at least a dispossession of the parties who defended and perhaps a delivery to claimant or his agent: (see s. ccxlviii, where the language is "and before execution executed by delivery of possession.")

(*b*) This seems to have reference to the cases contemplated in ss. ccxlv.-ccxlvi. provided the death take place "after verdict."

(*c*) *i. e.* In the manner and subject to be set aside, if untrue, as provided in the two preceding sections, ccxv-vi.

(*d*) See s. ccxli.

(*e*) The provisions of this section are peculiar. In case of the death of one of several claimants before "execution executed" the survivor, "whether the legal right to the property shall survive or not," may proceed for the recovery of the possession of the "entirety of the property," and be, it is presumed, tenant in common with, or trustee for, the representatives of the deceased, wherever the representatives derive any interest from the deceased in the land recovered.

(*f*) Although it is enacted that "the Court" may direct possession to be delivered, it is presumed that a judge in Chambers might exercise that power: (see note *m* to s. xxxvii.)

(*g*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 194.

(*h*) *Such claimant*, *i. e.* either the sole claimant in the action or one of several claimants in respect of a separate and individual estate or interest.

(*i*) The application must be ground-

not survive to another.

legal representative, and the action shall thereupon proceed,(*j*) and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of the deceased Claimant, and such Judgment shall follow upon the verdict in favor or against the person making such suggestion, as hereinbefore provided with reference to a Judgment for or against such Claimant; (*k*) and in case such suggestion in the case of a sole Claimant be made after trial and before execution executed by delivery of possession thereupon, (*l*) and such suggestion be denied by the Defendant within eight days after notice thereof, (*m*) or such further time as the Court or a Judge may allow, (*n*) then such suggestion shall be tried, and if upon trial thereof, a verdict shall pass for the person making such suggestion, he shall be entitled to such Judgment

Costs.

as aforesaid, (*o*) for the recovery of possession, and for the costs of and occasioned by such suggestion, and in case of a verdict for the Defendant, such Defendant shall be entitled to such Judgment as aforesaid for costs. (*p*)

Eng. C. L. P. A. 1852, s. 195.

CCXLIX. (*q*) In case of the death before or after Judgment of one of several Defendants in ejectment who defend jointly,

Death of one of several joint Defendants.

a suggestion may be made of the death, (*r*) which suggestion shall not be traversable, but only be subject to be set aside, if untrue, (*s*) and the action may proceed against the surviving Defendant to Judgment and execution. (*t*)

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ed upon affidavit. In a case where the representative of a deceased sole claimant made application the affidavit was as follows, "1. That this is an action of ejectment brought by plaintiff to recover possession of certain land being, &c.; 2. That the action was commenced by writ of summons issued on, &c.; 3. That defendant on, &c., appeared and defends this action.; 4. That on, &c., plaintiff died at, &c.; 5. That plaintiff by his last will and testament devised said land to deponent whereby deponent became and is the legal representative of said plaintiff; 6. That the venue in this action is laid in the county of, &c.": (*Stringer* v. *Ammerman*, Chambers, Oct. 25, 1856, Burns, J.)

(*j*) "*Thereupon proceed*," *i.e.* upon entry of the suggestion.

(*k*) See ss. ccxxxix.-xl.

(*l*) See note *a* to s. ccxlvii.

(*m*) The suggestion in this case to be served in the same manner as suggestions directed under s. ccxi.

(*n*) *Court or Judge.*—Relative powers see note *m* to s. xxxvii.

(*o*) See s. ccxxxix.

(*p*) See s. ccxl.

(*q*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 195.

(*r*) The suggestion may be in effect the same as that given in note *i* to s. ccxi.

(*s*) See note *p* to s. ccxlv.

(*t*) See s. ccxli.

Eng. C. L. P. A. 1852, s. 196.

Death of sole Defendant, or of all the Defendants before trial.

CCL. (*u*) In case of the death of a sole Defendant, or of all the Defendants in ejectment before trial, (*v*) a suggestion may be made of the death, (*w*) which suggestion shall not be traversable, but only be subject to be set aside if untrue, (*x*) and the Claimants shall be entitled to Judgment for recovery of possession of the property, unless some other person shall appear and defend within the time to be appointed for that purpose, by the order of the Court or a Judge, to be made upon the application of the Claimants; (*y*) and it shall be lawful for the Court or a Judge (*z*) upon such suggestion being made, and upon such application as aforesaid, to order that the Claimants shall be at liberty to sign Judgment within such time as the Court or Judge may think fit, unless the person then in possession by himself or his tenant or the legal representative of the deceased Defendant, shall within such time appear and defend the action; (*a*) and such order may be served in the same manner as the Writ, (*b*) and in case such person shall appear and defend the same, proceedings may be taken against such new Defendant as if he had originally appeared and defended the action, (*c*) and if no appearance be entered and defence made, then the Claimant shall be at liberty to sign Judgment pursuant to the order. (*d*)

Eng. C. L. P. A. 1852, s. 197.

Death of sole Defendant or

CCLI. (*e*) In case of the death of a sole Defendant or of all the Defendants in ejectment, after verdict, the Claimants shall nevertheless be entitled to Judgment as if no such death had

(*u*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 196, and in effect the same as s. cxi.

(*v*) Death after verdict is provided for in s. ccli.

(*w*) The suggestion may be substantially the same as that contained in note *i* to s. ccxi.

(*x*) See note *p* to s. ccxlv.

(*y*) The Court or Judge is by order, upon the application of claimant, to fix the time at which the claimant may sign judgment, unless the person then in possession, &c., shall appear, &c. The order intended is a conditional one, granting leave to sign judgment on a day named, unless, &c.

(*z*) Relative powers see note *m* to s. xxxvii.

(*a*) It is designed in the event of a person being in possession other than the original defendant deceased, that such person shall have notice of the pending action and be in a position to defend himself before being dispossessed under a judgment obtained against deceased.

(*b*) See s. ccxxiii. and notes thereto.

(*c*) See s. ccxxxii. It is presumed that such person may either defend for the whole or for part: (s. ccxxviii.)

(*d*) See s. ccxxxi.

(*e*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 197. The principle of

of all the Defendants, after verdict.

taken place, (*f*) and to proceed by execution for recovery of possession without suggestion or revivor, (*g*) and to proceed for the recovery of the costs in like manner as upon any other Judgment for money, against the legal representatives of the deceased Defendant. (*h*)

Eng. C. L. P. A. 1852, s. 198.

Death before trial of a Defendant defending separately for part.

CCLII. (*i*) In case of the death, before trial, of one of several Defendants in ejectment, who defends separately for a portion of the property for which the other Defendant or Defendants do not defend, (*j*) the same proceedings may be taken as to such portion as in the case of a sole Defendant, (*k*) or the Claimant may proceed against the surviving Defendants in respect of the portion of the property for which they defend. (*l*)

Eng. C. L. P. A. 1852, s. 199.

Death before trial of a Defendant who defends separately, but for Property for which others also defend.

CCLIII. (*m*) In case of the death, before trial, of one of several Defendants in ejectment, who defends separately in respect to property for which surviving Defendants also defend, (*n*) it shall be lawful for the Court or a Judge, (*o*) at any time before trial to allow the person in possession, at the time of the death, of the property, or the legal representative of the deceased Defendant, to appear and defend on such terms as may appear reasonable and just, upon the application of such person or representative, (*p*) and if no such application be made or leave granted, the Claimant suggesting the death in the manner

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this section is similar to that of s. ccxii. which see.

(*f*) Where after verdict had before the C. L. P. A. but judgment entered after that Act, plaintiff proceeded under this section; held he was entitled so to do: (*McCallum* v. *McCallum*, Chambers, Sept 29, 1855, Burns, J, II U. C. L. J. 211.)

(*g*) In which case judgment, it is presumed, must be entered against deceased defendant as if living.

(*h*) *i. e.* By suit upon the judgment or by writ of revivor.

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 198.

(*j*) Provision is made by s. ccliii. for the death before trial of one of several defendants, who defends separately for property for which the surviving defendants also defend.

(*k*) s. ccl.

(*l*) "*Or* the claimants." It is believed the word "or" should be read "and. The error, for such it is conceived to be, exists as well in the Eng. C.L.P.Act as in our Act. The corresponding section of the Irish C. L. P. A. (16 & 17 Vic. cap. 113, s. 220) is correct.

(*m*) Taken from Eng. Stat. 15 & 16 Vic. cap. 75, s. 199.

(*n*) Provision is made by s. cclii. for the death before trial of one of several defendants, who alone defends separately for a portion of the property.

(*o*) Court or Judge—relative powers see note *m* to s. xxxvii.

(*p*) The "person in possession" here intended must be some person other than the surviving defendants, and may or may not be the "legal re-

aforesaid, (*q*) may proceed against the surviving Defendants to Judgment and execution. (*r*)

Eng. C. L. P. Act A.1852, s. 200. Con stat for 4 c. ch 27 § 42

Claimant may discontinue as to one or more Defendants.

CCLIV. (*s*) The Claimant (*t*) in ejectment shall be at liberty at any time to discontinue the action as to one or more of the Defendants, (*u*) by giving to the Defendant or his Attorney a notice, headed in the Court and cause, and signed by the Claimant or his Attorney, stating that he discontinues such action, (*v*) and thereupon the Defendant to whom such notice is given shall be entitled to and may forthwith sign Judgment for costs in the form contained in the Schedule (A) to this Act annexed, marked No. 17, or to the like effect. (*w*)

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presentative" of deceased defendant.

(*q*) See ss. ccxlix-l.

(*r*) See s. ccxli.

(*s*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 200.

(*t*) One of several claimaints may discontinue under the provisions of s. cclv.

(*u*) The discontinuance may be made "at any time," and be "as to one or more of the defendants." This is a mode of procedure equivalent to *nolle prosequi* and *retraxit*, in ejectment formerly. It was allowable to enter a *nol. pros.* as to one or more of several defendants at any time before trial and even after the commission day of the assizes: (*Gree* v. *Rolle*, Ld. Rayd. 716.) A difference, however, between a *discontinuance*, *nolle prosequi* and *retraxit*, appears to exist. A plaintiff who finds that he has misconceived his action may obtain leave to *discontinue*. For the same or for any other reason a plaintiff may, under certain circumstances, before verdict, enter a *nolle prosequi*. In either case there is the right to commence a new action for the same cause; but a *nolle prosequi* after judgment operates as a *retraxit*, and a *retraxit* is a bar to any future action for the same cause: (1 Wms. Saunders, 207 *c*; (*Bowden* v. *Horne*, 7 Bing. 716; *Benton* v. *Polkinghorne*, 16 M. & W. 8.) It is a question whether a claimant desirous of discontinuing as to all the defendants, can do so under this section. The expression "one or more of the defendants," seems to have a contrary bearing. Before this Act a plaintiff could not discontinue as to all the defendants to an action, without the leave of the Court or a Judge.

(*v*) The notice may be in this form: "Take notice that in this cause the claimant discontinues the action as to C. D., one of the said defendants."

(*w*) The Stat. 8 Eliz. cap. 2, s. 2, gives costs to a defendant against whom a discontinuance or *nolle prosequi* is entered: (*Cooper* v. *Tiffin*, 3 T. R. 511; *Benge* v. *Swaine*, 15 C. B. 784.) But if the entry be made before notice of trial, it seems defendant will not be entitled to the costs of brief or draft copies: (*Doe d. Postlethwaite* v. *Neale*, 2 M. & W. 732;) nor of consultation with counsel for defence: (*Rivis* v. *Hatton*, 8 Dowl. P. C. 164.) Where the defendant obtained a verdict which was set aside upon the ground of misdirection at the trial, and the plaintiff gave notice for the second trial but before the time discontinued: Held that defendant was entitled to the costs of certain searches for documents used at the first trial, which would have been useful at the second, had not plaintiff discontinued: (*Daniell* v. *Wilkin*, 8 Ex. 155; See also *Joliffe* v. *Mundy*, 4 M. & W. 502.)

Eng. C. L. P. A. 1852, s. 201.

One of several claimants may discontinue.

CCLV. (*x*) In case one of several Claimants shall be desirous to discontinue, he may apply to the Court or a Judge (*y*) to have his name struck out of the proceedings, and an order may be made thereupon upon such terms as to the Court or Judge shall seem fit, (*z*) and the action shall thereupon proceed at the suit of the other Claimants.

Eng. C. L. P. A. 1852, s. 202.

Claimant not proceeding to trial in due time after notice.

CCLVI. (*a*) If after appearance entered, the Claimant, without going to trial, allow the time fixed by the practice of the Court for going to trial in ordinary cases after issue joined to elapse, (*b*) the Defendant in ejectment may give twenty days' notice to the Claimant to proceed to trial at the Assizes (*c*) next after the expiration of the notice, (*d*) and if the Claimant afterwards neglects to give notice of trial for such Assizes, (*e*) or to proceed to trial in pursuance to the said notice given by the Defendant, (*f*) and the time for going to trial shall not be extended by the Court or a Judge, (*g*) the Defendant may sign Judgment in the form contained in the Schedule (A) to this Act annexed, marked No. 18, and recover the costs of the defence. (*h*)

Right of Defendant in such case.

Eng. C. L. P. A. 1852, s. 203.

Sole defendant or all the defendants may confess the action as to the whole or a part of the property.

CCLVII. (*i*) A sole Defendant or all the Defendants in ejectment shall be at liberty to confess the action as to the whole or a part of the property, (*j*) by giving to the Claimant a notice headed in the Court and cause, and signed by the Defendant or Defendants, such signature to be attested by his or their Attorney, (*k*) and thereupon the Claimant shall be entitled

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(*x*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 201.

(*y*) See note *m* to s. xxxvii.

(*z*) It is enacted that upon application "an order *may* be made," &c. A discretion will be exercised to prevent injustice being done by reason of the intended discontinuance.

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 202.

(*b*) As to which see s. cli. to which this section conforms in many respects.

(*c*) Read "sittings or assizes" in Eng. C. L. P. Act.

(*d*) See note *o* to s. cli.

(*e*) Read "sittings or assizes" in Eng. C. L. P. Act. See also note *p* to s. cli.

(*f*) See note *q* to same section.

(*g*) See note *v* to same section.

(*h*) See note *t* to same section.

(*i*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 203.

(*j*) Under the operation of this and the following sections, one, more, or all defendants in ejectment may confess the action as to the whole of the property sought to be recovered or any part thereof.

(*k*) It is a question whether the notice here mentioned is intended as a substitute for *cognovit* in ejectment,

to and may forthwith sign Judgment and issue execution for the recovery of possession and costs, in the form contained in the Schedule (A) to this Act annexed, marked No. 19, or to the like effect. (*l*)

to the whole or part of the property.

CCLVIII. (*m*) In case one of several Defendants in ejectment, who defends separately for a portion of the property for which the other Defendant or Defendants do not defend, (*n*) shall be desirous of confessing the Claimant's title to such portion, he may give a like notice to the Claimant, (*o*) and thereupon the Claimant shall be entitled to, and may forthwith sign judgment and issue execution for the recovery of possession of such portion of the property, and for the costs occasioned by the defence relating to the same, and the action may proceed as to the residue.

Eng. C. L. P. A.1852, s.204.

And so may one of several Defendants, defending for a part for which others do not defend.

CCLIX. (*q*) In case one of several Defendants in ejectment, who defend severally in respect of property for which other Defendants also defend, (*r*) shall be desirous of confessing the Claimant's title, he may give a like notice thereof, (*s*) and there-

Eng. C. L. P. A.1852, s.205.

And if others defend as to the same part.

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and if so whether it should be attested with all the formalities attending the execution of a cognovit. Our N.R. 26, as to cognovits and warrants of attorney, is not, in any manner, expressly restricted to "personal actions." The Eng. Statute 1 & 2 Vic. c. 110, s. 9, whence it is taken, though upon the face of it restricted to personal actions in respect of warrants of attorney, was held to extend to cognovits in ejectment as in other forms of actions: (*Doe d. Rees* v. *Howell*, 12 A. & E. 696.) The object of attestation is to guard defendant from imposition or undue haste in a proceeding of a very summary character. Hence the presence of an attorney who can tender professional aid is made necessary. The attorney must attest the confession or warrant of attorney in testimony of his presence. No precise form of words is required in the attestation clause: (see *Phillips* v. *Gibbs*, 16 M. & W. 209; *Pocock* v. *Pickering*, 18 Q. B. 789; *Lewis* v. *Kensington*, 2 C. B. 463.) It has been held in England that an attorney, though practising without his certificate, might sufficiently attest a confession: (*Holgate* v. *Slight*, 2 L. M. & P. 662.)

(*l*) The judgment awards both possession and costs, and as to execution, there may be either one writ or separate writs: (s. ccxli.)

(*m*) Taken from Eng. Stat. 15 & 16 cap. 76, s. 204.

(*n*) The preceding section applies only to confessions by a "sole defendant," or if several, by "all defendants." This, to "one of several defendants," who defends separately for a portion of the property "for which the other defendants do not defend." The case of a confession by one of several defendants, who defends in respect of property, "for which the others also defend," is provided for in s. cclix.

(*o*) See note *k* to s. cclvii.

(*q*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 205.

(*r*) See note *n supra*.

(*s*) See note *k* to s. cclvii.

upon the Claimant shall be entitled to and may sign Judgment against such Defendant for the costs occasioned by his defence, and may proceed in the action against the other Defendants to Judgment and execution. (*u*)

Eng. C. L. P. A. 1852, s. 206.

Proceedings need not be enrolled before execution.

CCLX. (*v*) It shall not be necessary before issuing execution on any Judgment [in ejectment] under the authority of this Act, (*w*) to enter the proceedings upon any roll, but an *incipitur* thereof may be made upon paper, shortly describing the nature of the Judgment according to the practice heretofore used, (*x*) and Judgment may thereupon be signed, and costs taxed and execution issued; (*y*) Provided nevertheless, that the proceedings shall be entered on the roll whenever the same may become necessary for the purpose of evidence, or of bringing error, or appealing, or the like. (*z*)

Proviso.

Eng. C. L. P. A. 1852, s. 207.

CCLXI. (*a*) The effect of a Judgment in an action of ejectment

(*u*) See ss. ccxxxix.-xli.

(*v*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 206.

(*w*) The words in brackets are not in Eng. C. L. Act. Their object is manifestly to restrict this enactment in its operation to the action of ejectment. There being no such restriction in the section of the Eng. C. L. P. A. whence ours is taken, it has been said to extend to judgments in all forms of action, when entered under the Eng. C. L. P. Act: (Kerr's C. L. P. A, 1852, s. 206.)

(*x*) The words "according to the practice heretofore used," apply rather to England than to Upper Canada, and though quite proper in the Eng. C. L. P. Act are not equally so in ours: (Prov. Stat. 14 & 15 Vic. cap. 114, s. 8.)

(*y*) The costs here intended are of course those between party and party and not between attorney and client: (*Doe* v. *Filliter*, 13 M. & W. 47.) Taxation of costs and entry of judgment are in general contemporaneous acts: (*Peirce* v. *Derry*, 4 Q. B. 635), and unless there be a waiver of costs the entry of judgment is not final until taxation of costs: (*Ib.*) Notice of taxation should be given; but the omission to give it is no ground for setting aside the entry of judgment: (*Perry* v. *Turner*, 1 Dowl. P. C. 300; *Lloyd* v. *Kent*, 5 Dowl. P. C. 125; *Field* v. *Partridge*, 7 Ex. 689), however much it may be a ground for review of taxation: (*Ilderton* v. *Sill*, 2 C. B. 249.) But if upon any ground the judgment in ejectment be irregular there may be a writ of restitution: (*Doe d. Whittington* v. *Hurd*, 20 L. J. Q. B. 406.)

(*z*) To bring error upon a judgment that judgment must be shown to be a record. No judgment is a record until enrolled. So for other purposes, such as mentioned in the text, evidence, for instance, in order to an exemplification, there must be a judgment enrolled.

(*a*) The intention of this section is to declare that a judgment in ejectment shall not now have any other effect than one obtained when ejectment was a fictitious action. The action always has been of a possessory character, and still continues to be of that nature. When ejectment was a fictitious proceeding, the judgment was that John Doe, the lessor of the plaintiff, should recover his term. It is now that the plaintiff do recover possession of the

ment under this Act shall be the same as that of a Judgment

land mentioned in the writ, or of so much thereof as to which in the opinion of the jury he may be entitled. The direct issue raised and determined is the simple question of right to immediate possession. This stands or falls upon strength of title. The peculiarity of the action is that while it directly determines the right to possession, it involves questions of title, and indirectly determines them. The nature of the action and the consequences of a recovery in it, have been thus explained by Lord Mansfield, "An ejectment is a possessory action in which almost all titles to land are tried. Whether the party's title is to an estate in fee, fee tail for life or for years, the remedy is by one and the same action. In an action of ejectment the plaintiff recovers *only* the possession of the land and the execution is of the possession only. But if the lessor of the plaintiff recovers only the possession of the land, it may be asked '*how* he becomes seized according to his title?' To which it may be answered that when a person is in possession by title (as every person is who enters in execution of a judgment in ejectment, because the law does no wrong) the possession and title *unite*. For it is a rule of law that when a man having a title to an estate comes to the possession of it by lawful means, he shall be in possession according to his title. As where the title is to have in fee, he becomes seized in fee; where the title is to have an estate tail, he becomes seized of an estate tail, and so on, the law casting the estate upon him according to his title. . . In truth and in substance a judgment in ejectment is a recovery of the possession, not of the seisin or freehold, without prejudice to the *right*, as it may afterwards appear even between the same parties. He who enters under it can only be possessed according to the right *prout lex postulat*. If he has a freehold he is in as a freeholder; if he has a chattel interest he is in as a termor, and in respect of the freehold his possession endures according to the right. If he has no title he is in as a trespasser, and without any re-entry by the true owner is liable to account for the profits: (*Taylor d. Atkyns* v. *Horde*, 1 Burr. 90.) This being the effect of a judgment in ejectment it follows that no one action of ejectment can be pleaded to a subsequent action for the same land, though between the same parties. The judgment enforces only a right to possession, without conclusively determining the title of either party: (*Clerke* v. *Rowell*, 1 Mod. p. 10.) Hence there may be no end to trials in ejectment. Whatever the result of an action may be, no one recovery can be considered final between the litigants. It might be supposed that the abolition of the fictions in ejectment would have had the effect of subjecting it to the same rules as ordinary actions in respect of finality of procedure. But against this supposed intention there was an opinion given even upon the construction of Stat. 14 & 15 Vic. cap. 114, the expressed design of which was to place ejectment "as nearly as may be on the same footing as other actions." Upon a review of the Statute it was said, "The intention of the Legislature was clearly as respects the judgment in ejectment when for the claimant, to give no further force or effect to it than it would have had previous to the Statute:" (per Burns, J, *Clubine* v. *McMullen*, 11 U. C. R. 255.) It is enacted that if any person bring an action of ejectment, after having brought a prior action of ejectment, against the same defendant, or against any person through or under whom he claims, the Court may order such person to give security for costs: (s. cclxxiii.) The effect of the enactments peculiar to our C. L. P. Act, wherein both claimant and defendant are obliged to serve notices of their respective titles remains to be decided: (s. ccxxii. ccxxiv.) The object of such a provision would seem to be a trial of

Effect of judgment.

in ejectment obtained before the passing of the Act of this Province, in the Session of Parliament held in the thirteenth and fourteenth years of Her Majesty's Reign, intitled, *An Act to alter and amend the practice and proceedings in actions of Ejectment in Upper Canada.*

Eng. C. L. P. A. 1852, s. 209.

CCLXII. (*b*) Every tenant to whom any Writ in ejectment (*c*)

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titles. And if so, it is scarcely consistent therewith and the principles of of law applicable thereto, that after a solemn trial either party should be allowed again and again to provoke litigation without at least fresh materials. Courts of Equity possess a jurisdiction by entertaining bills of peace to prevent vexatious ejectments, and by means of such jurisdiction, when exercised after a recovery in ejectment, quiet titles at law: (*Barefoot* v. *Fry*, Bunb. 158; *Leighton* v. *Leighton*, 1 Str. 404; S. C. 1 P. W. 671; S. C. affirmed in House of Lords, 4 Bro. P. C. 378.)

It may be noticed that the section under consideration draws no distinction between a judgment in ejectment upon a verdict and a judgment by default. In the first case the right of the claimant is tried and determined, in the last case it is in effect confessed: (*Aslin* v. *Parkin*, 2 Burr. 668.) One effect of a judgment against defendant, remains to be considered, and that is as regards a claim or action for mesne profits. The claimant who alleges himself to be entitled to possession of a piece of land from a certain date recovers it. This recovery is tantamount to a judgment that defendant was wrongfully in possession, and therefore liable to plaintiff for rents and profits of the land while wrongfully withholding possession. At present plaintiff may either recover mesne profits as a consequence of a recovery in ejectment in one and the same action: (s. cclxvii), or as to part by means of a separate and independent action: (*Ib.*) In the event of a separate action being brought, defendant, if a party to the original ejectment or in privity with the defendant in that action, is estopped from disputing plaintiff's possession from the time alleged in the writ: (*Aslin* v. *Parkin*, *ubi supra*; *Doe* v. *Wright*, 10 A. & E. 763; *Mathew* v. *Osborne*, 13 C. B. 919; Doe v. *Wellsman*, 2 Ex. 368; *Armstrong* v. *Norton*, 2 Ir. L. R. 36; *Listowell* v. *Greene*, 3 Ir. L. R. 205; *Nugent* v. *Phillips*, 8 Ir. L. Rep. 17); but when brought against a person in possession of the land who was no party to the ejectment unless such person be connected with the ejectment by some evidence, the recovery in that action is no evidence against him: (*Denn* v. *White*, 7 T. R. 112; *Doe* v. *Harvey*, 8 Bing. 239.) And if plaintiff seek to recover mesne profits from a day anterior to that mentioned in the writ, he must prove his title, and that such title would have enabled him to have maintained trespass: (*Litchfield* v. *Ready*, 5 Ex. 939; *Turner* v. *Coalbrook Steam Co*, 5 Ex. 932.) But wherever a recovery in ejectment would be an estoppel, in an action for mesne profits, it matters not whether that recovery be had by verdict or through a judgment by default: (*Wilkinson* v. *Kirby*, 15 C. B. 430.)

(*b*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 209.—Substantially the same as Eng. Stat. 11 Geo. II. c. 19, s. 12, which is a remedial law, and enacted for more effectually securing against frauds by tenants: (*Crocker* v. *Fothergill*, Bayley, J, 2 B. & Ald. 659.)

(*c*) The Stat. of Geo. II. was held to extend only to ejectments which are inconsistent with the landlord's title: (*Buckley* v. *Buckley*, 1 T. R. 647.) Therefore in ejectment by a mortgagee against a tenant of the mortgagor to enforce attornment that stat. was held to be inapplicable: (*Ib.*) In

shall be delivered, (*d*) or to whose knowledge it shall come, (*e*) shall forthwith give notice thereof to his landlord, or his bailiff or receiver, (*f*) under the penalty of forfeiting the value of three years' (*g*) improved or rack rent (*h*) of the premises demised or holden in the possession of such tenant, (*i*) to the person of whom he holds, (*j*) to be recovered by action in any Court of Common Law having jurisdiction for the amount. (*k*)

Penalty on tenant receiving writ in ejectment and not notifying his landlord.

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case a mortgagor in possession makes a lease after the execution of the mortgage, reserving rent, the mortgagee cannot, by merely giving the lessee notice of the mortgage, and that principal and interest are in arrear, and requiring such lessee to pay the rent to him, make the lessee his tenant, or entitle himself to distrain for rent subsequently accruing under the terms of the lease: (*Evans* v. *Elliot*, 9 A. & E. 342.)

(*d*) Intending a personal service: (see notes to s. ccxxiii.)

(*e*) Intending a service on a wife, child, or other member of the tenant's family, with subsequent notice to him: (see notes to s. ccxxii.)

(*f*) No precise form of notice is made necessary. The following may be used—"Take notice that you will receive herewith a copy of a writ of ejectment which has been served for the recovery of the possession of the land and premises at, &c., of which I am your tenant:" (Chit. F. 7 Edn. 531.)

(*g*) This Statute, like that of Geo. II., does not give treble damages but only directs how single damages shall be ascertained: (*Crocker* v. *Fothergill*, *ubi supra*.) An application for treble costs of suit was therefore refused: (*Ib.*)

(*h*) The improved or rack rent here mentioned is not the rent reserved, but such a rent as the landlord or tenant might fairly agree on at the time of the service of the writ of ejectment in case the premises were *then* to be let: (*Crocker* v. *Fothergill*, *ubi supra*.)

(*i*) The tenant shall forfeit three years improved or rack rent not merely of the premises described in the writ of ejectment, but of the premises *demised* to him: (*Crocker* v. *Fothergill*, Bayley, J, *ubi supra*.) Upon a demise by lease of certain lands, together with the mines under them, with liberty to dig for ore in other mines under the surface of other lands not demised, the tenant fraudulently concealed a declaration in ejectment delivered to him and suffered judgment by default. The declaration did not mention mines at all; but the Sheriff in executing the writ of possession, by the concurrence of the tenant, delivered possession of the premises demised to the tenant, and also of those mines in which he had liberty to dig: Held that although the latter could not be recovered under the declaration in ejectment, still that the tenant by his own act had estopped himself from taking that objection, and that in an action for the value of three years' improved rent, the landlord might recover the treble rent in respect not only of the demised premises, but of the mines in which the tenant had only a liberty to dig: (*Ib.*)

(*j*) The Court in some cases will allow the landlord to come in and defend, even after judgment signed, in default of appearance: (see notes to s. ccxxv.)

(*k*) It may be that a party suing under this Act in a Superior Court to recover an amount within the jurisdiction of an inferior Court will deprive himself of Superior Court costs, unless the Judge before whom the trial takes place shall certify for the same: (see 8 Vic. cap. 13, s. 59; 13 & 14 Vic. cap. 53, s. 78.)

Eng. C. L. P. A. 1852, s. 210.

Landlord having power to re-enter for non-payment of rent, may recover possession by ejectment

CCLXIII. (*l*) In all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor to whom the same is due, hath right by law to re-enter for the non-payment thereof, (*m*) such landlord or lessor shall and may, without any formal demand or re-entry, (*n*) serve a Writ in ejectment for the recovery of the demised premises, (*o*) or in case the same cannot legally be served or no tenant be in actual possession of the

(*l*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 210.—Substantially the same as Eng. Stat. 4 Geo. II. cap. 28, s. 2.

(*m*) By the common law it was necessary for the person claiming title to lands and tenements, in all cases to make an actual entry upon them in order to support an ejectment. In the case of a lease, therefore, as the landlord could not enter and take the actual possession until the lease expired, it became usual to insert a clause that in case the rent should be behind and unpaid at a certain time, the lessor should have the right to re-enter: (Woodfall L. & T. 7 Edn. 717.) This Statute applies only to cases where the lease contains such a clause: (*Doe d. Dixon* v. *Roe*, 7 C. B. 134.) And where it is made to appear that the landlord had a power to re-enter in respect of the non-payment of a half-year's rent at the time of serving the ejectment: (*Ib.*) The right of entry must be shown to be absolute and the lease to be thereby avoided: (*Doe d. Darke* v. *Bowditch*, 8 Q. B. 973.) Thus the Statute was held not to apply in a case where the condition in the lease was that on non-payment of rent in twenty days after the time limited for payment thereof, the landlord might enter on the premises "till it be fully satisfied:" (*Ib.*) The landlord has a right to avail himself of the statute, provided half a year's rent be due, and he equally has that right if ten years' rent be due: (*Cross et al.* v. *Jordan*, 8 Ex. 149.) The right of entry will not be waived by taking an insufficient distress for the rent, nor by continuing in possession under such distress after the expiration of the last day for the payment of the rent: (*Doe d. Taylor* v. *Johnson*, 1 Stark 411.) Actual entry is not necessary to take advantage of any such clause: (*Goodright d. Hare* v. *Cator*, 2 Doug. 477.)

(*n*) By the common law, when a landlord reserved a right of entry in a lease in case of the non-payment of rent, it was necessary for him to make a demand of the precise sum in arrear: (*Fabian* v. *Winston*, Cro. Eliz. 209), either in person or by attorney lawfully appointed by deed: (*Doe d. West* v. *Davis*, 7 East. 363.) The demand was required to be made on the premises: (Co. Litt. 202 a), though no person were residing there: (*Kidwelly* v. *Brand*, Plowd. 71.) To do away with the necessity of complying with these and other prerequisites to ejectment at the common law, the Statute of Geo. II. was passed: (*Doe d. Forster* v. *Wandless*, 7 T. R. 117.) It is not necessary to make any demand in order to entitle a plaintiff to recover in a case brought within the Statute, although the proviso for re-entry be expressed to be in case of the rent in arrear being lawfully demanded: (*Doe d. Schofield* v. *Alexander*, 2 M. & S. 525; see also *Doe d. Lawrence* v. *Shawcross*, 3 B. & C. 752.) It may, however, be otherwise if the lease contain an express covenant that the lessor will not enter without demand: (*Doe d. Shrewsbury* v. *Wilson*, per Abbott, C.J, 5 B. & Ald. 385.)

(*o*) See s. ccxxiii., and notes thereto.

premises, then such landlord or lessor may affix a copy thereof upon the door of any demised messuage, or in case such action in ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, tenements, or hereditaments comprised in such Writ in ejectment, and such affixing shall be deemed legal service thereof, which service or affixing of such Writ in ejectment shall stand instead and place of a demand and re-entry; (p) and in case of Judgment against the Defendant for non-appearance, if it shall be made to appear to the Court wherein the said action is depending, by affidavit, (q) or be proved upon the trial in case the Defendant appears, (r) that half a year's rent was due before the said

And how such right shall be exercised.

(p) This means that the service shall be in the place of a legal demand made on the day on which it ought to be made by the common law: (*Doe d. Lawrence* v. *Shawcross*, Bayley, J, *ubi supra.*) And therefore it was held to be no ground of nonsuit in ejectment that the declaration was served on a day subsequent to the day on which the demise was laid, and being after the rent became due, because the title of the lessor must be taken to have accrued at common law by non-payment of the rent: (*Ib.*) The effect of the Statute is to dispense with the necessity of a demand by the landlord, and not to put the tenant in a worse situation than he would have been if he had tendered the rent when it ought to have been paid. The service of a writ in ejectment is substituted for the demand which was required at common law. The Statute is beneficial to the tenant as well as to the landlord. It relieves the latter from the necessity of making a demand with all the precision required at common law, and the tenant incurs no forfeiture until the writ of ejectment is served upon him. And if at that time he is ready to pay the rent, although he did not tender it when it was due, it gives him the same benefit as if he had tendered it at that time: (*Ib.* per Holroyd, J.)

(q) An affidavit stating, *inter alia*, that three quarters of a year's rent were due from the tenant before the copy of the writ was affixed to the premises and that at the time the copy was affixed, "no sufficient distress was to be found upon the said premises countervailing the said arrears," is sufficient: (*Cross et al.* v. *Jordan*, 8 Ex. 149.) This decision overrules *Doe d. Powell* v. *Roe*, 9 Dowl. P. C. 548; see further *Doe d. Gretton et al.* v. *Roe*, 4 C. B. 576. In one case the lessor having recovered in a former ejectment under the Statute of George II, the lessee, after the lapse of several years brought a second ejectment on the title of his lease; and the proceedings in the first ejectment being in all other respects confessedly regular, he insisted that he was entitled to recover because no affidavit was produced which had been made in conformity with the Act: Held that it was not incumbent on the landlord to prove the regularity of all the circumstances upon which his judgment and execution were founded, but that the judgment must be taken to have been a right, regular, and good one, as nothing appeared to the contrary: (*Doe d. Hitchings* v. *Lewis*, 1 Burr. 614.)

(r) This section, like the Statute of George II. prescribes *two* cases, viz., one in case of judgment by default, and the other in case of the action coming to a trial. In the former case an affidavit must be made in the Court where the suit is depending, that half a year's rent was due before the ser-

Writ was served, and that no sufficient distress was to be found on the demised premises countervailing the arrears then due, and that the lessor had power to re-enter, (*s*) then and in every such case the lessor shall recover Judgment and have execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made;(2) (*t*) and in case the lessee or his assignee, or other person claiming or deriving under the said lease, (*u*) shall permit and suffer Judgment to be had and

(2) § 52.

Consequences of the exercise of such right.

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vice of the writ, and that no sufficient distress was to be found upon the premises countervailing the arrears then due, and that the plaintiff had power to re-enter. In the latter case the same thing must be proved upon the trial: (1 Wms. Saund. 287, *c.*)

(*s*) The insufficiency of the distress must be established, and in order thereto proof of a search must be adduced: (*Doe d. Forster* v. *Wandlass*, 7 T. R. 117.) The words "no sufficient distress *to be found* on the premises" appear to be pertinently introduced into the Statute, because it is not enough that the tenant should have that secreted on the demised premises which would be sufficient to countervail the amount of rent due, but the property must be so visibly on the premises that a broker going to distrain on the tenant would, using reasonable diligence, find it so as to be able to distrain it: (*Doe dem. Haverson* v. *Franks*, Erle, J. 2 C. & K. 678.) If the landlord show that he was prevented from entering on the premises to distrain, he will be entitled to recover in ejectment, without showing that there was actually no sufficient distress upon the premises: (*Doe d. Chippindale et al* v. *Dyson et al*, 1 M. & M. 77.) Where the outer doors are locked up, so that the landlord cannot get at the premises to distrain, there is no available distress and consequently no sufficient distress within the meaning of the Act: (*Ib.*) Under such circumstances an affidavit of belief that there was no sufficient distress on the premises, will be sufficient: (*Doe d. Coz* v. *Roe*, 5 D. & L. 272.) If the landlord make out a *prima facie* case that there was no sufficient distress on the premises, the *onus* of showing the contrary will be shifted to the tenant: (*Doe d. Smelt* v. *Fuchau*, 15 East. 286.) Whenever there is a sufficient distress the landlord must proceed at common law as before the Statute: (*Doe d. Forster* v. *Wandlass*, 7 T.R.117.) But by special consent of the parties, a recovery may be made for default of payment of rent, without the aid of the Statute, and without any demand of the rent according to the common law: (*Doe d. Harris* v. *Masters*, 2 B. & C. 490.) Thus, if in the lease there be a proviso that in case of the rent being in arrear for twenty-one days, the lessor may re-enter, "although no legal or formal demand should be made for payment thereof:" (*Ib.*)

(*t*) Premises consisting of a cottage and garden had been let to a tenant who died and subsequently a stranger took possession of the garden, but the cottage was left vacant. There being one half year's rent in arrear, and no sufficient distress to be found upon the promises, countervailing the arrears of rent, a writ of ejectment was served upon the person in possession of the garden, and a copy of the writ affixed to the door of the cottage, which was unoccupied: Held service sufficient and that claimant was at liberty to sign judgment in ejectment to recover the whole premises: (*Clinton* v. *Wales*, 28 L.T.Rep. 105.)

(*u*) See note *a* to s. cclxiv. and note *l* to s. cclxv.

recovered on such trial in ejectment and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after execution executed, (*v*) then and in every such case the said lessee, and his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing a Writ of appeal for reversal of such Judgment in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the demised premises discharged from such lease, (*w*) and if, on such ejectment, a verdict shall pass for the Defendant, or the Claimant shall be non-suited therein, then and in every such case, such Defendant shall have and recover his costs. (*x*) Provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease or any part thereof, who shall not be in possession, so as such mortgagee shall and do within six months after such Judgment obtained and execution executed, pay all rent in arrear and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all covenants and agreements which on the part and behalf of the first lessee are or ought to be performed. (*y*)

(3) § 53.

If verdict be for defendant, &c.

(4) § 52

Proviso: as to mortgagee of lease.

(5) § 54.

(*v*) No relief can be had in equity against any forfeiture, except one caused by non-payment of rent of a sum certain: (see *Bracebridge* v. *Buckley*, 2 Price 200; *Wadman* v. *Calcraft*, 10 Ves. 67; *Bowser* v. *Colby*, 1 Hare 109; *Green* v. *Bridges*, 4 Sim. 96; see further note *c* to s. cclxiv.) The time limited for relief is "six months after execution executed." The months intended must be held to be calendar months: (12 Vic. s. 5, sub. s. 11; see also *Dowling* v. *Foxall*, 1 Ball & B. 193)

(*w*) The true end, and professed intention of this enactment is to *take off* from the landlord the inconvenience of his continuing always liable to the uncertainty of possession (from its remaining in the power of the tenant to offer him a compensation at *any* time, in order to found an application for relief in equity) and to *limit* and *confine* the tenant to six calendar months after execution executed for his doing this, or else that the landlord should from thenceforth hold the demised premises discharged from the lease: (*Doe dem. Hitchings* v. *Lewis*, Mansfield, C.J, 1 Burr. 619.)

(*x*) See s. ccxl. and notes.

(*y*) This a mortgagee might do independently of this proviso, as being "a person claiming or deriving title under the said lease:" (see *Malone* v. *Geraghty*, 5 Ir. Eq. R. 549; *Kelly* v. *Staunton*, 1 Hog. 393; see further note *l* to s. cclxv.)

Eng. C. L. P. A. 1852, s. 211.

Proceedings if the tenant ejected seek relief in Equity.

Rent must be paid into Court before injunction shall issue.

CCLXIV. (*z*) In case the said lessee, his assignee, or other person claiming any right, title, or interest in law or equity of, in, or to the said lease, (*a*) shall, within the time aforesaid, (*b*) proceed for relief in any Court of Equity, (*c*) such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the Claimant in such ejectment, (*d*) bring into Court and lodge with the proper officer such sum of money as the lessor or landlord shall, in his answer, swear to be due and in arrear over and above all just allowances, (*e*) and also the costs taxed in the said suit, (*f*) there to remain until the hearing of the

(*z*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 211.—Substantially the same as Eng. Stat. 4 Geo. II. cap. 28, s. 3, which is similar to Irish Stat. 11 Ann cap. 2, s. 3.

(*a*) An equitable mortgagee of the tenant's interest is entitled to ask the relief: (see *Malone* v. *Geraghty*, 5 Ir. Eq. Rep. 549; see further note *l* to s. cclxv.)

(*b*) *i. e.* Within six calendar months after execution executed: (see note *v* to s. cclxiii.) The day on which the *habere* is executed is not to be included in the computation: (*Dowling* v. *Foxall*, 1 Ball & B. 198.) Where a right would be divested or a forfeiture incurred by including the day of an act done, the computation will generally be made exclusively of it: (*Ib.*) In a redemption suit the bill charged that the writ of possession was executed "on or about the 18th of November, and possession was on that day taken." The answer stated "that it is not true, as in the bill untruly stated, that the said *habere* was executedon 18th November, for that defendant believed it was executed on 17th November:" Held that the precise day of execution was sufficiently put in issue: (*Fitzgerald* v. *Hussey*, 3 Ir. Eq. R. 819.) The litigious conduct of a tenant in defending an ejectment for non-payment of rent, does not disentitle him to relief upon a bill for redemption, nor to to the costs of that suit if he be otherwise entitled to them: (see *Newenham* v. *Mahon*, 3 Ir. Eq. R. 804.) Where plaintiff in equity established a waiver on the defendant's part, the Irish Statute was held to be out of the question, and it was therefore held that it was not essential that the bill should be filed within the six months as provided by the Act of Parliament: (see *Butler* v. *Burke*, 1 Dr. & Wal. 380.)

(*c*) Courts of Equity have from a very early period relieved tenants from forfeitures owing to non-payment of rent, upon payment of arrears with interest and all expenses: (*Sanders* v. *Pope*, 12 Ves. 289, Mad. Eq. 36.) A landlord has no right to enter upon the property forfeited by force, and a landlord who does so must, according to the ruling of Courts of law, withdraw from possession: (*Newton* v. *Harland*, per Tindal, C. J, 1 M. & G. 644; see also *Hillary* v. *Gay*, 6 C. & P. 284.)

(*d*) As to computation of time, see Chancery order, No. V., of 3rd June, 1853.

(*e*) See *McInherny* v. *Galway*, Jon. & C. 246. *Qu.* How far this enactment applies to the case of a penal rent reserved as an indemnity, and to answer a particular purpose? (see *Hume* v. *Kent*, 1 Ball & B. 558.)

(*f*) Although the general rule is to make the party seeking a redemption

cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court; (*g*) and in case such proceedings for relief in equity shall be taken within the time aforesaid, (*h*) and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and *bona fide*, without fraud, deceit, or wilful

If such proceedings be after execution executed.

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pay the costs of suit, the Court has jurisdiction to look at the landlord's conduct and throw the costs on him according to its discretion: (see *Geraghty* v. *Malone*, 1 H. L. Cas. 81, affirming S. C. 5 Ir. Eq. R. 549; see also *Fitzgerald* v. *Hussey*, 3 Ir. Eq. R. 549; *McInherny* v. *Galway*, Jon. & C. 247; *Sheridan* v. *Casserly*, Beat. 249.)

(*g*) On a bill to redeem under the Irish Stat. it was held to be imperative to relieve upon the conditions required by it being complied with; and the Court would not admit extrinsic considerations, such as breaches of other covenants in the lease, to be brought forward by the lessor to effect the equity of redemption of the tenant's interest evicted for non-payment of rent: (see *Swanton* v. *Biggs*, Beat. 240) It is important to have settled forms of decrees. In this case the decree strictly followed the words of Irish Statute 11 Ann cap 2: (*Ib.*) In a redemption suit by a tenant against his landlord, it appeared that a mortgagee in possession of the tenant's interest had not been served with the ejectment, and that on executing the writ of possession the landlord made a six months' lease to him. On the expiration of that lease the mortgagee refused to deliver possession to the landlord, and retained it with the privity and consent of the tenant. The landlord thereupon brought an ejectment on the title to evict the mortgagee and the persons in possession, and recovered judgment therein, but did not execute the writ of possession. The tenant had made the mortgagee a party defendant to his suit and charged that he and the landlord were in collusion; but the prayer of the bill was simply for a redemption. The usual accounts in a redemption suit were directed, and also an account of what the mortgagee, without wilful default, might have received. The Master reported that the entire amount of the head rent, including that for which the ejectment was brought, was due; that the mortgagee might, without wilful default, have received much more than the amount of head rent; and that, without wilful neglect, he did not receive anything: Held, first, that it was not wilful neglect in the landlord not to have taken possession under the judgment in ejectment on the title; secondly, that though the mortgagee was bound to apply the rents, in the first place, in payment of the head rent, yet as no account had been taken of the sum due on foot of the mortgage, the plaintiff was not entitled to a personal decree against the mortgagee, to be repaid the sums which he should be obliged to pay the landlord for arrears of rent: (*Reade* v. *Montmorency*, 5 Ir. Eq. R. 40.) The admission in the bill of rent being due to the landlord does not entitle him to be paid the sum lodged in Court if the bill be dismissed: (see *O'Keefe* v. *Dennhey*, 4 Ir. Eq. R. 323.) In a redemption suit, after the coming in of defendant's answer, the plaintiff entered a side bar rule dismissing his bill, and afterwards moved for the balance of the sum lodged in Court, after payment thereout of the defendant's taxed costs: Held that the motion should be granted, and that the landlord might have proceeded at law for his rent pending the proceedings in the redemption suit: (*Ib.* 323; see also *Callaghan* v. *Lesmore*, Beat. 223.)

(*h*) See note *c supra*.

neglect, make of the demised premises from the time of his entering into the actual possession thereof, (*i*) and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands. (*j*)

Eng. C. L. P. A. 1852, s. 212.

CCLXV. (*k*) If the tenant or his assignee (*l*) do and shall

(*i*) A landlord having rightfully evicted his tenant for non-payment of rent is not, when called upon to restore possession and to account, chargeable with the whole rents at which the lands were let but only with such rents as during his possession he received: (*Callaghan* v. *Lismore*, Beat. 223), and if in actual occupation himself according to the section here annotated, he shall be accountable "with so much and no more as he shall really and *bona fide*, without fraud, deceit, or wilful neglect, make of the demised premises," &c. On a lease containing a clause of distress and provision for entry in case of no sufficient distress, an ejectment for non payment of rent was brought and judgment by default obtained and the landlord sued out a writ of possession and went into possession. After bringing several ejectments unsuccessfully to recover possession, the tenant filed a bill for redemption and relief against the forfeiture: Held that he was entitled to redemption, the landlord accounting for the profits while in possession and the tenant paying the rent, interest, and costs: (*Canny* v. *Hodgens*, Hay & J. 769.)

(*j*) The plain intention of this provision is that in the event of a tenant being relieved against a forfeiture the position of both parties concerned shall be made as nearly as possible the same as if no forfeiture had taken place and no cause of forfeiture ever existed.

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 212.—Substantially the same as Eng. St. 4 Geo. II. c. 28, s. 4. The Courts even before the Statute of George II. exercised an equitable jurisdiction to stay proceedings in ejectment for non-payment of rent, upon payment of arrears of rent and costs: (*Phillips* v. *Doelittle*, 8 Mod. p. 345; *Smith* v. *Parkes*, 10 Mod. p. 383.) The Statute appears to be confirmatory of a power already inherent in the Courts: (*Roe d. West* v. *Davis*, 7 East. 363; *Doe d. Harris* v. *Masters*, 2 B. & C. 490.)

(*l*) *Tenant or his assignee.* The construction of these words may be open to doubt when considered in connexion with the two preceding sections and the expressions used in those sections. Section cclxiii. gives facilities to landlords in allowing them to bring ejectment for non-payment of rent, which may be conducted to judgment and execution, and then enacts that "in case the *lessee*, or his assignee, or *other person claiming or deriving under the said lease*" shall suffer a certain time to elapse without paying the rent, and without proceedings in equity for relief, then "the said lessee, and his assignee, and all other persons claiming and deriving under the said lease," shall be barred from relief both in law and equity. Section clxiv. provides that in case "the said *lessee*, his assignee, or other person claiming any right, title or interest in law or equity of, in, or to the said lease," shall within the time limited; *after* judgment at law file a bill in equity for redemption, relief may be given upon certain terms. Then comes

at any time before the trial in such ejectment, (*m*) pay or tender to the lessor or landlord, his executors or administrators, or his or their Attorney in that cause, or pay into the Court wherein the same cause is depending, (*n*) all the rent and arrears, together with the costs, (*o*) then and in such case all further proceedings on the said ejectment shall cease and be discontinued; (*p*) and if such lessee, his executors, administrators, or assigns, (*q*) shall, upon such proceedings as aforesaid, be relieved in equity, (*r*) he and they shall have, hold, and enjoy the demised lands according to the lease thereof made, without any new lease. (*s*)

Discontinuance if tenant pay arrears of rent and costs before trial, &c.

If he be relieved in Equity.

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the section here annotated (cclxv). It applies to the case of a party coming for relief before judgment to the Court in which the action is brought. It begins by enacting that "if the *tenant* or his assignee do and shall," &c., and further on proceeds thus, "and if *such* lessee, his executors, administrators, or assigns shall," &c. In order to construe the three sections consistently, the word "tenant" must be construed as meaning something more than "lessee or assignee." It at least embraces "a sub-lessee:" (*Doe dem. Wyatt* v. *Byron et al*, 1 C.B. 623), and a "mortgagee:" (*Doe d. Whitfield* v. *Roe*, 3 Taunt. 402.)

(*m*) See *Goodright* v. *Noright*, 2 W. Bla. 746; *Doe d. Forster* v. *Wandlass*, 7 T.R. 117; *Doe d. West* v. *Davis*, 7 East. 363; *Doe d. Harris* v. *Masters*, 2 B. & C. 490; *Doe d. Lambert* v. *Roe*, 3 Dowl. P. C. 557.

(*n*) *i. e.* The ejectment under s. cclxiii. and which must be brought under a right of entry for non-payment of rent. In ejectment brought on a clause of re-entry for not repairing as well as for rent in arrear, upon an application by the tenant to stay the proceedings, it was insisted for the plaintiff that the case was not within the Act of George II. for that it was not an ejectment founded singly on the Act, but brought likewise on a clause of re-entry for not repairing: Held that the application was within the Statute: (*Pure d. Withens et al.* v. *Sturdy*, Bull N. P. 97.) In an action of ejectment on a forfeiture for breach of a covenant to repair only, the Court has no power to stay proceedings upon any terms against the consent of the plaintiff: (*Doe d. Mayhew* v. *Asby*, 10 A. & E. 71.) In one case the plaintiffs were both devisees and executors. Defendant moved to stay proceedings upon payment of the rent due to plaintiffs as devisees, they not being entitled to bring ejectment as executors. There appeared to be a mutual debt due to defendant by simple contract, and defendant offered to go into the whole account, taking in both demands as devisees and executors having just allowances, which plaintiffs refused; but the rule was made absolute to stay proceeding on payment of the rent due to plaintiffs as devisees, together with costs: (*Duckworth d. Tubley et al.* v. *Tunstall*, Barnes, 184.)

(*o*) No rent can become due except on the days when reserved The "arrears" here intended must be computed to the last day whereon rent is made payable by the demise and not to the time of computation: (*Doe d. Harcourt* v. *Roe*, 4 Taunt. 883.)

(*p*) The party who makes application should obtain an order to the effect here enacted.

(*q*) See note *l supra*.

(*r*) *i. e.* Under s. cclxiii.

(*s*) It would seem that if the landlord obtain possession and crop the land, the Court will not compel him to

Eng. C. L. P. A. 1852, s. 213.

Proceedings when the term for which any tenants hold the lands leased, shall have expired

CCLXVI. (*t*) **Where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing,** (*u*) **any lands, tenements, or hereditaments for any term or number of years certain, or from year to year,** (*v*) **shall have expired, or been determined either by the landlord or tenant by regular notice to quit,** (*w*) **and such tenant or any one holding or**

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pay over the value of the crop to the tenant though it exceed the amount of rent reserved in the demise: (see *Doe Upton* v. *Witherwitck*, 3 Bing. 11.)

(*t*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 213.—Substantially the same as Eng. Stat. 1 Geo. IV. cap. 87, s. 1. The words in brackets are original and not to be found in the English Statutes. The main object of the section here annotated is to save the landlord the necessity of going to trial where the tenant holds over vexatiously and where the trouble and expense of an ejectment may be very disproportionate to the value of the premises sought to be recovered: (see *Doe d. Phillips* v. *Roe*, Abbott, C. J, 5 B. & Al. 768.)

(*u*) The words "under a lease or agreement in writing" apply to the whole sentence and are not confined to the case of a tenant holding for a number of years certain: (*Doe d. Bradford* v. *Roe*, Bayley, J, 5 B. & Al. 770.) Therefore where a tenant holds from year to year but without a lease or agreement in writing, the case is not within the Statute: (*Ib.*) A letting by parol is clearly not within the Statute: (*Rees d. Stepney* v. *Thrustout*, McClel. 492.) With reference to the meaning of the word "tenant," see *Jones* v. *Owen*, 5 D. & L. 669; *Banks* v. *Rebbeck*, 20 L. J. Q. B. 476.

(*v*) The intention of the Legislature appears to be to make provision for at least three classes of cases—tenancies from "year to year;" for "a year or number of years certain;" and for any other "term," though less than a year, for instance, three months: (*Doe d. Phillips* v. *Roe*, *ubi supra*.) A tenant holding from quarter to quarter, subject to a determination of the tenancy by three months' notice to quit, is not within the meaning of the section: (*Doe d. Carter et al.* v. *Roe*, 2 Dowl. N. S. 449), nor is a tenant whose term is determinable on lives: (*Doe d. Pemberton* v. *Roe*, 7 B. & C. 2), for in neither of these cases can the tenancy be said to be "a term or number of years certain," such as intended. Where after entering into an agreement for a tenancy for a term certain, the parties on the same day made another agreement for the tenancy to continue as long as the lessor should be vicar of a parish, held nevertheless to be a case within the Statute: (*Doe d. Newstead* v. *Roe*, 10 Jur. 925.)

(*w*) The enactment applies only to a case where the tenancy, if by lease, has expired by effluxion of time, or if a yearly tenancy, has been determined by a regular notice to quit: (*Doe d. Tindal* v. *Roe*, Tenterden, C. J, 1 Dowl. P.C. 146), and not to the case of a lessee holding over after notice to quit given by himself, where his tenancy has not expired by effluxion of time: (*Doe d. Cardigan* v. *Roe*, 1 D. & R. 540), nor where the tenant holds over after having surrendered his term: (*Doe d. Tindal* v. *Roe*, *ubi supra*.) If a landlord allow his tenant to hold over more than a year after the expiration of his term, a tenancy from year to year is thereby created: (*Doe d. Thomas* v. *Field*, 2 Dowl. P. C. 542), see also *Doe d. Hall* v. *Wood*, 14 M. & W. 682;) and if the lease contain a condition for re-entry on non-payment of rent, a tenancy from year to year thus created is subject to that condition: (*Thomas* v. *Packer*, Jan. 28, 1857, Ex. III. U.C.L.J.58.) The section does not apply where a right of entry is sought to be enforced for non-performance of

claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing (*x*) made and signed by the landlord or his agent, (*y*) and served personally upon, or left at the dwelling house or usual place of abode of such tenant or person, (*z*) and the landlord shall thereupon proceed by action of ejectment for recovery of possession, it shall be lawful for him at the foot of the Writ in ejectment, to address a notice to such tenant or person, requiring him to find such bail, (*a*) if ordered by the Court or a Judge, (*b*) and for

and the tenant shall refuse to deliver possession, after notice.

Notice to tenant to find security.

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covenants in any case where the term created has not expired: (*Doe d. Cundy* v. *Sharpley*, 15 M. & W. 558), nor where there is a *bona fide* dispute between the parties as to title: (*Doe d. Sanders* v. *Roe*, 1 Dowl. P. C. 4.) A notice to quit given by one of several joint tenants purporting to be given on behalf of all is good for all: (*Doe d. Aslin* v. *Summersett*, 1 B. & Ad. 135; *Doe d. Kindersley et al* v. *Hughes*, 9 M. & W. 139.)

(*x*) The demand may be in this form—"I, A B, do hereby, as your landlord, according to the Common Law Procedure Act, 1856, demand of and require you immediately to give and deliver up to me possession of the land and premises, with the appurtenances, situate at, &c., which you hold as a tenant thereof under and by virtue of a lease bearing date, &c., by me to you made in that behalf, your term therein having expired (or "which you hold as tenant thereof from year to year under and by virtue of an agreement in writing—*here state it*—and which tenancy of and in the same has been determined by a regular notice to quit given to you in that behalf.")

(*y*) One of several tenants in common may avail himself of the section; for it is not restricted to those cases wherein the landlord is entitled to the exclusive possession: (*Doe d. Morgan* v. *Rotherham*, 3 Dowl. P. C. 690), and applies as much to the case of a tenant suing his undertenant as to cases of plaintiffs being superior landlords: (*Doe d. Watts* v. *Roe*, 5 Dowl. P. C. 213.)

(*z*) Where the tenant had left England for America, his wife being still in possession of the premises, a service of the demand left on the premises, the wife having refused to take it, was held sufficient to entitle the landlord to a rule to show cause why the service should not be deemed good in order to entitle the landlord to a rule under the Statute of George II.: (*Doe d. Selyood* v. *Roe*, 1 W.W. & H. 206.) Further as to sufficiency of service, see notes to s. cxxiii.

(*a*) It is enacted that "the landlord shall thereupon," &c., and that "it shall be lawful for *him* at the foot of the writ in ejectment to address a notice," &c. Therefore the notice ought to be signed in the name of the landlord: (see *Anon.* 1 D. & R. 435, n), but a notice signed "A. B. agent for plaintiff" is sufficient: (*Doe d. Beard* v. *Roe*, 1 M. & W. 360.) The intention is that the notice shall be as if from the landlord, and if such be the construction of it the bare formality of signature will be immaterial: (see *Goodtitle d. Norfolk* v. *Notitle*, 5 B. & Ald. 849.) If signed by an agent it is not necessary that there should be an affidavit in proof of the agency: (*Doe d. Geldart* v. *Roe*, 1 W. W. & H. 846.) A notice given by one of several lessors' joint tenants enures to the benefit of all: (*Doe d. Austin* v. *Summersett*, 1 B. & Ad. 135; *Doe d. Kindersley* v. *Hughes*, 7 M. & W. 139.)

(*b*) *Court or Judge.* Relative powers see note *m* to s. xxxvii.

such purposes as are hereinafter next specified, and upon the appearance of the party, [or in case of non-appearance,] on [making and filing] an affidavit of service of the Writ and notice, (*c*) it shall be lawful for the landlord producing the lease or agreement, or some some counterpart or duplicate thereof, (*d*) and proving the execution of the same by affidavit, (*e*) and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, as the case may be, (*f*) and that possession has been lawfully demanded in manner aforesaid, (*g*) to move the Court or to apply to a Judge at Chambers (*h*) for a rule or summons (*i*) for such tenant or person, to show cause, within a time to be fixed by the Court or Judge on the consideration of the situation of the premises, (*j*) why such tenant or person should not enter into a recognizance by himself and two sufficient

Rule to show cause why tenant should not give security.

(*c*) As to affidavits generally, see s. xxiii. and notes thereto, divisions 3, 7, 8, 9, intituled "Deponent," "Commissioner," "Signature of Deponent," "Jurat;" also N. R. 109, *et seq.*

(*d*) The original agreement or some counterpart, or duplicate thereof, when counterparts or duplicates have been executed, must be produced. When produced, the instrument should upon the face of it appear to be valid: (*Doe d. Caulfield et al.* v. *Roe*, 3 Bing. N.C. 329; see also *Doe d. Holder* v. *Rushworth*, 4 M. & W. 74.) In England it is necessary that the instrument when first produced, should be properly stamped: (*Ib.*)

(*e*) It is not indispensable that the attesting witness, if there be one, should make the affidavit of execution: (see *Doe d. Morgan* v. *Rotherham*, 3 Dowl. P. C. 690; *Doe d. Gowland* v. *Roe*, 6 Dowl. P. C. 35; also *Doe d. Avery* v. *Roe*, 6 Dowl. P.C. 518, and s. clxiii. of this Act.)

(*f*) It would be well for the affidavit to state when the notice was given, in order that the Court may judge of its sufficiency and regularity: (*Doe d. Topping* v. *Boast*, 7 Dowl. P. C. 487.) The affidavit should not omit the word "regular" in referring to the notice: (*Ib.*) The lease, agreement, counterpart, or duplicate should be annexed to the affidavit: (*Doe d. Foucan* v. *Roe*, 2 L. M. & P. 322.)

(*g*) See note *x*, *supra*.

(*h*) It is enacted that it shall be lawful for the landlord producing, &c., and proving, &c., and upon affidavit, &c., to move the Court or a Judge. These several acts mentioned are conditions precedent to the application and necessary to sustain it.

(*i*) Though the powers of the Court and of a Judge in Chambers are for the purpose of the application under this section made co-ordinate, it is apprehended that the Court will be slow to entertain the application in the first instance. For all necessary forms of proceedings under this section, see Chit. F. 6 Edn. 388 *et seq*, 7 Edn. p. 556 *et seq.*)

(*j*) Two points are involved in this sentence, first, that the time within which cause must be shown should be fixed by the Court or Judge, second, that it shall be determined on a consideration of the situation of the premises.

sureties, (*k*) in a reasonable sum, (*l*) conditioned to pay the costs and damages which shall be recovered by the Claimant in the action, (*m*) and it shall be lawful for the Court or Judge, upon cause shown, or upon affidavit of the service of the rule or summons, in case no cause shall be shown, (*n*) to make the same absolute in whole or in part, and to order such tenant or person within a time to be fixed upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner, as shall be specified in the said rule or summons, or such part of the same so made absolute, (*o*) and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the Court or Judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such rule or order has been made or served and not complied with, shall be at liberty to sign Judgment for recovery of possession

And if no cause be shown, judgment for landlord.

(*k*) "*Two*," not "two or more." The defendant as well as the bail should enter into the recognizance.

(*l*) The reasonableness of which must be determined by the Court or Judge. It is unnecessary to express in the rule *nisi* the amount of the security required. The amount should be determined when the rule is made absolute, because then the Court or Judge will be enabled to decide what may be a reasonable sum to be fixed in view of all the circumstances of the case: (*Doe d. Phillips* v. *Roe*, 5 B. & Al. 766; *Doe Anglesey* v. *Brown*, 2 D. & R. 688.)

(*m*) Under the Statute of George II. it was held that the Court was only empowered to give a reasonable sum for the costs of the action and not for *mesne* profits: (*Doe d. Sampson* v. *Roe*, 6 Moore, 54.) But in a case where *mesne* profits can now be recovered on the trial, *i. e.* where the ejectment is brought by a landlord against his tenant, there does not appear to be any reason why they should not be included in the recognizance: (Paterson, McNamara, and Marshall, p. 970.) Special damage alleged to have been caused by the tenant to the premises cannot, it seems, be inserted in the recognizance: (*Doe d. Marks* v. *Roe*, 6 D. & L. 87.) The Court or Judge in any event can direct the recognizance to be taken to the extent of a year's value of the premises and a reasonable sum for the costs of the action. The amount to be inserted in the recognizance in respect of the costs should be ascertained by the Master: (*Doe Levi* v. *Roe*, 6 C. B. 272.) In England the amount usually inserted is twice the annual rent, together with £40 for costs: (Woodfall's L. & T. 848 n.)

(*n*) If the tenant can show with certainty that a new demise has been made to him, that will be sufficient cause: (see *Doe d. Durant* v. *Roe*, 6 Bing. 574.)

(*o*) The *Bail-piece* may be as follows:—

County of, &c. } On the, &c.
To wit. } A. B. against C. D.
For the recovery of, &c. (*according to the writ.*)
Recognizance in £100 by rule of Court or Judge's order. } The sureties are—B. B. of, &c. butcher, and T. B. of, &c., tailor.
Taken and acknowledged, &c.

The *acknowledgment* may be as follows—

and costs of suit, in the form contained in Schedule (A) to this Act annexed, marked No. 20, or to the like effect;[p] (p) [Provided always, (q) that nothing herein contained shall be held to prevent or restrict any landlord from proceeding against his tenant, who shall wrongfully hold over after his term has expired, according to the provisions contained in an Act of the Parliament of Upper Canada, passed in the fourth year of the Reign of His late Majesty King William the Fourth, intituled, *An Act to amend the law respecting real property, and to render the proceedings for recovering possession thereof, in certain cases, less difficult and expensive.*]

(3) §5 q Proviso.

Landlord may proceed under Act of U. C. 4 Wm. 4, c. 1.

Eng. C. L. P. A. 1852, s. 214.

CCLXVII. (r) Whenever it shall appear on the trial of any

[p] You do jointly and severally undertake that if you, C. D., shall be condemned in this action, you, C. D., shall pay the costs and damages which shall be recovered in such action by the plaintiff, or in default of your so doing, that you, B. B. and T. B., will pay the costs and damages for the defendant.

Are you content?

(Chit. F. 7 Edn. 562.)

(p) It may be a part of the rule that the landlord shall be at liberty to sign judgment in case of a default on the part of the tenant to give the required securities: (see *Doe* v. *Roe*, 2 Dowl. P. C. 180.)

(q) This proviso is original, and intended to save s. 53 and following sections of 4 Wm. IV. cap. 1, under which a given mode of procedure may be had against overholding tenants. One important distinction between the section here annotated and the Statute of William IV. is, that under the latter proceedings may be taken against a tenant holding over after the expiration of a term created by *parol* demise. And, on the other hand, under the latter no proceedings can be had where the interest of the tenant instead of being determined by effluxion of time is determined by act of the parties. The Statute of William IV. has been held not to apply to a tenancy at will: (*Adverant* v. *Shriver, MS.* T. T. 6 & 7 Wm. IV. R. & H. Dig. "Landlord and Tenant," II. 2.) It seems to apply only to the plain case of a tenant overholding after the expiration of a term expressly created by contract between the parties: (see *Adams* v. *Baines*, 4 U. C. R. 157.) A tenant remaining in possession after the expiration of his term, and paying two months rent, cannot in the middle of the third month be ejected by his landlord as an overholding tenant within the meaning of the 4 W. IV. cap. 1. (*Ib.*) The Statute does not apply to tenants whose terms are alleged to be forfeited by alleged breach of covenants: (*McNab* v. *Dunlop et al*, 3 U. C. R. 135.) The Court will not under the Act of William IV. grant an attachment against an overholding tenant for non-payment of costs until an order to pay them has been first served upon him and a demand made: (*McLachlan in re*, 3 U.C. R. 331.) When once a tenant has been ejected under the operation of the Act it is no ground for his restoration to possession that after the finding of the jury the agent of the landlord received a month's rent from the tenant: (*Wright* v. *Johnson*, 2 U. C. R. 273.) Where a tenant overholds after the expiration of his term the landlord has a right to take possession if he can without a breach of the peace: (*Boulton* v. *Murphy et al*, 5 O.S. 371.)

(r) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 214.

ejectment at the suit of a landlord against a tenant, (*s*) that such tenant or his Attorney hath been served with due notice of trial, (*t*) the Judge before whom such cause shall come on to be tried, shall, whether the Defendant shall appear upon such trial or not, (*u*) permit the Claimant on the trial, after proof of his right to recover possession of the whole or of any part of the premises mentioned in the Writ in ejectment, (*v*) to go into evidence of the mesne profits thereof, which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same, (*w*) down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein, (*x*) and the Jury on the trial finding for the Claimant shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, (*y*) and also as to the amount of the damages to be paid for such mesne profits, (*z*) and in such case the landlord shall have Judgment within the time hereinbefore provided, (*a*) not only for the recovery of possession and

Court may allow proof of mense profits at trial, as soon as the landlord shall have established his right to recover possession, &c.

(*s*) The action of debt for double value given by Stat. 4 Geo. II. cap. 28 is not affected by this enactment: (see *Hamer* v. *Laing*, 18 U. C. R. 233.)

(*t*) As to which see s. cxlvi. and notes thereto.

(*u*) In case of defendant's non-appearance at the trial, if claimant should be unprepared with proof of title he might waive mesne profits and take a verdict under s. ccxxxvii. of this Act.

(*v*) See s. ccxxxiv.

(*w*) See note *w* to s. cclxvi.

(*x*) This section expressly provides that claimant may go into the question of mesne profits; and it does not contain any provision which makes the insertion of such a claim a condition precedent to the claimant's right to recover in respect of them. The only matter which is made a condition precedent is that the tenant or his attorney shall be served with due notice of trial. The claim for mesne profits must be considered as included in the writ: (*Smith* v. *Tett*, 9 Ex. 307, S. C. 20 L. & Eq. 483; see also *Freer* v. *Savage*, 18 Jur. 680; *Doe d. Thompson* v. *Hodgson*, 12 A. & E. 135.) In this respect the C. L. P. Act differs from our former Statute 14 & 15 Vic. cap. 114, which enacted that a plaintiff in ejectment, to entitle himself to recover for mesne profits at the trial of the ejectment, should with the original summons deliver a notice of his intention to claim substantial damages: (s. 12.) If he omitted to give the notice, he waived all such claim, and could not bring any action afterwards on that account: (see *Curtis et ux.* v. *Jarvis*, 10 U. C. R. 466; *Hamer* v. *Laing*, 13 U. C. R. 233.)

(*y*) See s. ccxxxiv.

(*z*) *Such mesne profits, i. e.* "which shall or might have accrued from the day of the expiration or determination of the tenant's interest down to the time of the verdict given in the cause or some preceding day to be specially mentioned therein."

(*a*) See s. ccxxxix; further see s. cclxviii.

costs, (*b*) but also for the mesne profits found by the Jury; (*c*) Provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, (*d*) or from the day so specified therein, (*e*) down to the day of the delivery of possession of the premises recovered in the ejectment.

Proviso: as to mesne profits after verdict, &c.

Eng. C. L. P. A. 1852, s. 215.

CCLXVIII. (*f*) In all cases in which such security shall have been given as aforesaid, (*g*) if upon the trial a verdict shall pass for the Claimant, (*h*) unless it shall appear to the Judge

(*b*) Costs as between attorney and client cannot be recovered by claimant: (*Doe* v. *Filliter*, 13 M. & W. 47.)

(*c*) See s. ccxli.

(*d*) The former part of this section permits claimant to recover such mesne profits "as shall or might have accrued *from* the day of the expiration or determination of the tenant's interest *down to the time of the verdict* given in the cause." Then it is enacted that "nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue *from the verdict*, &c., down to the day of the *delivery of possession*," &c. The inference is that if a claimant neglect at the trial of an ejcotment to recover mesne profits "down to the time of the verdict" he is barred from bringing an action for such mesne profits, and in such action restricted to mesne profits "*from* the verdict," &c.

(*e*) Claimant may at the trial of the ejcotment recover mesne profits "down to the time of the verdict given in the cause or to some *preceding day* to be specially mentioned in the writ." This is the day to which reference is here made as "the day so specified." In an action for mesne profits it has been held that the judgment in ejectment is conclusive of plaintiff's right to possession from the day of the demise laid: (*Dodwell* v. *Gibbs*, 2 C. & P. 615), but to be conclusive must be replied by way of estoppel to a plea of not possessed: (*Doe* v. *Wright*, 10 A. & E. 763; *Mathew* v. *Osborne*, 13 C. B. 919.) To an action for mesne profits from December, 1844, to March, 1846, it is no estoppel to reply a judgment in ejectment on a demise laid as of 14th October, 1845: (*Doe* v. *Wellsman*, 2 Ex. 368; see also *Litchfield* v. *Ready*, 15 L. J. Ex. 140.) Though formerly a judgment against the casual ejector was held not to estop a defendant in an action for mesne profits from disputing the title of plaintiff from the time of the demise laid in the action of ejectment: (*Ponton* v. *Daly*, 1 U. C. R. 187), it is now settled that a judgment by default is as much conclusive if properly replied as a judgment on verdict: (see note *d* to s. ccxxxi.) In trespass for mesne profits it is neeessary to state that the land is the land of the plaintiff: (*Grant et al.* v. *Fanning*, Tay. U.C.R.470.) And in such an action defendants may give in evidence in mitigation of damages, the value of buildings erected on the premises by them: (*Lindsay et al.* v. *McFarling*, Dra. Rep. 6), or other substantial improvements made by them: (*Patterson* v. *Reardon*, 7 U. C. R. 326.) A defendant may be sued for mesne profits though he was never in actual occupation: (*Doe* v. *Harlow*, 12 A. & E. 40.)

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 215, the origin of which is Eng. Stat. 1 Geo. IV. dap. 87. s. 3.

(*g*) Under s. cclxvi.

(*h*) *Qu.* And one of several claimants?

before whom the same shall have been had, that the finding of the Jury was contrary to the evidence, or that the damages given were excessive, (*i*) such Judge (*j*) [may in his discretion order that Judgment may be entered and execution issue in favour of the Claimant at the expiration of six days next after the giving of such verdict.] (*k*)

Court may order execution within six days, in cases where security is given, unless, &c.

CCLXIX. (*l*) All recognizances and securities entered into [in pursuance of the Section of this Act numbered two hundred and sixty-six], (*m*) may and shall be taken respectively in such manner and by and before such persons as are provided and authorized in respect of recognizances of bail upon actions and suits depending [in the said Superior Courts, and subject to the like fees and charges]; (*n*) but no action or other proceeding (*o*) shall be commenced upon any such recognizance or

Eng. C. L. P. Act 1852, s. 216.

As to recognizances under sec. 266, and proceedings thereon.

(*i*) The finding of the jury intended is as to the right of possession: (s. cexxxiv), and the damages intended those for mesne profits: (s. cclxvii.)

(*j*) *Such Judge. i. e.* the Judge before whom the trial shall have been had.

(*k*) The words in brackets are in substitution for a wholly different provision in the section of the Eng. C. L. P. Act corresponding with the one here annotated. In England upon a finding for claimant, unless the Judge make an order to the contrary, judgment may be entered on the fifth day in term after the verdict, "or within fourteen days after verdict, whichever shall first happen:" (Eng. C. L. P. A. 1852, s. 185.) In Upper Canada, unless ordered to the contrary, no judgment in ejectment shall be entered until "the fifth day in term after the verdict:" (s. ccxxxix.) Thus there exists a difference in the language of the two sections, which is necessary to be noted. By the Eng. C. L. P. Act, 1852, s. 215, in the event of execution being stayed until the term following, the verdict when a longer period than fourteen days, provision is made requiring defendant to give security, "not to commit any waste or act in the nature of waste or other wilful damage, and not to sell or carry off any standing crops, hay, straw, or manure produced or made (if any) upon the premises, and which may happen to be thereupon from the day on which the verdict shall have been given, to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be."

(*k*) As to computation of time see note *d* to s. lvii.

(*l*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 216,—the origin of which is Eng. Stat. 1 Geo. IV., chap. 78, s. 4.

(*m*) Instead of the words in brackets read in Eng. C. L. P. Act, "as last aforesaid," having reference to recognizances against waste: (see note *j* to s. cclxviii.)

(*n*) Instead of the words in brackets read in Eng. C. L. P. Act, "in the Court in which any such ejectment shall have been commenced, and the officer of the same Court with whom recognizances of bail are filed, shall file such recognizance and security, for which respectively the sum of two shillings and sixpence and no more shall be paid." As to recognizance and the practice of bail generally in Upper Canada, see note *u* to s. xxiv.

(*o*) *Or other proceeding*, intending a proceeding by *sci. fa.*

security (*p*) after the expiration of six months (*q*) from the time when possession of the premises or any part thereof shall actually have been delivered to the landlord. (*r*)

Eng. C. L. P. A. 1852, s. 218. Rights of landlords not prejudiced by this Act.

CCLXX. (*s*) Nothing herein contained shall be construed to prejudice or affect any other right of action or remedy which landlords may possess in any case hereinbefore provided for, otherwise than hereinbefore expressly enacted. (*t*)

Eng. C. L. P. A. 1852, s. 219. Mortgagor sued in ejectment by his mortgagee, may pay into Court the amount of the mortgage debt, interest and costs, and shall thereon be dis-

CCLXXI. (*u*) Where an action of ejectment shall be brought by any mortgagee, his heirs, executors, administrators, or assignees (*v*) for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, (*w*) and no suit shall be then depending [in the Court of Chancery] (*x*) for or touching the foreclosing or redeeming of such mortaged lands, tenements, or hereditaments, (*y*) if the person having right to redeem such mortgaged lands, tenements, or hereditaments, (*z*) and who shall appear and become Defendant in such action, (*a*) shall at

(*p*) The condition of which should be "to pay the costs and damages which shall be recovered by the claimant:" (s. cclxvi.)

(*q*) *i. e.* Calendar months: (12 Vic. cap. 10, s. v, sub-s. 11.)

(*r*) As to computation of time see note *d* to s. lvii.

(*s*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 218.

(*t*) Thus actions of assumpsit, debt, or covenant for rent according to the nature of the contract of letting, may still be brought. The right of proceeding against overholding tenants under 4 Wm. IV. cap. 1, is saved by express proviso in s. cclxvi.

(*u*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 219,—the origin of which is Eng. Stats. 7 Geo. II. cap. 20, s. 1.

(*v*) Although plaintiff being a mortgagee after the commencement of an action by him receive notice from a subsequent mortgagee not to part with the title-deeds, the case is still within the Statute and a rule will be granted directing such first mortgagee on payment of principal, interest, and costs, to deliver up the title-deeds to the mortgagor: (*Dixon* v. *Wigram*, 2 C. & J. 613.)

(*w*) The Act of 7 Geo. II. cap. 20, s. 1, which is still in force, extends also to actions brought "on any bond for payment of the money secured by such mortgage or performance of the covenants therein mentioned," which words have been held to include actions on covenants contained in the mortgage: (*Smeeton* v. *Collyer*, 2 Ex. 457.) The section here annotated is restricted to actions of ejectment, and applies only to mortgagees not in possession: (*Sutton* v. *Rawlings*, 3 Ex. 407), who have not attempted to exercise powers of sale, if there be such in their mortgages: (*Ib.*)

(*x*) Instead of the words in brackets read in Eng. C L. P. Act "in any of her Majesty's Courts of Equity in that part of Great Britain called England."

(*y*) There should be an affidavit of this fact: (*Wilkinson* v. *Traxton*, Selwyn's N. P. 700, 11 Edn.)

(*z*) See note *m* to s. cclxxii.

(*a*) An appearance by the party is necessary before he can take the benefit of this enactment: (*Doe d. Tubb* v. *Roe*, 4 Taunt. 887; *Doe d. Hurst* v.

any time pending such action, (*b*) pay unto such mortgagee; (*c*) or in case of his refusal, shall bring into the Court where such action shall be depending, (*d*) all the principal moneys and interest due on such mortgage, (*e*) and also all such costs as have been expended in any suit at law or in equity upon such mortgage, (*f*) (such money for principal, interest, and costs, to be ascertained and computed by the Court where such action is or shall be pending, or by the proper officer by such Court

charged, and mortgagee may be ordered to recovery.

Clifton, 4 A. & E. 814.) The Court has no jurisdiction until after appearance: (*Ib.*) If a mortgagee recover possession of mortgaged premises under a judgment in an undefended ejectment the Court has no jurisdiction to restore on payment of debt, interest, and costs, the possession to the mortgagor who has not appeared: (*Doe d. Tubb* v. *Roe, ubi supra.*) Unless the mortgagor make himself defendant, the Court will not interfere either under the Statute or in the exercise of its general power over actions in the Court: (*Doe d. Hurst* v. *Clifton, ubi supra.*) The fact of the mortgagor's appearance ought to be shown in his affidavit: (*Doe d. Cox* v. *Brown*, 6 Dowl. P. C. 471.)

(*b*) *i. e. Before* judgment: (*Wilkinson* v. *Traxton*, Selwyn's N. P. 700, n. 11 Edn.; *Amis* v. *Lloyd*, 3 Ves. & B. 15; but see *Doe d. Millburne* v. *Sibbald*, 4 U. C. O. S. 330.)

(*c*) See note *v*, *ante*.

(*d*) If the section were strictly construed, it would seem to contemplate that the mortgagor should first tender the money to plaintiff, and that only in case "of his refusal" will the mortgagor be entitled to make application to the Court. But under the Statute of George II. in which the expression used corresponds precisely with that of this section, it was not usual for the affidavit to state that the money had been tendered: (*Filbee* v. *Hopkins*, 6 D. & L. 264.)

(*e*) The Court of Queen's Bench stayed proceedings upon payment of principal, interest, and costs, in an ejectment by plaintiff claiming under a deed absolute upon its face, where it appeared that the deed was in truth a security for money lent: (*Doe d. Shuter et al* v. *Maclean*, 4 U.C. O. S. 1), and refused to permit plaintiff to include in the redemption money a simple contract debt due to him by the mortgagor: (*Ib.*)

(*f*) The Legislature intend to exonerate the mortgagor from the delay and expense of an equity suit to redeem, but not to deprive the mortgagee of any equity. To avoid such delay and expense, they authorise the Court of law in which the mortgagee may bring his action, to afford relief upon a summary application; but the Legislature do not purpose to lessen the fine which in equity the mortgagor should pay for the redemption of the hereditaments pledged: (*Sutton* v. *Rawlings*, Pollock, C. B, 3 Ex. 411.) Where a mortgagee in pursuance of a power of sale attempted to dispose of the property, the Court refused to compel him to re-convey the premises and deliver up the title-deeds, except upon payment of the costs of the abortive attempt at sale: (*Ib.*) So where the instalments on a mortgage were by mistake for a larger sum than was advanced, and the mortgagee on discovering the mistake gave an undertaking on a separate paper, not under seal, that only the correct sum should be demanded and afterwards assigned the mortgage, and the assignee brought an action against the mortgagor for non-payment of the instalments as set out in the mortgage, the Court refused to stay proceedings on payment of the sum really due being less than the sum

to be appointed for that purpose), (*g*) the moneys so paid to such mortgagee or brought into such Court shall be deemed and taken to be in full satisfaction and discharge of such mortgage, (*h*) and the Court shall and may discharge every such mortgagor or Defendant of and from the same accordingly, (*i*) and shall and may by rule of the same Court (*j*) compel such mortgagee to assign, surrender, or re-convey such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee has therein, and to deliver up all deeds, evidences, and writings in his custody relating to the title of such mortgaged lands, tenements, and hereditaments unto such mortgagor who shall have paid or brought such moneys into the Court, his heirs, executors, or administrators, or to such other persons as he or they shall, for that purpose, nominate and appoint.

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which according to the face of the mortgage was due: (*Baby* v. *Milne*, 5 U.C.O.S. 76.) As to costs see also *Sidney* v. *Nevinson*, Str. 699; *Archer* v. *Snatt*, Str. 1107; *Goodtitle* v. *Lonsdown*, 3 Anst. 937; *Goodright* v. *Moore*, Barnes 176; *Millard* v. *Major*, 3 Mod. 433; *Doe d. Capps* v. *Capps*, 3 Bing. N. C. 768.

(*g*) The intention of the enactment is to break in upon the jurisdiction of the Court of Chancery only to the limited extent of perfectly plain cases on admitted facts or facts capable of ascertainment by the way ordinarily pursued on motion in the Common Law Courts: (*Doe d. Harrison* v. *Louch*, per Coleridge, J, 6 D. & L. 276.) Therefore the Court of Queen's Bench refused to stay proceedings in ejectment on a mortgage on payment into Court of the money due upon the mortgage, together with the costs in the action, where the whole amount secured by the mortgage was not admitted to be due, and refused a reference to the Master to ascertain the amount actually due in such case: (*Goodtitle d. Fisher* v. *Bishop*, 1 Y. & J. 344; *Doe d. Mackenzie et al.* v. *Rutherford*, 1 U. C. R. 172; see also *Huson* v. *Hewson*, 4 Ves. 105.)

(*h*) The Court has power to order a reconveyance and delivery over of title deeds: (see *Dixon* v. *Wigram*, 2 C. & J. 613; *Smeeton* v. *Collyer*, 1 Ex. 457, and conclusion of this section.)

(*i*) A Judge in Chambers might exercise the powers conferred upon the Court by this Statute: (*Smeeton* v. *Collyer*, *ubi supra*.)

(*j*) The formal part of the rule when *nisi*, may be as follows—"Show cause why upon the defendant bringing into this Court all the principal moneys and interest due to the plaintiff upon his mortgage upon the premises for the recovery of possession of which this action is brought, and also all such costs as have been expended in any suit or suits at law or in equity upon such mortgage (such money for principal, interest, and costs to be ascertained, computed, and taxed by the Master of this Court), the money brought into this Court should not be deemed and taken to be in full satisfaction and discharge of such mortgage, and upon payment thereof to the plaintiff why all proceedings in this action should not be stayed, and why the mortgaged premises and the plaintiff's estate and interest therein should not be assigned, surrendered, and re-con-

Eng. C. L. P. A. 1852, s. 220.

Next preceding section not to extend to cases where the right to redeem, or the sum due is contested.

CCLXXII. (*k*) Nothing herein contained shall extend to any case when the person against whom the redemption is or shall be prayed, (*l*) shall (by writing under his hand or the hand of his Attorney, Agent, or Solicitor to be delivered before the money shall be brought into such Court of law to the Attorney or Solicitor for the other side), insist either that the party praying a redemption has not a right to redeem, (*m*) or that the premises are chargeable with other or different principal sums than what appear on the face of the mortgage, or shall be admitted on the other side, (*n*) or to any case where the right of redemption to the mortgaged lands and premises in question in any cause or suit shall be contravened* or questioned by or between Defendants in the same cause or suit, (*o*)

veyed; and why all deeds, and evidences, and writings relating to the title of such mortgaged premises, and in the custody and power of the plaintiff, should not be delivered up to the defendant or to such person or persons as he shall for that purpose nominate and appoint:" (Pat. McM. & Mar. 949.) The rule absolute may be to the same effect, but directory.

(*k*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 220, the origin of which is Stat. 7 Geo. II. cap. 20, s. 8.

(*l*) *i. e.* "The mortgagee, is heirs, executors, administrators, or assignees:" (s. cclxxi.)

(*m*) A party who assumes a position inconsistent with that of a mortgagor, for instance, by disputing the mortgagee's title, will not be entitled to redeem: (*Roe* v. *Wardle*, 3 Y. & C. 70), nor if admitting mortgagee's title he has contracted to sell the equity of redemption to him: (*Goodtitle* v. *Pope*, 7 T. R. 185.) Where A, having purchased a lot of land, and paid several instalments of the purchase money, but having received no deed and being unable to meet the remaining instalments, assigned his right to B, taking a bond from him that if he should obtain the deed on the payment by A to him of £130 in two years, he would convey the land to A: Held on ejectment brought by B, the two years having expired, that A was not entitled to treat the bond as a mortgage and redeem on payment of principal, interest and costs: (*Doe d. Shannon* v. *Roe*, 5 U. C. O. S. 484.)

(*n*) The Statute does not apply where the right to redeem is disputed upon affidavits: (*Goodtitle* v. *Bishop*, 1 Y. & J. 344; *Garth* v. *Thomas*, 2 Sim. & S. 188), but in order to deprive the mortgagor of his right to redeem, it is not sufficient that the mortgagee should in the notice mentioned in this section make a mere general statement that he insists that the mortgagor has no right to redeem, and that the mortgaged premises are chargeable with other sums than appear on the face of the mortgage deed or than are admitted by the mortgagor: (*Goodtitle* v. *Lonsdown*, 3 Anst. 937; *Doe* v. *Louch*, 6 D. & L. 270; but see *Filbee* v. *Hopkins*, 6 D. & L. 264.) Enough must be stated by the mortgagee to enable the Court to determine what the question is between the parties: (*Doe* v. *Louch*, *ubi supra*.) The ulterior demand and its amount must also be stated: (*Goodtitle* v. *Lonsdown*, *ubi supra*.)

(*o*) There is a material change in the language of this clause, as it advances to specify another case to which the Statute shall not extend, wherein

* "*Contravened*" a mistake—"Controverted" probably intended.

Or to prejudice any subsequent mortgagee, &c.

or shall be any prejudice to any subsequent mortgage or subsequent incumbrance, anything herein contained to the contrary thereof in any wise notwithstanding. (*p*)

Eng. C. L. P. A. 1854, s. 93.

The same Claimant in subsequent action for the same property may

CCLXXIII. (*q*) If any person shall bring an action of ejectment after a prior action of ejectment (*r*) shall have been unsuccessfully brought by such person or by any person through or under whom he claims, against the same Defendant or against any person through or under whom he defends, the

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instead of speaking of notices, it speaks of the right of redemption *being* controverted between different defendants. Here it is certainly not enough to insist by notice in writing, but the fact of the dispute must be made out in order to get rid of the defendant's application: (*Doe d. Harrison* v. *Louch*, Coleridge, 6 D. & L. 275.)

(*p*) See note *v* to s. cclxxi.

(*q*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 93.

(*r*) The peculiarity of the action of ejectment is that a claimant may litigate a title more than once, no one action being an estoppel to subsequent actions between the same parties or their representatives: (see note *a* to s. cclxi.) This privilege, unless carefully watched by the Courts, might be productive of vexation and expense. Because of this, the Courts have exercised the jurisdiction of staying proceedings in a subsequent, until payment of costs incurred in the prosecution of a prior ejectment: (*Keene* v. *Angell et al*, 6 T. R. 740; *Doe d. Felden* v. *Roe*, 8 T. R. 655; *Doe d. Pinchard* v. *Roe*, 4 East. 585; *Benn d. Mortimer* v. *Denn*, Barnes, 180; *Doe Hussey* v. *Roe*, E. T. 3 Vic. *MS.* R. & H. Dig. "Ejectment," VI. 4.) "The reason why the Court stays proceedings on a second ejectment is to prevent vexation, for it is in the power of a person to bring as many ejectments as he pleases, unless he has been enjoined to the contrary by the Court of Chancery, which this Court has no power to do. Therefore where a plaintiff has had judgment in a former ejectment against him and is bringing a new one, we cannot deny it to him absolutely, but as it is as a creature of the Court, and an equitable proceeding, we grant it him upon paying the costs and making the recompense for the vexation he had caused in the prior ejectment:" (*Doe Hamilton* v. *Atherly*, 7 Mod. p. 422, case 338.) The practice prevails in cases where the second or subsequent action is between the representatives of the original parties or the representatives of either of them, as much as if between the original parties themselves: (*Doe d. Feldon* v. *Roe, ubi supra*; *Doe Chambers* v. *Law*, 2 W. Bl. 1180; *Doe Hamilton* v. *Atherly, ubi. sup. Doe Standish* v. *Roe*, 5 B. & Ad. 878; *Doe d. Heighley* v. *Harland*, 10 A. & E. 761) and in cases where the second or subsequent action, though not for the same land as the former suit, depends upon the same title: (*Keene d. Angel* v. *Angel*, 6 T. R. 740; *Doe d. Heightley* v. *Harland, ubi supra; Doe d. Brayne* v. *Bather*, 12 Q. B. 941), although the previous action may have been in a Court different to that in which the suit is stayed: (*Coningsby's Case*, 1 Str. 548; *Grumble* v. *Bodilly, Ib.* 554; *Doe Chambers* v. *Law, ubi supra; Anon.* 1 Salk. 225; *Doe Carthew* v. *Brenton*, 6 Bing. 469; see also *Wade* v. *Simeon*, 1 C. B. 610.) But a limitation of the practice is that it is only exercised in cases where the previous ejectment has been tried and not where the plaintiff in such previous ejectment abandoned his suit before trial, because in such cases there is

Court or a Judge (*s*) may, if they or he think fit, (*t*) on the application of the Defendant at any time after such Defendant has appeared to the Writ, (*u*) order that the Plaintiff shall give to the Defendant security for the payment of the Defendants costs, (*v*) and that all further proceedings in the cause shall be stayed until such security be given, whether the prior action shall have been disposed of by discontinuance (*w*) or by non-suit, or by Judgment for the Defendant.

Be ordered to give security for costs.

CCLXXIV. (*x*) The several Courts and the Judges thereof

consist for u.c. ch 27 § 77

little vexation and very little expense: (*Short* v. *King*, 2 Str. 681; *Brittain* v. *Greenville*, *Ib.* 1121; *Doe Selby* v. *Alston*, 1 T. R. 49; *Doe Blackburn* v. *Standish*, 2 Dowl. N. S. 26; *Doe d. Mackay* v. *Roe*, M.T. 5 Vic. *MS.* R. & H. Dig. "Ejectment," VI. 5.) If it can be shown that the previous suit was instituted and conducted without plaintiff's knowledge or privity, the subsequent, will not be stayed until payment of costs in the former suit: (see *Souter* v. *Watts*, 2 Dowl. P.C. 263.) The rule to stay proceedings in cases such as already mentioned is not, however, an inflexible one. If it be made to appear that in the previous ejectment plaintiff was nonsuited in consequence of the fraud or perjury of defendant no stay will be granted: (*Doe Rees* v. *Thomas*, 2 B. & C. 622.) This section is an extension of the principle contained in the foregoing cases. The Court now has authority not only to stay proceedings until payment of the costs of a previous ejectment, but until security be given for payment of costs in the pending suit.

(*s*) Relative powers see note *m* to s. xxxvii.

(*t*) "If *they* or *he* think fit." The decision of a Judge in Chambers when made in the exercise of a sound discretion will not be the subject of an appeal to the Court.

(*u*) Until appearance defendant is without a *locus standi* in the Court: (see note *z* to s. ccxxiv.) This was also the rule as to moving to stay proceedings for non-payment of costs in a previous suit under the old practice: (*Doe d. Flanders* v. *Roe*, 3 U. C. R. 127.) In a second ejectment for the same premises between the same parties, proceedings were thus stayed, and plaintiff, disregarding it, proceeded, and was nonsuited for not confessing lease, entry, and ouster. Defendant thereupon moved to set aside the proceedings, but so worded his affidavit as to be evidently made in the first cause, the Court notwithstanding overruled the objection and set aside the proceedings: (*Doe d. Lake* v. *Davis*, 3 U. C. O. S. 311.) In answer to an application to stay proceedings until payment of the costs of a previous suit, it has been held enough for plaintiff to deny that he claims under the same title as in the former ejectment: (*Doe d. Bailey* v. *Bennett*, 9 Dowl. P. C. 1012; see also *Doe d. Evans* v. *Snead*, 2 D. & L. 119.)

(*v*) This, it is apprehended, means the costs of the pending suit in which application is made, and has no reference to any former suit.

(*w*) The power to stay a suit until payment of the costs of a previous suit is not in general exercised, unless where the previous suit has been brought down to trial and tried: (see note *r*, *supra*.)

(*x*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 221.

Eng. C. L. P. A., 1852, s. 221.

Courts may exercise the same jurisdiction as formerly over proceedings in ejectment.

respectively, shall and may exercise over the proceedings [in ejectment under this Act], (*y*) the like jurisdiction as exercised in the old action of ejectment, (*z*) so as to ensure a trial of the title and of actual ouster when necessary, (*a*) and for all other purposes for which such jurisdiction [might have been] (*b*) exercised. (*c*)

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Mandamus.

(*d*) And in order to give to Plaintiff a further remedy by Writ of *Mandamus*, Be it enacted as follows:

(*y*) The words in brackets are original.

(*z*) In Eng. C. L. P. A. "the like jurisdiction as heretofore exercised in the action of ejectment." As to the jurisdiction exercised in the old action of ejectment, see Tillinghast's Adam's Ejectment, 224, *et seq.*

(*a*) See s. ccxlii.

(*b*) For the words in brackets read in Eng. C. L. P. A. "may at present."

(*c*) The Eng. C. L. P. A. continues, "and the provisions of all Statutes not inconsistent with this Act and which may be applicable to the altered mode of proceeding, shall remain in force and be applied thereto."

(*d*) A peculiarity in the constitution of the Courts of England and of Upper Canada is the existence of two distinct sets of tribunals for the administration of justice. These tribunals, known as Courts of Law and Equity, though in many respects acting independently of each other, in some cases occupy a common ground of concurrent jurisdiction. Proceedings in each tribunal have one object only, which is, the recovery of rights and the prevention of wrongs. The steps by which a person may seek his civil rights in a Court of Law constitute a mode of procedure known as an action. With few exceptions actions have only one object, which is compensation in damages, or in the words of the Common Law Commissioners "to procure a stipulated sum payable in respect of some debt or duty or damage in money for the loss sustained by plaintiff by the non-performance of a contract or for an injury sustained by a wrongful act." The previous part of this Act is directed to the improvement of this mode of procedure, as it existed at the time of the passing of the Act. In the following sections an attempt is made to effect an extension of the operation of an action at law. Compensation is not always adequate redress. To satisfy the demands of justice there must be a power lodged somewhere to *protect* rights and *prevent* wrongs. Until the passing of this Act that power was almost exclusively confined to Courts of Equity. It appeared to the C. L. Commissioners that "Courts of Common Law, to be able satisfactorily to administer justice, ought to possess in all matters within their jurisdiction the power to give all the redress necessary to protect and vindicate common law rights and to prevent wrongs whether existing or likely to happen unless prevented." In their opinion "a consolidation of all the elements of a complete remedy in the same Court is obviously most desirable not to say imperatively necessary to the establishment of a consistent and rational system of jurisprudence." In pursuance of this opinion, the Commissioners recommended a transfer from Courts of Equity to Courts of Law of "the power in certain cases of common law obligations and rights to enforce specific performance, and in other cases of legal wrongs commenced or threatened to prohibit by injunction the commission of wrongful acts." How far the legislature has succeeded in carrying this recommendation into effect remains to be seen

CCLXXV. (*e*) The Plaintiff, in any action (*f*) in either of the Superior Courts, (*g*) except replevin or ejectment, (*h*) may (*i*) indorse upon the Writ and copy to be served, a notice that the Plaintiff intends to claim a Writ of *Mandamus*, (*j*) and the Plaintiff may thereupon claim in the declaration, either together with any other demand which may now be enforced

Eng. C. L. P. Consol. Act, 1854, s. 68. Plaintiff giving notice thereof on the writ may claim *Mandamus* for enforcing any duty of

(*e*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 68.—Founded upon 2d Rept. C. L. Comrs. s. 46.

(*f*) *Any action.* *i. e.* whether upon contract or in tort.

(*g*) *i.e.* Queen's Bench or Common Pleas.

(*h*) In each of which forms of action the judgment is for the delivery of a specific thing, and not mere compensation for the wrong of detaining it, and therefore not requiring the remedy contained in this and the following sections.

(*i*) *Must* indorse, if the intention be to claim a *mandamus*.

(*j*) The writ of *mandamus* here intended is the old prerogative writ of that name amplified both in form and efficacy. The use intended is that of enforcing the specific performance of certain duties, "in the fulfilment of which the plaintiff is personally interested." The right of Courts of Common Law to issue the writ for such purposes, so far as the same is dependent upon this Statute, is a supplementary jurisdiction received from Courts of Equity, and will not generally be exercised, unless in cases wherein a bill for specific performance would not lie in Equity. But it by no means follows that the converse of this proposition holds good, viz., that wherever Courts of Equity will entertain a bill for specific relief Courts of Law will grant a writ of *mandamus*. There are cases in which Equity will entertain such a bill, although the party applying have no legal right whatever, and in which Courts of Law, in the absence of a legal right, would not interfere: (see *Pardoe* v. *Price*, 16 M. & W. 451; *Reg.* v. *Baby Turnpike*, 22 L. J. Q. B. 164; *Edwards* v. *Loundes*, 1 El. & B. 81.) In such cases the remedy exclusively belongs to Equity. There is a larger class of cases in which, although hitherto there has been a remedy at law, yet because of its inadequacy, Equity exercises a concurrent jurisdiction by granting specific relief where Courts of Law could only grant pecuniary compensation. To this class of cases the section under consideration appears to be chiefly directed, but in the opinion of the Courts has wholly failed to embrace them. The declared intention of the Commissioners was that each Court should possess within itself the elements of complete redress. But the words used by the Legislature to carry out this intention have fallen far short of the purpose intended. The only class of cases to which the section can without doubt be said to apply is that "in which there in a duty of a public nature, or a duty created by Act of Parliament, in the fulfilment of which some other party has a personal interest:" (*Benson* v. *Paull*, Crompton, J. 2 Jur. N. S. 425.) The language of this section, it will be noticed, gives to plaintiff the right "in any action" to claim in the declaration "either together with any other demand which may now be enforced in such action, or separately," a writ of *mandamus*. The cases in which the writ may be asked "separately" are not those in which relief might be had in Equity, but those, such, for example, as mentioned in the next succeeding note. The claim to a *mandamus* under this section must be founded upon some ground to be set forth in the declaration, which must, in addition, allege that plaintiff sustains damage, or may sustain damage by the non-performance

Defendant towards him. in such action or separately, (*k*) a Writ of *Mandamus* commanding the Defendant to fulfil any duty (*l*) in the fulfilment

of the duty, the fulfilment of which it is his desire to enforce: (s. cclxxvi.) The foundation of the claim is the broad one of right to present or prospective money compensation in the nature of damages. There must be some real difference between a *mandamus* under this section and the ordinary writ of that name. The Legislature has observed a distinction in s. cclxxxi. of this Act. The prerogative writ, as a general rule, is only granted in cases where a party has a legal right to have anything done, but has no specific means of compelling its performance by the ordinary remedy of an action at law: (See note *x* to s. cclxxxi.) There must be a specific legal right as well as the want of a *specific* legal remedy, in order to found an application for the prerogative writ: (*Ib.*) But the *mandamus* under this section would appear to be grantable in cases wherein there is a specific legal right as well as a specific but inadequate legal remedy, viz., damages. And there is a difference to be observed between a proceeding for *mandamus* and an ordinary action for the recovery of damages. The Legislature has treated the two modes of procedure as something different, but in each of which the pleadings and other proceedings shall be as near as may be the same: (s. cclxxvii.) The proceeding for a *mandamus* under this Act is a peculiar form of action described as "Action for *mandamus*:" (s. cclxxxi.)

(*k*) In Equity there may be a bill for specific performance, and a supplemental bill, in principle answering to an action under this section and a supplementary right to *mandamus*. Thus, if pending a suit for the specific performance of an agreement, for instance, of a demise of quarries, a part of the subject matter be abstracted, compensation therefor may be obtained by a supplemental bill: (*Nelson* v. *Bridges*, 2 Beav. 539.) This case is given as an illustration of a principle in which a severance of proceedings might be very necessary to complete relief but not as a precedent representing a class in which relief might be had under this section in Courts of Common Law.

(*l*) To every contract there are at least two parties. It is the duty of the one party to perform his part of the contract, and in the fulfilment of it the other party may be personally interested. This of itself, however, it appears, will not entitle the latter to obtain a *mandamus* under this section in a Court of Law. The only case decided in England under the section of Eng. C. L. P. Act corresponding with the section here annotated has narrowed the construction of the section, so as to cripple its operation, and render it almost nugatory. In a declaration on an agreement for the lease of a house plaintiff claimed a writ of *mandamus*, commanding defendant to prepare a lease in accordance with the terms of the agreement. There was a demurrer to the declaration for cause that the case was not one coming within the meaning of the Eng. C. L. P. Act. And per Campbell, C. J., "I am of opinion that this section does not extend to a duty arising out of a personal contract; if it did in all cases where a contract was to be performed, it might be resorted to, because it is the duty of every person to perform his contract. It could hardly have been the intention of the Legislature to give the Courts of Common Law a jurisdiction much more extensive than Courts of Equity have ever exercised, and yet according to the construction contended for by the plaintiff, the Courts of Common Law would have a jurisdiction to grant a *mandamus* in the case of every contract in which a person was personally interested. If the action in this case could be maintained *pari ratione* on the application of a lady, her suitor might be ordered to perform his pro-

of which the Plaintiff is personally interested. (*m*)

CCLXXVI. (*n*) The declaration in such action shall set forth sufficient ground upon which such claim is founded, (*o*) and shall set forth that the Plaintiff is personally interested therein, (*p*) and that he sustains or may sustain damage by the non-performance of such duty, (*q*) and that performance thereof

Eng. C. L. P. Act 1854, s. 69.

What shall be stated in the declaration in such case.

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mise to marry her; whereas the Courts of Equity have never interfered in that delicate contract. Therefore I am of opinion that this section *is confined to cases in which a writ of mandamus might be applied for before the passing of this Act, in which cases the provisions facilitate the remedy.* The section also extends the power which this Court (Queen's Bench) has to the other Superior Courts of Common Law in Westminster Hall, those being cases in which the power may be well and beneficially exercised:" (*Benson* v. *Paull*, 2 Jur. N. S. 425.) In the *Law Times* Report of the same case, in addition to the above, Lord Campbell is reported as having said, "It seemed to him that it was never intended to confer a power on the Common Law Courts which they could not satisfactorily exercise. If the Common Law Courts attempted to exercise this jurisdiction (specific performance) within the area which is now occupied by Courts of Equity, then they would launch into a wide sea without chart or compass. It seemed to him that their jurisdiction must be confined to those cases where there might have been a *mandamus* before the Act passed, and in which the interest of the party is of a public nature or arose under an Act of Parliament. Within *that limit* it might be very well and beneficially exercisd, but to extend it as proposed to every personal contract, would lead to great confusion and mischief:" (27 L. T. Rep. 78.)

(*m*) "The words 'personally interested' refer to a class of cases in which there is a duty of a *public nature* or a duty *created by Act of Parliament*, in the fulfilment of which some other party has a personal interest:" (*Ib.* 2 Jur. N. S. 425., Crompton, J.) Cases of nuisance may be given as an example. The public has an interest in the removal or abatement of a nuisance; but any private individual who suffers particular injury may at common law have his action for damages: (see *Brown* v. *Mallett*, 5 C. B. 599; *Dobson* v. *Blackmore*, 9 Q. B. 991; also *Russell* v. *Shenton*, 3 Q. B. 449; *Goldthorpe* v. *Hardman*, 2 D. & L. 442; *Fay* v. *Prentice*, 1 C. B. 828.)

(*n*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 69.—Founded upon 2d Rep. C. L. Comrs. s. 46.

(*o*) This differs from the practice as to the prerogative writ of *mandamus*. The ground upon which the claim to the writ is founded here required to be set forth in the declaration must, as regards the prerogative writ, be set forth upon the face of the writ itself: (*Reg.* v. *Hopkins*, 1 Q. B. 161), and if in this respect the writ be defective, nothing appearing in the return can cure the defect: (*Ib.*) Even after the return objections, whether in form or substance, can in certain cases be made to the writ: (*Rex.* v. *Margate Pier Co.* 3 B. & Al. 220.) The allegation in the declaration under this section disclosing the grounds upon which the writ is claimed will for all practical purposes answer to the similar allegation hitherto required upon the face of every writ of *mandamus*. This being the case the plea to such a declaration will be governed by the same principles as the return necessary to be made to the ordinary writ of *mandamus*.—See Tapping's Mandamus, 340.

(*p*) See note *m* to s. cclxxv.

(*q*) See note *j* to s. cclxxv.

has been demanded by him and refused or neglected. (*r*)

Eng. C. L. P. A. 1854, s. 70.

CCLXXVII. (*s*) The pleadings and other proceedings in any action in which a Writ of *Mandamus* is claimed, shall be the same in all respects as nearly as may be, (*t*) and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages; (*u*) and in case Judgment shall be given for the Plaintiff that a *Mandamus* do issue, (*v*) it shall be lawful

Proceedings in such action.

Costs.

(*r*) The demand must be specific, and non-compliance therewith clearly made to appear: (see *Reg.* v. *Frost*, 8 A. & E. 822; *Reg.* v. *Bristol R. Co.* 4 Q. B. 162; *Reg.* v. *Justices of Worcestershire*, 3 El. & B. 477.) Where a rule for a *mandamus* was discharged on the ground of there being no demand and refusal, the Court declined to grant a second rule, although upon the second application it was shown that since the discharge of the former rule a demand and refusal had taken place: (*Ex parte Thompson*, 6 Q.B. 721.) The demand may be made either by plaintiff or by some person duly authorized by him: (*Reg.* v. *Ford*, 2 A. & E. 588; *Reg.* v. *Frost*, 8 A. & E. 822; *Rex.* v. *Mayor of West Looe*, 3 B. & C. 86.) Further as to the demand, see Tapping's Mandamus, 282.)

(*s*) Taken from Eng. Stat. 17 & 18 Vic. c. 125, ss. 70-71.—Founded upon 2d Rep. C. L. Comrs. s. 46.

(*t*) It is necessary for the party to whom a *mandamus* is addressed, to make a return to it: (9 Anne, cap. 20 s. 1.) The party prosecuting the writ may plead to or traverse all or any of the material facts contained in the return: (*Ib.* s. 2.) To which the person who makes the return may reply, take issue, or demur: (*Ib.*) The party demurring may thereby impeach the validity of the writ: (*Clarke* v. *Leicestershire Canal Co.* 6 Q. B. 898.) The objection that defendant is not bound to perform the act, the performance of which plaintiff seeks to enforce may be made upon demurrer to the return as well as in opposition to the original motion for the writ: (*Reg.* v. *Whitmarsh*, 19 L. J. Q. B. 185.) If issue be joined upon a traverse of a matter of fact, and the prosecutor do not proceed to trial according to the practice of the Court, judgment for not proceeding may be had against him: (*Rex* v. *Mayor of Stafford*, 4 T.R. 689), and after trial if there be sufficient ground therefor, judgment *non obstante veredicto* may be given for the party who made the return: (*Reg.* v. *Darlington School*, 6 Q. B. 682; see further note *b* to s. ccxvii.)

(*u*) It is a general rule on an application for the prerogative writ of *mandamus* that costs shall follow the event. There is, however, a general rule which leads in an opposite direction, namely, that where the necessity of issuing a *mandamus* to a *Court*, has arisen from the mistake of the Court, the party relying upon the judgment of that Court shall not pay costs: (*Reg.* v. *Justices of Surrey*, 9 Q. B. 87.) But the Court of Queen's Bench, in England, without binding itself absolutely to general rules has always exercised a discretionary power as to such costs: (*Reg.* v. *Thames Com'rs*, 5 A. & E. 806.) Formerly there was a practice of going at great length into the merits on an application for costs of a *mandamus*, but that was found to be inconvenient, and a general rule laid down that the Court without entering into the merits would order the unsuccessful party to pay the costs: (*Reg.* v. *Ingham*, 17 Q. B. 884.) It is the ordinary practice to make a separate application for costs of a prerogative *mandamus*: (*Reg.* v. *East Anglian R. Co.* 2 El. & B. 475.)

(*v*) The form of which judgment

for the Court in which such Judgment shall be given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, (*w*) also to issue a peremptory Writ of *Mandamus* to the Defendant, commanding him forthwith to perform the duty to be enforced. (*x*)

Peremptory *Mandamus*.

Eng. C. L. P. A. 1854.

CCLXXVIII. (*y*) Such Writ (*z*) need not recite the declaration or other proceedings or the matter therein stated, (*a*) but shall simply command the performance of the duty, (*b*) and in other respects shall be in the form of an ordinary Writ of Execution, except that it shall be directed to the party and

Eng. C. L. P. A. 1854, s. 72

Form of such peremptory writ.

To whom addressed.

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shall be according to form No. 55 in Sch. to N. Rs.

(*w*) See s. clxxxii. *et seq.*

(*x*) Provision is made here for the issue of only one *mandamus*, viz., that in the nature of an execution, which therefore must be peremptory nature. The declaration represents the first writ of *mandamus* or *mandamus nisi* issued in proceedings independently of this Act. It is a rule in such a proceeding that no peremptory writ shall issue until the proceedings on the first writ of *mandamus* are completed: (*Reg.* v. *Baldwin*, 8 A. & E. 947), and when granted peremptorily, the Court will not hear any return to it: (*Reg.* v. *Ledgard*, 1 Q. B. 616), other than that of compliance: (s. cclxxviii.)

(*y*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 72.—Founded upon 2d Rep. C. L. Comrs. s. 46.

(*z*) *Such writ*, *i. e.* the peremptory writ of *mandamus* mentioned in the preceding section.

(*a*) A peremptory *mandamus* issued independently of this Statute need not in general recite the previous writ of *mandamus*, to which in a great measure the declaration under the practice established by this Act corresponds. But in form the peremptory writ must be the same as the writ originally awarded, that is to say, there must not be any substantial variance, otherwise defendants would have a right to make a new return to it, a step which the practice forbids. The *mandamus nisi* orders the act to be done, or cause to be returned for not doing it; whereas the peremptory mandamus commands the act to be done, and will admit of no return except that of performance. (*Reg.* v. *the Mayor of London*, 13 Q. B. 1. See also note *x supra*.)

(*b*) Great particularity must be observed in the mandatory part of the writ. To support a writ commanding the doing of several things, all must be valid, else the writ must be quashed. If the writ be bad as to one of the things commanded to be done it will be bad as to all; (*Reg.* v. *Tithe Commissioners*, 14 Q. B. 459.) "It is quite settled that if any part of what is commanded by a peremptory *mandamus* go beyond the legal obligation the whole writ must be set aside:" (*Reg.* v. *Caledonian R. Co.* 16 Q. B. 19; *The South Eastern R. Co.* v. *Reg.* 17 Q. B. 485; *Reg.* v. *East and West India Docks and Birmingham R. Co.* 2 El. & B. 466.) The Courts have refused to amend prerogative writs of *mandamus* when peremptory: (*Rex* v. *the Church Trustees of St. Pancras*, 3 A. & E. 535; *Reg.* v. *Tithe Commissioners*, *ubi supra*; *Reg.* v. *Kidwelly and Llanelly Canal Tramroad Co.* 14 Q. B. 481, n.) The motion against such a writ upon the ground of some defect in it is not too late, on a motion for an attachment, because of disobedience: (*Reg.* v. *Ledgard*, 1 Q. B. 616; see also *Mayo* v. *Connell*, 3 N. C. L. Rep. 10.)

not to the Sheriff, (*c*) and may be issued in term or vacation and returnable forthwith, (*d*) and no return thereto, except that of compliance, shall be allowed, (*e*) but time to return it may, upon sufficient ground, be allowed by the Court or a Judge, (*f*) either with or without terms. (*g*)

Return thereto.

consol for u.c.ch 23 § 8.

Eng. C. L. P. A. 1854, s. 73.

CCLXXIX. (*h*) The Writ of *Mandamus* so issued as aforesaid (*i*) shall have the same force and effect as a peremptory Writ of *Mandamus*, (*j*) and in case of disobedience, may be enforced by attachment. (*k*)

Its effect and how enforced

(*c*) It is enough to direct the writ to those who are bound to perform the duty commanded: (*Reg* v. *Mayor of Hereford*, 2 Salk. 701.) It may be directed to a corporation by name or to those members of it who have the power to do the thing required: (*Rex* v. *Mayor of Gloucester*, Holt's Rep. 45.) But it must be directed either to that part of the corporation who are bound to do the act or to the corporation at large: (*Rex* v. *Mayor of Abingdon*, 2 Salk. 699.) See further Tapping's Mandamus, p. 310, *et seq.*

(*d*) The prerogative writ of *mandamus* is regulated by a like practice: (s. cclxxxii.)

(*e*) This is the rule also as to the prerogative writ when peremptory: (*Reg.* v. *Ledgard*, 1 Q. B. 616.)

(*f*) Relative powers, see note *m* to s. xxxvii.

(*g*) If prosecutor endeavour to enforce a return within an unreasonable time or otherwise in an unreasonable manner, further time will, it is apprehended, be granted without terms.

(*h*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 78.—Founded upon 2d Rep. C. L. Commrs. s. 46.

(*i*) *i.e.* Issued under s. cclxxvii.

(*j*) In Eng. C. L. P. Act, "shall have the same force and effect as a peremptory writ of *mandamus* issued out of the Court of Queen's Bench," because before the Eng. C. L. P. Act the writ of *mandamus* in England was issuable only from the Court of Queen's Bench. In Upper Canada since the constitution of the Court of Common Pleas, that Court and the Queen's Bench have in all respects exercised a concurrent jurisdiction. (12 Vic. c. 63, s. 8.)

(*k*) The peremptory *mandamus* commands obedience. No return can be made to it except that of compliance: (s. cclxxviii.) If that return be not made within a reasonable time, the Court will grant an attachment against the persons to whom the writ is directed, with this difference, however, that where a *mandamus* is directed to a corporation to do a corporate act, the attachment is granted only against those particular persons who refuse to pay obedience; but where it is directed to several persons in their natural capacity the attachment for disobedience must issue against all, though when they are brought before the Court the punishment will be proportioned to the offence of each: (Bull N. P. 201-2; *Reg.* v. *Poole*, 1 Q. B. 616.) A *mandamus* was directed to two bailiffs, one of whom inclined to obey the writ and the other would not obey it nor join in a return. The Court granted an attachment against both, saying it would be endless to try in all cases who was in the right and who wrong, and that if the same were done it would be used as a handle for delay: (*In re Bailiffs of Bridgenorth*, 2 Str. 808.) An attachment was ordered against the Mayor of a corporation for not making a return to a *mandamus* within the time prescribed by the writ, though there had been no personal service thereof upon the Mayor: (*Rex* v. *Mayor of Fowey*, 5 D. & R. 614. If the return upon the

Eng. C. L. P. A. 1854, s. 74. Court may order the thing to be done by the Plaintiff at the costs of the Defendant.

CCLXXX. (*l*) The Court (*m*) may, upon application by the Plaintiff, besides or instead of proceeding against the disobedient party by attachment, (*n*) direct that the act required to be done may be done by the Plaintiff or some other person appointed by the Court, at the expense of the Defendant, (*o*) and upon the act being done (*p*) the amount of such expense may be ascertained by the Court either by Writ of enquiry (*q*) or reference to the proper officer, (*r*) as the Court or a Judge may order, (*s*) and the Court may order payment of the amount of such expenses and costs, (*t*) and enforce payment thereof by by execution. (*u*)

Execution for such costs.

Eng. C. L. P. A. 1854, s. 75. Present power to

CCLXXXI. (*v*) Nothing herein contained shall take away the Jurisdiction of [either of the Superior Courts] (*w*) to grant Writs of *Mandamus*; (*x*) nor shall any Writ of *Mandamus*

face of it be good but the matter of it false, an action upon the case lies for the party injured, against the person making such false return: (Bull N.P. 202.) Proceedings by attachment under this section will much resemble attachment for non-performance of an award, as to which see note *g* to s. lxxvii; further see Tapping's Mandamus 421.

(*l*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 46.—Founded upon 2d Rep. C. L. Comrs. s. 46.

(*m*) *Qu.* Court *or* Judge—see note *s*, *infra*.

(*n*) Under s. cclxxix.

(*o*) This may apply to abatement of nuisances, &c: see note *m* to s. cclxxv.

(*p*) The doing of which must be made to appear on affidavit.

(*q*) As to form of writ see N. Rs. Sch. No. 56.

(*r*) *i.e.* Clerk of the Court.

(*s*) It is enacted *the Court* "may, upon application, &c., direct that the act required to be done may be done by the plaintiff, &c., and that upon the act being done the amount of the expense of doing it may be ascertained, &c., as '*the Court or Judge*' may order, &c., and that '*the Court*' may order judgment of such expense, &c. These changes of expression shewing when power rests with the Court or a Judge, and when with the Court exclusively, are material to be observed in the practical application of this section.

(*t*) An order for payment of the expenses and costs, from the peculiar wording of the section, would appear to be necessary to warrant issue of the execution.

(*u*) The execution intended is, it is presumed, the ordinary writ of *fieri facias*. Whether other forms of execution can be issued remains to be decided.

(*v*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 75.

(*w*) Instead of the words in brackets read in Eng. C. L. P. Act, "the Court of Queen's Bench." See not *j*. to s. cclxxix.

(*x*) *Mandamus* is a high prerogative writ of a most extensive remedial character, issuable in Upper Canada out of either of the Superior Courts of Common Law, "directed to any corporation or compsny, inferior Court of Judicature, or person, requiring them to do some particular thing specified therein, which appertains to their office, and which it is their duty to perform:" (Impey on Mandamus, 1.) The writ being one of prerogative issuable from Courts of Common Law

issue prerogative *Mandamus* not affected.

issued out of such Courts be invalid by reason of the right of the prosecutor to proceed by action for *Mandamus* under this Act. (*y*)

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can only be issued to enforce a *legal* ascertained right: (*Rex* v. *Archbishop of Canterbury*, 8 East. 213; *Rex* v. *Stafford*, 3 T. R. 646; *In re Orton Vicarage*, 18 Jur. 1049; *Ex parte Napier*, 18 Q. B. 692; *Reg.* v. *Trustees of the Balby Workshop Turnpike Road*, 22 L. J. Q. B. 164; *Barnhart* v. *Justices of the Home District*, 5 O.S. 507; *Reg.* v. *District Council of the District of Gore*, 5 U. C. R. 351); in general where there is no other specific remedy, or one that it is doubtful or inconsistent: (*Rex* v. *Bishop of Chester*, 1 T. R. 404; *Rex* v. *Bristol Dock Co.* 12 East. 429; *Rex* v. *St. Katherine's Dock Co.* 4 B. & Ad. 360; *Rex* v. *Windham*, Cowp. 377; *Rex* v. *Damerel*, 5 A. & E. 584; *Rex.* v. *Nottingham Waterworks*, 6 A. & E. 355; *Reg.* v. *Rector of Birmingham*, 7 A. & E. 254; *Reg.* v. *Hull & Selby R. Co.* 6 Q. B. 70); and to enforce the performance of a duty imperative and clear: (*Rex* v. *Eye*, 1 B. & C. 85; *Rex* v. *Justices of Lancashire*, 7 B. & C. 691; *Rex* v. *Bishop of Gloucester*, 2 B. & Ad. 158; *Ex parte Beck*, 3 B. & Ad. 704; *Rex* v. *Mayor of London*, 3 B. & Ad. 255; *Rex* v. *Justices of Yorkshire*, 5 B. & Ad. 667; *Reg.* v. *South Eastern R. Co.* 4 H. L. Cas. 471; *Rex* v. *Hughes*, 3 A. & E. 425; *Reg.* v. *Greene*, 6 A. & E. 548; *Reg.* v. *Eastern Counties R. Co.* 10 A. & E. 531); being one of a public or *quasi* public character, that is to say, one in which applicant is not at all events the sole person interested: (*Rex* v. *Baker*, Burr. 1265; *Rex* v. *Lord Monlacute*, 1 W. Bl. 61; *Rex* v. *Cheere*, 4 B. & C. 902; *Ex parte Robins*, 7 Dowl. P. C. 566; *Reg* v. *Eastern Counties R. Co.* 10 A. & E. 557); but will not be issued to enforce the doing of an act which if done would serve no good purpose: (*Anon.* Loft. 148; *Rex* v. *The Commissioners of the Llandio District Roads*, 2 T. R. 232; *Reg.* v. *Blackwell R. Co.* 9 Dowl. P. C. 558; *Rex* v. *Justices of Staffordshire*, 6 A. & E. 90; *Reg.* v. *Pitt*, 10 A. & E. 272; *Reg.* v. *Harrison*, 9 Q. B. 794); or cause unnecessary trouble, vexation, or confusion: (*Reg.* v. *St. John's Coll. Camb.* 238; *Reg.* v. *Bishop of Ely*, 1 W. Bl. 59; *Rex* v. *Coleridge*, 1 Chit. R. 588); or direct the doing of an act which is impossible: (*Rex* v. *London and North West R. Co.* 6 Rail. Cas. 684); or be otherwise fruitless and useless: (*Rex* v. *Bridgman*, 15 L. J., Q. B., 44; *Rex* v. *Gilbert Heathcote, Mayor of London*, 10 Mod. 53; *Rex* v. *Norwich Savings Bank*, 9 A. & E. 729); or generally to do an act, the doing of which would subject the party to an action: (*Rex* v. *Dayrell*, 1 B. & C. 485.) No waiver of objections will entitle a party to a *mandamus*, unless the party applying of himself disclose a good right thereto: (*Rex* v. *Lords of the Treasury*, 16 Q. B. 357.) The party applying must show that there has been a specific demand for the performance of the duty, followed by a refusal in terms or by circumstances which distinctly show the intention of the party not to do the act required of him, and which it is the object of the *mandamus* to enforce: (*Rex* v. *Brecknock and Abergavenny R. Co.* 3 A. & E. 217; *Reg.* v. *St. Margaret's Vestry*, 8 A. & E. 889; *Reg.* v. *Bristol R. Co.* 4 Q. B. 162; *ex parte Thompson*, 6 Q. B. 721.) The application must be made within a reasonable time: (*Reg.* v. *Canal Co.* 11 A. & E. 316; *Reg.* v. *Townsend*, 28 L. T. Rep. 100.)

(*y*) It is a rule that the prerogative writ of *mandamus* can only be had in cases where there is no other specific remedy: (note *x*.) The statutory *mandamus* allowed by this Act will be in some cases a specific remedy, but in no case such a remedy as will prevent the interference of the Court by the issue of the prerogative writ.

CCLXXXII. (z) Upon application by motion for any Writ of *Mandamus*, (a) the rule may in all cases be absolute in the first instance, if the Court shall think fit, (b) and the Writ may bear teste on the day of its issuing, (c) and may be made returnable forthwith whether in term or in vacation, (d) but time may be allowed to return it by the Court or a Judge either with or without terms; (e) and the provisions of this Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ or *mandamus* issued by either of the Superior Courts. (f)

Eng. C. L. P. A. 1854. ss. 75, 76, 77.

Provisions concerning the issue of prerogative writs of *Mandamus*.

(g) And in order to give to Plaintiff a further remedy by Writ of injunction; Be it enacted as follows:

(z) Taken from Eng. Stat. 17 & 18 Vic. cap. 126, ss. 75, 76-77.

(a) In Eng. C. L. P. A. "Upon any application by motion for any writ of *mandamus* in the Court of Queen's Bench." See note *j* to s. cclxxix.

(b) This has always been the rule of practice. As to when the rule should be *nisi* and when absolute, see Impey's Mandamus, p. 114; Tapping's Mandamus, 297-298.

(c) And herein conform with the practice regulating writs of summons (s. xix) and execution (s. clxxxix.) Hitherto all writs of *mandamus* were tested in term: (Com. Dig. *Mandamus*, C. 4.; *Reg.* v. *Conyers*, 8 Q. B. 981.) And in practice were supposed to issue on the day when ordered by the Court: (*Ib.*) Under this section the writ may bear date "on the date of its issuing" "either in term or vacation," and without reference to the day when ordered by the Court.

(d) Same rule as applied to writs of execution: (see s. clxxxix.)

(e) *Court or Judge*—Relative powers, see note *m* to s. xxxvii.

(f) The latter part of this section is taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 77, and is in many respects an important provision. However, it is a question how far ss. cclxxvi-cclxxvii. can be applied to the prerogative writ of *mandamus*.

(g) The object of most actions at law is, as already noticed, to obtain compensation in money for damages sustained: (see note *d* to s. cclxxv.) There may be a breach of contract or other injury for which no damages that a jury can award would be adequate compensation. In such cases a jurisdiction to prevent the breach of contract or other wrongful act would be much more salutary if exercised than a jurisdiction to indemnify against the consequences of its commission. The want of some Court having such a jurisdiction was felt and and acknowledged at a very early period in the history of English jurisprudence: (see *Monkton* v. *Attorney General*, 2 Coop. 507.) Courts of Equity having observed the want seized the opportunity of administering the desired relief, and in so doing arrogated to themselves a most useful and most powerful jurisdiction. Having assumed to exercise it, these Courts did not confine its operations to mere equitable rights, but administered the relief as well where there were legal as purely equitable rights. In this manner a great inroad was made upon the jurisdiction of Courts of Common Law, so much so that in many cases no satisfactory redress could be had at law without first having invoked the supplementary aid of a Court of Equity. The attention of the Common Law Commissioners of of 1834 having been directed to these

Eng. C. L. P. A. 1854, s. 79.

CCLXXXIII. (*h*) **In all cases of breach of contract or other injury,** (*i*) **where the party injured is entitled to maintain and**

circumstances, they reported that there was no reason "why a Court of Law should not exercise the same jurisdiction as a Court of Equity, and restrain the violation of legal rights in cases in which an injunction might issue for that purpose from Courts of Equity." The advantages to arise from such a change also received the attention of the Commissioners. Their report was to this effect, "It would obviously be attended with great advantage and convenience, that where common law rights are concerned, the whole litigation relating to them should fall within the cognizance of a common law court, not only because the expense and delay of a suit in Equity may be thus avoided, but because the common law Judges are more competent than those in Equity to decide any question of law which the application for an injunction may involve, and can exercise more conveniently a controlling or directing power over any action connected with the matter in dispute." It was ascertained that to carry out these recommendations no creation of machinery was necessary. "Little more would be required than to give an existing writ a wider application of a kind sanctioned by ancient usage. For in former times a writ of prohibition was granted not only to prevent excess of jurisdiction but to restrain waste. Prohibition of waste lay at common law for the owner of the inheritance against the tenant by the curtesy tenant in dower and guardian in chivalry; and this, says Lord Coke, 'was an excellent law, for preventing injustice excelleth punishing injustice:'" (2d Rep. C. L. Comrs. s. 48.) It is the design of the following sections to put these recommendations, which received the approval of the Common Law Commissioners of 1850, into practice.

(*h*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 79.—Founded upon 2d Rep. C. L. Comrs. s. 48.

(*i*) The application of this section is in some degree made to depend upon a reference to the *mandamus* clauses. It is enacted that in all cases of breach of contract or other injury, &c., plaintiff "may in like cases and manner as hereinbefore provided with respect to writ of *mandamus* claim a writ of injunction," &c. It is not in every case of a breach of contract or other injury that plaintiff may obtain a writ of *mandamus*. This writ is only obtainable to enforce the fulfilment of some duty of a public nature or arising under an Act of Parliament: (see note *l* to s. cclxxv.) But between the cases in which the proper application would be for a *mandamus*, and those for an injunction, there is at least one obvious distinction. The former writ issues to command the doing of something and is in general issued in cases of non-feasance. Whereas the latter writ does not so much issue to command the doing of a thing as to desist from doing something, and issues generally in cases of misfeasance, or in the words of this section, the injunction may issue "against the *continuance*" of a breach of contract or other injury. However in some degree the enactment is anticipatory, for relief may be asked not only against the continuance, &c., but against the "repetition" and against the "committal" of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. The words "breach of contract *or other injury*" are also deserving of attention. The first inference is that a breach of contract is an injury within the meaning of the section. Cases have arisen in which great doubts were entertained as to whether, for the breach of a particular contract, the remedy was on the contract or in tort. The distinction appears to be that whenever there is a duty arising from a general employ-

has brought an action, (*j*) he may in like case and manner as In case of

ment, then an action may be brought in tort, though the breach of such duty may consist in doing something contrary to an agreement made in the course of such duty by the party on whom the general duty is imposed: (*Courtney* v. *Earle*, 10 C. B. 73; see also *Boorman* v. *Brown*, 3 Q. B. 511—reported as affirmed in 11 Cl. & F. 1; *Wood* v. *Furnis*, 21 L. J. Ex. 188.) Where the command to desist from the doing of an act involves the doing of some other act, the injunction may nevertheless be granted. Thus, in an action for the obstruction of plaintiff's lights by the erection of a wall, the Court granted an injunction, the effect of which was of necessity to compel defendant *to take down the wall*: (*Jessel* v. *Chaplin*, 4 W. R. 610.) Many cases of a like kind will readily suggest themselves — See *Bradbee* v. *Christ's Hospital*, 4 M. & G. 714; *Rose* v. *Groves*, 5 M. & G. 613; *Firmstone* v. *Wheeley*, 2 D. & L. 203; *Goldthorpe* v. *Hardman*, 2 D. & L. 442; *Russell* v. *Shenton*, 3 Q. B. 449; *Fay* v. *Prentice*, 1 C. B. 828; *Brown* v. *Mallett*, 5 C.B. 599, decided in Courts of Common Law—and the cases of *Martin* v. *Nutkin*, 2 P. W. 266; *Haines* v. *Taylor*, 2 Ph. 209, affid. 10 Beav. 75; *Spencer* v. *London and Birmingham R. Co.* 8 Sim. 198; *Squire* v. *Campbell*, 1 M. & C. 459; *Attorney General* v. *Forbes*, 2 M. & C. 123; *Ripon* v. *Hobart*, 3 M. & K. 169, decided in Courts of Equity. There are cases in which Courts of Equity grant injunctions prohibitory in form but mandatory in effect, the principles of which will govern the application of the section under consideration: see *Mexborough* v. *Bower*, 7 Beav. 127.

(*j*) The "breach of contract or other injury" must be one for which plaintiff is *entitled* to bring, and for which he *has* brought an action. There must be the legal right infringed upon by the wrongful act or injury, the subject of the action. Courts of Equity have observed the principles involved in this provision with as much strictness as Courts of Law can well do. In applications to Courts of Equity for relief in cases depending upon legal rights, these Courts have at all times taken good care that the right should be ascertained before their jurisdiction by injunction is exercised. In all applications of the kind the first question to be determined is the legal right. If the Court doubt that, it may commit injustice by interfering, until it be decided. A great objection to granting an injunction before the legal right is ascertained, is that the granting of the writ itself operates upon the question before that question is discussed and determined in the ordinary mode. Hence Courts of Equity, unless quite clear as to the legal right, have deemed it the safer course to abstain from exercising their jurisdiction, until the determination of that right: (see *Rigby* v. *Great Western R. Co.* 1 Coop. 3; *Clayton* v. *Attorney General*, *Ib.* 139; *Saunders* v. *Smith*, 3 M. & C. 711; *Bramwell* v. *Halcomb*, 3 M. & C. 737; *Pidding* v. *Howe*, 8 Sim. 477; *Collard* v. *Allison*, 4 M. & C. 487; *Ringer* v. *Blake*, 3 Y. & C. 571; *Smith* v. *Elzer*, 3 Jur. 792; *Spottiswoode* v. *Clark*, 2 Phill. 154; *Stevens* v. *Keating*, *Ib.* 333; *Simple* v. *London and Birmingham R. Co.* 1 Rail. Cas. 120; *Electric Telegraph Co.* v. *Nott*, 11 Jur. 157; *England* v. *Carne*, 8 Beav. 129; *Bridson* v. *McAlpine*, 8 Beav. 229; *Hames* v. *Taylor*, 10 Beav. 75; *Rowth* v. *Nester R. Co.* 10 Beav. 561; *Lidgett* v. *Williams*, 4 Hare, 464; *Hodfield* v. *Manchester R. Co.* 12 Jur. 1083; *Oakin* v. *London and N. W. R. Co.* 13 Jur. 579.) There are, however, cases in which Equity, in the exercise of its peculiar jurisdiction, will grant relief by injunction, though there be no legal subsisting right, as in cases of breach of trust, confidence, &c: (see *Prince Albert* v. *Strange*, 1 Mac. & G. 25); and on the other hand some cases in which Equity will not interfere though there be the legal right: (see *Bedford* v. *British Museum*, 1 Coop. 90 n; *Davenport* v. *Davenport*, 7 Hare, 217;

breach of contract or other injury, Plaintiff may claim injunction against repetition, &c., and also damages.

hereinbefore provided, with respect to *Mandamus*, (*k*) claim a Writ of injunction (*l*) against the repetition (*m*) or continuance of such breach of contract or other injury, (*n*) or the committal of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right, (*o*) and he may also in the same action include a claim for damages or other redress. (*p*)

Clark v. *Freeman*, 11 Beav. 1121; *Sainter* v. *Ferguson*, 1 Mac. & G. 286.) Where a Court of Equity sees that there is a question between the parties, and that that question may be dealt with but cannot be wholly decided at law, while a part of the relief sought by plaintiff can only be obtained in Equity, the Court of Equity will on a motion for an injunction to restrain an action at law grant the injunction until the hearing of the cause: (*The Athenæum Life Assurance Co.* v. *Pooley et al*, 27 L. T. Rep. 282.) But it must be on plaintiff's paying into Court the amount, if any, due from them to the defendants in Equity, and undertaking to pay what may become due up to the hearing of the cause: (*Ib.*)

(*k*) *i.e.* May indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of injunction, &c.: (s. cclxxv.)

(*l*) The effect of these sections as to injunction is to give the same power to a Court of Law as to granting an injunction which Courts of Equity exercise in cases where the injunction is granted *without terms*; in other words, the Courts of Common Law will only grant an injunction where, under the same circumstances, a Court of Equity would grant an absolute injunction: (Paterson, McNamara, and Marshall, 1276, referring to *Mines Royal Society* v. *Magnay*, 10 Ex. 489.) Injunctions upon surmise (*si ita sit*) will, it is presumed, be refused by Courts of Law: (*Christopherus* v. *Chomly*, Cary. 53.) Interlocutory injunctions seem to be grantable under s. cclxxxvi.

(*m*) The fraudulent use of trade marks: (*Crawshay* v. *Thompson*, 4 M. & G. 357; *Rodgers* v. *Nowill*, 5 C. B. 109) the piracy of designs: (*Millington* v. *Picken*, 1 C. B. 799); the infringement of patents: (*Stead* v. *Williams*, 7 M. & G. 818; *Russell* v. *Ledsam*, 14 M. & W. 574;) or of copyrights: (*Wright* v. *Tallis*, 1 C. B. 893); and such like cases are those in which, if a wrongful act be restrained, the repetition of it may be also prohibited.

(*n*) This part of the section will apply either to the continuance of a wrong properly so called, for instance, a trespass by placing stakes on plaintiff's land and continuing them there notwithstanding a verdict in plaintiff's favour: (*Bowyer* v. *Cook*, 4 C. B. 236); or of a breach of duty arising out of a contract, for instance, a covenant to keep insured: (*Dormay* v. *Burrowdaile*, 5 C. B. 380; see further *Loolock* v. *Franklyn*, 8 Q. B. 371; *Cannock* v. *Jones*, 3 Ex. 33.)

(*o*) These words though very general seem to be directed to a class of cases where a party violates confidence reposed in him as an agent, who, having obtained possession of property belonging to his principal for a given purpose, in fraud of that principal, appropriates it to some other purpose: (see *Phillips* v. *Huth*, 6 M. & W. 572; *Eden* v. *Turtle*, 10 M. & W. 635; *Hatfield* v. *Phillips*, 14 M. & W. 655; see also *Sikes* v. *Giles*, 5 M. & W. 642; *Raleigh* v. *Atkinson*, 6 M. & W. 670; *Pickwood* v. *Neate*, 10 M. & W. 206.

(*p*) Plaintiff claiming a writ of *mandamus* must allege either that he "sustains or may sustain damage from the non-performance of the duty to be fulfilled" (s. cclxxvi); but when claiming an injunction, it would seem from the peculiar language of this section, may or may not in addition "include

CCLXXIV. (*q*) The Writ of Summons in such action (*r*) shall be in the same form as the Writ of Summons in any personal action, (*s*) but on every such Writ and copy thereof, there shall be indorsed a notice, that in default of appearance, the plaintiff may, besides proceeding to Judgment and execution for damages and costs, apply for and obtain a Writ of injunction. (*t*)

Eng. C. L. P. A. 1854, s. 80. Form of writ and notice to be indorsed on it.

CCLXXXV. (*u*) The proceedings in such action (*v*) shall be the same as nearly as may be, and subject to the like control as the proceedings in an action to obtain *Mandamus* under the provisions hereinbefore contained, (*w*) and in such action Judgment may be given that the Writ of injunction do or do not issue, as justice may require; (*x*) and in case of disobedience, such Writ of injunction may be enforced by attachment

Eng. C. L. P. A. 1854, s. 81. Proceedings and judgment in such case. Enforcing injunction.

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a claim for damages or other redress."

(*q*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 80.

(*r*) *Such action. i.e.* an action brought for a breach of contract or other injury and such as mentioned in the preceding section.

(*s*) See Sch. A to this Act, Form No. 1.

(*t*) As to the form of notice see Sch. to N. Rs. Form No. 59.

(*u*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 81.

(*v*) *Such action.* See note *r supra.*

(*w*) Which are directed to be the same in all respects as nearly as may be, as in an ordinary action for the recovery of damages: (s. cclxxiii.), and costs shall be recoverable by either party in the same manner as in an ordinary action: (*Ib.*)

(*x*) The limits of the jurisdiction of Courts of Law as to injunctions are not yet well defined. Courts of Equity constantly decline to lay down any rule which shall limit their powers or discretion. For this reason, and owing to the difference in the constitution of Courts of Law and of Equity, the latter Courts no doubt will with respect to writs of injunction, exercise a more extensive jurisdiction than Courts of Law. The absence of a remedy in other Courts for a supposed wrong is not of itself a sufficient reason to entitle Courts of Equity to assume jurisdiction: (*Ryves* v. *Wellington*, 9 Beav. 579.) There must be in each case wherein application is made to a Court of Equity for an injunction circumstances at least disclosing equitable if not legal ground for relief: (see *Hammon* v. *Sedgwick*, 6 Hare 256; also *Smith* v. *Jeyes*, 4 Beav. 503; *England* v. *Curling*, 8 Beav. 129; *Hall* v. *Hall*, 12 Beav. 414.) If there be a clear legal remedy for the supposed wrong in Courts of Law, Equity will not interfere: (*Clark* v. *Freeman*, 11 Beav. 112; also *Goodheart* v. *Lowe*, 2 J. & W. 349; *Bayley* v. *Taylor*, 1 Russ. & M. 73; *Southey* v. *Sherwood*, 4 Meri. 435.) But if there be no remedy or an insufficient remedy at Law and there be equitable as distinct from legal grounds, Equity will interfere: (*Ridgway* v. *Roberts*, 4 Hare 106; also *Grealex* v. *Grealex*, 1 De Gex. & S. 692; *Abernethy* v. *Hutchinson*, 1 H.T. 28; *Routh* v. *Webster*, 10 Beav. 561; *Prince Albert* v. *Strange*, 1 Mac. & G. 25; *McCrea* v. *Holdsworth*, 12 Jur. 820; *Geary* v. *Norton*, 1 De G. & Sm. 9; *Dickens* v. *Lee*, 8 Jur. 183; *Kelly*

by the Court, (*y*) of* when such Court shall not be sitting by a Judge. (*z*)

Eng. C. L. P. A. 1854, s. 82.

Plaintiff may apply *ex*

CCLXXXVI. (*a*) It shall be lawful for the Plaintiff at any time after the commencement of the action, (*b*) and whether before or after Judgment, (*c*) to apply *ex parte* to the Court or

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v. *Hooper*, 1 Y. & C. Chan. C. 197; *Chapnall* v. *Purday*, 4 Y. & C. Cas. 485.) Where any act involving a breach of trust is intended to be done though not in its consequences irremediable, Courts of Equity will prevent it by injunction: (*Attorney General* v. *Aspinall*, 2 M. & C. 613.) Thus an injunction was granted to restrain the disclosure of secrets, of which defendant received a knowledge in the course of a lawful employment: (*Evitt* v. *Price*, 1 Sim. 483.) But Courts of Equity will not exercise any jurisdiction in criminal cases: (Story Eq. 89).

(*y*) The proceedings to enforce obedience to a writ of injunction under this section will resemble those of enforcing the performance of awards, as to which see note *g* to s. lxxxvii.

(*z*) The power of a judge to act is only when the Court is not sitting. Hence during the term no single judge can issue an attachment under this section.

(*a*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 82, the origin of which seems to be Eng. Stat. 15 & 16 Vic. c. 83, s. 43, which is as follows—"In any action in any of her Majesty's Superior Courts of Record at Westminster, it shall be lawful for the Court in which such action is pending, if the Court be then sitting or if the Court be not then sitting, then for a Judge of such Court, on the application of the plaintiff or defendant respectively, to make an order for an *injunction*, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such Court or Judge may seem meet."

(*b*) The action intended is one for "a breach of contract or other injury" (s. cclxxxiii) which admits of a "repetition" or "continuance."

(*c*) This section appears to apply to interlocutory injunctions. The object of the interference of the Court by interlocutory injunction between two parties who are at issue upon a legal right is solely the protection of the property in dispute, until the legal right shall be ascertained: (*Harman* v. *Jones*, Cr. & Ph. 299.) Thus in an action of ejectment, plaintiff applied under this section for an injunction restraining defendant and one F. from cutting timber upon and carrying away wood and hay from off the land for which the action was brought. The injunction was granted without terms, "because the cutting down and removal of the timber may be an irreparable injury and cannot be compensated for:" (*Robins* v. *Porter*, Chambers, Oct. 15, 1856, Burns, J, II. U.C. L. J. 230.) In this case the affidavit was as follows, "That this is an action of ejectment brought to recover possession of a certain lot of land now in the possession and occupation of the defendant. That deponent has obtained the government patent for said land, and that he believes defendant holds possession without any good or valid defence to this action. That one F, for whom and at whose instigation this action is defended, hath hitherto cut down and carried away large quantities of timber from off said land, and deponent is apprehensive of his again doing so unless restrained. That there is a large quantity of wood and hay cut therefrom now piled and stacked upon said land. That deponent is desirous of having said defend-

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* "Of" is clearly an error, "or" probably being intended.

a Judge (*d*) for a Writ of injunction to restrain the Defendant in such action (*e*) from the repetition (*f*) or continuance of the wrongful act or breach of contract complained of, (*g*) or the committal of any breach of contract or injury of a like kind, (*h*) arising out of the same contract or relating to the same property or right; (*i*) and such Writ may be granted or denied by the Court or Judge upon such terms as to the dura-

ex parte for injunction at any stage of the case.

Court may impose terms.

ant and F, their servants, and agents, restrained from removing the same. That the defence is set up solely for the purpose of delay and that there is no real and substantial defence to deponent's title to the said land:" (*Ib.*) There may be other cases of a different nature, such as infringements of patents or copyrights, in which the interference of the Court by interlocutory injunction may be invoked under this section. With respect to these, Courts of Equity are disposed rather to restrict than increase the number of cases in which it interferes by injunction before the establishment of the legal title: (*McNeil* v. *Williams*, 11 Jur. 344.) It is necessary to give great weight to the question which side is more likely to suffer by an erroneous or hasty judgment, and also to consider the prejudicial effect the injunction may have on the trial of the action: (*Ib.*; see further note *j* to s. cclxxxiii.)

(*d*) The rule for the injunction must be *nisi* in the first instance: (*Gittens* v. *Symes*, 15 C. B. 862; *Warren* v. *Munroe*, Chambers, Sept. 24, 1856, Burns, J, II. U.C.L.J. 209.)

(*e*) *Such action.* See note *b*, *ante.*

(*f*) See note *m* to s. cclxxxiii.

(*g*) See note *n* to do.

(*h*) See note *o* to do.

(*i*) Upon the invasion of a patent right the party complaining has in Equity a right to the protection of an injunction, although the other party may promise to commit no further infringement and may offer to pay the costs of preparing the bill: (*Geary* v. *Norton*, 1 De G. & S. 9.) An injunction being applied for, it is not sufficient for the defendant to admit the infringement and promise not to repeat it: (*Losh* v. *Hague*, Web. Pat. Cas. 200.) And if infringement be shown, proof of enjoyment for twelve years establishes a *prima facie* case for an injunction: (*Neilson* v. *Thomson et al*, Web.Pat. Cas.277.) Where a patent is new the Court of Equity considers the proof of the title in the patentee to be wanting, inasmuch as the public have had no opportunity of contesting the validity thereof, and therefore in such a case refuses to interfere by injunction until the title is established at law: (*Caldwell* v. *Van Vlissingen*, 9 Hare 415.) Plaintiffs licensed defendant to use a patent at the annual rent of £2000, reserving the power of determining the lease in default of payment. The defendant failed to pay the entire rent, but the plaintiffs allowed him for several years to use the patent, and received payments on the footing of a reduced rent: Held that by so doing, the plaintiffs had elected not to treat the previous breach as a forfeiture of the license, and that consequently they were not entitled to an injunction restraining defendant from the use of the patent: (*Warwick* v. *Hooper*, 3 Mac. & G. 60.) On an application for an injunction to restrain the infringement of a patent the party applying must swear that at the time of making the application, he believes that at the date of the patent the invention was new or had not been previously known or used in the Province: (*Sturzs* v. *De la Rue*, 5 Russ. 322.) A Court of Equity will not interfere upon the application of an author to restrain the publication of a work

Enforcing injunction.

tion of the Writ—keeping an account (*j*)—giving security—or otherwise, as to such Court or Judge shall seem reasonable and just; and in case of disobedience, such Writ may be en-

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which is of such a nature that an action could not be maintained for damages: (*Southey* v. *Sherwood*, 2 Meriv. 435.)

(*j*) In patent cases the practice in Equity is in general to direct an action at law to try the right, to order that an account be taken in the meantime, and to grant an interlocutory injunction until the cause is determined. Courts of Law must under the injunction clauses of this Act, do nearly as possible as Courts of Equity would do: (per Jervis, C.J, *Gittens* v. *Symes*, 15 C. B. 362; see *Bridson* v. *Benecke*, 12 Beav. 1; *McCrea* v. *Holdsworth*, 12 Jur. 820; *Bridson* v. *McAlpine*, 8 Beav. 229; *Dickens* v. *Lee*, 8 Jur. 183; *Kelly* v. *Hooper*, 1 Y. & C. Chan. C. 197; *Sweet* v. *Cater*, 11 Sim. 572; *Bacon* v. *Jones*, 4 M. & C. 433; *Collard* v. *Allison*, *Ib.* 487; *Sweet* v. *Maugham*, 11 Sim. 31; *Saunders* v. *Smith*, 3 Myl.'& C. 711; *Curtis* v. *Cutts*, 8 L. J. N. S. Ch. 184; *Lewis* v. *Fullarton*, 2 Beav. 6; *Motley* v. *Downman*, 3 M. & C. 1; *Martin* v. *Wright*, 6 Sim. 297; *Bailey* v. *Taylor*, 1 Russ. & M. 73; *Hunt* v. *Penrice*, 17 Beav. 525; *Young* v. *White*, 17 Beav. 532.) A Court of Equity, where justice requires it, will grant an injunction to restrain a piracy, on the application of a person having only an equitable title: (*Chappel* v. *Purday*, 4 Y. & C. C. C. 485; *Hodges* v. *Welsh*, 2 Ir. Eq. R. 266; *Mawman* v. *Tegg* 2 Russ. 385.) But Courts of Equity are averse to the practice of their time being occupied by applications for injunctions to restrain infringements of copyright in cases in which it is difficult, if not impossible, to take an account of the loss of which complaint is made: (*Bell* v. *Whitehead*, 8 L. J. Ch. 141.) The English Patent Law Amendment Act, 15 & 16 Vic. c. 83, s. 42, was held to vest in any English Court of Common Law in which an action for the infringement of a patent is pending, the powers before exclusively exercised by Courts of Equity; and to enable Courts of Common Law to grant either by interlocutory order an account of all patent articles sold during the suit, or after verdict for the plaintiff, and as part of the final judgment in the action, an account of all profits made by the defendant since the commencement of the action, and after notice that an account would be required. But that no Court of Common Law has power, where damages nominal or substantial have been recovered by the plaintiff, to order an account of profits made by the defendant prior to the commencement of the action, the damages assessed by the jury being considered as the compensation for the loss of such profits: (*Holland* v. *Fox*, 3 El. & B. 977.) Where an action is brought for the infringement of a patent, a retrospective account of the defendant's sales and profits of the patented article will not in general be granted before judgment: (*Vidi* v. *Smith*, 3 El. & B. 969) Upon reasonable evidence of the existence of a valid patent, and of its infringement by the defendant, and of the defendant's making a profit thereby, defendant may be ordered to keep an account of all sales to be made of the article alleged to be an infringement, and of the profits thereon, until further order of the Court, upon condition of the plaintiff's waiving all right to more than nominal damages at the time of the action, and undertaking in case the verdict and judgment should be in favour of defendant, to pay the expense of keeping such an account: (Ib.) A bill charged defendant with infringing plaintiff's patent, and asked for an account, seeking to make defendant answerable for the profits received in consequence of the infringement. Held, that defendant must

forced by attachment by the Court, (*k*) or when such Court shall not be sitting, by a Judge; (*l*) Provided always, that any order for a Writ of injunction made by a Judge, or any Writ issued by virtue thereof may be discharged, or varied, or set aside by the Court on application made thereto by any party dissatisfied with such order. (*m*)

Proviso: Order made by a Judge may be set aside by the Court.

And as to the action of replevin; (*n*) Be it enacted as follows:

Replevin.

answer the interrogatories contained in the bill, though he dispute the title of plaintiff, and insist that the discovery will be a oppression, and that there is little probability that the Court at the hearing will direct an account upon the facts disclosed: (*Swinborne* v. *Nelson*, 16 Beav. 416.)

(*k*) See note *y* to s. cclxxxv.

(*l*) See note *z* to same.

(*m*) See note *m* to s. xxxvii.

(*n*) The sections following, which admit equitable pleas and replications in actions at law, introduce a new feature into the practice of the Common Law Courts. Though prefaced with the words, "And as to the action of replevin," &c., there is a difference of opinion among the judges as to the real application of the sections—whether to all ordinary actions or to replevin alone. Of the former opinion was Burns, J, in *Reilly* v. *Clark*, Chambers, Oct. 7, 1856, II. U. C. L. J. 232. Of the latter opinion was Robinson, C. J, in *Watts* v. *George*, Chambers, March 7, 1857, III. U. C. L. J. 71. It is much to be regretted that the Legislature did not express their meaning in suitable language, if they really did mean to give the right to plead and reply on equitable grounds in all forms of action. The Report of the Common Law Commissioners contains nothing which can be construed in favor of restricting that right to any one particular form of action. The English C. L. P. Act contains no such restriction. It is conceived that the peculiar language of our C. L. P. Act arose from a misapprehension of the actual intent and effect of the English Act. And it is confidently believed that during the present session of our Provincial Legislature an Act will be passed in express words, giving the right to plead and reply upon equitable grounds in all forms of action. In anticipation of this change it is proposed to consider the sections here annotated as if the extent of their application were no longer a matter of doubt.

Suitors in a Court have a right to expect the administration of complete and final justice in that Court. Whether proceedings be had in law or in equity such ought to be the result of the proceedings. But cases have arisen in which a Court of Law has given judgment in favour of a suitor, which a Court of Equity has restrained him from enforcing. The fruit of a judgment at law is the writ of execution. If the judgment were just, no Court either of Law or Equity should have the power of preventing the issue of execution. The mischief was that hitherto in some cases decided in Courts of Common Law the administration of law has not been the adminstration of justice. This was in a great measure attributable to the fact of defences valid in equity being wholly excluded from the cognizance of Courts of Common Law. Upon a consideration of this mischief the C. L. Comrs. formed the opinion that "there are cases in which Courts of Common Law have not sufficient power to prevent the law from being the means of vexatious and of useless expense." To enable these Courts to administer complete and final justice it was recommended "that whatever is ground for a perpetual injunction (in

Eng. C. L. P. A. 1854, s. 83.

CCLXXXVII. (*o*) It shall be lawful for the Plaintiff or Defendant in replevin, (*p*) in any cause in either of the Superior Courts (*q*) in which, if Judgment were obtained, he would be entitled to relief against such Judgment on equitable grounds, (*r*)

Equity) shall for the future be received by Courts of Common Law in the first instance as a defence." This recommendation has been substantially enacted in the following sections.

(*o*) Taken from Eng. Stat. 17 & 18 Vic. cap. 128, s. 83.—Founded upon 2d Rep. C. L. Comrs. s. 49.—Applied to County Courts.

(*p*) The Eng. C. L. Act reads, "It shall be lawful for the *defendant* (or plaintiff in replevin) in any cause, &c. The meaning of the Eng. C. L. P. Act when a part of the sentence is placed in parenthesis as above, is obvious. It is that the defendant in any ordinary action may plead, &c., and that the plaintiff in replevin, who stands in the position of a defendant in other actions, may plead, &c. The words though nearly the same in our C. L. P. Act have been transposed, and if taken literally as transposed would appear to defeat the object of the C. L. Comrs. However, Burns, J, in *Reilly* v. *Clarke*, *ubi supra*, construed the section as if the language of it were similar in all respects to that of the Eng. C. L. P. Act.

(*q*) This enactment applies only to actions in which pleadings are allowed. As there are no pleadings allowable in ejectment, there can be no equitable plea or replication in that form of action: (*Neave* v. *Avery*, 16 C. B. 328.)

(*r*) The important question is what "equitable grounds" will be sufficient as a defence in a Court of Common Law, The question has received the consideration of the Superior Courts of Common Law in England, and the law respecting it may, upon the whole, be considered as well settled.

The first English reported case appears to be *Burgoyne* v. *Cottrell*, 24 L. J. Q. B. 28, which arose in the Bail Court, and was decided on 25th Nov. 1854. The action was by the indorsee of two bills of exchange drawn abroad and directed as follows, the one "To the Chairman and Board of Directors of the A. Company," and the other "To the Board of Directors of the A. Company." They were accepted by defendant, the Chairman of the Company, in such a manner as in the opinion of plaintiff to make him personally liable upon his acceptances. Defendant desired to plead as a defence on equitable grounds in effect that the bills were addressed to the Company and intended to be made binding on the Company, and that by *mistake* the defendant as Chairman had so accepted them as to make himself personally liable. And per Crompton, J, "The notion seems to be that to support an equitable plea you must show some equity that will give you a right to an *unconditional injunction*." The plea was allowed to stand with liberty to plaintiff to demur. The opinion thus expressed has been confirmed and supported in each of the Courts of Exchequer, Queen's Bench, and Common Pleas.

First—Exchequer. Nov. 25, 1854. *Mines Royal Society* v. *Magnay*, 10 Ex. 489. Action on a lease for non-payment of rent and non-repair of premises. Defendant applied to be allowed to plead an agreement, in substance that defendant *should* surrender, &c., and that owing to the fraud and laches of plaintiff such surrender was *not* completed. Parke, B, "In my opinion the equitable defence allowed to be pleaded by this Statute means such a defence as would in a Court of Equity be a complete answer to the plaintiff's claim, and would, as such, afford sufficient grounds for a perpetual injunction granted absolutely and without any conditions. But according to the statement in the plea a Court of Equity would not interfere except upon the

to plead the facts which entitle him to such relief by way of

condition of the execution of a valid surrender by defendant. We have no machinery by which we can compel the execution of a surrender. The Statute does not say that the Courts of Common Law may give relief on equitable conditions, but that a plea shall be allowed which discloses a *defence* upon equitable grounds." Leave to plead the intended plea was therefore refused. The gravamen of this decision is that owing to the imperfect machinery of Courts of Common Law complete and final justice could not be done. These Courts have no power to order the execution and completion of a surrender, nor indeed of any other *executory* contract. When an agreement to do a thing is wholly *executed*, and nothing remains to be done by either party towards perfecting it, such an agreement would be a sufficient equitable ground of defence in Courts of Common Law. Thus, in trover for goods, defendants were allowed to plead that the plaintiff was the owner of certain chemical works, that the goods in question were stock in trade, and materials on the premises; that the defendants agreed to purchase the chemical works, and that the goods in question were to be included in the property sold; that certain brokers were employed to make the contract, and that they made it by bought and sold notes; that by *mistake* of the brokers the notes were so worded as not to include the stock in trade and materials; that possession of the chemical works, including the goods in question, had been delivered by plaintiff to defendants, and the purchase *completed;* and that plaintiff was unjustly availing himself of what was a mere mistake in the notes. And per Parke, B, "The Statute says that 'it shall be lawful for the defendant in any cause in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence.' We have already held that the relief must be absolute and unconditional; and in this case I think that absolute and uncondition relief would be granted. It seems to me that there would be no use in reforming the agreement when it is *wholly executed*, and nothing remains to be done by either party:" (*Steele* v. *Haddock*, Jan. 16, 1855, 10 Ex. 643.) In support of such a plea as that allowed in this case, there ought certainly to be an affidavit of the facts filed: (*Ib.*)

Second—Queen's Bench, June 5, 1855, *Wodehouse et al.* v. *Farebrother*, 5 El. & B. 277. Action on a bond against defendant as surety for a third party, who had covenanted with plaintiff to repay £2000 lent on a mortgage of a policy of insurance, and to keep up the policy until the money was repaid—breaches assigned. The defendant admitted the breaches, but set up as an equitable defence that he was willing to pay all that plaintiff was entitled to in equity, if plaintiff would assign his securities, but that plaintiff refused so to do. To this plea there was a demurrer. And per Campbell, C.J, "It is not for us, sitting here judicially, to say how far it is desirable or expedient that equitable jurisdiction should be given to Courts of Common Law. We have only, looking to the language of the Legislature, to consider that equitable jurisdiction has actually been given to us, bearing in mind that unless, in as far as our power and procedure have been altered by express enactment, or reasonable implication from what has been expressly enacted, they remain unchanged under the Common Law Procedure Act. We are authorised to receive this defence by way of plea, if the facts pleaded would entitle the defendant to relief on equitable grounds in a Court of Equity against a judgment obtained in this action in a Court of Law, no equitable defence having been set up there. The first objection to the plea is that the defendant does not satisfactorily show that

defence, and the said Courts are hereby empowered to receive

if such a judgment were obtained he would be entitled to relief against it on equitable grounds within the meaning of the enactment. He does not impeach the deed set up as fraudulent, or show that a judgment obtained in this action would not be honest. On the contrary, he admits that he executed the deed, that he broke his covenant in the manner alleged by the declaration, and that he is liable to pay to the plaintiffs the several sums demanded in respect of arrears of interest, of non-payment of the premiums of insurance, and of the costs incurred by the plaintiffs, against which he was bound to indemnify them. He only contends that after having made these payments, or at the time of making them, he is entitled to have the policy handed over to him, which was assigned to the plaintiffs as a security for the debt due to them from the principal debtor for whom he was surety, alleging that the plaintiffs had refused to hand it over to him although he offered, on receiving it, to pay the sums which he owed them, still offering to pay these sums and to indemnify the plaintiffs. There is no doubt that as a surety having done all that is incumbent upon him in fulfilment of his engagement, he would be entitled, as against the debtor for whom he was surety, to stand in the shoes of the creditor and to have an assignment of any security which the satisfied creditor held for the debt guaranteed. Bct no authority was cited to show *what precise relief* a Court of Equity would have given to the defendant, *if judgment had been obtained against him in this action;* and at all events we conceive he would be entitled to no relief against the judgment, unless he filed a bill against the new plaintiffs and the principal debtor, and paid into Court or undertook to pay the sums which he admits that he owes to the plaintiffs on the judgment. He could only ask for *a temporary or conditional injunction* against suing out execution on the judgment not for a perpetual or absolute injunction. The very important question therefore arises whether, where a defendant would only be entitled to a relief against a judgment to the extent of a temporary or conditional injunction he is entitled to set up his equitable grounds of relief by way of defence in a Court of Law? We are of opinion that as yet the Legislature has authorised us to receive a plea disclosing equitable grounds of relief only where the defendant is entitled to an absolute and perpetual injunction against the judgment. In this last case no difficulty occurs, for the plea is a simple bar to the action, and we should only have to pronounce the common law judgment 'that the plaintiff take nothing by his writ, and that defendant go thereof without day.' But if the injunction is to be temporary or conditional in equity, at common law we have no such judgment, and we have no analogous judgment. We could not attempt to do justice between the parties without pronouncing, instead of a common law judgment an equitable decree. If upon such a plea we were to give judgment in bar of the action, all legal remedy would be gone, although the defendant confesses his liability to pay the sums which this action seeks to recover. It is said that the plaintiffs might afterwards have relief in equity, or might perhaps bring another action when they have transferred the policy to the defendant, but we think that it was intended to admit a plea on equitable grounds only where *final justice* may be done by the Court of Law in the pending suit. This could only be by pronouncing an equitable decree. Bnt we have no warrant to pronounce such a decree. By section 85 (s. cclxxxix. of our C. L. P. Act) a replication is supposed to follow the equitable plea, and common law procedure is still contemplated. Where the judgment if obtained would be substantially reversed by a perpetual injunc-

such defence by way of plea; provided that such plea shall Commencement of plea.

tion in equity that which would be a ground for the perpetual injunction is admitted as a legal defence, in the same manner as payment after the day which rt common law was only ground for equitable relief after a judgment had been obtained for the penalty of the bond, was by the Statute of Anne let in as a legal defence, and so by the recent Statute to an action against a surety on an instrument under seal, time given to the principal debtor without the consent of the surety is turned into a legal defence, although previously it was only ground for equitable relief. But where the ground for equitable relief is not a complete bar to any proceedings upon the judgment, and is not if offered by plea a complete bar to the action, we are not furnished with any means of doing justice between the parties. We cannot enter into equities and cross equities; we should often be without means to determine what are fit conditions on which relief should be given; no power is given to us to pronounce a conditional judgment; no process is provided by which we could enforce performance of the condition; there are no writs of execution against person or goods adapted to such a judgment, and no one can conjecture what remedy it would give against the lands of the debtor. In short, we think a plea on equitable grounds is to prevail only when followed by a common law judgment, it will do *complete and final justice between the parties*. Such appears to have been the view taken of this subject by the Judges of the Court of Exchequer in *Mines Rogal Society* v. *Magnay* (10 Ex. 489), where leave was refused to plead such a plea, something remaining to be done by the defendant before he could have claimed a perpetual injunction in a Court of Equity. As that case was decided merely on motion without the opportunity of carrying it into a Court of Error, we should not have considered ourselves bound by it had we disapproved of it; but we entirely concur in the reasoning on which it is founded. And therefore, without deeming it necessary to consider the replication or rejoinder, on the insufficiency of the plea, we give judgment for the plaintiff."

Third—Court of Common Pleas. Although one of the Judges of this Court at an early period spoke of the decision of *Mines Royal Society* v. *Magnay*, as "a rather narrow construction of the Act:" (Crowder, J, in *Chilton* v. *Carrington*, April 25, 1855, 16 C.B. 206), yet subsequent authorities in the Court of Common Pleas in effect support that case. The leading authority in the Common Pleas is *Wood* v. *Copper Miners' Co.* Jan. 28, 1856, 17 C. B. 561.) This was an action for the breach of covenants in a lease. The defendant in effect pleaded as an equitable defence that the parties had agreed to refer to arbitration the terms on which the lease should be cancelled and had bound themselves not to sue upon it. It was not alleged that any award had been made; but, on the contrary, it appeared that the arbitrator had been discharged from making an award. There was a demurrer to the plea. And per Jervis, C. J, "It seems to me that the plaintiff in this case is entitled to the judgment of the Court. Without attempting to defend the form or the precise circumstances under which a Court of Law will admit an equitable plea to enure as an answer to an action, it is plain that inasmuch as a judgment for the defendants here would bar the action, we cannot hold this to be a good equitable plea, unless it discloses a case in which a Court of Equity would grant a perpetual unqualified and unconditional injunction. No doubt in this as in all cases, the Court will not admit an equitable plea, that would carry the legal defence further than a Court of Equity would extend its protection to the party. What is the effect of this plea? Mr. Bovell (defendant's counsel) says it discloses an absolute agreement be-

begin with the words "for defence on equitable grounds," or

tween the parties, upon sufficient consideration to rescind the contract, and then a reference to Mr. Bros (the arbitrator) to ascertain the compensation to be paid by the defendants to the plaintiff therefor. I think, however, it is a reference to Mr. Bros to say upon what terms the contract shall be rescinded. . . In truth the plea amounts to no more than a plea of the pendency of an arbitration under an order of reference empowering an arbitrator to say upon what terms the action is to be discontinued. Although it is quite possible that a Court of Equity . . might interfere to restrain the bringing of an action in violation of the compact entered into between the parties, it could only be done upon terms and conditions which we have no power of imposing or enforcing."

The principles which govern Courts of Common Law in entertaining pleas disclosing equitable defences under the C. L. P. Act, are, it is conceived, fully established in the foregoing cases. There is no material difference in the views of the three Superior Courts of Common Law in England as expressed in the leading case of each Court in regard to those principles. Nothing now remains than to notice subsequent cases in which these established principles have been applied.

First—Equitable Pleas allowed. It seems to be settled that in general where a party seeks to enforce an agreement in writing, defendant may on equitable grounds show by parol that such agreement was framed in mistake: (*Vorley* v. *Barrett*, Creswell, J, 28 L. T. Rep. 86.) The object of the Legislature is to enable parties to have the benefit of an equitable answer without going into Equity: (*Ib.*; See also *Wood* v. *Dwarris*, 11 Ex. 493; *Perez* v. *Oleaga*, 11 Ex. 505.) Thus in an action on a covenant binding defendant, a surgeon, not to practice in A, an equitable plea was allowed to the effect that as between defendant and plaintiff the part of A in which the defendant practised had always been treated as a part of B, and that it was not intended to restrain the defendant from practising in the part of B in question, and that the covenant was framed by mistake: (*Luce* v. *Izod*, 2 Jur. N. S. 578.) In an action by the payee against the maker of two promissory notes, the defendant pleaded by way of equitable defence that the notes were made by him, defendant, whose name was James Harradine, and by one John Harradine, that defendant made the notes at the request and for the accommodation of John Harradine, to secure a debt due from him to the plaintiff, and that he did so without value or consideration, and that the notes were delivered to the plaintiff and received by him from the defendant upon an express agreement made between them that the defendant should be liable thereon as surety only, and that plaintiff at the time the notes were made had notice and knowledge of the same having been so made by him as surety. The plea then stated that the plaintiff, whilst holder of the notes, without the knowledge or consent of defendant, for a good and valuable consideration, agreed to give and did give the said John Harradine time for the payment of the notes, and forbore to enforce them, and that he could and might, had he not given such time, have obtained payment from the said John Harradine. The plaintiff having demurred to this plea, it was argued and holden to disclose good equitable grounds of defence: (*Pooley* v. *Harradine*, 28 L. T. Rep. 367.) This case overrules several *obiter dicta* in *Strong* v. *Foster*, 17 C. B. 201, which case unless examined closely appears to be an authority against the position taken by the Court in *Pooley* v. *Harradine*.

Second—Equitable Pleas disallowed. The Legislature never intended that the course of practice of Courts of Equity should be pleaded and become the subject of investigation at Law: (*Prothero* v. *Phelps*, 25 L.J. Ch. 109.)

words to the like effect.

Action upon an agreement to put a stop to an action formerly pending between plaintiff and defendant and to release defendant from the covenants contained in a certain lease, assigning breaches of the covenant. The plea, which was in substance that plaintiff had gone into equity to enforce specific performance of the same agreement, and had obtained a decree in his favour, and that this decree was a final adjudication between the parties, and that according to the rules and practice of Chancery after such a decree, the defendant would be entitled to relief on equitable grounds against a judgment in the present action, held bad: (*Phelps* v. *Prothero*, 16 C.B. 370.) In an action by the trustee of a married woman against a banker for dividends which the latter had paid over to a third party, pursuant to a power of attorney given by plaintiff, it was held an equitable plea that the married woman had obtained an advance of her dividends by means of the power of attorney which she had revoked before defendant had received notice of the revocation of the power, was not allowable: (*Clarke* v. *Laurie*, 28 L. T. Rep. 125.) And per Pollock, C.B, "It is an established rule now and it is essential to the carrying into effect of the Statute which gives these equitable pleas, that no equitable plea shall be permitted except in a case where the plea and the decision and judgment of the Court upon it will work out and complete all the equity that belong to the matter to which the plea refers. As for instance, if a person is sued upon a bond or any covenant under seal, who has by an instrument not under seal, dispensed with performance and accepted something in lieu of it, and so on, there you are permitted to plead now that which at law would have been formerly no defence. But there the judgment works out the whole equity of the matter. That could not be so here. An equitable plea in answer to the claim of the trustee would not settle the whole matter as between the parties; there would still be a question whether the trustee would not be liable to the *cestui que trust*, and we have no power of protecting the trustee against such an action. . . We are of opinion that the equitable plea ought not to be allowed in the present case:" (*Ib.*) Pleas of equitable set-off may be allowed; but if having no natural connexion with the subject of plaintiff's claim, must be rejected. To an action for money payable for freight and porterage for the conveyance of goods, the defendants pleaded as to £47 0s 6d, an equitable plea that plaintiff was a bargeman and was employed by defendants in that capacity; that in the course of such employment plaintiff agreed to carry on a certain river a large quantity of coal belonging to the defendants in certain barges of the plaintiff, and that the said coal was so utterly lost on the said voyage by and through negligence, &c., of the plaintiff, and that the cost price of the coal so lost was £47 0s 6d, and that defendant claims equitably to set the said sum off against plaintiff's demand: Held plea bad: (*Stimson* v. *Hall et al*, 28 L. T. Rep. 325.) And per Bramwell, B, "It is a common opinion that equity deals out a sort of vague justice unfettered by rules—a sort of natural equlty; but that is a mistake; their rules are in fact as binding as ours. Then the question is whether, according to law as administered in equity, equity would give unconditional relief. Now, in the case of *Beasley* v. *D'Arcy* (2 Sch. & Lef. 403), which has been cited, it was clear that there was an equity, but here there is no natural connexion between the claim and the cross-claim, and there is no semblance of authority in defendant's favour."

Third—Other matters. A defendant who in an action at law pleads a subject matter as an equitable defence, is not precluded from applying upon that subject matter to a Court of Equity

App. Co. C. Eng. C. L. P. A. 1854, s. 84.

CCLXXXVIII. (*s*) Any such matter which if it arose before or during the time for pleading would be an answer to the

for an injunction: (*Phelps* v. *Prothero*, 25 L. J. Chan. 105), and though the plea be demurred to at law, and the demurrer remain undecided, a Court of Equity may still interfere: (*Evans* v. *Bremridge*, 27 L. T. Rep. 8.) But a party who, having unsuccessfully defended an action at law, afterwards resorts to equity upon the same ground of defence and there succeeds, shall be entitled only to the costs of one proceeding: (*Watson* v. *Alcock*, 1 N. Eq. Rep. 234.) In one case the Court when allowing an equitable plea, thinking that it would raise an issue which could not be satisfactorily disposed of by a jury, gave to plaintiff the option of having the trial *in banc.* (*Luce* v. *Izod*, 1 H. & N. 245.) There may be a conflict of opinion between Courts of Law and Equity upon the adjudication of the same subject matter under the operation of the sections here annotated. Thus, in an action at law a defendant pleads an equitable defence which the Court of Law refuses to entertain, upon the ground in their opinion it would not be sufficient to entitle defendant in equity to an absolute and unconditional injunction against the judgment when obtained. Defendant though defeated at law may afterwards apply to a Court of Equity for the very injunction which a Court of Law decided a Court of Equity could not give him. Contrary to the opinion of the Court of Common Law, Equity may see fit to grant the relief sought by the issue of an absolute and unconditional injunction. The effect of such procedure is obviously the allowance of an appeal from a Court of Common Law to a Court of Equity, a contingency which the Legislature when passing the C. L. P. Act, does not seem to have contemplated. The following case, though not quite in point, may serve to illustrate the meaning of these observations. The payee of two promissory notes being about to sue the maker, the brother of the maker agreed to pay £200 to the payee in trust for E, or £6 10s per quarter so long as the £200 should be unpaid, so that the notes should be suspended and rendered inoperative so long as the brother continued to pay the £6 10s per quarter to the payee; and on payment of the £200 all claim on the notes to cease, and the same to be given up. The brother not having paid the £6 10s to the payee for two quarters, but having paid these sums to E, the *cestui que trust* (as the latter admitted) the payee brought his action upon the notes against the maker. Held in error reversing the judgment of the Court of Queen's Bench, that the agreement could not be pleaded in bar to the action upon the notes, but might be the subject of a cross action. Held in Equity that the agreement must be construed as a contract by the brother, to provide for E. the annuity of £25, or the gross sum of £200 as a substitute for the two notes, and by the payee that the two notes should thenceforth be only a security for the performance of such contract, and not an agreement under which the original right of payee would revive on any failure of the quarterly payments by the brother. Held also that the brother was entitled to the specific performance of the agreement in equity not on the ground of the circuity of cross actions which the rule of law occasioned, but on the ground that the Court by modifying its decree could give to all parties the benefit of the agreement, whilst a Court of Law, being unable so to modify its judgment, could not give to one party the benefit of the agreement, without depriving another party altogether of such benefit: (*Beech* v. *Ford*, 7 Hare 208.)

(*s*) Taken from Eng. Stat. 17 & 18 Vic. cap. 125, s. 84.—Founded upon 2d Rep. C. L. Comrs. s. 50.—Applied to County Courts.

action by way of plea, (*t*) may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querela*. (*u*)

Equitable defence by way of *audita querela*.

(*t*) *Any such matter, &c. i.e.* matter entitling defendant to relief on equitable grounds; as to which see note *r* to s. cclxxxvii.

(*u*) *Audita Querela* is a remedial writ invented to prevent a defect of justice in cases where a party having a good defence has no opportunity of making it by the ordinary process of law. Thus it lies for a person who is either in execution or in danger of being so, upon a judgment or recognizance when he has matter to show that the execution if issued ought not to have issued, or if not issued should not issue: (2 Wms. Saund. 147 (1). It has been refused where the applicant was a stranger to the judgment, having no other privity than that he was alienee of the land which was taken in execution, and had acquired his interest after execution had issued: (*Beard* v. *Ketchum*, 8 U. C. R. 523.) Though the point is involved in some doubt, it seems to be a writ of common right—*ex debito justitiæ*: (*Nathan* v. *Giles*, Marsh, 226; *Giles* v. *Hutt et al.* 1 Ex. 59), and is in the nature of a bill in equity to be relieved against the oppression of plaintiff: (3 Blac. Com. 406.) And yet a defendant is not either by the existence of the remedy or by having unsuccessfully resorted to it precluded from bringing his original bill in Equity for relief: (*Williams* v. *Roberts*, 8 Hare 315.) The writ, however, is not a difficult proceeding: (*Baker* v. *Ridgway*, 2 Bing. 41.) Though *ex debito justitiæ*, it cannot issue without an order in open Court: (*Dearie* v. *Ker*, 7 D. & L. 231; *Beard* v. *Ketchum*. 8 U. C. R. 523. It may bementioned that Eng. Rule 79 of H. T. 1853, ordering that "no writ of *audita querela* shall be allowed unless by rule of Court or order of a Judge," is not adopted among our N. Rs. of T. T. 1856. The writ when issued in the name of the Queen directed to the Court in which the original proceedings have been had sets out the record down to judgment, then states the subsequent matter, and enjoins the Court to call the parties before it to cause justice to be done: (see form in 2 Wms. Saund. 137 *o*; also *Porchester* v. *Petrie*, 3 Doug. 261.) If the writ be founded on record, or the party be in custody, the process upon it, when allowed, is a *scire facias*. But if the *audita querela* be grounded on a matter of fact or the party be not in custody, but only brought *quia timet*, the process on the *audita querela* is a *venire facias*, and on default thereto a *distringas ad infinitum*: (*Clerk* v. *Moor*, 1 Salk. 92.) The process issued upon the *audita querela* should be personally served: (*Williams* v. *Roberts*, 1 L. M. & P. 381), and the party served warned to appear. If he appear the party who sued out the process declares. In the declaration the whole writ of *audita querela* is recited in the same manner as in a declaration on a *scire facias*: (Sellon's Pr. II. 256), thereupon the party made defendant pleads: (*Giles* v. *Hutt*, 1 Ex. 701), and the parties proceed to issue. The indulgence shown by the Courts in modern times by way of motion has in a great measure superseded procedure by *audita querela*: (*Sutton* v. *Bishop*, 4 Burr. 2287; *Wickett* v. *Cremer*, 1 Rayd. 439; *Baker* v. *Ridgway*, 2 Bing. 41; *Humphreys* v. *Knight*, 6 Bing. 572; *Plevin* v. *Henshall*, 10 Bing. 24; *Barrow* v. *Poil*, 1 B. & Ad. 629; *Outcherlony* v. *Gibson*, 6 Scott N. R. 577; *Sharp* v. *D'Almaine*, 8 Dowl. 688; *Turner* v. *Pulman*, 2 Ex. 508.) But relief upon motion is only granted where the right to relief is clear and beyond all question: (*Dolby* v. *Mott*, 6 Taunt. 329; *Harrison* v. *Blakely*, M. & P. 261; *Lister* v. *Mundell*, 1 B. & P. 427; *Symons* v. *Blake*, 2 C. M. & P. 416; *Beard* v. *Ketchum*, 8 U. C. R. 524.)

App. Co. C. Eng. C. L. P. A. 1854, s. 85. Replication on equitable

CCLXXXIX. (*v*) The Plaintiff may reply, in answer to any Plea of the Defendant, (*w*) facts which avoid such plea upon equitable grounds, (*x*) provided that such replication shall begin

(*v*) Taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 85.—Applied to County Courts.

(*x*) It is enacted that the plaintiff may reply in answer "to *any* plea of the defendant, facts which avoid such plea upon equitable grounds," &c. This enactment is sufficiently comprehensive to admit an equitable replication either to a *legal* or an *equitable* plea. Whether there can be a legal replication to an equitable plea is a question. The point, though raised in *Wood* v. *Copper Miners' Co.* 17 C. B. 587, was not decided. It would seem that where the plea is legal, the replication may be considered either upon legal or equitable grounds, though stated to be upon equitable grounds; but only upon equitable grounds when the plea is an equitable plea: (*Varley* v. *Barrett*, Willis, J, 28 L. T. Rep. 86.)

(*x*) A Court of Common Law having no power to enforce anything which depends upon a condition: (see note *r* to s. cclxxxvii), an equitable replication must disclose facts which in equity would entitle plaintiff to unconditional relief: (*Teede et al.* v. *Johnson*, 11 Ex. 840.) Declaration on a guarantee by defendant for payment of goods supplied by the plaintiffs to one A. Plea that after A became indebted to the plaintiffs, he being also indebted to other persons by an indenture between A of the first part, C and D (one of the plaintiffs) trustees for themselves and the rest of the creditors of the second part; and the several other persons whose names and seals were thereunto subscribed and set, being creditors of A, of the third part; after reciting that A was indebted to the parties thereto of the second and third parts in the several sums set opposite to their names in the schedule thereunder written, which he was unable to pay in full, it was witnessed that A assigned all his estate and effects to the said trustees upon trust to pay rateably and without preference to themselves and their partners and the parties thereto of the third part, the sum set opposite their names in the schedule; and in consideration of the assignment the several creditors, parties thereto of the second and third parts, released A from all debts which they or their partners might have against him up to the date thereof. Replication on equitable grounds that D executed the agreement in his character of trustee and not in his character of creditor, and that he did so merely for the purpose of declaring the trusts of the deed, and not with any intention of releasing the debt; that he did not sign nor seal the schedule, nor was the debt of the plaintiffs contained therein, and that if the deed operated in law as a release it was executed by mistake and in ignorance that such would be its legal effect. Held that the facts disclosed by the replication did not afford any answer to the plea on equitable grounds: (*Teede et al.* v. *Johnson*, *ubi sup.* The principles governing the allowance or disallowance of equitable pleas must, it is manifest, in many respects govern the allowance or disallowance of equitable replications: (see note *r* to s. cclxxxvii.) Whenever the Statute of Limitations is a good answer to a declaration and is pleaded, it would appear that in general it cannot be avoided in a Court of Law by an equitable replication. Thus, action against the executors of a deceased for work, labor, and materials, &c. Plea of the Statute of Limitations. Replication on equitable grounds that the testator by his will appointed defendants his executors, and amongst other things devised certain premises to them to sell, &c., that said testator also bequeathed to them the residue of his personal estate upon trust to call in and convert it into money, &c., and

with the words "for replication on equitable grounds," or grounds.

that they should from the money so to arise from the real and personal estate pay testator's debts, funeral expenses, and legacies bequeathed, and hold the residue in trust for plaintiff and his other children in equal shares. Averment of sufficiency to pay same, &c. Held replication bad: (*Gulliver* v. *Gulliver*, 27 L. T. Rep. 189.) So in an action for breaking plaintiff's close and converting his goods, a replication to a plea of the Statute of Limitations that the cause of action was fraudulently concealed from plaintiff until within six years before action was disallowed: (*Hunter* v. *Gibbons*, Ex. *MS.* 24th Nov. 1856, Pater Mac N. & M. 1282.) In *Gulliver* v. *Gulliver*, *ubi supra*, besides the plea of the Statute of Limitations there was as to £65 paid, &c., a plea of set-off, to which plaintiff replied on equitable grounds that the testator by his last will devised and bequeathed certain real and personal estate to plaintiff, his son, and other children, and by said will declared the same should be deemed to be advancements, and that the children should not be required to account for the same; that defendants' set-off were the same moneys and effects so given as such advancements, and that defendants ought not therefore to be allowed to set-off, &c. Held also bad. Where defendant relies upon an equitable ground of defence, it is open to plaintiff in his replication to show a better equity: (*Sloper* v. *Cotterell*, 27 L. T. Rep. 198.) Thus, action for money had and received. Plea on equitable grounds that the money was bequeathed to the sole and separate use of the plaintiff, and was paid to the defendant by the executors upon her separate receipt, and that she in her lifetime disposed of and assigned the fund upon trusts in which the plaintiff took no interest, and that the defendant held the money upon those trusts. Replication upon equitable grounds, alleging a prior assignment by the wife to the husband before the receipt of the money by the defendant, and that the defendant received the money merely as agent of the wife in order to get in the money from the executors as the money of the plaintiff. Held sufficient: (*Ib.*) In this case the Court was of opinion that the legal as well as equitable right to the money was in the plaintiff. Had there been only an equitable right some difficulty might have been experienced owing to plaintiff in his replication setting up a purely equitable claim to money which in his declaration he claimed upon legal grounds, and thus lay the replication open to objection upon the ground of departure. Whenever in a case there is a conflict of equities, the principles mentioned in a recent decision of Kindersley, V. C, may be consulted with advantage. The question raised was whether the equitable interest of a vendor's lien for unpaid purchase money should be preferred to the equitable interest of an equitable mortgagee. *Per cur.* "The rule of the Court of Equity for determining the preference as between persons having adverse equitable interests is not always *qui potior est tempore potior jure;* that is not only not universally true as between persons having only equitable interests, but is not so even where the equitable interests are precisely the same in nature, and in that respect perfectly equal. Nor is it always true of persons having equitable interests, if their equities are equal; for it is impossible that two persons should have equal equities, except where a Court of Equity would altogether refuse to lend its assistance to one side or the other; and if the Court will interfere to enforce the right of one against the other on *any* ground, as for priority in time, how can their equities be equal? The rule seems to be this as between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity. In a contest between persons having equi-

words to the like effect.

table interests, priority of time is the ground of interference last resorted to. That is, a Court will not resort to it until it finds that there is no other sufficient ground of preference between them. In examining into the relative merits or equities of the two parties, the point to which the Court must direct its attention are these—the nature and condition of their respective equitable interests—the circumstances and manner of their requisition, and the whole conduct of each party in respect thereto. In this case the two equitable interests both arise out of the forbearance of money. The vendor's lien is a right created by a rule of equity without special contract, the right of the equitable mortgagee is created by special contract; but this does not constitute any sufficient ground of preference, though if it makes any difference it is in favour of the mortgagee. The mortgagee has also possession of the title deeds, and there is authority for holding, that as between two persons where equitable interests are of precisely the same nature and quality, and in that respect equal, the possession of the deeds gives the better equity. And as regards the conduct of the parties, everything appears in favour of the equitable mortgagee; he was guilty of no negligence, and was encouraged by the vendors to rely on the purchaser's title, and assured by their acts that the mortgagor, so far as they were concerned, had an absolute title at law and equity:" (*Anon.* Finl. C. L. P. A. p. 450.) In another case it was held that a legal mortgagee was not to be postponed to a prior equitable mortgagee on the ground of not having got the title deeds, unless there were fraud on the part of the former, and that neither negligence nor fraud could be imputed to him when he had made *bona fide* enquiries and got reasonable answers. *Secus*, if he had made no inquiry (*Hewitt* v. *Loosemore*, 21 L. J. Ch. 69.) If a plaintiff sue upon a written executed contract, to which defendant pleads inequitable matter as a defence, and to which there is a good equitable answer, Courts of Common Law may admit the answer, although a Court of Equity might be precluded by its rules from entertaining such an answer until the contract should be reformed: (*Wood* v. *Dwarris et al*, 11 Ex. 493.) Thus, to a declaration on a policy of insurance defendant pleaded that the policy was made upon the terms of a previous proposal, and upon the express condition that if any statement in the proposal were untrue the policy should be void, and that a particular statement mentioned was untrue. Replication on equitable grounds that before the policy was made defendants issued a prospectus containing a representation that all policies effected by them should be indisputable, except in cases of fraud, and that plaintiff effected the policy on the faith of such representation. Held that the replication was a good avoidance of the plea: (*Ib.*) So where plaintiff and defendant became cosureties for one A B, by endorsing a bill for £300. A B became bankrupt. The plaintiff had had other dealings with A B, and had advanced him £2661 6s. 6d. for the purpose of erecting houses pursuant to a building contract, and had supplied him with building materials worth £1512 for the same purpose, as well as £136. 17s. 4d. for other purposes. After the bankruptcy of A B, the plaintiff and the other creditors agreed that the building agreement should be delivered up to the plaintiff, to be cancelled upon the payment by the plaintiff of £150 in full discharge of all claims which the creditors might have upon the house and property comprised in the agreement, and that the plaintiff should relinquish all claims on the bankrupt or his estate for the said money which had been so advanced to the bankrupt for building purposes and for building materials. The attorneys of the parties in drawing up the agreement made

CCXC. (*y*) Provided always, that in case it shall appear to the Court or any Judge thereof, (*z*) that any such equitable plea or equitable replication cannot be dealt with by a Court of

App. Co. C. Eng. C. L. P. A. 1854, s. 86. Striking out any such

the plaintiff "relinquish all claim for moneys advanced to and for the bankrupt, and his claim for goods supplied for the above mentioned purposes." The plaintiff having paid the £300 upon the bill which was dishonored by A B, sued the defendant for contribution. The defendant pleaded that the plaintiff had discharged A B by the abovementioned agreement. To which the plaintiff replied on equitable grounds that the memorandum of agreement was drawn up by mistake, the real agreement being confined to claims of the plaintiff for moneys advanced for building purposes, and having no reference to the £300 bill and being already executed; he also denied that he had relinquished his claim against the bankrupt for the £300. To this replication the defendant demurred. Held that it was doubtful whether the terms of the memorandum of agreement included the claim for the £300, but that even if it were so, the defendant by demurring *having admitted the mistake*, the replication was a good equitable answer to the plea, and that the agreement having been executed, it was not necessary that a Court of Equity should reform it to entitle plaintiff to the benefit of his replication: (*Varley* v. *Barrett*, 28 L.T.Rep. 86.) But in an action of account upon the Statute of 4 Anne, cap. 16, s. 27, by one tenant in common against another for not accounting for rents received, the defendant pleaded that before the receipt af the rents the plaintiff and defendant by indenture demised the premises to one C. D. for a term of 500 years, which term, after divers assignments, vested in defendant, to which there was an equitable replication that the said indenture was a mortgage to secure a sum of money, and that defendant had received more than sufficient to pay the mortgage debt. This replication was struck out because the Court of Common Law had no power to order a reconveyance: (*Garley* v. *Garley*, 1 H. & N. 144.) An action was brought on a covenant in a mortgage deed made by defendant and one E F, securing payment of £2800. Plea on equitable grounds that under the mortgage deed certain chattels were assigned to plaintiff as a security with power to sell, and that he sold, and that the proceeds were sufficient to satisfy his demand. Replication on equitable grounds that part of the goods so assigned were not in fact the property of the assignor till after the date of the indenture, and did not pass by it, and that afterwards they became the property of E. F. by a decree in Chancery, which bound him to pay £700 for them, and that he had not paid it. The plaintiff therefore asserted his right to deduct from the proceeds of the sale the £700 for which he, as purchaser, having notice of a trust, was liable in Equity. He also claimed to deduct the £600 subsequently advanced to E. F, and to apply only the sum remaining after these deductions in discharge of the defendant's liability. The Court decided in favour of the claim to deduct the £700, as the proceeds of the property sold were in truth less that amount, but refused to allow the £600 to be deducted, as that was an attempt to tack the second mortgage to the first: (*Marcon* v. *Bloxam*, 11 Ex. 586.)

(*y*) Taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 86.—Applied to County Courts.

(*z*) Although an equitable plea has been allowed by a Judge at Chambers, the plaintiff still has a right to apply to the Court for a rule to strike it out, and this not by way of appeal from the decision of the Judge at Chambers, but as a substantive motion: (*Wood* v. *the Copper Miners' Co*, 26 L. T. Rep. 91.)

plea, &c., which cannot be dealt with by a Court of Law

Law so as to do justice between the parties, (*a*) it shall be lawful for such Court or Judge to order the same to be struck out, (*b*) on such terms, as to the costs, and otherwise, as to such Court or Judge may seem reasonable. (*c*)

Amendments.

(*d*) And whereas the power of amendment now vested in the Courts and the Judges thereof, is insufficient to enable

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(*a*) A Court of Equity often refuses to entertain bills for relief when its jurisdiction cannot be beneficially exercised: (see *Hills* v. *Crull*, 2 Ph. 60; *Lumley* v. *Gye*, 21 L. J. Ch. 899.)

(*b*) To an action by the drawer against the acceptor of a bill of exchange at three months, dated 12th July, the defendant pleaded by way of equitable defence that the bill ought to have been and was represented to him by the plaintiff to be drawn on 25th July, and that three months from 25th July had not elapsed before action brought, whereupon plaintiff made application to a Judge in Chambers to strike out the plea on the ground that "it was frivolous, and discosed no defence in equity," and was by the Judge refered to the full Court. Plaintiff accordingly obtained a rule *nisi* from the full Court on affidavits that the plea was "false in substance and in fact." The Court thinking that the plea "did not disclose a full equitable defence" struck it out: (*Drain* v. *Harvey*, 17 C. B. 257, 33 L. & Eq. 333.) The admissibility of an equitable pleading whether plea or replication may be determined in either of two modes. First, when application is made for leave to plead more than one plea or replication one thereof being equitable, in which case the admissibility of the equitable pleading may be decided upon *in limine*. Second, where a party having the right to plead singly without leave pleads an equitable pleading, in which case his opponent may apply under the section here annotated to strike it out. Whenever it appears that the equitable pleading cannot be dealt with by a Court of Law "so as to do justice between the parties," it may be disallowed or struck out. A Court of Law has no power to administer conditional relief such as dispensed by Courts of Equity through the medium of conditional injunctions. The equitable pleading will be sustained only when disclosing equitable grounds which in the opinion of the Court would entitle the party pleading it to an absolute and unconditional injunction against the judgment obtained at law if no such pleading were allowed: (see sections cclxxxvii-viii-ix, and notes thereto.)

(*c*) *Court or Judge*—relative powers see note *m* to s. xxxvii.

(*d*) By an amendment is understood the correction of an error. The Court has an inherent jurisdiction to allow amendments when in furtherance of justice; but the exercise of this jurisdiction at common law was very uncertain. Repeated refusals to exercise it in cases where it might have been beneficially exercised led to the passing of a series of statutes, each one of which is more comprehensive than its predecessor. Power is conferred to amend errors caused by the misprision of officers of the Court: (14 Ed. 3 Stat. 1 cap. 6), which amendments are allowable either before or after judgment: (4 Hen. 6, cap. 3; 8 Hen. 6, caps. 12-15.) So mistakes or misprisions of the parties are in certain cases cured after verdict or confession of judgment by the operation of statutes known as the Statutes of Jeofails: (32 Hen. 8, cap. 30; 18 Eliz. cap. 14; 21 Jac. 1, c. 13; 16 & 17 Car. 2, c. 8; 4 & 5 Anne c. 16, s. 2; 5 Geo. 1 c. 13.) Until modern times there does not appear to have been any distinct power to make amendments during the trial of an action. This was the cause of

them to prevent the failure of Justice by reason of mistakes and

great mischief, and the mischief induced specific remedies at the hands of the Legislature. The Legislature of Upper Canada imitating the Legislature of England passed very important Statutes upon the subject of amendments. In 1831, an Act was passed authorising "every Court of Record holding plea in civil actions, any Judge sitting at Nisi Prius, and any Court of Oyer and Terminer and General Gaol Delivery in this Province, if such Court or Judge shall see fit so to do, to cause the record on which any trial may be pending before any such Court or Judge in any civil action or in any indictment or information for any misdemeanor when any variance shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the Court," &c: (1 Wm. IV. cap. 1, s. 1; Har. Prac. Stats. p. 21.) This Statute is taken from Eng. Stat. 9 Geo. IV. c. 15. Afterwards in 1836 a second Act was passed, which considerably extended the powers of the Court and Judge to make amendments. It enacts "that it shall be lawful for any Court of Record holding plea in civil actions, or for any Judge sitting at Nisi Prius, if such Court or Judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such Court or Judge in any civil action or in any information in the nature of a *quo warranto* or proceedings on a *mandamus*, when any variance shall appear between the proof and the recital or the setting forth on the record, writ, or document in which the trial is proceeding, of any contract, name, or other matter, in any particular or particulars in the judgment of such Court or Judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the Court or otherwise both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it become necessary to amend," &c.: (7 Wm. IV. cap. 3, s. 15; Har. Prac. Stats. p. 50.) This Statute is taken from Eng, Stat. 3 & 4 Wm. IV. cap. 42, s. 23. The powers of amendment conferred by the C. L. P. Act are, however, of a much more extended and remedial character than any of the preceding. *First*, If plaintiff or his attorney shall omit to insert or indorse on any writ or copy any of the matters required by the C. L. P. A. to be indorsed, an amendment may be allowed: (s. xxxvii.) *Secondly*, It is in the power of the Court or a Judge at any time *before the trial* of any cause under certain circumstances to order that any person or persons not joined as plaintiff or plaintiffs in such cause shall be so joined, or that any person or persons originally joined as plaintiff or plaintiffs shall be struck out from such cause (s. lxvii). *Thirdly*. In case it shall appear *at the trial* of any action that there has been a misjoinder of plaintiffs, or that some person or persons not joined as plaintiff or plaintiffs ought to have been so joined under the circumstances, such misjoinder or nonjoinders may be amended as a variance at the trial: (s. lxviii.) *Fourthly*. It is in the power of the Court or Judge, in case of the joinder of too many defendants at any time *before* the trial under certain circumstances, to order that the names of one or more of such defendants shall be struck out: (s. lxx), so also if it appear *at the trial* that there has been a misjoinder of defendants, such misjoinder may be amended as a variance at the trial: (*Ib.*) *Fifthly*. It is in the power of the Superior Courts of Common Law and every Judge thereof, and every Judge sitting at Nisi Prius *at all times* to amend *all defects and errors*, whether there be anything in writing

objections of form; (*e*) Be it enacted as follows:

App. Co. C. Eng. C. L. P. A. 1852, s. 222.

The Courts may and must make all such

CCXCI. (*f*) It shall be lawful for the Superior Courts of Common Law, (*g*) and every Judge thereof, and any Judge sitting at *Nisi Prius*, (*h*) at all times to amend all defects and

to amend by or not: (s. ccxci.) Hitherto the difficulty has been to mention cases in which amendments might be allowed; but for the future the difficulty will be to say in what cases amendments might not be made. It is the duty of the Courts and every Judge thereof to extend the powers of amendment so far as they reasonably can, in order to prevent parties being tripped up by mere technical objections: (per Parke, B, in *Wilkinson* v. *Sharland*, 11 Ex. 36.)

(*e*) This recital is of importance as furnishing a clue to the subsequent enactment. It is recited that the power of amendment at the time of the passing of the Act vested in the Courts and the Judges thereof was insufficient to enable them to prevent the failure of justice by reason of mistakes and objections of form. A remedy is therefore provided. The meaning is, that where pleadings are informal, so as not to raise the question which the parties intended to try, the Court or Judge must amend them: (*Ritchie et al.* v. *Van Gelder*, 9 Ex. 762.) But a change of defence by the substitution of one plea for another or the addition of a new plea is a matter entirely in the discretion of the Court or Judge: (*Ib.*) The enactment does not at all interfere with the general equitable jurisdiction of the Courts over their own judgments: (*Cannan et al.* v. *Reynolds*, 5 El. & B. 301.) And the Courts have jurisdiction to set aside a judgment obtained either by mistake or fraud: (*Ib.*)

(*f*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 222.—Founded upon 1st Rep. C. L. Comrs. s. 88.—Applied to County Courts.

(*g*) *Qu.* Does this extend to the Court of Error and Appeal? Until the actual removal of the record into a Court of Error and Appeal, the Court below has power to amend: (*Wilkinson* v. *Sharland*, 11 Ex. 33.) In England the powers of amendment were held not to extend to inferior Courts of Record: (*Wickes* v. *Grove*, 2 Jur. N. S. 212), but this section is made applicable to County Courts, the only Inferior Courts of Record of civil jurisdiction in Upper Canada.

(*h*) The Statute imposes a duty upon the persons who are authorized to amend, in all cases where the amendment is such as may be necessary for determining in the existing suit "the real question in controversy between the parties:" (*Wilkin* v. *Reed*, Maule, J, 15 C. B. 200; *Brennan* v. *Howard*, 25 L. J. Ex. 289.) The Court may amend, a Judge in Chambers may amend, and a Judge at Nisi Prius may amend. Nothing is said about review: that is left to the general law: (*Wilkin* v. *Reed*, Maule, J, 15 C. B. 200), and the general law does not preclude a party unsuccessful before a Judge from making a substantive application to the Court for amendment: (*Ib.* Jervis, C. J.; *Brennan* v. *Howard*, 25 L. J. Ex. 289.) If the Judge who makes an order under this section have jurisdiction as to the subject matter of the order, then whether he makes it rightly or wrongly it is not for the Court to interfere: (*Emery* v. *Webster*, 9 Ex. 242, affirmed in 10 Ex. 901; *Brennan* v. *Howard*, *ubi supra*; *Cawkwell* v. *Russell*, 26 L. J. Ex. 34.) There is power under this section to make the amendment in the cases provided for, whether it be in a matter that is material to the merits of the case or not. "Whether or not a particular amendment is material to the merits is matter of law; but whether or not the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties is matter of fact to be decided by the Judge:" (*Wilkin* v. *Reed*, Maule, J, 15 C. B. 205.)

errors in any proceeding in civil causes, (*i*) whether there is amend-

It often happens that there being a controversy, the parties are unable to try that controversy properly, because the pleadings between them do not correctly raise upon the record what the controversy is. It was to obviate that inconvenience that this section was framed: (*Ib.*) Upon a trial by record the Court amended the declaration by inserting therein the true date: (*Noble* v. *Chapman*, 14 C. B. 400), and the true amount of the original judgment: (*Hunter* v. *Emmanuel*, 15 C. B. 290.) In an action for breach of contract to employ the plaintiff as an actor for three years at a weekly salary of £8, the declaration claimed general damages for a wrongful dismissal; but the plaintiff in his particulars of demand merely claimed £32 for four weeks' salary. The defendant paid £32 into Court, and the plaintiff's attorney, under the mistaken impression that the plaintiff was entitled under that form of declaration to recover for four weeks' salary only, took the money out of Court and gave notice of taxation of costs, which were accordingly taxed and paid. Under the circumstances, the plaintiff's attorney having discovered his mistake within a few days afterwards, obtained a Judge's order to set aside the replication and all subsequent proceedings, with leave to the plaintiff upon refunding the money so paid and the costs, to amend his declaration and particulars of demand, with liberty to plead *de novo* being given to the defendant. Held order correctly made: (*Emery* v. *Webster*,, 9 Ex. 242.) It has been held that a Judge at Nisi Prius may amend a declaration by altering the form of action, for example, so as to make the declaration in case instead of trespass: (*May* v. *Footner*, 5 El. & B. 505.) Action on a contract by plaintiff to deliver to defendant at C. a cargo in March, alleging as a breach that defendant would not accept or pay for the goods. Pleas, first, *non assumpsit*, and second, that plaintiff was not ready and willing to deliver at C. in March. It appeared that defendant had by letter requested plaintiff to postpone the shipment, that the ship arrived in C. on the evening of 31st March, and consequently that the cargo was not ready for delivery till April. The Judge on plaintiff's application amended the declaration by inserting an averment that, at defendant's request, plaintiff delayed the shipment, and that defendant promised to accept a delivery of that shipment with reasonable speed, and exonerated plaintiff from delivering in March: Held properly made: (*Tennyson* v. *O'Brien*, 5 El. & B. 497.) Upon a plea of "not guilty" by Statute where the defence was upon several Statutes, several of which were omitted from the margin, an amendment was allowed by the insertion of them: (*Edwards* v. *Hodges*, 15 C.B. 477.)

(*i*) The power is *at all times* to amend *all* defects and errors in *any proceeding* in civil causes. The amendment may be made at any time *before*, *at*, or *after* the trial: (*Morgan* v. *Pike*, 25 L. & Eq. 281), and although delay may be a ground for refusing an amendment on the eve of a trial, it is no ground for ultimately refusing it, unless it would involve some prejudice to the opposite party, as by reason of the unexpected absence or death of a witness: (*Tricket* v. *Jarman*, 25 L. & Eq. 414.) The Court has power after a trial upon a motion for judgment *non obstante veredicto*, or for a new trial to amend a defect in a pleading, so as to raise the real question in controversy, though no advantage was taken of an offer to allow amendments at the trial: (*Parsons* v. *Alexander*, 5 El. & B. 263.) At the trial it appeared that defendant entered a gaming house, and there lost at billiards £65, for which he gave an I.O.U., and subsequently sent plaintiff an unstamped cheque. The cheque was not received in evidence. The Judge intimated generally that he would make what amendments were necessary; neither party asking for an

ments in any civil proceedings as may be necessary to do full justice.

anything in writing to amend by or not, (*j*) and whether the defect or error be that of the party applying to amend or not, (*k*) and all such amendments may be made with or without costs, (*l*) and upon such terms as to the Court or Judge may seem fit, (*m*) and all such amendments as may be necessary for the purpose

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amendment, the question was left to the jury whether the account was stated of money lost at gambling. The jury found for the defendant. Held that the Court *in banco* had, without consent, power to amend the plea by making it apply to an account stated concerning the consideration of the cheque, so as to raise on the record the question really to be tried: (*Ib.*) The power to amend after trial by the *addition* of a plea was doubtful: (*Melzner* v. *Bolton*, 23 L. T. Rep. 22; *Charnley* v. *Grundry*, Jervis, C.J, 14 C.B. 614.) After trial a defendant was allowed upon payment of costs to amend a plea of not guilty "by Statute," by inserting several additional Statutes in the margin: (*Edwards* v. *Hodges*, 15 C.B. 77.) In one case after a motion in arrest of judgment and after proceedings in error for a defect in a declaration leave was given to plaintiff to amend upon paying the costs of the motion in arrest of judgment of the proceedings in error and of the application to amend: (*Wilkenson* v. *Sharland*, 11 Ex. 38.) The power of amendment extends, however, not merely to declarations, and pleas, and other pleadings, but to *any* proceeding in civil causes. This will apply to the writs, verdict, postea, judgment, and in short all the various steps in an action at law. (See *Gregory* v. *Cotterell*, 5 El. & B. 571, 571; also *Bell* v. *Postlethwaite*, 5 El. & B.; *Hayne* v. *Robertson*, 17 C. B. 548; *Kendell* v. *Merritt*, 18 C. B. 178.) Leave to amend a writ of *capias* issued in an action for seduction was granted after arrest upon the application of plaintiff, and upon payment of costs by striking out the words "in an action on promises," and inserting "in an action on the case:" (*Legeay* v. *Lacroix*, Chambers, Feb. 26, 1857, Hagarty, J.) The section gives no power to amend in cases of misjoinder which is not a "defect or error," such as contemplated: (*Robson* v. *Doyle*, 3 El. & B. 396.) In cases of misjoinder or nonjoinder either of plaintiffs or defendants, application must be made under ss. lxvii. lxviii. lxx.: (see note *d*, *ante*.)

(*j*) Formerly amendments could only be made on the record when there was something in writing to amend by: (*Cheese* v. *Scales*, 10 M. & W. 491.)

(*k*) An amendment may be reamended or annulled: (*Morgan* v. *Pike*, 14 C.B. 479.)

(*l*) Every pleading is to be taken subject to such amendments as the law as it now stands permits the Court or Judge to make: (*Buckland* v. *Johnson*, Maule, J, 15 C. B. 165.) Where the amendment raises substantially the real question in controversy between the parties, there is no reason why it should be allowed only upon the terms of the party whose pleading it is paying costs: (*Ib.* Crowder, J.) A discretion must be exercised in each case in view of all the circumstances of the case, and with reference to terms the case be disposed of upon full consideration of such circumstances. If an order for leave to amend be abandoned after service, the opposite party has in general no right to costs incurred before the abandonment on the supposition that the order would be acted upon by the party obtaining it: (*Brown* v. *Millington*, 22 L. J. Ex. 138.)

(*m*) The Court always takes care that if one party to an action be allowed to amend, the other party shall not be prejudiced or delayed thereby: (*Alder* v. *Chip*, Burr. 756.) In trials at Nisi Prius an amendment may in many cases make necessary a postponement of the trial. One test of the propriety of refusing a postponement

of determining in the existing suit the real question in controversy between the parties, (*n*) shall be so made.

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is to see whether the party against whom the amendment is made could, if the trial were postponed, get other evidence: (*Tennyson* v. *O'Brien*, 5 El. & B. 487, Wightman, J.) In an action on a contract an amendment of the declaration was made at Nisi Prius for the purpose of raising the real question in controversy between the parties and leave given to defendant to amend his plea; but defendant objected to the amendment being made, and requested a postponement of the trial, which the Judge refused. Thereupon defendant refused to alter his plea and to appear further, whereupon the jury under the direction of the judge assessed the damages. On a motion for a new trial, it was held that no injustice being suggested to have been sustained by the defendant in consequence of the refusal to postpone the trial, the discretion of the Judge in that respect ought not to be reversed: (*Ib.*) Where leave to amend is offered during an argument in banc. but declined, leave cannot be afterwards obtained: (*Weld* v. *Baxter*, 27 L. T. Rep. 190; *Deposit Life Assur. Co.* v *Ayscough*, 2 Jur. N. S. *n.* 812.)

(*n*) The powers conferred by this section appear not to be restricted to "defects or errors," but to extend to all amendments which tend to promote the trial of the substantial question between the parties: (*Mitchell* v. *Crasswaller*, Jervis, C.J, 13 C. B. 244.) To determine what is the substantial question between the parties is to determine not a matter of law but of fact, which matter of fact must be determined by the Judge on a careful consideration of the pleadings and evidence: (see note *h*, *supra*.) But the Statute does not contemplate amendments in every matter which could by possibility be started in the course of the trial. It has been thought by some of the Judges that the presiding Judge is bound to make an amendment asked for, if by so doing *some* question *might* be raised between the parties; but this impression is clearly incorrect: (*Wilkin* v. *Reed*, 15 C. B. 192; *Cawkwell* v. *Russell*, 26 L. J. Ex. 34.) It was intended by the C. L. P. Act to limit the powers of amendment to the introduction of matters which the parties hoped and *intended* to try in the cause, and not to authorize amendments which might raise questions which never were contemplated by the parties: (*Wilkin* v. *Reed*, *ubi sup.* Maule, J.) The declaration in an action for giving a false character of one P, a clerk, alleged that the defendant fraudulently represented to the plaintiff that the reason why he dismissed P. from his employment was the decrease of his business, and that the defendant recommended the plaintiff to try P., and knowingly suppressed and concealed from plaintiff the fact that P. had been dismissed from his employment on account of dishonesty. At the trial it appeared that P. had been guilty of dishonesty while in the defendant's employment, but that defendant had not mentioned that fact to plaintiff when he recommended him to try P. It further appeared, however, that P. had not been dismissed from the defendant's employment on account of his dishonesty, but really for the reason which defendant had assigned to plaintiff. The Judge at the trial refused to allow the declaration to be amended, by inserting an allegation "that P. whilst in the defendant's employment was guilty of dishonesty," instead of the allegation "that P. had been dismissed from the employment of the defendant on account of dishonesty." Held that the amendment was properly refused—the matter in controversy between the parties being *not* whether the defendant had fraudulently suppressed the fact that P. had been guilty of dishonesty, but whether he had given the true reason for having dismissed him: (*Wilkin* v. *Reed*, *ubi supra*.) So an amendment of a spe-

Negotiable Instruments. **And with regard to actions on Bills of Exchange or other negotiable instruments; (*o*) Be it enacted as follows:**

cial case for the purpose of letting in a question neither considered nor presented by the parties for consideration, was refused: (*Hills* v. *Hunt*, 15 C. B. 1.) Again, to hold that a Judge is *bound* to add a new plea whenever it is necessary to let in the defence as it appears upon the evidence would be to put an end to trial by jury altogether. No man could ever know what case he was going to meet: (*Bridges et al.* v. *Gay*, 22 L. T. Rep. 65.) In the exercise of discretion it seems that such an amendment may be allowed: (*Taylor* v. *Shaw*, 21 L. T. Rep. 58; *Charnley* v. *Grundy*, 14 C. B. 608.) Leave to add a plea was refused where the effect of the amendment if allowed would have been contrary to the justice of the case: (*Corby et al.* v. *Cotton*, Chambers, Jan. 31, 1857, III. U.C.L.J. 50.) The design of the intended amendment was to defeat the security upon which the action was brought and upon which defendant received the whole consideration: (*Ib.*) And per Robinson, C.J, "I think I am called upon to exercise a discretion in allowing such an amendment just as before the C.L.P.A.—the object of that Statute being to enlarge the power of the Court and Judges in granting amendments, not to compel the granting of amendments against the justice of the case." In an English case where the point arose whether a Judge should be influenced in allowing or refusing an amendment, by the fact that the action was a hard one or contrary to certain notions of morality which the law had not made obligatory, Pollock, C.B, and Willes, J, were of opinion that such a consideration should have some weight, but Lord Wensleydale and Bramwell, B, were of a contrary opinion: (*Brennan* v. *Howard*, 2 Jur. N. S. 546.) The Statute does not render it *imperative* on the Court or a Judge to allow one plea to be substituted for another: (*Ritchie et al.* v. *Van Gelder*, 9 Ex. 762.) Where the defendant pleaded never indebted to an action for money lent, and issue was joined thereon, the Court in the exercise of discretion refused to allow the defendant to substitute a plea that the money was lent for the purpose of purchasing shares in a foreign lottery and reselling them in England: (*Ib.*) A Judge at Nisi Prius has no power to strike out a plea to which there is a demurrer: (*Thomas* v. *Walters*, 22 L. T. Rep. 200.)

(*o*) The person who pays a bill or other negotiable instrument, is in general entitled to demand the instrument itself as his voucher: (*Alexander* v. *Strong*, 9 M. & W. 733.) In the leading case upon this subject which was an action by the indorsee against defendant as acceptor of a bill of exchange, the reasons of the rule were thus dwelt upon by Lord Tenterden—"The general rule of the English law does not allow an action by the assignee of a *chose in action*. The custom of merchants considered as part of the law furnishes in this case an exception to the general rule. What then is the custom in this respect? It is that the holder of the bill shall present the instrument at its maturity to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer. If upon an offer of payment the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer or retain his money? And if this be the right of an acceptor ready to pay at the maturity of the bill, must not his right remain the same if, though not ready at that time, he is ready afterwards—and can his right be varied if the payment is to be made under a compulsory process of law? The foundation of his right, his own security, his voucher, and his discharge towards the drawer remain un-

CCXCII. (*p*) In case of any action founded on a bill of exchange or other negotiable instrument, (*q*) it shall be lawful for the Court or a Judge (*r*) to order that the loss of such instrument shall not be set up, provided an indemnity be given &c. not to be

App. Co. C. Eng. C. L. P. A. 1854, s. 87.

Court may order loss,

changed. As far as regards his voucher and discharge towards the drawer, it will be the same thing whether the instrument has been destroyed or mislaid. With respect to his own security against a demand by another holder, there may be a difference. But how is he to be assured of the fact either of the loss or destruction of the bill? Is he to rely upon the assertion of the holder, or to defend an action at the peril of costs? And if the bill should afterwards appear, and a suit be brought against him by another holder, a fact not absolutely improbable in the case of a lost bill, is he to seek for the witnesses to prove the loss, and prove that the then plaintiff must have obtained the bill after it became due? Has the holder a right by his own negligence or misfortune to cast the burden upon the acceptor, even as a punishment for not discharging the bill on the day it became due? We think that the custom of merchants does not authorise us to say that this is the law. Is the holder then without remedy? Not wholly so. He may tender sufficient indemnity to the acceptor, and if it be refused, he may enforce payment thereupon in a Court of Equity: (see *Davies* v. *Dod*, 4 Price 176; *Macartney* v. *Graham*, 2 Sim. 285; *Cochell* v. *Bridgman*, 4 Beav. 499; *Cook* v. *Darwin*, 23 L. J. 997.) And this is agreeable to the mercantile law of other countries:" (*Hansard* v. *Robinson*, 7 B. & C. 90.) It is the object of the following section to allow plaintiff upon tendering indemnity, instead of being driven to Equity, to recover in a Court of Law with the same effect as if he had proceeded in Equity. An additional remedy may also be mentioned. It is that afforded by Stat. 9 & 10 Will. III. cap. 17, s. 3, which enacts that if any inland bill be lost or miscarry within the time limited for its payment, the drawer shall upon request and security given to indemnify him, if such bill be found again give another bill of the same tenor and form." However, under the Act of William III. Courts of Law seem to have no jurisdiction: (See *Davis* v. *Dod*, 4 Taunt. 602; *Hansard* v. *Robinson*, *ubi supra*; *Ramuz* v. *Crowe*, 1 Ex. 167; *Ex parte Greenway*, 6 Ves. 811; *Macartney* v. *Graham*, 2 Sim. 285; *Mossop* v. *Eadon*, 16 Ves. 430.)

(*p*) Taken from Eng. Stat. 17 & 18 Vic. c. 125, s. 87.—Applied to County Courts.

(*q*) The law hitherto was that if a negotiable bill or note that is a bill or note in its original state payable to bearer or order was lost, the loser could not at law maintain an action upon it: (*Pierson* v. *Hutchinson*, 2 Camp. 211; *Davis* v. *Dod*, 4 Taunt. 602; *Hansard* v. *Robinson*, 7 B. & C. 90; *Ramuz* v. *Crowe*, 1 Ex. 167), nor for the consideration upon which it was given: (*Champion* v. *Terry*, 2 B. & B. 295; *Alderson* v. *Langdale*, 3 B. & Ad. 660; *Clay* v. *Crowe*, 8 Ex. 295; *Russell et al.* v. *McDonald et al*, 1 U.C. R. 295.) But to enable defendant to avail himself of such a defence to an action when brought, a special plea was necessary: (*Poole* v. *Smith*, Holt, 144; *Pooley* v. *Mullurd*, 1 C. & J. 411 *Blackie* v. *Pidding*, 6 C. B. 196.) Such defence could not, it seems, be set up to an action on a *non*-negotiable instrument: (*Clay v. Crowe*, *ubi sup.*; *Charnley* v. *Grundy*, 14 C. B. 608; *Rolt* v. *Watson*, 4 Bing. 273.; *Main* v. *Bailey*, 10 A. & E. 616.) The enactment, it will be observed, extends not only to bills but to "other negotiable instruments," words sufficient to embrace at least promissory notes: (Smith's Mer. Law, 5 Ed. 204.)

(*r*) *Relative powers*, see note *m* to s, xxxvii.

made a defence, on indemnity being given.

to the satisfaction of the Court or Judge or any officer of the Court, to whom the same may be referred by such Court or Judge, (*s*) against the claims of any other person upon such negotiable instrument. (*t*)

Error and Appeal.

And with respect to proceedings in error and appeal; (*u*) Be it enacted as follows:

Eng. C. L. P. A. 1852, s. 146.

Appeal must be brought

CCXCIII. (*v*) No Judgment, [decree, or other proceeding, either at law or in equity,] (*w*) shall be reversed or avoided for any error or defect therein, (*x*) unless the Writ of appeal be

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(*s*) There will not in general be any necessity to make an order that such a defence shall not be set up in anticipation of the same being done, but rather to strike it out when pleaded as a sole defence, or disallow it if leave be asked to plead it with other defences: (s. cxxx.)

(*t*) See remarks of Lord Tenderden in *Hansard* v. *Robinson*, *ante*, note *o*.

(*u*) The only object of the two following sections is to lessen the period within which an appeal may be made from a judgment, decree, or other proceeding in one of the Superior Courts of Law or Equity. Before the passing of this Act the period was twenty years after judgment signed or entered of record: (10 & 11 Will. III. c. 14.) It is now "four years after such judgment, decree, or proceeding shall have been entered of record, made, pronounced, had, or completed: (s. ccxciii.) The usual exception in favor of infants, femes, coverts, persons non-compotes mentis, or without the limits of the Province, is made: (s. ccxciv.) The change is as to the time of bringing the appeal, but not as to the law regulating appeals, and which is explained at length in the notes to *Jaques* v. *Cesar*, 2 Wms. Saund. 100. As to the procedure by bill of exceptions, see note *m* to s. ccxxxviii. A Court of Law has authority over its own record which it may amend even after appeal brought, so long as the record is not in fact removed: (*Mellish* v. *Richardson*, 1 Cl. & F. 221.) A Court of error or appeal will not inquire into the propriety of amendments made in the Court below, though made after error brought, but will consider them as parts of the original record: (*Ib.*; also *Scales* v. *Cheese*, 1 D. & L. 657.) By the recent Statute, which amends the laws respecting appeals and alters the constitution of the Court of Error and Appeal, error or appeal instead of being brought or had by writ of error or appeal must be prosecuted as a proceeding in the original cause: (Prov. Stat. 20 Vic. cap. 5.)

(*v*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 146.—Founded upon 1st Rep. C. L. Comrs. s. 87, *bis*.—Not applied to County Courts.

(*w*) Instead of the words in brackets read in Eng. C. L. P. Act "in any cause," which words were held not to include an information in the nature of a *quo warranto*, as regards which the *fiat* of the Attorney General is necessary: (*Reg.* v. *Seale*, 5 El. & B. 1.) Proceedings by *mandamus* are within the meaning of this section: (s. cclxxxii.) The words in our C. L. P. A. substituted for the word "cause" in the Eng. C. L. P. Act are intended to embrace a wider class of cases than were contemplated by the English Legislature. Thus in our Act provision is made for appeals from Courts of Equity as well as Courts of Law; (See 20 Vic. cap. 5.)

(*x*) The wide application of the section may be gathered from the words "error *or defect therein*." The intention is that *all* proceedings by error or

sued out and prosecuted with effect within four years (*y*) after such Judgment, [decree, or proceeding shall have been entered of record, made, pronounced, had, or completed.] (*z*)

within four years.

CCXCIV. (*a*) If any person who is or shall be entitled to bring error [or appeal] (*b*) as aforesaid, (*c*) shall be at the time such title accrued, within the age of twenty-one years, *feme covert, non compos mentis*, or [without the limits of this Province], (*d*) then such person shall be at liberty [to sue out his Writ of appeal,] (*e*) so as such person commences or brings and prosecutes (*f*) the same with effect within six years (*g*) after coming to or being of full age, *discovert*, of sound memory, or return [to the Province], (*h*) and if the opposite party shall, at the time [the title to bring error or appeal accrued] (*i*) be [without the limits of this Province], (*j*) then [the Writ of appeal may be sued out], (*k*) provided the proceeding be commenced and prosecuted with effect within six years (*l*) after

Eng. C. L. P. A. 1852, s. 147.

Further time allowed in cases of disability to bring appeal at the time before limited.

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appeal *must* be brought within the time limited or else be barred.

(*y*) "*Six* years" in Eng. C. L. P. A.

(*z*) Instead of the words in brackets read in Eng. C. L. P. Act "signed or entered of record." The reason of the change in language is explained in note *w*, *supra*. The proceedings in error cannot in general be maintained if commenced more than four years after judgment in the Court below, and it would seem that though proceedings on the face of them appear to be so brought the Court of Error and Appeal will not summarily quash them: (*Higgs* v. *Evans*, 2 Str. 837.) To do so might be to deprive the party prosecuting from availing himself if entitled so to do of some or one of the exceptions mentioned in the next succeeding section, (cexciv).

(*a*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 147, the origin of which is Eng. Stat. 9 & 10 Will. III. cap. 14, s. 2, which in language corresponds with Stat. U.C. 7 W. IV. c. 8, s. 4.

(*b*) The words "or appeal" are not in Eng. C. L. P. Act.

(*c*) Either party if dissatisfied with the judgment or decision of a Superior Court of Law or Equity may in general appeal to the Court of Error and Appeal: (Prov. Stat., 20 Vic. cap. 5.)

(*d*) Instead of the words in brackets read in Eng. C. L. P. A. "beyond the seas."

(*e*) Read in Eng. & L. P. A. "bring error as aforesaid," and which since the passing of 20 Vic. cap. 5, doing away with writs of error and appeal would if used in our C. L. P. A. be the correct expression.

(*f*) "Commences or "brings, &c." An appeal is "commenced," error is "brought."

(*g*) *Six years*—This agrees with the Eng. C. L. P. Act. It is strange that as four years is the time limited in the preceding section, a similar term was not here enacted.

(*h*) Instead of the words in brackets read in Eng. C. L. P. Act "from beyond the seas."

(*i*) Read in Eng. C. L. P. Act "of the judgment signed or entered of record."

(*j*) Read in Eng. C. L. P. A. "beyond the seas."

(*k*) Read in Eng. C. L. P. A. "error may be brought."

(*l*) See note *g*, *sup.*

the return of such party [to this Province]. (*m*)

Insolvent Debtors.

(*n*) And with respect to the payments of weekly allowance to

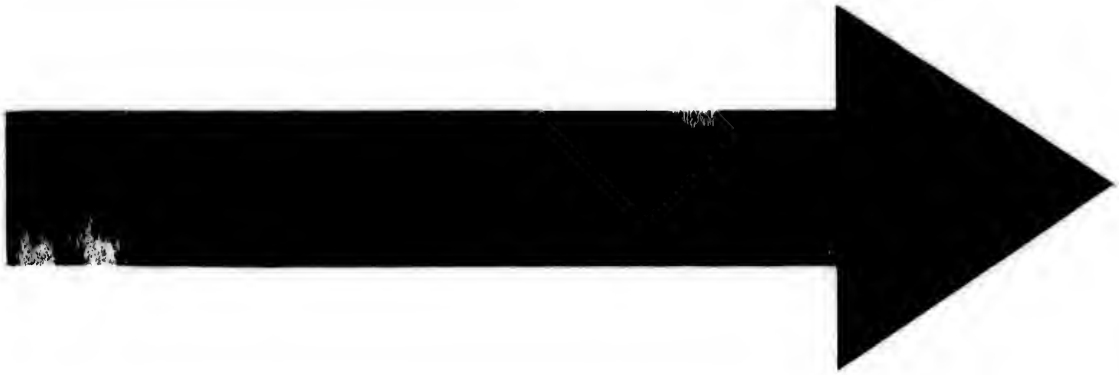
(*m*) Read in Eng. C. L. P. A. "beyond the seas."

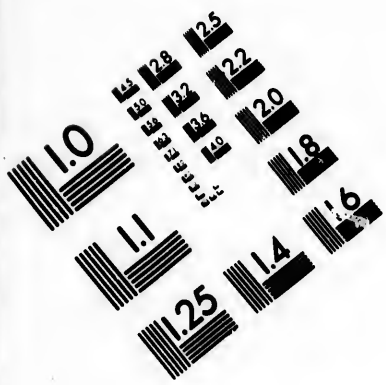
(*n*) It is the right of a creditor to recover his debt, and with a view thereto to adopt such proceedings as the laws prescribe. This right existed from a very remote period, but the mode of procedure has been from time to time changed. During the times of feudalism the feudal lord had an interest in the person as well as the lands of a debtor. Therefore the body of a debtor was no more subject to be attached for the claims of an ordinary creditor than the lands of such debtor. To imprison the person of a debtor might be to deprive the lord of his services and for this reason the person of a debtor was during the feudal age protected from arrest. Besides freedom from arrest was linked with the liberty of the subject, and the continuance of the one was thought to be essential to the preservation of the other. The law of arrest in civil cases was of very slow growth—step by step extending over a great space of time its history may be traced upon the Statute books of the Realm. Its present state cannot be more effectively explained than by a reference to its history.

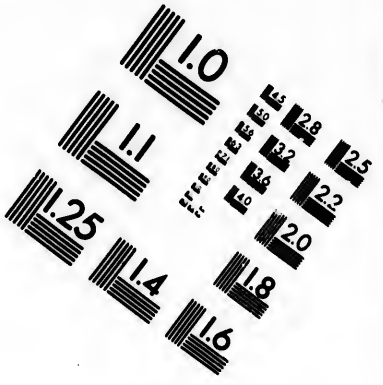
No arrest could be made at common law in any form of action excepting that of trespass *vi et armis*, which partook more of a criminal than a civil proceeding. The first Statute giving the right to arrest in matters of a purely civil nature is that of Marlbridge, which was passed for the protection of the barons by subjecting their bailiffs to arrest when attempting to abscond in debt, and leaving no lands behind them: (52 Hen. III.) The second Statute is that of Acton Burnel, which, for the protection of merchants, allowed process against the body of a debtor in cases where process against his lands proved unavailing: (11 Ed. I.) The third Statute was for the further protection of the barons, and allowed them generally to arrest their servants, bailiffs, chamberlains, and receivers when in arrear: (13 Ed. I.) This Statute, which gave a form of procedure known as writ of account, became the basis of all future Statutes and by means of its gradual extension made arrest in civil cases a right in all the ordinary forms of action. It was extended to actions of debt and detinet so as to admit of arrests in each of these forms of action: (25 Ed. III. c. 17.) Afterwards to actions upon the case: (19 Hen. VII. cap. 9.) then to actions for forcible entry of annuity and of covenant: (23 Hen. VIII. cap. 14); and finally to all personal actions: (21 Jac. I, cap. 4.) The effect of these different Statutes was to allow the issue of a *capias* in any personal action whatever. In cases of doubt the Courts connived at a proceeding, which had the desired result. It was the practice of declaring bye the bye. Inasmuch as an arrest might be made at common law in an action of trespass *vi et armis* process was allowed to issue in that form of action whereon defendant was arrested. This done, the fictitious charge of a trespass with force and arms was for the time abandoned, and a declaration charging defendant *bye the bye* with a common debt or breach of promise filed. A debtor once in custody was always detained until he answered every charge brought against him during the pendency of the original charge. At this point the Legislature began to turn their attention to the hardships of arrest, and passed several Statutes regulating the giving of bail. These have been already reviewed in note *u* to s. xxiv. of this Act. A distinction arose as to arrest on process to *answer* a suit, which was termed bailable process, and arrest on process to *satisfy* a judgment, which was called final process. The right of a creditor to arrest his debtor on bailable process in Upper Canada was introduced in

insolvent debtors, and as to Gaol limits, and to the discharge of such debtors; Be it enacted as follows:

1791 (32 Geo. III. cap. 1), and since maintained, the requirements of the affidavit to authorize the arrest having been from time to time varied: (see s. xxiii. and notes thereto.) The right to arrest on final process in Upper Canada, in other words, charge in execution, was introduced by the same Statute, though taken away for a short period (by 7 Vic. c. 31, which was repealed by 8 Vic. cap. 48), has also been upheld. The progress of the law in Upper Canada since its introduction from England has upon the whole been of an ameliorating tendency. For the support of an insolvent debtor confined in execution it was in 1805 enacted that if not worth £5 and guilty of no fraud the creditor should pay him five shillings a week: (45 Geo. III. cap. 7.) To detect and prevent fraud the creditor was enabled to tender interrogatories, which the debtor was bound to answer on pain of losing the weekly allowance: (2 Geo. IV. cap. 8.) In default of payment of the weekly allowance, the debtor was entitled to his discharge: (8 Geo. IV. cap. 8.) But such discharge was not deemed satisfaction of the debt: (*Ib.*) The rights and privileges conferred by the foregoing Statutes as to weekly allowance, &c., were in 1834 extended to prisoners on mesne as well as final process: (4 Wm. IV. cap. 3.), and subsequently to persons imprisoned for contempt in not paying costs or money pursuant to an award: (10 & 11 Vic. c. 15, s. 2.) Provision was also made for the discharge of debtors at the expiration of certain periods of imprisonment, having reference to the amount of the debt for which they were imprisoned: (4 Wm. IV. cap. 3, s. 5; 5 Wm. IV. cap. 3, ss. 3–4; 8 Vic. cap. 6.) The effect of these last-mentioned Statutes was indeed thought to be that the prisoner should remain in custody for the periods named under ordinary circumstances before being entitled to move for his discharge. That effect, however, was clearly removed by the 10 & 11 Vic. cap. 15, which entitled the prisoner to make application for his discharge at any time without reference to the amount of the debt or period of his imprisonment. Debtors fraudulently obtaining their discharge were made liable to recommitment. (5 Wm. IV. c. 3, s. 7), and a fraudulent assignment of property was made misdemeanor: (*Ib.* s. 8.) Certain debtors making a full and unreserved surrender of their property were altogether protected from imprisonment for debt: (8 Vic. c. 48.) To provide for the health of those debtors in custody who could not obtain their discharge various Statutes were passed under certain circumstances, giving to such debtors a privilege beyond the actual walls of the gaol within a circumscribed area: (2 Geo. IV. cap. 6; 7 Geo. IV. cap. 9; 11 Geo. IV. cap. 3.) The original area consisted of 16 acres contiguous to the gaol, which area was known as the Gaol Limits: (11 Geo. IV. cap. 3.) The limits were afterwards made coextensive with the towns in which the gaols were situate: (4 Wm. IV. c. 10), and finally with the whole of the district in which the gaol was situate: (10 & 11 Vic. cap. 15.) The debtor was only entitled to the limits upon giving to the Sheriff a bond with sufficient sureties, for the sufficiency of which the Sheriff was made responsible. Afterwards the bond was abolished, and a recognizance of bail substituted, the object of which was to relieve the Sheriff from that responsibility: (10 & 11 Vic. cap. 15.) The recognizance instead of being approved by the Sheriff was entered into, subject to the approval of a Judge, which approval when given was certified by the Clerk of the Crown, whose certificate to the Sheriff was his authority for giving to the debtor the benefit of the limits: (*Ib.*) But in order that the debtor







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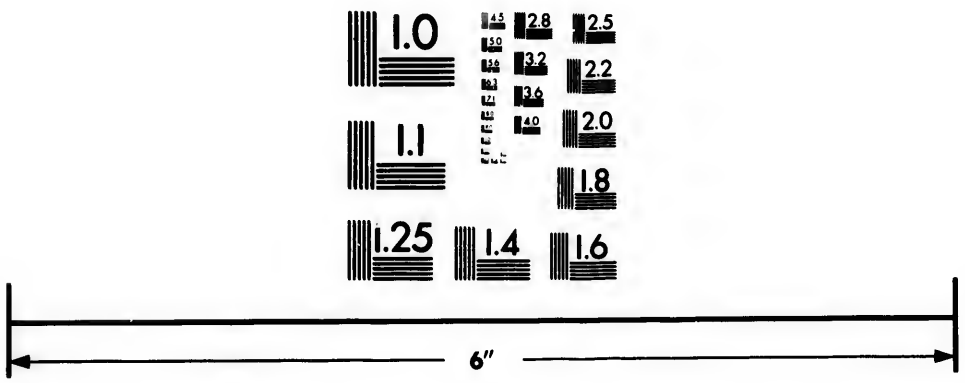

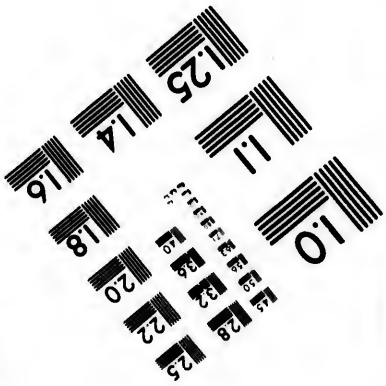

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App. Co. C.

In what cases a debtor in close custody shall be entitled to Weekly allowance.

CCXCV. (*o*) If any debtor in close custody (*p*) upon any mesne process, (*q*) or in execution, (*r*) or upon an attachment, or other process issued by any Court in Upper Canada, (*s*) for non-payment of costs, (*t*) or for non-payment of any sum of money awarded, or for the non-payment of any claim in the nature of a debt or demand due, being a sum certain or capable of being ascertained by computation, and not in the nature of a penalty to enforce the doing of some act, other than the payment of a sum of money, (*u*) (in which several cases, the

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when arrested either on mesne or final process might not be imprisoned from the time of his arrest until the security was approved, the Sheriff was enabled to give him the benefit of the limits immediately after his arrest upon receiving a specified bond: (16 Vic. cap. 175, ss. 7–8.) All these Statutes, excepting that of 8 Vic. cap. 48 (Har. Prac. Stats. p. 95), have been consolidated in the following sections in a manner as able as the work of consolidation was itself necessary. The work of at all harmonizing so many Statutes was, before the passing of the C.L.P.A, daily becoming a more difficult task. In one case the Court of Queen's Bench, speaking of 10 & 11 Vic. c. 15, said, "The Legislature in passing this last Act have created difficulty by not repealing the former acts, and by making some provisions evidently in contemplation of their continuing in force, while other provisions would seem as if designed to be substituted for them:" (per Robinson, C. J, in *Clarkson* v. *Hart*, 9 U. C. R. 351.) In a still later case the Court was again compelled to point out the state of the law in these words, "It is not very easy from the various enactments which both before and since the Union (of the Provinces) have been in force in Upper Canada, satisfactorily to deduce the precise intention of the Legislature, so as to have a clear guiding principle to assist us in coming to a conclusion upon doubtful questions of construction upon these Acts:" (per Draper, J, in *Calcutt* v. *Ruttan*, 13 U. C. R. 223.)

(*o*) This section is a consolidation of many parts of Statutes, each of which will be noticed in its proper place. The section is applied to County Courts.

(*p*) *Close custody.* A debtor on the limits is a prisoner in custody, but not in close custody. The distinction deserves to be noted. None other than debtors in actual confinement within the walls of the gaol can be deemed in "close custody," so as to avail themselves of the provisions of this section. It has been held that a debtor after obtaining his weekly allowance, who takes the benefit of the limits must give notice of his return to close custody before being entitled to further payment: (*Hyde* v. *Barnhart*, Dra. Rep. 210.)

(*q*) 4 Wm. IV. cap. 3.

(*r*) 45 Geo. III. cap. 7.

(*s*) *Any Court, &c., i.e.* whether of superior or inferior jurisdiction if having the power to arrest.

(*t*) It was held under 5 Wm. IV. c. 3, that a prisoner under attachment for non-payment of costs was not entitled to his discharge: (*Reg.* v. *Dillingham*, E. T. 1843, *MS.* cited per Jones, J, in *Doe d. Vancott* v. *Read*, 4 U. C. R. 127), but the Statute 10 & 11 Vic. cap. 15, was in this respect an extension of Stat. 5 Wm. IV. cap. 3. However, before 10 & 11 Vic. cap. 15, the Courts ordered the weekly allowance to plaintiffs as well as defendants imprisoned for non-payment of costs: (*Doe d. Vancott* v. *Read*, *ubi supra.*)

(*u*) 10 & 11 Vic. cap. 15, s. 2.

debtor shall be deemed to be a prisoner in execution), (*v*) shall make oath that he is a prisoner in close custody, (*w*) setting forth on which of the causes of detention above specified, and that he is unable to find security for the limits, (*x*) and is not worth the sum of five pounds, (*y*) and in case he is in custody on mesne process that he is unable to procure bail to the action, (*z*) and that he does not believe the demand of the Plaintiff to be just, and for that cause and no other he resists payment of the same and refuses to confess Judgment for the sum sworn to, (*a*) it shall be lawful for the Court from which the process against such debtor issued, (*b*) or any Judge having authority to dispose of matters arising in suits in such Court, (*c*) to make

(*v*) A prisoner charged in execution in case for seduction was held entitled to the benefit of 5 Wm. IV. cap. 3: (*Perkins* v. *O' Connolly*, H.T. 6 Vic. *MS.* R. & H. Dig. "Insolvent," 14.) But a defendant rendered by his bail after a return of *non est inventus* was held neither to be in custody on *mesne* process nor charged in execution, so as to be entitled to claim weekly allowance: (*Lyman et al.* v. *Vandecar*, M.T. 2 Vic. *MS.* R. & H. Dig. "Insolvent," 17.)

(*w*) A debtor in custody under 53 Geo. III. was held to be sufficiently described in the affidavit on an application for weekly allowance as "a prisoner in execution in the gaol of the Midland District at the suit of the plaintiff:" (*Shuck* v. *Cranston*, Tay. U. C. R. 509.)

(*x*) Under s. cccliii. of this Act.

(*y*) A rule for weekly allowance was granted under 45 Geo. III. cap. 7, on an affidavit that defendant was not worth £5, "except his necessary wearing apparel:" (*Malone* v. *Hardy*, 5 O. S. 75.) The Court in this case considering that wearing apparel was expressly exempted from being taken in execution under 11 Geo. IV. cap. 4, thought it was only reasonable to hold that the affidavit under 45 Geo. III. c. 7, might be so modified as to give the debtor the benefit of the exception: (*Ib.*) It may be observed that Stat. 11 Geo. IV. cap. 4, is still unrepealed. With the exception of the amount, there is a clause in C. L. P. A, 1857, to the same effect as the 11 Geo. IV. c. 4, "The necessary wearing apparel, the bed and bedding, and one stove and the cooking utensils of a party against whom any writ of execution may be issued, or of his family, and also the tools and implements of his trade, to the value of fifteen pounds, shall be protection from seizure under any execution from either of the said Courts or from any County Court:" (section 23.) The affidavit to be made under s. ccc. of this Act by debtors "who shall have been confined in close custody in execution three successive calendar months" is that applicant "is not worth five pounds, exclusive of his wearing apparel," &c.

(*z*) See s. xxii. and notes thereto.

(*a*) 4 Wm. IV. cap. 3, s. 4.

(*b*) Since this section applies to County Courts, the Judges of these Courts may, as to arrests made under process of their Courts, grant relief.

(*c*) A Judge in Chambers may dispose of cases under this section though he be not a Judge of the Court from which process issued: (s. cccxv. of this act; also *Palmer* v. *Western Assurance Co*, 28 L. T. Rep. 120.) A Judge in Chambers had no authority to act under 45 Geo. III. cap. 7; the

a rule or order on the Plaintiff (*d*) at whose suit such debtor is detained, to pay to such debtor on the third Monday after the service of such rule or order, and upon each Monday thereafter, (*e*) so long as such debtor shall be detained in prison at the suit of such Plaintiff for such cause, (*f*) the sum of ten shillings; such payment to be made to the debtor or to the Gaoler in whose custody he is, for the use of such debtor, (*g*) and in default of such payment (*h*) such debtor shall after service of a rule *nisi* or Judge's Summons, to be obtained on oath of the default, (*i*) be discharged from custody by rule or order, unless sufficient cause to the contrary be shown; (*j*) Provided always that such discharge shall not, when the debtor was confined on mesne process, prevent the Plaintiff from proceeding to Judgment and execution against the body, lands, or goods according to the practice of the Court, (*k*) and that such discharge shall not, when the debtor was a prisoner in execution, be construed as a release or satisfaction of the Judgment or other debt or demand, for the non-payment whereof such debtor was in custody, or to deprive the Plaintiff of any remedy against the lands or goods (*l*) of such debtor.

The allowance; and how payable.

Discharge if not paid.

Proviso.

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authority was, however, supplied by 2 Geo. IV. cap. 8, s. 8.

(*d*) As to apportionment when the debtor is in custody at the suit of several plaintiffs, see s. ccxcviii.

(*e*) The 2 Geo. IV. cap. 8, s. 3, required the order for weekly allowance to be served "on the plaintiff or his attorney within the district wherein such defendant shall be imprisoned." This enactment was repealed by 8 Geo. IV. c. 8, which simply made provision for the service of the order on the plaintiff or his attorney, intentionally omitting the qualification as to place of residence, but was held not to be retrospective: (*Shuck* v. *Cranston*, Tay, U. C. R. 605.)

(*f*) 8 Geo. IV. cap. 8.

(*g*) Payment for the use of the debtor to a person acting as turnkey was held to be a good payment under 45 Geo. III. cap. 7: (*Hyde* v. *Barnhart*,, Dra. Rep. 56.).

(*h*) The Court refused under 45 Geo. III. cap. 7, to discharge a prisoner in execution, where the plaintiff died and the weekly allowance was tendered by a person who had usually paid it, although no administration was at the time granted: (*Beard* v. *Orr*, Dra. Rep. 253.)

(*i*) The Court refused under 45 Geo. III. cap. 7, and 2 Geo. IV. cap. 8, a rule absolute in the first instance: (*Williams* v. *Crosby*, Tay. U.C.R. 6.)

(*j*) It would seem that a debtor who, after having received the weekly allowance takes the benefit of the limits must notify plaintiff of his return to close custody before being entitled to further payment: (see note *p ante* to this section.)

(*k*) 4 Wm. IV. cap. 3, s. 2.

(*l*) 8 Geo. IV. cap. 8.

CCXCVI. (*m*) Whenever any such debtor (*n*) shall apply for the weekly allowance, (*o*) or to be discharged from custody for the non-payment thereof, (*p*) it shall be lawful for the Plaintiff at whose suit he is confined, (*q*) to file interrogatories for the purpose of discovering any property or effects which such debtor may be possessed of or entitled to, (*r*) or which may be in the possession or under the control of some other person for the use or benefit of such debtor, or which such debtor, having been in possession of may have fraudulently disposed of to injure his creditor, (*s*) and to serve a copy of such interrogatories on such debtor, (*t*) and thereupon and until such debtor shall have fully answered such interrogatories upon oath to the satisfaction of the Court or Judge, (*u*) and filed his answers and given sufficient notice of such filing to the

2 G. IV. c. 8. 2 W. IV. c. 3. App. Co. C.

Debtor not entitled to allowance or to his discharge in default of payment thereof, until he shall have answered interrogatories touching his property.

(*m*) The origin of this section is 2 Geo. IV. cap. 8, s. 1, and 4 Wm. IV. cap. 3, s. 1.

(*n*) *Such debtor*, *i.e.* every debtor in close custody, &c., such as described in the preceding section: (s. ccxcv.)

(*o*) The next succeeding section applies to cases where "such debtor *shall have* obtained the order for payment of the weekly allowance," &c.

(*p*) Under s. ccxcv.

(*q*) If there be several plaintiffs all must join in administering interrogatories: (s. ccxcviii.)

(*r*) Interrogatories in one case were filed and answered; defendant then applied for his discharge upon showing non-payment of the weekly allowance. An application by plaintiff to file fresh interrogatories, and in the meantime to suspend payment of the weekly allowance upon an affidavit that further instructions had been received by plaintiff's attorney respecting property supposed to have been made away with by the defendant, and of which the attorney had no knowledge when he filed the first interrogatories. Application refused: (*Hyde* v. *Burnhart*, Dra. Rep. 56.) It is clear that plaintiff has no right in any case to file fresh interrogatories without the leave of the Court: (*Malone* v. *Handy*, 5 O. S. 310.) In s. ccc. there is a provision made for the filing of "further interrogatories" in cases under that section.

(*s*) The subjects upon which discovery may be had through the instrumentality of interrogatories filed under this section a little vary from those mentioned in the original provisions—2 Geo. IV. cap. 6; 8 Geo. IV. cap. 8; 4 Wm. IV. cap. 3. It was held under 10 & 11 Vic. cap. 15, that a prisoner cannot by assigning away his effects in trust for his creditors generally, entitle himself to his discharge: (*Gillespie* v. *Nickerson*, 6 U. C. R. 628; see also *Aikens* v. *Pentland et al*, 11 U. C. R. 19.) In the latter case the question was raised whether a prisoner who after judgment made an assignment of his property for the benefit of his creditors generally thereby deprived himself of all right to the gaol limits. No decision was given upon the point.

(*t*) It is presumed that service of interrogatories will be governed by the same rules as service of ordinary notices, orders, &c.: (N. Rs. 134, 135.)

(*u*) The answers must not only be full but satisfactory: (*Sanderson* v. *Cameron*, E.T. 2 Vic. *M.S.* R. & H. Dig. "Insolvent," 18.) A simple answer of "yes" or "no" to each interrogatory is not a satisfactory answer. It might

Plaintiff or his Attorney, (*v*) no rule or order for the payment of such weekly allowance shall be made, or if previously made, no order for his discharge for non-payment thereof shall be made. (*w*)

App. Co. C. 2 G. IV. c. 8.

CCXCVII. (*x*) Where any such debtor (*y*) shall have obtained the order for payment of the weekly allowance, (*z*) the

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do upon a *viva voce* examination, but is clearly not the mode to reply to a written question: (*Ryan* v. *Cullen*, 1 U. C. Cham. R. 229.) The answers of a prisoner, being styled in the cause and intitled in the proper Court, were headed "The answers upon oath of," &c., and proceeded thus "To the first interrogatory he saith," &c. To the second interrogatory the answer omitted the words "he saith." To the fifteenth interrogatory the answer made no reference, but had simply the figures "15" prefixed. The jurat stated that the deponent was sworn, &c., "and made oath that the foregoing answers *were* true on this 8th day of March, 1854." Held the answers were in form insufficient and the jurat defective: (*Addy* v. *Brouse*, 1 U. C. Prac. R. 234.) Leave to controvert answers filed was allowed under 2 Geo. IV. cap. 8: (*Montgomery* v. *Robinet*, 2 O. S. 506), but refused under 10 & 11 Vic. cap. 15: (*Campbell* v. *Anderson*, 1 U. C. Cham. R. 91.) Still later it was held that leave to do so might be given: (*Clarkson* v. *Hart*, 9 U. C. R. 848.) Without such leave "the plaintiff may be made to lose a debt which he may be able to show the defendant his abundant means within his control to pay, merely because the defendant has given false answers to his interrogatories:" (per Robinson, C. J, *Ib.* p. 851.) Payment of the weekly allowance after defendant has filed his answers is a waiver of any objections plaintiff might otherwise make to the answers: (*Malone* v. *Handy*, 5 O. S. 331.) The Court or Judge will not discharge a prisoner unless satisfied that he has no means of support and has not fraudulently secreted or conveyed the property, &c.: (*Montgomery* v. *Robinet*, 2 O. S. 504.) In one case the Court said, "We consider that the interrogatories in this case are not satisfactorily answered, which means that we are not in fact satisfied from the defendant's statements that she has not under her control some means of satisfying the plaintiff's demand, although they may be means which an execution cannot reach, and which an assignment would not affect:" (*Clarkson* v. *Hart*, Robinson, C. J, 9 U.C.R. 351.)

(*v*) The object of this provision is to prevent defendant by delivering his answers at the last moment ensuring a default of payment of the weekly allowance, and then applying for his discharge because of non-payment, and thus taking advantage of his own wrong: (*Reg.* v. *Heathers*, 1 U. C. Cham. R. 520.) Answers to interrogatories were filed and served in Toronto on Friday, 20th August. The weekly allowance was not paid at Barrie, the county town of the county in which prisoner was confined on Monday, 23d August. Held upon a summons to discharge the prisoner for non-payment, that a reasonable time had not elapsed between the filing of the answers and the non-payment of the allowance to entitle defendant to make the application: (*Ib.*)

(*w*) 2 Geo. IV. cap. 8, s. 2.

(*x*) The origin of this section is 2 Geo. IV. cap. 8.

(*y*) *Such debtor.* See note *n* to s. ccxcvi.

(*z*) The preceding section applies to cases where prisoner "shall apply for the weekly allowance or to be dis-

Plaintiff at whose suit he is confined (*a*) may at any time (*b*) file and serve such interrogatories as aforesaid, (*c*) and it shall be lawful for the Court from which the process issued, (*d*) or a Judge as aforesaid, (*e*) on application of the Plaintiff, (*f*) to stay further payment until the debtor shall have sworn to and filed his answers, (*g*) and have given to the Plaintiff or his Attorney four clear days' notice thereof. (*h*)

Filing interrogatories to debtor, &c.

CCXCVIII. (*i*) Whenever such debtor (*j*) is a prisoner in close custody in several suits or matters, (*k*) he must make all the Plaintiffs in such suits or matters parties to his application

(App. Ch. C.) Defendant in custody on several writs only

Con stat for R. S. ch 26 § 5

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charged from custody for the non-payment thereof:" (s. ccxcvi.)

(*a*) If the debtor be in custody at the suit of more than one plaintiff "all such plaintiffs must join in administering interrogatories:" (s. ccxcviii.)

(*b*) Under the old Statutes it was held that plaintiff might file interrogatories even after default in payment of the weekly allowance, so long as the debtor had not in fact made any application for his discharge: (*Elwood* v. *Monk; Butler* v. *Thomas*, M. T. 3 Vic. *MS.* R. & H. Dig. "Insolvent," 19.) Since the C. L. P. A, defendant having obtained an order for weekly allowance and default having been made in the payment of it afterwards applied for his discharge. Plaintiff in showing cause contended that interrogatories having been filed and served previous to the debtor's application, he must answer them before an order could be made for his discharge. Held that the cases of *Edward* v. *Monk* and *Butler* v. *Thomas*, *ubi supra*, were clearly in point, and that the C. L. P. A. is not any more indulgent on this point than the former practice, and therefore that the debtor was not entitled to have his summons made absolute: (*Concoran* v. *Taylor*, Chambers, Nov. 7, 1856, II. U. C. L. J. 233.)

(*c*) *As aforesaid, i. e.* "for the purpose of discovering any property or effects which such debtor may be possessed of or entitled to, or which may be in the possession of or under the control of some other person for the use or benefit of such debtor, or which such debtor having been in possession of may have fraudulently disposed of to injure his creditors:" (s. ccxcvi.)

(*d*) See note *b* to s. ccxcv.

(*e*) See note *c* to s. ccxcv.

(*f*) *i.e.* Plaintiff may at any time file and serve interrogatories, *whereupon* it shall be lawful for the Court or a Judge on his application to stay further payment of the weekly allowance, &c.

(*g*) The Court under 2 Geo. IV. c. 8, refused to grant an order for the arrears of weekly allowance which had accrued pending an unsuccessful application by the prisoner for his discharge from custody; (*Moran* v. *Maloy et al*, Tay, U. C. R. 563.) Sherwood, J, observed that "the defendant had made an experiment, of which he must submit to the consequences:" (*Ib.*)

(*h*) *i.e.* First and last days exclusive.

(*i*) This section appears to be original, though perhaps no more than a substantive enactment of what was understood though not expressed in the old law. It is applied to County Courts.

(*j*) *Such debtor.* See note *n* to s. ccxcvi.

(*k*) *Suits or matters.* The word "matters" is intended to embrace proceedings not suits, but in which a party may be imprisoned: thus attachments for contempt issued when no suit is pending.

entitled to one allowance, &c.

for the weekly allowance, (*l*) and he shall only be entitled to one weekly sum of ten shillings, although he is in custody in several suits and matters; (*m*) and in any such case if the weekly allowance be unpaid, the debtor shall have the same right as when he is in custody in one suit only, to be discharged from custody in all the suits or matters named in the order for payment, (*n*) and the Plaintiffs named in such order must all be made parties on any application for the debtor's discharge on account of non-payment, (*o*) and all such Plaintiffs must join in administering interrogatories to the Defendant, as if they were Plaintiffs in one suit, (*p*) and such Plaintiffs shall regulate among themselves the apportionment of the weekly allowance and the arrangement for payment thereof. (*q*)

Interrogatories in such case.

(*App. Co. C.*) 4 Wm. IV. Cap. 3, s. 2.

CCXCIX. (*r*) The Plaintiff in any suit (*s*) shall be entitled to recover from his debtor all sums paid to him (*t*) for weekly allowance, while a prisoner on *mesne* process, (*u*) and upon proof of the amount of such payment (*v*) before the proper taxing Officer, (*w*) such sums shall be allowed as disbursements

Allowance may be recovered from debtor as costs.

(*l*) The numbers and names of plaintiffs can always be ascertained upon reference to the Sheriff in whose county prisoner is confined.

(*m*) Under the old Statutes it was held to be no excuse for non-payment of the weekly allowance pursuant to order that defendant had an order for weekly allowance at the suit of another plaintiff: (*Truscott et al.* v. *Walsh et al.* 5 O.S. 79.)

(*n*) Plaintiffs must regulate among themselves "the apportionment of the weekly allowance and the arrangement for payment thereof."

(*o*) All being bound by the result and being equally interested in preventing that result ought of course to be equally notified of the prisoner's intentions.

(*p*) It might have been enacted that it should be lawful for any one of several plaintiffs to administer interrogatories; but had such an enactment been passed, the door for oppression of the debtor would have been unnecessarily opened.

(*q*) See note *m*, *supra*.

(*r*) The origin of this section is 4 Wm. IV. cap. 3, s. 2. It is applied to County Courts.

(*s*) Where there are several suits and defendant is in custody in each suit, of course he will not be bound to pay to *each* plaintiff a sum equal to the aggregate of advances made by all the plaintiffs.

(*t*) *i.e. Each* plaintiff shall be entitled to recover what *he* paid to the debtor.

(*u*) It is necessary for a defendant in custody on *mesne* process, when applying for the weekly allowance in his affidavit, amongst other things to swear that "he is unable to procure bail to the action:" (s. ccxcv.)

(*v*) It is not stated in what manner proof shall be made. The usual mode of proof before the Master is by affidavit, which it is presumed is the mode here intended. The proof must of course be to the satisfaction of the Master.

(*w*) "All proceedings to final judg-

in the suit, and be taxed as part of the costs thereof. (*x*)

(*App. Ch. C.*) Same 5 Wm. IV. cap. 3. Repealed 22 Vic ch 96 s 22

Debtor in prison over three months may obtain his discharge on certain conditions.

CCC. (*y*) Any debtor according to the intent and meaning of this Act, who shall have been confined in close custody in execution (*z*) for three successive calendar months, (*a*) may (on giving to the party at whose suit he is a prisoner, or to his Attorney, fifteen days' notice of his intention to apply to be discharged from custody), (*b*) upon proof of such notice, and upon making oath, (*c*) that he is not worth five pounds exclusive of his necessary wearing apparel and that of his family, (*d*) and their beds and bedding and ordinary household utensils, not exceeding in the whole the value of ten pounds, (*e*) and that he hath answered all interrogatories which have been filed by the Plaintiff, and hath given due notice of such answers (or if no interrogatories have been served, that he hath not been

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ment shall be carried on in the office from which first process issued:" (s. ix.) Before the entry of final judgment costs should be taxed, or otherwise will be considered as waived: (*Peirce* v. *Derry*, 4 Q.B. 635.) In cases of taxation by a deputy clerk of the Crown, a revision as of course may be had upon giving two days' notice to the opposite party: (s. xii.)

(*z*) And if taxed before judgment entered upon the roll, are recoverable like other costs in the cause.

(*y*) The origin of this section is 5 Wm. IV. cap. 3, which was in great part taken from Eng. Stat. 48 Geo. III. cap. 123. The section though in many respects resembling the original Statutes, is in the main original. It is applied to County Courts.

(*z*) A debtor in custody on mesne process cannot obtain his discharge under this section: (*Wright et al.* v. *Hall*, Chambers, Feb. 12, 1857, Burns, J.)

(*a*) The relief under this section can only be had where defendant has been in close custody for three successive calendar months, that is to say, lain in gaol without benefit of the limits during that period: (see *Denham* v. *Talbot*, 5 O. S. 79.) The 10 & 11 Vic. cap. 15, section 3, authorized the discharge of a prisoner "in close custody *or other custody*," upon such prisoner giving fifteen days' notice of his intention to make application.

(*b*) *Qu.* first and last days inclusive: see 2 Geo, IV. cap. 1, s. 22; see also N. R 166.

(*c*) The affidavit should not be "sworn sooner than the day after that on which the notice of application shall expire," and should in all cases state "whether any interrogatories were served before the expiration of the fifteen days' notice, and if so whether the answers thereto upon oath have been duly made and filed, and when notice thereof was given:" (N. R. 143.)

(*d*). Since 10 & 11 Vic. cap. 15 is repealed, no debtor can now apply to be discharged upon a mere affidavit that he is not worth £5 exclusive of wearing apparel. A debtor so circumstanced if in custody on final process must, with a view to his discharge from custody, take the proceedings made necessary by this section: (*Travis* v. *Wanless*, Chambers, March 19, 1857, McLean, J., III. U.C. L. J., 89.)

(*e*) By 10 & 11 Vic. cap. 15, it was enacted that any person in custody in execution for debt, &c., might give

served with any interrogatories), (*e*) apply to the Court from which the process on which he is confined issued, (*f*) or to a Judge as aforesaid, (*g*) for a rule or summons to show cause why he should not be discharged from custody, (*h*) and upon the return of such rule or summons, and where there are interrogatories, if the answers thereto are deemed sufficient by such Court or Judge, (*i*) such debtor shall be by rule or order discharged from custody, and such discharge shall have the same and no other effect as a discharge for non-payment of the weekly allowance; (*j*) Provided that the Court or Judge may on the return of the rule or summons, if the Plaintiff has already filed interrogatories (which he is hereby authorized to do in like manner as on an application for the weekly allowance), (*k*) and if further inquiry appears requisite for the ends of justice, allow to the Plaintiff a reasonable time to file further interrogatories, and for the debtor to answer them before the rule or summons be finally disposed of; (*l*) Provided also, that the Court or Judge may make it a condition of the debtor's discharge, that he shall first assign and convey to the party at whose suit he is in custody any right or interest which he may have or be presumed to have in and to any property, credits, and effects other than the wearing apparel, beds, bedding, and household utensils before mentioned, such assignment or conveyance to

Proviso: for the interrogatories.

Proviso: Assignment by debtor may be required.

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fifteen days notice of application for his discharge, and that upon proof thereof, &c., and upon making an affidavit, &c., the Court or a Judge might order his discharge, provided he should have satisfactorily answered interrogatories which the creditor might cause to be filed and served before the expiration of the notice. On 14th August, being Saturday, an application was made under this Act by a debtor in execution for his discharge. On 30th August, being Monday, plaintiff filed interrogatories: Held that the day of service was to be excluded in the computation of the fifteen days, and that then the last day being a Sunday or *dies non*, plaintiff had all Monday, 30th August, to file interrogatories: (*Bulkley et al.* v. *Grigge*, 1 U.C. Cham. R. 50.)

(*f*) See note *b* to s. ccxcv.

(*g*) See note *c* to s. ccxcv.

(*h*) The Court under 5 Wm. IV. cap. 3, only granted a rule *nisi* or a Judge a summons to show cause in the first instance: (*King* v. *Keogh*, 5 O.S. 326.)

(*i*) The expressions "if the answers thereto are deemed sufficient by such Court or Judge," are of the same import as "to the satisfaction of the Court or Judge," used in s. ccxcvi.: (see note *u* to s. ccxcvi.)

(*j*) See note *l* to s. ccxcv.

(*k*) See ss. ccxcv–ccxcvi.

(*l*) Additional interrogatories may at all times be filed with the leave of the Court or Judge.: (see note *u* to s. ccxcvi.)

be approved by the Court or Judge; (*m*) Provided lastly, that if it shall appear that the debt for which such debtor is confined was contracted by any manner of fraud or breach of trust, or that he is confined by reason of any Judgment in an action for breach of promise of marriage, seduction, criminal conversation, libel, or slander, (*n*) the Court or Judge may order the Applicant to be re-committed to close custody for any period not exceeding twelve calendar months, and to be then discharged. (*o*)

Proviso: if debt arose from fraud, breach of trust, &c.

CCCI. (*p*) The limits of each County and Union of Counties (*App. Co. C.*)

(*m*) 10 & 11 Vic. cap. 15, s. 4.

(*n*) This part of the section appears to be new and original.

(*o*) Committal to close custody under the circumstances mentioned in the section can only be considered in the light of a punishment more than a means to enforce payment of the debt due. The imprisonment for a period "not exceeding twelve calendar months" is similar to the period named in 5 Wm. IV. cap. 3, s. 4.

(*p*) The origin of this section is 10 & 11 Vic. cap. 15, s. 1. In England the regulations of the Court of Queen's Bench in regard to the custody of debtors in execution were before 1842 the same that now prevails in Upper Canada. The Queen's Bench prison being under the control of the Court of Queen's Bench, that Court by various rules published from time to time from the reign of George I. downwards extended the limits of the prison by declaring that certain spaces in its vicinity should form part of it. The Sheriff had authority under these rules to keep debtors in execution either within the walls of the prison or anywhere else within the limits, and was not liable for an escape unless the debtors passed beyond the limits. But as the Sheriff was responsible for the safe keeping of the debtors, being liable even when they broke the walls of the prison, he was of course not compelled to give them the indulgence of any limits beyond the walls, unless they made him secure by such securities as he would accept. In taking this security, whether by bond or otherwise, the Sheriff did nothing illegal. So the law appears to be now in Upper Canada under the C. L. P. A. So far as regards debtors in custody, the limits are made part of the gaol, and the Sheriff by letting the prisoners enjoy them is not suffering an escape, even if he should take no security. As he incurs great risk, however, in relinquishing the security which the walls of the prison afford, he is not bound to do so, unless the prisoners shall indemnify him. The law in Upper Canada stands in this respect precisely on the same footing as in England before the passing of Statute 5 Vic. cap. 22, which abolished the Queen's Bench prison: (s. 1), and also abolished the limits or liberties of the gaol as they are described in that Statute: (s. 12.) The Queen's Bench extended the limits of the prison by their rules of Court, and in Upper Canada the Legislature has done the same thing. If therefore in Upper Canada, the sheriff having taken his prisoner, and had him in custody, place him upon the limits instead of keeping him within the walls, he does nothing wrong: (see *Campbell* v. *Lemon*, Robinson, C. J, 2 O. S. 406.) For all purposes of arrest the limits constitute the gaol, and the debtor while confined within the limits is in legal custody: (*Ib.* Macaulay, J, p. 419.) But so far as the debtor is concerned, there is still a difference between these limits and the actual

10 & 11, Vic. c. 15, s. 1. Limits of Counties to be limits of gaols.

in Upper Canada for judicial purposes, shall be and are hereby declared to be the limits of the Gaols of such Counties or Unions of Counties respectively. (*q*)

11 Geo. IV.

CCCII. (*r*) The Sheriff of any such County or Union of

gaol. The Sheriff may allow the debtor to enjoy them or he may not; and in this respect he has it in his power to show the debtor ease and favor, for he may without exacting any security or any consideration permit the debtor to go out upon the limits if willing to incur the risk. On the other hand, he may refuse to do so unless satisfactory security be offered. The sheriff under some circumstances *may* make this power of granting or withholding the privilege of the limits the occasion of that kind of extortion which the 23 Hen. IV. cap. 9, was intended to restrain, and so render himself liable to the penalties of extortion. If, for instance, he should in consideration of allowing the limits exact a bond from the prisoner that he would convey to him a certain lot of land or pay him absolutely a certain sum of money, such an obligation would be undoubtedly void. The objects and the extent of the Statute 23 Hen. VI. are fully stated in *Dyer* v. *Manningham*, Plowden, 67. If the sheriff upon the occasion of allowing the limits, will take such a security as he may enforce, he must take such an one as is contemplated by the next succeeding section: (*Leonard* v. *McBride*, Robinson, C. J, 2 O.S. 2.) As to the history of the gaol limits, showing their gradual extension, see note *n* to s. cccv. This section (s. ccci.) is applied to County Courts.

(*q*) As to counties united for judicial purposes, see 12 Vic. cap. 78, s. 5. In Stat. 18 Vic. cap. 69, intituled "An Act making certain provisions rendered necessary by the separation of the Counties of Halton and Wentworth," there is a provision which nobody would expect to find in an Act so intitled. It is as follows—"And be it enacted, for the purpose of preventing injustice to parties, that in any case where a person shall have heretofore or shall hereafter be admitted to the limits of any Union of Counties in the manner prescribed by law, and when such Union shall have been heretofore or shall hereafter be dissolved, or where any one or more Counties shall have been heretofore or shall hereafter be separated from such Union after such admission, then and in every such case the said person shall be held to retain the right to travel and reside in any portion of the said Counties, as if no such dissolution or separation had taken place, and the said person shall not be held by reason of such travel or residence to have broken any bond or condition thereof, or to forfeit any security given for the purpose of obtaining the benefit of such limits. Provided always that in case when proceedings at law have been instituted before the passing of this Act against any person or his or her sureties by reason of such person having travelled from one County into another County of the said Union, or by reason of his or her having continued to reside in one County of the said Union after any dissolution or separation, such legal proceedings may be continued and prosecuted until the payment by the defendant or defendants of the plaintiffs' costs of suit as between attorney and client, and on such payment the said proceedings shall be discontinued:" (s.)

(*r*) This section, though resembling in part each of the repealed Statutes 11 Geo. IV. cap 3; 10 & 11 Vic. cap. 15; 16 Vic. cap. 175, cannot be said decidedly to be a re-enactment of any one of them. The sheriff under the 11 Geo. IV. cap. 3, was enabled to take a bond to the limits when giving a debtor the benefit of the limits to secure himself from risk. Of the sufficiency of this bond the sheriff was obliged to judge, and the responsibility of a

Counties may (*s*) take from any debtor confined in the Gaol thereof in execution or upon mesne process, (*t*) a bond with not less than two or more than four sufficient sureties, (*u*) to be jointly and severally bound in a penalty double the amount for which such debtor is so confined, (*v*) conditioned that such

c. s. 10 & 11 V. c. 15. 16 V. c. 176.

Sheriff may take security from any debtor that he will keep

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breach he was obliged to assume. But to relieve him of this responsibility 10 & 11 Vic. cap. 15 was passed, which substituted a recognizance of bail for the bond to the limits. The recognizance when taken was filed with the Clerk of the Crown or his deputy in the Court in which the action was pending. After being filed proceedings were had for its allowance, to which proceedings plaintiff was made a party. When allowed, the Clerk with whom the recognizance was filed, granted a certificate thereof, which was the sheriff's authority for giving the debtor the benefit of the limits: (see *Miller* v. *James*, 5 U. C. R. 216; *White* v. *Petch et al*, 7 U. C. R. 1.) Between the time that the debtor was arrested and the time when his recognizance to the limits was allowed, an interval of several days necessarily elapsed, during which the sheriff not having any security against risk was accustomed to imprison within the walls of the gaol. For remedy 16 Vic. cap. 175 was passed, which enabled the sheriff before the allowance of the recognizance of bail to take a bond for his own security, and forthwith give to the debtor the benefit of the limits: (ss. 7, 8.) The effect of the section here annotated is to restore the law to its early state by making the sheriff responsible for the conduct of a debtor on the limits. The sheriff for his own security may at any time take a bond with sureties, conditioned that the defendant shall remain within the limits, &c. In the event of a breach plaintiff may either sue the sheriff or take an assignment of the bond. The recognizance of bail to the limits, which as a step in the cause had its existence under 10 & 11 Vic. cap. 15, is abolished. The Court will not order an *exoneretur* to be entered on a bond to the limits upon the ground that the debtor has obtained a final order for his discharge in an Insolvency Court: (*Nordheimer* v. *Grover*, Chambers, March 11, 1857, Robinson, C. J, III. U. C. L. J. 74.) In the event of an action being brought by the sheriff on the bond, if the Court would do anything more than stay proceedings in the action it would be to order the bond to be delivered up to be cancelled: (*Ib.*)

(*s*) The sheriff being responsible for the safe-keeping of prisoners committed to his custody, and liable even if they break the walls of the prison, is not of course *compelled* to give them the indulgence of any limits beyond the actual walls, unless the prisoner make him secure by such security as he will accept: (see note *p* to *s.* cccl.) Read in connexion with this sec. ss. 25, 26, of C. L. P. A., 1857.

(*t*) It was held under the old statutes that a debtor in custody on mesne as well as final process might have the benefit of the limits: (*Montgomery* v. *Howland*, E. T. 2 Vic. *MS.* R. & H. Dig. "Limits," I, 2; *Clegg* v. *McNab*, 1 U. C. Prac. R. 150), and that a prisoner in custody for contempt might also have that benefit: (*Rex* v. *Kidd*, H. T. 6 Wm. IV. *MS.* R. & H. Dig. "Limits," I, 1.) Before the passing of 10 & 11 Vic. cap. 15, it was considered that after the return of an attachment for non-payment of money the sheriff might of course take bail to the limits: (*Lane* v. *Kingsmill*, 6 U.C. R. 579.)

(*u*) The Court refused to make an attorney pay the costs in an action on a bond to the limits, though he had on a mere parol authority executed the bond in the name of and upon behalf of one of the obligors: (*Leonard* v. *Glendenmen*, M.T. 1 Wm. IV. *MS.* R. & H. Dig. "Attorney," II. (3) 4.)

(*v*) By the common law a sheriff might have taken a bond from sureties

the limits, obey all lawful orders of the Court, &c.

debtor shall remain and abide within the limits of such Gaol, and shall not depart therefrom, unless discharged from custody in the suit or matter upon which he was so confined by due course of law, (*w*) and also that such debtor shall and will, during all the time that he shall be upon the limits subject to such custody, observe and obey all notices, orders, or rules of Court touching or concerning such debtor, or his answering interrogatories, or his returning and being remanded into close custody, and that they will produce such debtor to the Sheriff when they or either of them shall be required, upon reasonable notice, (*x*) and the Sheriff may also require each surety when there are only two, to make oath in writing, to be annexed to

Justification of the sureties.

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to indemnify him against the consequences of any indulgence he might choose to show to a prisoner in execution: (see note *p* to s. ccci.)

(*w*) The condition that the debtor "shall *remain* and *abide* within the limits of the gaol," evidently intends cases only where at the time of entering into the bond the debtor is *within* the limits. The condition, too, that the debtor shall not "depart" from the limits strengthens this opinion. These expressions are in effect the same as the language of 11 Geo. IV. cap. 8, under which it was held by a majority of the Court that a debtor who had never been on the limits could never depart therefrom within the meaning of the Act, and that a bond so conditioned given under such circumstances was void: (*Campbell* v. *Lemon*, 2 O. S. 401.) If the debtor depart from the limits of the gaol an action may be brought by plaintiff either against the sheriff or upon an assignment of the bond against the sureties: (see note *r*, *supra*.) In such an action the departure must be clearly alleged and as clearly proved. A wilful departure is meant. *Prima facie* a wilful departure is proved by adducing evidence to show that the debtor did in fact go out of the limits, which now consist of the whole of the County or Union of Counties in which the gaol is situate: (s. ccci.) But where it is shown that the debtor is mistaken as to boundaries in a doubtful case, and has no idea of transgressing the limits, it is not clear that upon such facts a departure can be inferred within the intent and meaning of an ordinary bond: (*Lewis* v. *Grant*, 1 U. C. R. 290.) However, if the debtor, transgress the limits by going from one County into another, though informed that he is not transgressing the limits, if there be really no doubt as to boundaries, the bond is broken: (*Hedden* v. *Gregory*, 10 U.C. R. 384.) It would seem that if the debtor transgress the limits in obedience to the call of paramount duty, for instance, in obedience to the command of militia officers to quell a riot, such departure from the limits is not a breach of the bond: (*Douglas* v. *Murchison et al*, 6 O. S. 481.) An admission by a debtor that he did depart from the limits has been held to be no evidence after his death in an action against his sureties for breach of the bond to the limits: (*Freelend* v. *Jones et al*, 6 O. S. 44.) Where in such an action it was proved that the debtor had been seen fifty yards beyond the limits, and the jury notwithstanding found for the defendants, a new trial was granted on payment of costs: (*Chesley* v. *McMillan*, E T. 3 Vic. *MS.* R. & H. Dig. "New Trial," I, 8.)

(*x*) When a sheriff is legally called upon by order of the Court to re-commit to close custody a debtor whom he has admitted to the limits, his failure to obey the order is an escape. His

the bond, (*y*) that he is a freeholder or householder in some part of Upper Canada, stating where, and is worth the sum for which the debtor is in custody (naming it), and fifty pounds more over and above what will pay all his debts, (*z*) or where there are more than two sureties, then that each surety shall make oath as aforesaid, that he is a freeholder or householder as aforesaid, and is worth one-half the sum for which the debtor is in custody (naming it), and fifty pounds more, over and above what will pay all his debts. (*a*)

(*App. Co. C.*) 11 Geo. IV. cap. 3, s. 2.

CCCIII. (*b*) Upon receipt of such bond, (*c*) accompanied by an affidavit of a subscribing witness of the due execution thereof, (*d*) and by the sureties' affidavits of solvency, (*e*) if required by the Sheriff, (*f*) it shall be lawful for the Sheriff to

On receipt of such security Sheriff

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declaration that he cannot find the debtor is evidence of an escape. After a debtor has been once deprived of the limits by order of the Court, his continuance upon them after the sheriff has had reasonable notice of the order, is as much an escape as if there were no limits beyond the walls of the gaol. It consequently becomes immaterial whether the debtor was within or without the limits after the period when the sheriff ought to have had him in close custody. The provisions of 8 & 9 Wm. III. cap. 27, s. 7, are in force in Upper Canada. When a prisoner is no longer entitled to the limits, the sheriff is bound to produce him in twenty-four hours, as in England: (see *Wragg* v. *Jarvis*, 4 O. S. 317.)

(*y*) Where a blank for the amount of the debt had been left at the time of the execution of a bond to the limits, which blank was afterwards, with the assent of the obligor though not in his presence, filled up according to the indorsement in the *ca. sa.* under which the arrest was made, held not sufficient to justify a nonsuit of plaintiff upon an issue of *non est factum*: (*Leonard* v. *Merritt*, Dra. Rep. 294.)

(*z*) The affidavit may be in this form —*Style of Court and Cause.* We, A. B. of, &c., C. D. of, &c., do severally make oath and say as follows, First, I, deponent, A. B., do make oath and say, I am a freeholder or householder (*as the case may be*) residing at, &c., (*or* "in respect of freehold estate at," &c., *deponent must show himself to be a freeholder or householder in Upper Canada, and state "where"*) and am worth the sum for which the defendant in this cause is in custody, that is to say, £— (*naming the sum*), and fifty pounds more over what will pay my just debts. Secondly. I, deponent, C. D., do make oath and say that I am, &c. (*as before.*)

(*a*) The affidavit in this case may be in the same form as the preceding, with the alteration of the number of sureties and the respective amounts of security.

(*b*) The origin of this section is s. 2 of 11 Geo. IV. cap. 3. It is applied to County Courts.

(*c*) *i.e* The bond mentioned in the preceding section (cccii.)

(*d*) The affidavit may be in this form —*Style of Court and Cause*—I, A. B. of, &c., do make oath and say that I was present and did see the annexed bond duly signed, sealed, and delivered by the therein named C. D., E. F., &c., the obligors, and that I am a subscribing witness to the same.

(*e*) See note *z supra.*

(*f*) The bond being for the security of the sheriff, it is for him to judge of its sufficiency, which he may do either

may allow the debtor the limits, without being liable for an escape.

permit and allow (*g*) the debtor to go out of close custody in Gaol, into and upon the Gaol limits, and so long as such debtor shall remain within the said limits without departing therefrom, and shall in all other respects observe, fulfil, and keep on his part the condition of the said bond, such Sheriff shall not be liable to the party at whose suit such debtor was confined, in any action, for the escape of such debtor from gaol. (*h*)

(*App. Co. C.*)

If the sure-

CCCIV. (*i*) In case the Sheriff shall have good reason to apprehend (*j*) that such sureties or either of them, have, after

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of his own knowledge or by means of the affidavit of solvency.

(*g*) In the event of a breach of the condition of the bond, the sheriff may sue the sureties upon it, or if requested may assign the bond to plaintiff so as to entitle plaintiff to sue upon it: (s. cccv.) If the sheriff sue, his action may be brought even before he has been sued for the escape or paid any money upon account of it: (*Ruttan* v. *Wilson et al*, 3 Vic. *MS.* R. & H. Dig. "Escape," 22.) In such an action it is not necessary for the sheriff to show that he has sustained any pecuniary damage: (*Kingsmill* v. *Gardiner et al*, 1 U.C.R. 223.) One of the sureties of a debtor to the limits hearing of the debtor's escape, paid to the sheriff the amount of the debt and costs for which the debtor was imprisoned, exclusive of the sheriff's own fees. The sheriff then sued the remaining obligor named in the bond to recover from him the amount of costs in an action which the creditor had brought against him, the sheriff. Held that after receipt by the sheriff of the money paid by the first mentioned obligor the sheriff could not recover for those costs, since he ought to have paid over the money to the creditor at once instead of allowing the action to proceed for the recovery of it: (*Corbett* v. *Lake*, 5 U.C.R. 454.) In an action by a sheriff on a bond to the limits if the defendant plead that the debtor left the limits but afterwards returned to them and always remained on them after his return, the sheriff may without new assigning take issue on the subsequent remaining. However, this he cannot do, unless the defendants by their plea admit the bond to have been broken before the debtor's return, because otherwise the plea would amount to the general issue: (*Cameron* v. *McLeod et al*, T. T. 4 Vic. *MS.* R. & H. Dig. "Sheriff," IV. 1.) The sheriff declared that the debtor left the limits in February. Plea that plaintiff as sheriff removed the debtor in November and that he returned to the limits and always afterwards remained thereon. Replication that the debtor did not always afterwards remain on the limits. Issue joined and verdict for plaintiff. Held that the verdict according to the time stated was consistent with plaintiff's right and that the issue being on the subsequent remaining only, there was no ground for arrest of judgment: (*Ib.*) *Non damnificatus* is no answer to a declaration on a limit bond containing specific conditions: (*Kingsmill* v. *Gardiner et al*, 1 U.C.R. 223.)

(*h*) See note *p* to s. ccci.

(*i*) This section appears to be new and original. It is applied to County Courts.

(*j*) "In case the *sheriff* shall have good reason to apprehend, &c." All these sections as to insolvent debtors are consistent in treating bonds to the limits as direct securities to the sheriff to cover his responsibility to plaintiff.

entering into such bond, (*k*) become insufficient to pay the amount severally sworn to by them, (*l*) it shall be lawful for him again to arrest the debtor, and to detain him in close custody, (*m*) and the sureties of such debtor may plead such arrest and detention in bar of any action to be brought against them upon the bond so entered into by them, and such plea if sustained in proof shall wholly discharge them from such action; (*n*) Provided always, that such debtor may again obtain the benefit of the Gaol limits, on giving a new bond with sureties, as aforesaid, to the Sheriff. (*o*)

Sureties become insolvent, &c., Sheriff may re-take the debtor, &c.

Proviso.

CCCV. (*p*) Upon any breach of the condition of such bond, (*q*) the party at whose suit the debtor is confined may require the Sheriff to assign the same to him, (*r*) which assignment shall

(*App. Ca. C.*) 11 Geo. IV., cap. 3, sec. 5; 16 Vic., cap. 175, sec. 10.

(*k*) *i. e.* The bond for which provision is made in s. cccii.

(*l*) See note *z* to s. ccciii.

(*m*) See note *p* to s. ccxcv.

(*n*) And this whether the action be at the suit of the sheriff or his assignee suing under s. cccv.

(*o*) See s. cccii.

(*p*) The origin of this section is 11 Geo. IV. c. 3, s. 5. It is applied to County Courts.

(*q*) It would seem that the bond will not be void altogether although part of the condition be contrary to the statute: (*Stebbins* v. *O'Grady*, 5 O. S. 742.) Where in a declaration on a bond to the limits the condition set out was that the debtor should not depart from the limits, and the defendant on oyer showed the condition to be that the debtor would remain on the limits until payment of the debt or should be legally discharged. Held a variance: (*McGuire* v. *Pringle*, M.T. 3 Vic. *MS.* R. & H. Dig. "Limits," II. 8.) Now that oyer is abolished (s. civ.) and that all amendments "necessary to the determination of the real question in controversy" between the parties may be made (s. ccxci.), it is doubtful how far the foregoing case can be deemed an abiding authority.

(*r*) It is a general maxim of law that a *chose in action* cannot be assigned, and that an assignee cannot sue thereon. Bail-bonds were made assignable by St. 4 Anne, c. 16, s. 20. Since that Statute most cases in the books are between the bail and the sheriff's assignees. Antecedently the action was necessarily brought by the sheriff himself or at least in his name. Bonds to the limits were in Upper Canada first made assignable by Statute 11 Geo. IV. cap. 3, s. 5. The authority to assign under the Statute of Geo. IV. was on the debtor "withdrawing or departing" from the limits. It is under the section here annotated "upon any breach of the condition of such bond." A bond, however, either before or after breach of the condition may be delivered up to be cancelled: (*Le Mesurier* v. *Smith*, Macaulay, J, 2 O. S. 486.) If after an escape and before assignment of the bond, the sheriff accept the debtor from his sureties and give up the bond to be cancelled and it be cancelled accordingly, the sheriff disables himself from afterwards assigning it: (*Ib.*) The bond is annulled by cancelation, so that it no longer subsists and not subsisting cannot be assigned: (*Ib.*) But a mere surrender to the sheriff after breach neither cancels the bond nor bars the remedy upon it: (*Shaw* v. *Evans et al*, Dra. Rep. 14.) The bond therefore may in such case be assigned and convey to

In case of breach, Sheriff may be required to assign the Bond, and on doing so shall be discharged from liability.

be made in writing, under the seal of the Sheriff, (*s*) and attested by at least one witness, (*t*) and the assignee of the Sheriff or the executors or administrators of such assignee may maintain an action in his or their own names upon such bond, (*u*) which action the Sheriff shall have no power to release; (*v*) but upon executing such assignment at such request,

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the assignees a good right of action against the sureties: (*Ib.*)

(*s*) The assigment may be in this form—I, A. B. of, &c., Sheriff of, &c., within named, have at the request of C. D., the plaintiff, also within named, assigned and by these presents do assign to him, the said C. D., the within bond to the limits, and all benefit and advantage arising therefrom, pursuant to the Statute in that case made and provided. In witness whereof I have hereunto set my hand and seal of office this — day of, &c.: (Chit. F. 6 Edn. 234.)

(*t*) An assignment of a bail bond under 4 Anne cap. 16, s. 20, must be made in the presence of *two* credible witnesses. Sheriffs should note the difference in the practice, and be careful to observe it. Unless the assignment in each case be conformable to what the Statute authorizes, it will be void. The right to assign is purely statutable, and a right which is, too, at variance with the common law: (see note *r*, *supra.*)

(*u*) In an action on a bond to the limits whether at the suit of the sheriff or of his assignee it should be shown in express terms and not merely by implication that the defendants became bound: (*Douglas* v. *Murchison et al*, 6 O.S. 48.) In such an action if the sheriff sue it would appear that he is under no obligation to disclose the condition of the bond in his declaration, but may as in other cases between ordinary parties declare upon the bond simply: (*Leonard* v. *McBride*, Robinson, C. J, 3 O. S. 3.) But when an assignee sues, he being enabled only by statute so to do, must by inducement state the judgment *ca. sa.*, &c., and so lay a foundation for the sheriff's right to assign and his, the assignee's, right to sue. Without these circumstances sues by special leave of the statute. The one requires a substratum for his suit, the other does not: (*Ib.* per Macaulay, J, p. 9.) If a sheriff on suing upon a bond to the limits declare upon it according to its legal effect, which he may do, it is not very clear how much or how little of the original proceedings must be made to appear in the declaration: (*Ib.* p. 1.) It is no plea to an action by the assignee that the debtor before the assignment of the bond left the limits without the knowledge of defendants, and afterwards and before the commencement of the action returned to the limits and still continued thereon: (*McMahon* v. *Masters et al*, M. T. 7 Vic. *MS.* R. & H. Dig. "Limits," II. 14.)

(*v*) Even in the case of a *chose in action* not made assignable by statute the assignor will not be suffered to give a release in fraud of his assignee: (*Rowland* v. *Tyler*,, M. T. 5 Wm. IV. *MS.* R. & H. Dig. "Release," II. 1; *Barclay* v. *Adair*, Chambers, March 5, 1857, III. U.C.L.J. 88.) In an action by the assignee of a *chose in action* in the name of the assignor, the Court set aside a plea of release so given and ordered that it should not be made use of at the trial: (*Ib.*) When a bond to the limits has been assigned by the sheriff, his assignee is entitled if the original debtor were in custody on final process to recover the amount indorsed on the *ca. sa.*, together with the sheriff's fees and interest: (*Callagher* v. *Strobridge*, Macaulay, J, Dra. Rep. 168.) And if plaintiff in such a case there is nothing to show the right of the assignee to sue, and on general demurrer his declaration would there-

the Sheriff shall be thenceforth discharged from all liability on account of the debtor or his safe custody. (*w*)

CCCVI. (*x*) The sureties of any such debtor may surrender him into the custody of the Sheriff at the gaol, (*y*) and it shall be the duty of the Sheriff, his Deputy, or Gaoler, there to re- (*App. Co. C.*) 11 Geo. IV. cap. 4, s. 8. Sureties may

fore be bad. The sheriff sues at common law upon his bond. The assignee by mistake takes a verdict for the penalty of the bond leave to amend the *postea* by the Judge's notes may be given: (*Ib.*)

(*w*) There is a clause in the C. L. P. A., 1857, to enable the sheriff to assign either before or after breach and be thereby discharged: (s. 25.)

(*x*) The origin of this section is 11 Geo. IV., cap. 8, s. 8. It is applied to County Courts. In civil actions there are now at least two ordinary kinds of bail—to the sheriff, and to the action. Bail to the sheriff cannot as of right take their principal into custody or surrender him in discharge of themselves, but like main-pernors at the common law can do nothing, except perform the condition of their bond. They are barely and unconditionally sureties for their principal. Like sureties for the performance of any other act they become liable when the condition of their obligation is broken, and are entitled to no favour beyond what is allowed by the Statute 4 & 5 Anne, cap. 16, s. 20, and the equitable powers and practice of the Court: (see Petersdorff on Bail, 216.) Bail to the action, generally called special bail, are not only responsible for the safe keeping of their principal, but have the right to surrender him in discharge of themselves. Bail to the limits have under the section here annotated privileges similar to bail to the action: (see *Evans* v. *Shaw*, Sherwood, J, Dra. Rep. 28.) An interim order for protection under the Insolvent Debtors' Act does not prevent bail from surrendering their principal: (*Ross et al.* v. *Brookes et al*, Chambers, March 25, 1857, Robinson, C.J.) Nor can bail to the limits apply to be allowed to enter an *exoneretur* upon the ground that the principal has obtained a final order for his discharge: (*Nordheimer* v. *Grover*, Chambers, March 11, 1857, Robinson, C. J, III. U. C. L. J, 74.) The final order does not discharge the bail from liability if bail be previously fixed: (*Ross et al.* v. *Brookes et al, ubi supra.*)

(*y*) It is not stated when or under what circumstances the surrender may be made. It was made a question under the old statute whether the surrender could be made after breach of the bond so as to discharge the sureties: (*Evans* v. *Shaw, ubi supra.*) Under the present Statute, however, there is much less room for doubt. It is enacted that the surrender when made may be pleaded "in bar of any action brought on the bond for a breach of the condition happening *after* such surrender," &c. This means that the surrender to be an effectual bar to the action must be made *before* breach. It was also a question under the old law whether bail to the limits had the right to follow their principal beyond the limits, retake, and then surrender him. The point was raised in *Evans* v. *Shaw*, *ubi supra*, and one Judge (Sherwood, J.) expressed an opinion that the Legislature under the Statute then in force "intended to allow the bail for the limits the right of taking and surrendering their principal, if they found him within or without the limits:" (*Ib.* p. 25.) But it is manifest that if bail to retake their principal so as to surrender him are obliged to follow him *beyond* the limits, such a fact of itself establishes a breach of the bond. Wherefore if no surrender after breach can be an effectual bar to an action on the bond, no surrender under such circumstances can have the effect of discharging the sureties.

make or tender a surrender of the debtor.

ceive such debtor into custody, (*z*) and the sureties may plead such surrender or an offer to surrender, and the refusal of the Sheriff, his Deputy, or Gaoler to receive such debtor into custody at the gaol, (*a*) in bar of any action brought on the bond for a breach of the condition happening after such surrender or tender and refusal, and such plea, if sustained in proof, shall discharge them from any such action; (*b*) Provided always, that such debtor may again obtain the benefit of the limits on giving a new bond with sureties as aforesaid, to the Sheriff. (*c*)

Proviso.

Con Stat for U.C. ch 24 §35436

(*App. Co. C.*) 11 Geo. IV. cap. 3, s. 10. 4. Wm. IV. cap. 10, s. 4.

CCCVII. (*d*) The party at whose suit any debtor is confined, may at any time while the debtor enjoys the benefit of the limits, file and serve such interrogatories, to be answered by such debtor in manner aforesaid; (*e*) and in case such debtor shall neglect or omit for the space of fifteen days next after

Debtor on limits bound

(*z*) *There to receive, &c. i. e.* at the gaol. It is not the duty of the sheriff or his deputy to receive from the sureties their principal wherever they choose to tender him. Reason and convenience alike require the tender to be at the gaol wherein the sheriff without risk and without delay may at once incarcerate the prisoner.

(*a*) The plea may be either a surrender or an offer to surrender at the gaol and refusal there to accept him.

(*b*) The decision of the Court in *Evans* v. *Shaw*, *ubi supra*, was that to an action on a bond for the limits no surrender after breach was a defence. Such appears to be the law arising upon the construction of the section here annotated: (see note *y*, *supra*.) But whether a surrender after breach constitute an equitable ground of defence so as to admit of an equitable plea is a question to be decided. The following remarks of Macaulay, J, made in *Evans* v. *Shaw*, *ubi supra*, bear upon the question. "The undertaking of bail is a contract and the contract here was not that L. A. should make no escape, but that 'he should not go or remove beyond the limits of the gaol.' The breach is that he did go, remove, withdraw, and depart. The plea admits a departure, and seeks to avoid the penalty by avoiding the breach. A departure is doubtless a literal breach of the condition, and if so the penalty was incurred; but it is contended that the condition was saved by the subsequent surrender. Such a defence rests I fear rather upon equitable than upon legal grounds:" (Dra. Rep. p. 87.)

(*c*) *i.e.* Under s. cccii.

(*d*) The origin of this section is 11 Geo. IV. cap. 3, s. 10, and 4 Wm. IV. cap. 10, s. 4. It is applied to County Courts.

(*e*) The reference here made by the expression "such interrogatories," and "in manner aforesaid," appears to be to the provisions contained in s. cccvi. If so, the interrogatories may be for "the purpose of discovering any property or effects which such debtor may be possessed of or entitled to," &c. See also s. ccc. The old law allowed a creditor to serve a demand upon the debtor for a statement of his effects, which demand was required to be signed by plaintiff or his attorney: (*Meighan* v. *Reynolds*, 4 O. S. 19.) Where a defendant in execution on the limits on demand of plaintiff's attorney gave him a schedule of debts due to him (the debtor), and of property belonging to him amounting to more than £2000, and offered to assign the whole for the benefit of his creditors, but refused to give up any part to the plaintiff alone, the debtor was re-com-

service thereof, (*f*) to answer such interrogatories and to file the answers, (*g*) and to give immediate notice of such filing to the party at whose suit he is in custody, or to the Attorney of that party, (*h*) the Court or a Judge as aforesaid, (*i*) may make a rule or order for such debtor's being committed to close custody, (*j*) and it shall be the duty of the Sheriff on due notice of such rule or order, forthwith to take such debtor and re-commit him to close custody, (*k*) until he shall obtain a rule of Court or Judge's order for again admitting him to the limits, on giving the necessary bond as aforesaid, (*l*) (which rule or order may be granted on the debtor's showing that he has filed his answers to such interrogatories, and has given to the Plaintiff or his Attorney ten days' notice thereof, and of his intention to apply), (*m*) or until he shall be otherwise discharged in due course of law.

to answer interrogatories.

Penalty for refusal.

CCCVIII. (*n*) The party at whose suit any debtor is confined in execution, (*o*) may, whenever such debtor shall take the benefit of the limits, (*p*) sue out any execution against his lands or goods, (*q*) notwithstanding such debtor was charged in execution, (*r*) and such execution shall not be stayed, but shall be proceeded with until executed, (*s*) although such debtor has been re-committed to close custody; (*t*) Provided always,

(*App. Ch. C.*) 11 Geo. IV. cap. 3, s. 9.

Plaintiff may have execution against property of debtor on the limits.

Proviso.

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mitted to close custody: (*Bruneau* v. *Joyce*, E.T. 7 Vic. *MS.* R. & H. Dig. "Limits," I. 4.)

(*f*) As to computation of time see note *d* to s. lvii.

(*g*) The answers must not only be filed but be satisfactory when filed, *i.e.* satisfactory to the Judge to whom application is made: (*Kirby* v. *Mitchell*, 1 U. C. Cham. R. 137.)

(*h*) It appears that the notice may be either given to the party at whose suit the debtor is in custody, *or* to his attorney. *Qu.*—Does not the first part of the provision apply to a plaintiff suing in person?

(*i*) It was held under 4 Wm. IV. c. 4, s. 10, that a Judge when applied to in vacation for the committal to close custody of a debtor on the limits, disposed of the case without the power of appeal by declining to interfere: (*Shaw et al.* v. *Nickerson*, 7 U. C. R. 541.)

(*j*) The rule if *nisi* ought to be personally served: (*Meighan* v. *Reynolds*, 4 O. S. 19.) The order when granted should be directed to the sheriff and follow the words of the Statute: (*Hamilton* v. *Anderson*, 2 U. C. R. 452.)

(*k*) *Close custody.* See note *p* to s. cccv.

(*l*) Under s. cccii.

(*m*) See note *h*, *supra*.

(*n*) The origin of this section is Stat. 11 Geo. IV. cap. 3, s. 9. It is applied to County Courts.

(*o*) *i.e.* In custody upon final process as to which see note *n* to s. cccv.

(*p*) *i.e.* Under s. cccii.

(*q*) As to executions generally in Upper Canada see note *n* to s. clxxxii.

(*r*) See s. cxcii. and notes thereto.

(*s*) See note *h* to s. clxxxix.

(*t*) Under s. cccvii.

Exemptions from execution.

that the wearing apparel of such debtor and that of his family, and their beds and bedding, and household utensils, not exceeding together the value of ten pounds, (*u*) and the tools and implements of the trade of such debtor, not exceeding in value ten ponnds, (*v*) shall be protected from such subsequent execution.

(App. Co. C.) 11 Geo. IV. cap. 3, s. 6. Foregoing provisions not to extend to persons in custody, &c., on any criminal charge

CCCIX. (*w*) None of the foregoing provisions relative to the weekly allowance, discharge from custody on account of insolvency (*x*) or Gaol limits, (*y*) shall extend or be applicable to debtors who shall at the same time be in custody upon any criminal charge. (*z*)

(App. Co. C.) 11 Geo. IV. cap. 3, s. 11. False swearing under preceding Sections to be perjury.

CCCX. (*a*) Every person who shall upon any examination upon oath or affirmation or in any affidavit made or taken in any proceedings under this Act, (*b*) wilfully and corruptly give false evidence or wilfully and corruptly swear or affirm any thing which shall be false and shall be thereof convicted, shall be liable to the penalties of wilful and corrupt perjury. (*c*)

And with respect to costs; (*d*) Be it enacted as follows:

(*u*) Twelve pounds and ten shillings was the sum mentioned in 11 Geo. IV. cap. 3, s. 9. See now s. 23 of C. L. P. A., 1857.

(*v*) As to implements of trade protected under 11 Geo. IV. cap. 3 there was no limit as to value. Implements of trade to the value of £15 are protected from execution in ordinary cases: (C. L. P. A, 1857, s. 23.)

(*w*) The origin of this section is 11 Geo. IV. cap. 3, s. 6. It is applied to County Courts.

(*x*) Ss. cccvi. *et seq.*

(*y*) Ss. cccl. *et seq.*

(*z*) It was held under the old statutes that an insolvent debtor while also in custody on a criminal charge could not obtain a rule for weekly allowance in a civil suit: (*Thompson* v. *Hughson*, M. T. 6 Vic. *MS.* R. & H. Dig. "Insolvent," 22.)

(*a*) The origin of this section is 11 Geo. IV. cap. 3, s. 11. It is applied to County Courts.

(*b*) See 12 Vic. c. 10, s. 5, sub. s. 13.

(*c*) Perjury at common law is defined to be a wilfully false oath by one, who being lawfully required to depose the truth in any judicial proceeding, swears absolutely in a material to the point in question, whether he be believed or not: (Hawk, P. C. 6, 1, c. 69, s. 1.) In order, therefore, to constitute legal guilt of perjury, the oath must be false, the intention wilful, the proceedings judicial, the party lawfully sworn, the assertion absolute, and the falsehood material to the matter in question: (Chit. Crim. Law, III. 802.)

(*d*) There was no such thing as costs at common law *eo nomine*; but they were generally included in the damages given by the jury. This, however, being discretionary and inadequate, the legislature in 1278 put a *plaintiff's* right to costs upon a surer basis. It was in that year that the Statute of Gloucester was passed. It refers to certain original writs now obsolete, and enacts that "demandant may recover against the tenant the costs of his writ purchased together with the damages," and that the Act "shall hold place in *all cases* where a party is to recover damages:" (6 Edw. I. cap. 1.) Though the Statute gives the costs of the "writ," it has been

CCCXI. Until otherwise ordered by rule of Court, the costs

construed as extending to the costs of suit generally. But as by it costs were made recoverable in all cases indiscriminately, irrespective of the *quantum* of damages, however small, so long as some damages were recovered, plaintiffs having trifling demands forsook the inferior, to bring their actions in the Superior Courts. To prevent this abuse the legislature enacted that "if upon any action personal to be brought in any of her Majesty's Courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of lands, nor for any battery, it shall appear to the Judges of the same Court, and so signified or set down by the Justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same Court shall not amount to forty shillings or above, that in every such case the Judge and Justices before whom any such action shall be pursued shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto but less at their discretions:" (43 Eliz. cap. 6, s. 2.) The effect of this statute is to authorize a Judge's certificate, the consequence of which is plainly to deprive plaintiff of costs beyond the amount of his verdict. In 1623 a statute was passed which operated differently. It enacts that "in all actions upon the case for slanderous words to be sued or prosecuted by any person or persons, &c., if the jury upon the trial of the issue in such action, or the jury that shall enquire of the damages do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same:" (21 Jac. I. cap. 16, s. 6.) The operation of this Statute depends not upon any certificate but upon the mere finding of the jury. Though under the Statute of Elizabeth plaintiff can have no more costs than damages, if the damages be under 40s. in case the Judge certify, by a still later statute if the damages be under 40s. plaintiff shall have no more costs than damages *unless* the Judge do certify. It is enacted that "in all actions of trespass, assault, and battery, and other personal actions wherein the Judge at the trial shall not find and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, or that the freehold or title of the plaintiff against the defendant, or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question, the plaintiff in such action in case the jury shall find the damages to be under the value of 40s. shall not recover or obtain more costs of suit than the damages so found shall amount to:" (22 & 23 Car. II., st. 2, cap. 9.) This Statute notwithstanding the use of the words "other personal actions," was construed as extending only to actions of *trespass quare clausam fregit* and *assault and battery*. Afterwards in 1697, "for the preventing of wilful and malicious trespasses," it was enacted that "in all actions of trespass to be commenced, &c., in any of his Majesty's Courts of Record, &c., wherein at the trial of the cause it shall appear and be certified by the Judge under his hand upon the back of the record that the trespass upon which any defendant shall be found guilty was wilful and malicious, the plaintiff shall recover not only his damages but his full costs of suit: (8 & 9 Will. III. cap. 11, s. 4.) Such were the chief features of the English law as to costs of plaintiffs when the "laws of England relative to property and civil rights" were in effect adopted in Upper Canada (32 Geo. III. cap. 1, s. 3), and when by the Legislature of Upper Canada it was expressly declared that "the allowance of costs to either party plaintiff or defendant in

Con stat for u.c. ch 22 §3/3

§3/4-

Con stat for u.c. ch 22 §3/5

Costs on writs under this Act to be as heretofore until otherwise ordered.

Proviso as to mileage.

of Writs (*e*) issued under the authority of this Act and of all other proceedings under the same, shall be and remain as nearly as the nature thereof will allow, the same as heretofore, but in no case greater than those already established; (*f*) Provided always, that hereafter no mileage shall be taxed or allowed for the service of any Writ, paper, or proceeding, without an affidavit being made and produced to the proper taxing officer, stating the sum actually disbursed and paid for such mileage,

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all civil suits, &c., be regulated by the Statutes and usages which direct the payment of costs by the laws of England:" (2 Geo. IV. cap. 1, s. 38.) Subsequently the legislature of Upper Canada in furtherance of the intention and spirit of the English Statutes enacted that in any suit brought in a Superior Court of Common Law of the proper competence of a County Court, no more than County Court costs should be taxed against defendant: (8 Vic., cap. 13, s. 59; Har. Prac. Stats. p. 85); and with respect to suits of the proper competence of a Division Court a similar provision exists: (13 & 14 Vic. cap. 53, s. 78; Har. Prac. Stats. p. 185.) Still later the Provincial Legislature followed the example of the English Legislature in extending the principle of the English Statute of Charles to all actions of trespass. This was done by Prov. Stat. 16 Vic. cap. 175, s. 26, taken from Eng. Stat. 3 & 4 Vic. cap. 24, s. 2. Though 16 Vic. cap. 175, s. 26, is repealed by the C. L. P. A, yet s. cccxii. of this Act is a substantial re-enactment of it. Rather than repeat unnecessarily, the Editor refers the reader to that section, as showing the provisions engrafted upon the earlier Statutes.

Until the Statute of 23 Hen. VIII. cap. 15, a defendant was not entitled to costs in any case except on a writ of right of ward maliciously brought, which costs were given by the Statute of Marlbridge. But even from the time of Hen. VIII. to the reign of James I. a defendant was entitled to costs only in certain specified actions. During the reign of James it was enacted "that if any person or persons, &c., shall commence, &c., any action, &c., wherein the plaintiff or demandant might have costs (if in case judgment should be given for him) and the plaintiff or plaintiffs, demandant or demandants in any such action, &c., after appearance of the defendant or defendants be nonsuited, or that any verdict happen to pass by any lawful trial against the plaintiff, &c., in any such action, &c., that then the defendant, &c., in every such action, &c., shall have judgment to recover his costs against every such plaintiff," &c.: (4 Jac. I. cap. 3, s 2.) This with other Statutes giving costs to defendants in case of discontinuance nonsuit and demurrer noticed in other parts of this work and not necessary to be here repeated were introduced into Upper Canada in like manner and at the same time as the Statutes giving costs to plaintiffs. In 1830 the Legislature of Upper Canada passed a Statute entitling a defendant pleading a set-off and proving a greater one than plaintiff's demand to recover a verdict "besides his costs and charges:" (11 Geo. IV. cap. 5, s. 1; Har. Prac. Stats. p. 20.) This completes the sketch intended of the principal Statutes which give to plaintiffs and defendants costs of suit. There are others of minor import, a notice of which in this place, time and space alike forbid.

(*e*) This is a temporary provision, with which there is a corresponding provision in Co. C. P. A., 1856, s. 18.

(*f*) See N. Rs. which in Schd. B. establish a table of costs to be taken

and the name of the party to whom such payment was made.(*g*)

(*App. Co. C.*) Plaintiff in trespass, or trespass on the case, to recover no costs if the verdict be for

CCCXII. (*h*) If the Plaintiff in any action of trespass (*i*) or trespass on the case (*j*) brought or to be brought in either of the said Courts (*k*) or in any County Court in Upper Canada,(*l*) shall recover by the verdict of a Jury less damages than forty

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by attorneys, sheriffs, and other officers of the Courts.

(*g*) N. R. 160 is substantially the same as this proviso. See further C. L. P. A., 1857, s. 28.

(*h*) This is a re-enactment of 16 Vic. cap. 175, s. 26, which was taken from Eng. Stat. 3 & 4 Vic. cap. 24, s. 2. It may be mentioned that the last-named Statute repeals the Act of 43 Eliz. cap. 6, "so far as it relates to costs in actions of trespass or trespass on the case," and so much of the 22 & 23 Car. II. cap. 9, "as relates to costs in personal actions:" (see *Morgan* v. *Thorne*, 7 M. & W. 400); but that our 16 Vic. cap. 175, s. 26, did not do so in express words any more than the section here annotated. Referring to 16 Vic. cap. 175, s. 26, Robinson, C. J, said, "The new provision forms a single clause in a Statute which relates to a multitude of other subjects. No intention is expressed of consolidating the existing law on this point or of affording one simple rule as a substitute for all others relating to the plaintiff's costs in actions of trespass and trespass on the case. It follows then, we think, that we can only take this isolated clause as it stands and give effect to its provisions by allowing them to overrule any previous enactment with which they conflict. We cannot go so far as to hold that this clause virtually repeals all former laws on this subject, though we may and must hold it to have virtually repealed whatever is clearly inconsistent with it:" (*Pedder* v. *Moore*, 1 U. C. Prac. R. 119.)

(*i*) It is a noticeable fact that the specific terms "trespass" and "trespass on the case" are retained here, though *forms* of action are elsewhere in a manner abolished: (see note *m* to s. xvii.) It is not clear that the Statute of Will. III. (*ante* note *d*,) which allows plaintiff's full costs in actions of trespass upon a certificate of the presiding Judge that the trespass proved is wilful and malicious, no matter what the amount of the verdict may be, is repealed: (*Wise* v. *Hewson*, 1 U. C. Prac. Rep. 232.) In an action of trespass since the Stat. 16 Vic. cap. 175, s. 26, of which this section is a re-enactment, the verdict was for 45s, and application was made at the trial for a certificate under the Statute of Will. III. The Judge took time to consider and before judgment entered, but after the first four days of the term next following the trial certified that the trespass was wilful and malicious, and that the case was one proper to be tried in a Superior Court: Held that plaintiff was entitled to full costs and that the delay in granting the certificate was no objection: (*Ib.*)

(*j*) Though *assumpsit* is a species of trespass on the case, yet it is not contemplated by this section. The only species of actions on the case intended are those brought for "grievances," *i.e.* actions for tort: (see *Morrison* v. *Salmon*, 10 L. J. C. P. 92; *Townsend* v. *Syms*, 2 C. & K. 381.) For example, actions for the infringement of patents: (*Gillet* v. *Green*, 7 M. & W. 347); for libel: (*Foster* v. *Pointer*, 1 Dowl. N.S. 28; *Newton* v. *Rowe*, 2 D. & L. 815); for nuisance: (*Shuttleworth* v. *Cocker*, 9 Dowl. P. C. 76; *Reid* v. *Ashby*, 13 C. B. 897, and generally for any wrong committed (*ex delicto*) which is the subject of an action.

(*k*) *i. e.* Queen's Bench or Common Pleas.

(*l*) This section is also expressly adopted by the Co. C. P. A, s. 2.

less than forty shillings, unless the Judge certify certain facts.

shillings, (*m*) such Plaintiff shall not be entitled to recover in respect of such verdict any costs whatever, (*n*) whether the verdict be given on any issue tried, (*o*) or Judgment have passed by default, (*p*) unless the Judge or Presiding Officer before whom such verdict shall be obtained (*q*) shall immedi-

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(*m*) See note *n*, *infra*.

(*n*) If the plaintiff, &c., shall recover, &c., less damages than forty shillings, &c., he shall not be entitled to recover in respect of such verdict *any costs whatever*. The penalty is different from that enacted by the Statutes of Elizabeth, James, and Charles II. which debar plaintiff from recovering "more costs than damages:" (see note *d*, *ante*.)

(*o*) The Eng. Stat. of 3 & 4 Vic. c. 24, s. 2, which reads, "upon any issue *or issues* tried, &c.," was clearly held to contemplate actions in which there were more issues than one: (*Newton* v. *Rowe*, 1 C. B. 187.) In an action for a libel the defendant pleaded not guilty and several pleas of justification; the plaintiff recovered a verdict on all the issues, damages three farthings: Held under Stat. 3 & 4 Vic. that he was not entitled to any costs: (*Ib.*) Referring to this case the Court of Exchequer said, "We concur entirely in that decision:" (*Sharland* v. *Soaring*, 1 Ex. 375.) To a count of trespass *qu. cl. fr.* upon three closes the defendant pleaded several pleas; the plaintiff new assigned trespasses *extra viam* as to the third close, to which the defendant pleaded not guilty. The defendant had a verdict on some of the issues with respect to the first and second closes, and the plaintiff upon the others, so that the defendant succeeded as to the causes of action in those closes; the plaintiff had a verdict with one shilling damages upon the new assignment. There was no certificate under the English Stat. of 3 & 4 Vic. Held that the causes of action were divisible, and that under Stat. 4 & 5 Anne, cap. 16, ss. 4–5, the plaintiff was entitled to the costs of the issues found for him with respect to the causes of action in the first and second closes; but that he was deprived of all costs by the 3 & 4 Vic. with respect to the cause of action for trespass in the third close: (*Ib.*) By the one Statute the defendant is punished for pleading pleas which he cannot support; by the other the plaintiff is punished for bringing a frivolous action, though he succeed: (*Ib.*) A plaintiff having obtained judgment upon a demurrer to a replication, the cause went down for trial upon the issues of fact without a *venire tam quam:* the plaintiff recovered only 20s damages, and the Judge refused to certify under 3 & 4 Vic. cap. 24. Held that plaintiff was only entitled to the costs of the demurrer: (*Poole* v. *Grantham*, 2 D. & L. 522.)

(*p*) The words "issue tried" and "default" do not comprehend an inquiry after judgment on demurrer though the verdict be only for one farthing damages: (*Taylor* v. *Rolf et al*, 5 Q. B. 337.)

(*q*) An action of trespass *qu. cl. fr.* was referred to arbitration and by the order of reference the arbitrator was empowered to certify in the same manner as a Judge at Nisi Prius. The arbitrator though awarding 1s. damages did certify that the action was brought "to try a right besides the mere right to recover damages." Held, plaintiff entitled to full costs: (*Spain* v. *Cadell*, 9 Dowl. P.C. 745.) And per Alderson, B, "It seems to me that the parties are concluded by their own agreement upon which we must put a reasonable construction. By the order of reference the parties have consented that the arbitrator shall stand in the same situation and have the same power to certify as a Judge at Nisi Prius. . . They have then given to the arbitrator the same authority as a Judge possesses

to determine whether or not the verdict is to carry costs; I certainly am of opinion that an arbitrator who is invested with such a power by consent of the parties must in all substantial points follow the directions of the Statute, that is to say, he must give his opinion immediately on the matter, he cannot make his award at one time and certify at another. That is in substance the power possessed by the Judge at Nisi Prius, and as the latter is by the Statute required to indorse his certificate on the record at the time of the trial, so it would be altogether a nugatory act, and not fulfilling the intention of the parties, if the arbitrator was to give a certificate on any subsequent occasion. He is bound to carry the agreement into effect *cy pres*, the mode of doing which is by immediately inserting his certificate in the award. By this construction the intention of the parties can be carried into effect, and we think we can adopt it consistently with the provisions of the Act:" (*Ib.*) By an order of reference in an action for an injury to the plaintiff's reversion by making a drain into his premises, a verdict was directed to be entered for the plaintiff, claim £500, costs 40s, subject to the award of a barrister, to whom the cause and all matters in difference were referred, and who was empowered to direct a verdict for the plaintiff or the defendant as he should think proper, and to have all the same powers as the Court or a Judge sitting at Nisi Prius, and the costs of the suit to abide the event of the award. The arbitrator by his award found all the issues in the action in favor of the plaintiff except the first, and that he found partly for the plaintiff and partly for the defendant; and he further directed that the verdict entered for the plaintiff should stand but that the damages should be reduced to one farthing. Held that the plaintiff was not in the absence of a certificate under 3 & 4 Vic. cap. 24, s. 2, entitled to the costs of the cause: (*Cooper* v. *Pegg*, 16 C. B. 454.) Where in an action on the case for diverting a stream or water-course "all matters in difference in the cause" were referred to arbitration, "the costs of the suit to abide the event of the award or umpirage," but no power was given to certify under 3 & 4 Vic. cap. 24, s. 2. Held that the true meaning of the submission was what its words import, that costs, *i. e.* the payment of costs should follow the event, *i. e.* the legal event of the award, that he in whose favour the decision was should be paid by the other party the costs of the suit: (*Griffiths* v. *Thomas*, 4 D. & L. 109.) In this case the arbitrator found for the plaintiff on all the issues and assessed his damages at 6d. Held that plaintiff notwithstanding was entitled to full costs: (*Ib.*) If a *verdict* be taken at Nisi Prius subject to a reference though no power to certify be conferred upon the arbitrator, still the case will come within the Statute depriving a plaintiff of costs "who shall recover by the verdict of the jury less damages than 40s.:" (*Reid* v. *Ashby*, 13 C. B. 897.) In this case the first count of the declaration charged the defendants with injury to the plaintiff's party wall in excavating by the side of it and raising and overloading it. The defendants pleaded, first, as to the raising and overloading not guilty by Statute, secondly, as to the residue payment into Court of £30. The plaintiff joined issue on the first plea, and replied damages *ultra* to the second. At the trial a verdict was taken for the plaintiff for £2000, subject to an award, but no power was reserved to the arbitrator to certify under 3 & 4 Vic. cap. 24. The arbitrator having directed a verdict to be entered for the plaintiff on the first issue, damages 20s. and for the defendant on the second issue. Held that plaintiff was not entitled to any costs whatever: (*Ib.*) Where on a writ of inquiry in England directed to the sheriff, the certificate granted under the 3 & 4 Vic. cap. 25, was by the under-sheriff, it was held necessary for him to sign it in the name of the sheriff and not in his own name: (*Stroud* v. *Watts*, 3 D. & L.

ately afterwards (*r*) certify on the back of the record or of the

799.) If the record be so framed that a right beyond a mere right to recover damages *may* come in question, the Court *in banc.* cannot inquire whether the "Judge or presiding officer" before whom such verdict shall have been obtained has exercised a sound discretion in granting the certificate: (*Shuttleworth* v. *Cocker*, 1 M. & G. 829.) But even supposing the record so framed that the right could not come in question, yet the action may still have been brought to try a right, although the defendant afterwards did not think proper to contest such right. An action may be brought to try a right, where nothing appears to indicate such an intention. An action of trover is often brought for the purpose of trying a right without exhibiting anything on the record to show what the intention was in commencing the action, or whether or not the right came in question at the trial. The object of the section is manifestly to discourage frivolous suits. But an exception is made in favour of persons who although they claim only small damages seek to negative the right of other parties to do the act of which they complain. If the case be one in which it is proper for the Judge to certify, the Court above can have nothing to do with the evidence given at the trial; for the power to grant the certificate rests with "the Judge or other presiding officer," and there is no authority to review his decision: (*Ib.* Maule, J.) The Judge or presiding officer has a discretion vested in him whether he will certify or not, in all cases of trespass or trespass on the case, with the exercise of which discretion no Court has the right to interfere. If an attempt at appeal be made the questions to be asked are these—Is the action one of trespass or trespass on the case? did the Judge exercise his discretion? If affirmative answers must be given to both these questions there is no power to review: (*Barker* v. *Hollier*, 8 M. & W. 513.) In an action against an attorney for maliciously refusing to give notice to the sheriff that a judgment had been satisfied by a co-defendant, whereby the plaintiff was taken in execution after the judgment had been satisfied, the jury having found for the plaintiff with nominal damages, the Judge refused to certify that the grievance was wilful and malicious, and refused to receive affidavits either in support or in opposition to the application: (*Tebbitt* v. *Holt*, 1 C. & K. 280.)

(*r*) *Immediately afterwards.* The word "immediately" excludes all intermediate time and action; but it appears that in this section it has not necessarily so strict a signification: (*Rex* v. *Francis*, Cas. Temp. Hardw. 114.) To make good the deeds and intents of parties it should be construed such convenient time as is reasonably requisite for the doing of a thing: (*Pybris* v. *Mitford*, 2 Leon. 77.) It is certainly impossible to say that there is no doubt on the construction of this Act of Parliament, but such is the case with respect to many, nay most Acts of Parliament. If they could be construed literally consistently with common sense and justice, undoubtedly they ought to be so construed. If it were manifest that the intention of the legislature when framing this section was that not a single moment's interval should take place before the granting of the certificate, the Courts would feel bound to submit to that declared intention: (*Thompson* v. *Gibson*, 8 M. & W. 281.) But such cannot be the interpretation. How, therefore, consistently with common sense and the principles of justice are the words "immediately afterwards" to be construed? If they do not mean that the act is to be done the very instant afterwards, do they mean within ten minutes or a quarter of an hour afterwards? They should be interpreted to mean "within such reasonable time as will exclude the danger of intervening facts operating upon the mind of

writ of trial or inquiry (*s*) that the action was really brought to try a right besides the right to recover damages for the trespass

the Judge or other presiding officer, so as to disturb the impression made upon it by the evidence in the cause:" (*Ib.* per Abinger, C. B.) It has been held too late to apply for the certificate after application made to the Master to tax full costs and a refusal by him to do so: (*Gillett* v. *Green*, 7 M. & W. 347.) In an action on the case for a nuisance to the plaintiff's market, which was the last case tried at the assizes, a verdict was found for the plaintiff with nominal damages. The Judge thereupon immediately adjourned the Court to his lodgings and quitted the Court. No application was made in Court for a certificate under 3 & 4 Vic. cap. 24, but the plaintiff's counsel followed the Judge to his lodgings and there within a quarter of an hour after the delivery of the verdict obtained the certificate: Held that it was well given: (*Thompson* v. *Gibson et al*, 8 M. & W. 281.) In one case it was doubted whether the certificate could be granted after another cause had been called on: (*Gillett* v. *Green*, 9 Dowl. P. C. 219); but that doubt has been set at rest by holding that notwithstanding, the certificate may be granted: (*Page* v. *Pearce*, 9 Dowl. P. C. 815.) And per Abinger, C. B., "I think that a Judge need not certify before he takes another case. He surely may take time to consider; and can it be said that he ought to postpone every other cause until he has made up his mind? Such a course would be unreasonable and very inconvenient:" (*Ib.*) The effect of the decisions of *Thompson* v. *Gibson* and *Page* v. *Pearce*, *ubi supra*, is that the word "immediately" in the sense in which it is employed in the Act does not mean so soon as the verdict is given, without any time whatever being taken for consideration, but that a reasonable time for consideration may be taken, and that a Judge if called upon to certify under the Act must have some time allowed him for consideration. If the word were construed to mean the moment the verdict is delivered, the Judge would have no time whatever to view the bearings of the case: (*Nelmes* v. *Hedges*, Patterson, J, 2 Dowl. N. S. 350.) A certificate applied for even after one of the jurors in another cause had been sworn and granted after the whole of them had been sworn, was held to be sufficient: (*Ib.*) The result of the foregoing cases so far as a result can be deduced is that the certificate must be granted within a reasonable time, and that the reasonableness of the time can only be determined in reference to the circumstances of each particular case. To an action of trespass the defendant pleaded four pleas, one of which was found for him and the others for the plaintiff. The plaintiff applied to the Judge at the trial to certify under 3 & 4 Vic. cap. 24, that the action was brought to try a right, &c. It being suggested that the plea found for the defendant was bad *non obstante veredicto*, the Judge said he would certify if it became necessary to do so, and subjoined the following memorandum, "I certify if necessary that the right came in question." Several terms afterwards a rule for judgment for the plaintiff *non obstante veredicto* was made absolute, and subsequently the learned Judge after hearing the parties on summons indorsed on the record a certificate that the action was brought to try a right, &c. It was held under the circumstances that what took place at the trial was equivalent to an assent that the certificate was to be taken to have the same effect as if then made: (*Jones* v. *Williams*, 2 D. & L. 247.)

(*s*) There is nothing in this statute to say that a certificate shall give full costs or shall prevail against any other restraining statute: (see note *d* to s. cccxi), but simply that *without a certificate* there shall be *no costs whatever*: (*Pedder* v. *Moore*, Robinson, C. J, 1 U. C. Prac. R. 124.) The Statute does

(t) § 324

Proviso: This shall not extend to certain trespasses.

or grievance in respect of which the action was brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious; (t) Provided always, (u) that nothing herein contained shall extend or be construed to extend to deprive the Plaintiff of costs in any action brought for a trespass or trespasses over any lands, (v) wastes, closes, woods,

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not interfere with 21 Jac. 1, cap. 16: (*Ib. ante* note *d.*) Where in an action for slander no special damage being laid, the verdict was for one shilling damages, although the Judge certified that the grievance was wilful and malicious, the plaintiff was held to be restrained under 21 Jac. I. cap. 16, from recovering more costs than damages: (*Ib.*) In England it was held at Nisi Prius that in an action of trespass *qu. cl. fr.* the 3 & 4 Vic. cap. 24, should be construed with reference to the 8 & 9 Will. III. cap. 11. s. 4: (see note *d* to s. cccxi), under which Statute it was always held that a plaintiff was entitled to full costs where the defendant committed the trespass after notice: (*Sherwin* v. *Swindall*, 1 C. & K. 402.)

(*t*) An action of trespass or trespass on the case in which less damages than forty shillings are recovered, is frivolous within the meaning of this section. Those suits are exceptions to it, which are in fact brought to try not merely the right to recover damages, but to try a right beyond that or to vindicate the plaintiff from the vexation of a wilful or malicious injury. All others are frivolous and vexatious, and the plaintiff should be deprived of his costs: (*Marriott* v. *Stanley*, Maule, J, 9 Dowl. P. C. 61.) The object of the Act is to prevent plaintiffs from bringing actions of a vexations and litigious nature, where very little damage has been sustained and there is no right in issue: (*Shuttleworth* v. *Cocker*, Tindal, C. J, 1 M. & G. 835.) What the Judge is called upon to do is to see the design which the plaintiff had in instituting the suit, and if satisfied by the course of the evidence that the plaintiff really thought he had a right which came in question or which might by possibility come in issue, though the form of action may not be fitted for that purpose, and the right did not in fact come in question, he has a discretionary power in granting the certificate: (*Morrison* v. *Salmon*, per Maule, J, 9 Dowl. P. C. 387), and the Court will not interfere with the exercise of that discretion in cases proper for its exercise: (see note *q*, *supra.*) The Judge has power to certify where the action is for selling medicines which the defendant falsely represented as prepared by the plaintiff: (*Morison* v. *Salmon*, *ubi supra*), or for a nuisance to the plaintiff's messuage from the defendant's factory: (*Shuttleworth* v. *Cocker*, *ubi sup.*) But where the action was for leaving dangerous instruments in the highway, it was doubted whether a Judge had a discretion to certify: (*Marriott* v. *Stanley*, 9 Dowl. P. C. 59.) In order to justify a Judge in certifying under this section that the act complained of was malicious, in actions for libel he must be satisfied that the conduct of the defendant arose from *personal* malice as contradistinguished from malice in law, which is essntial to sustain the action: (*Foster* v. *Pointer*, Alderson, B, 8 M. & W. 395), but in actions of trespass without personal malice the act may be considered so violent and outrageous as to be considered malicious within the meaning of the section: (*Ib.*) An act committed without authority and after notice may be deemed malicious: (*Sherwin* v. *Swindall*, 12 M. & W. 783.)

(*u*) The origin of this proviso is Eng. St. 3 & 4 Vic. cap. 24, s. 3.

(*v*) The word "commons" here followed in our Stat. 16 Vic. cap. 175, as copied from Eng. Stat. 3 & 4 Vic. cap.

plantations, or inclosures, or for entering into any dwelling, out-building, or premises, in respect to which notice not to trespass (*w*) shall have been previously served by or on behalf of the owner or occupier of the land trespassed over, upon, or left at the last reputed or known place of abode of the Defendant in such action; (*x*) Provided also, that nothing in this Proviso:

24, s. 3, but is intentionally omitted from the section here annotated.

(*w*) Read "thereon or therein" in Eng. Stat. 3 & 4 Vic. cap. 24.

(*x*) There is some difficulty in putting a construction upon this proviso. One interpretation of it may be that wherever a notice in writing has been given, the plaintiff shall be entitled to costs without any certificate, although the amount of damages be less than 40s.; but if so, unless the fact of the notice appear on the face of the declaration, it would seem that there must be a suggestion on the record for that purpose, which the defendant would be at liberty to traverse, — or the meaning may be that it shall be imperative on the Judge to certify where a written notice has been given, whereas in other cases it is discretionary. Probably in order to avoid inconvenience the latter is the true construction: (*Sherwin* v. *Swindall*, Parke, B, 12 M. & W. 790.) However, where in trespass for placing stumps and stakes on the plaintiff's land the defendant paid 40s. into Court, which the plaintiff took out in satisfaction of the trespass, and the plaintiff afterwards gave the defendant notice that unless he removed the stumps and stakes a further action would be brought against him; it was held that leaving the stumps and stakes on the land was a new trespass, and that the plaintiff was entitled to full costs in an action for their continuance after the notice, though he recovered less than 40s. and the Judge refused to certify that the trespass was wilful and malicious; and that the proper mode of obtaining the costs was by a suggestion that the trespass was committed after notice: (*Bowyer* v. *Cook*, 4 C.B. 236.) In an action of trespass where the plaintiff recovered less damages than 40s, and the trespass had been committed after a verbal notice not to do it, it was held a matter of discretion with the presiding Judge to certify for costs under 8 & 9 Will. III. cap. 11, s. 4, as altered by 3 & 4 Vic. cap. 24: (*Sherwin* v. *Swindall*, *ubi sup.*) It has been held that if in trespass the damages recovered be less than 40s, and the Judge do not certify that the trespass was wilful and malicious, proof that written notice not to trespass had been previously given will not entitle plaintiff to full costs: (*Daw* v. *Holt*, 15 L. J. Q. B. 32.) The plaintiff in trespass for crossing a field had given notice to the defendant not to trespass on the field. Defendant justified under a right of way. Plaintiff traversed the right of way and new assigned. Defendant joined issue on the right of way, and suffered judgment to go by default on the new assignment. The jury found for the defendant as to the right of way, and gave the plaintiff 1s. damages on the new assignment. The Judge refused to make any certificate under 3 & 4 Vic. cap. 24. Held the Statute did not apply and that plaintiff was not entitled to full costs: (*Bourne* v. *Alcock*, 4 Q. B. 62.) And per Patterson, J, "Before this action was brought defendant asserted a right of way over the plaintiff's close. The plaintiff gave him notice not to trespass there, that is, in effect not to assert the right he claimed. If the plaintiff had succeeded on the justification his notice would have entitled him to costs, but the defendant has established his right to do what the notice forbade. The plaintiff says that the trespass *extra viam* was that which the defendant had notice not to do; but

As to actions which might have been brought in an Inferior Court.

section (*y*) shall be construed to entitle any Plaintiff to recover costs as of an action brought in a Superior Court in any case where by law his action might properly have been brought in an inferior Court.(*z*)

(b) s 325

Rules.

(*a*) And in order to enable the Courts and Judges to carry this Act thoroughly into effect, and to enable them from time

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that is not so. If the plaintiff had said 'It is true you have the right of way over a particular part of the close, but take care you do not go out of that way,' the case would have been different. Here he has only given a notice not to come upon the close at all."

(*y*) This proviso, which is original, has special reference to Prov. Stats. 8 Vic. cap. 13, s. 59: (Har. Prac. Stats. p. 85); 13 & 14 Vic. cap. 53, s. 78: (*Ib.* p. 185.)

(*z*) Though a Judge certify that "the action was really brought to try a right besides the right to recover damages," &c., or that "the trespass or grievance in respect of which the action was brought is wilful and malicious," yet if the verdict be within the jurisdiction of an inferior Court, a further certificate that the cause is one fit to be tried in a Superior Court seems to be required: (see *Wise* v. *Hewson et al*, 1 U. C. Prac. R. 232.)

(*a*) The power of Superior Courts of Common Law to make regulations for the practice in their Courts, so long as not inconsistent with some express statutory provision, seems never to have been doubted. A distinction, however, appears to exist between practice properly so called and pleading. The distinction is evidenced by the language used in the English Common Law Procedure Acts. The Act of 1852 is intitled "An Act to amend the Process, Practice, and Mode of Pleading in the Superior Courts of Common Law," &c. The Act of 1854 is intitled "An Act for the further amendment of the Process, Practice, and Mode of Pleading, &c." In the preamble to the Act of 1852 it is recited that "the process, practice, and mode of pleading in the Superior Courts of Common Law at Westminster may be rendered more simple and easy," &c. Our C. L. P. A. though adopting the greater part of the Eng. C. L. P. Acts, merely recites that "it is expedient to simplify and expedite the proceedings in the Courts of Queen's Bench and Common Pleas for Upper Canada." Whatever the reasons for the distinction may be, it is evident that throughout the Eng. C. L. P. Acts a line is drawn between process, practice, and mode of pleading. In our C. L. P. Act the same may be discerned. Preceding section ii. there is a preamble as follows, "And with respect to the sealing and issuing of writs, &c." So preceding s. xvi. are the words, "And with respect to the writs for the commencement of personal actions, &c." Then follow no less than twenty-seven distinct sections relating exclusively to first process in a suit. From this it is made to appear that the first part of the Act is intended to relate to Process. Then we find s. lix. and following sections prefaced with the words, "And with respect to the appearance, &c.," which is a matter of practice. There are many other groups of sections also prefaced with recitals relating solely to matters of practice. This presents the second great division of the Act, which is designed to relate to "Practice." Then preceding sections xcviii.–cxxxix. there is a recital, "And with respect to the language and form of pleadings in general, &c." In this there is represented the third great division of the Act, which is the one relating to "Pleading." There are other groups which are sub-divisions of one or other of these great divisions. The Legislature has, it will be per-

to time to make rules and regulations, and to frame Writs and proceedings for that purpose; Be it enacted as follows:

CCCXIII. (*b*) It shall be lawful for the Judges of the said Eng. C. L. P.

ceived, adhered to the distinction in the following sections, the object of which is to enable the Courts and Judges "from time to time to make rules and regulations" in order "to carry this Act thoroughly into effect," and "to frame writs and proceedings for that purpose." It is expected that the powers to be exercised by the Courts will be exercised in reference to and upon the model of the Act itself. The divisions of Process, Practice, and Pleading, the landmarks, as it were, of the Act, are to be kept in view by the Courts when framing rules and regulations. *First*, as to Process, there is power to issue "new or altered writs:" (s. cccxiv.) *Second*, as to Practice, there is power to make rules and orders "for fixing the costs to be allowed," &c., "for apportioning the costs of issues," &c., and "for the purpose of enforcing uniformity of practice in the allowance of costs," &c.: (see first part of s. cccxiii.) *Third*, As to Pleading, there is power "to make alterations in the time and mode of pleading," "in the mode of entering and transcribing pleadings," &c., "in the time and manner of objecting to errors in pleadings," &c., "in the mode of verifying pleas," &c.: (see second part of s. cccxiii.) The power of the Courts to make *alterations* in existing laws or issue rules contrary to existing Statutes is a power derivable from statute rather than inherent in the jurisdiction of the Courts. It is as it were a power delegated to the to the Courts by the Legislature, and only exercisable in the manner the Legislature prescribes. In England in 1833 the Legislature authorized the Judges of the Superior Courts at any time within five years to make *alterations* in the mode of pleading, &c.: (3 & 4 Wm. IV. cap. 42, s. 1.) The legislature of Upper Canada shortly afterwards adopted this Statute as a part of our laws: (7 Wm. IV. cap. 3, s. 1.) Both in England and in Upper Canada the power was limited in duration to five years, and in each country the Judges availed themselves of it and issued rules within the time limited. The powers were then allowed to expire, and in both countries after the time limited wholly ceased to exist. In England in the year 1850 the power was revived by express authority of the legislature for a further term of five years: (13 & 14 Vic. cap. 16.) The Act reviving the power appears to be substantially a re-enactment of the previous Statute, 3 & 4 Wm. IV. c. 42, s. 1. No re-enactment of our 7 Wm. IV. cap. 3, was made previous to the passing of the Common Law Procedure Act, 1856, s. cccxiii., which contains the re-enactment required. The latter part of s. cccxiii. of our C.L. P.A. and s. 1 of Eng. St. 13 & 14 Vic. c. 16, are copies of the same original: (3 & 4 Wm. IV. cap. 42, s. 1), and are therefore copies of each other. It is submitted that under our s. cccxiii. the Judges have no general power to make rules over-riding the C.L.P.A. Referring to the recital as a key to what follows, the powers are given "to enable the Courts and Judges to carry this Act thoroughly into effect," and "for that purpose" "to make rules, &c." If rules contrary to the letter of the Act were necessary for thoroughly carrying into effect its spirit, such rules might it seems be made: (see *Rowberry* v. *Morgan*, 9 Ex. 730.) Of this N. R. 146 as compared with s. xiii. of C. L. P. A., 1856, is an example.

(*b*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 223.—Not applied to County Courts. The power of the Judges of the Supreme Courts to make rules for the government of County Courts has been doubted: (*Chard* v. *Lount*, Chambers, Oct. 6, Burns, J. H. U. C. L. J. 227), but since this

Con stat for C.C. ch 22 §333 & 337.

(1) § 333
(2) Sub Sec 3
(3) Sub Sec 4
(4) Sub Sec 5
(5) Sub Sec 6.

Act, 1852, s. 223. Power to make rules for giving effect to this Act.

Courts (*c*) or any four or more of them, of whom the Chief Justices shall be two, (*d*) from time to time to make all such general rules and orders for the effectual execution of this Act, and of the intention and object hereof, (*e*) and for fixing the costs to be allowed for and in respect of the matters herein contained and the performance thereof, (*f*) and for apportioning the costs of issues, (*g*) and for the purpose of enforcing uniformity of practice in the allowance of costs in the said Courts, (*h*) as in their judgment shall be necessary or proper, (*i*) and for that purpose to meet from time to time as occasion may require; (*j*) and it shall also be lawful for the said Judges, (*k*) or any four or more of them, of whom the Chief Justices shall be two, (*l*) by any rule or order to be from time to time by

To make further alterations in mode of pleading, &c.

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case a clause has been introduced into the recent C.L.P.A, 1857, giving the requisite authority: (s. 9.)

(*c*) *i.e.* Queen's Bench and Common Pleas.

(*d*) The Eng. C. L. P. A, reads, "It shall be lawful for the Judges, &c., or any eight or more of them, of whom the Chief Justices of each of the Courts shall be three," &c. In England there are three Superior Courts of common law jurisdiction, each having one Chief Justice and three Puisne Justices. In Upper Canada there are only two, each having one Chief Justice and two Puisne Justices. Hence the change in the language of our C. L. P. Act as compared with the Eng. C. L. P. Act.

(*e*) The power here conferred is to "make *general* rules and orders for the efficient execution of this Act," &c. Immediately following there is power given to make rules and orders, for subjects of practice specifically mentioned, as "costs to be allowed," &c. These rules, whether general or particular, are clearly to be made "for the effectual execution of this Act and of the intention and object thereof."

(*f*) See Sch. B. to N. Rs.

(*g*) See N. R. 51.

(*h*) The Eng. C. L. P. A. here continues "and of ensuring as far as may be practicable an equal division of the business of taxation amongst the Masters of the said Courts."

(*i*) The powers conferred are very extensive; but it is a question whether they authorize the Judges to make rules overruling the C. L. P. Act or in any way altering its provisions, though in the opinion of the Judges necessary for the effectual execution of the Act. See *Rowberry* v. *Morgan*, 9 Ex. 730.

(*j*) The seat of the Superior Court of Common Law in Upper Canada is Toronto, and is the place intended for the meeting of the Judges.

(*k*) "And it shall *also* be lawful," &c. The Eng. C.L.P.A. reads, "And it shall be *further* lawful," &c. The inference is that the section proceeds to confer powers such as are not conferred by the previous part of the section. The remainder of the section here annotated is taken from Eng. St. 13 & 14 Vic. cap. 16, which never having been in force in Upper Canada is specifically enacted. In the Eng. C. L. P. A. it is simply provided that "it shall be lawful for the Judges . . from time to time to exercise all the powers and authority given them by Stat. 13 & 14 Vic. cap. 16, with respect to any matter in the C. L. Act contained relative to practice and pleading:" (Eng. C.L.P. Act, 1852, s. 223.)

(*l*) See note *d*, *supra*.

them made in Term or Vacation at any time within five years after this Act shall come into force, (*m*) to make such further alterations in the time and mode of pleading in the said Courts, (*n*) and in the mode 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, and in the mode of verifying pleas and obtaining final judgment without trial in certain cases, as to them may seem expedient, anything in this Act to the contrary notwithstanding; (*o*) and all such Rule, Order, or Regulations (*p*) shall be laid before both Houses of 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 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, (*q*)

Rules, &c., to be laid before Parliament, and not to have effect for a certain time thereafter.

(*m*) *Within five years*, &c. There was a similar limitation in Stat. U. C. 7 Wm. IV. c. 3, s. 1, which was taken from Eng. Stat. 3 & 4 Wm. IV. c. 42, s. 1; the origin of Eng. St. 13 and 14 Vic. cap. 16: (see note *a*, *ante*.)

(*n*) "To make alterations in the *time* and mode of pleading," &c. The power to make alterations in the *time* of pleading, which is a power neither conferred by Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 1, nor 13 & 14 Vic. c. 16, would seem to contemplate alterations at variance with the C. L. P. A, which makes provision for the time of pleading: (ss. cii. cxii.)

(*o*) With the exception pointed out in the previous note, this part of the section is an enactment of Eng. Stat. 13 & 14 Vic. cap. 16.

(*p*) And all *such* rules, &c. A question might be raised whether the rules intended are those for which provision is made in the first part as well as in the part of the section under consideration. Though the words of the section might bear such a construction, it would be a construction quite at variance with the Eng. C. L. P. A. Both the Eng. C. L. P. A. and our C. L. P. A. as already observed in note *a*, *ante*, provide for at least two sets of rules—the one for practice, the other for pleading. It is intended that the former shall take effect from the time of their promulgation; but the latter only after having been laid before Parliament for a specified period of time. Such was the view taken by the Judges of Upper Canada, who in issuing the rules of T.T. 1856, made the first division of the rules relating to practice take effect immediately, but declared that the second division relating to pleading should not take effect until E.T. 1857. The object was to lay the latter before the legislature which was expected to meet early in the Spring of 1857. This object it is believed has been carried into execution during the late session of the legislature.

(*p*) Within *twenty* days, &c. The time limited in the English and Canadian Stats. of William IV. was "five days."

(*q*) Rules when laid before Parliament in pursuance of a direction such as the above have the effect of an Act passed by the legislature. The object of submitting the rules to the legisla-

and any Rule, Order, or Regulation so made shall, from and after such time as aforesaid, (*r*) be binding and obligatory on the said Courts (*s*) and on all Courts of Error and Appeal in this Province, into which the Judgments of the said Courts or either of them shall be removed, (*t*) and be of like force and effect as if the provisions contained therein had been expressly enacted by the Parliament of this Province; (*u*) Provided always, that it shall be lawful for the Governor of this Province, by proclamation, or for either of the Houses of Parliament, by any resolution, at any time within three months next after such Rules, Orders, and Regulations shall have been laid before Parliament, to suspend the whole or any part of such Rules, Orders, or Regulations, (*v*) and in such case the whole or such

(7) § 336

Proviso: Such rules may be disallowed in in whole or in part.

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ture is that they may be either confirmed or rejected as the legislature in its wisdom may see fit. This presumes an inspection if not a critical examination of the rules submitted. But the presumption is not supported by facts, and the form of submission is known to be idle and useless. The rules in general provide for matters of practice in detail and are made by men fully competent from knowledge and position to do them justice. This is more than can be said of any mixed body of men such as a Parliament, of whom few members are lawyers. The majority have neither the disposition nor capacity to revise rules of Court made by the Judges of the Courts. Under these circumstances the wisdom of enacting that "no such rule, &c., shall have effect for three months until after the same shall have been laid before both Houses of Parliament" is difficult of discernment.

(*r*) *i. e.* After the expiration of three months, &c., as mentioned in the last note.

(*s*) *i. e.* Queen's Bench and Common Pleas.

(*t*) There is only one Court of Error and Appeal in Upper Canada: (20 Vic. cap. 5.)

(*u*) This effect of laying rules before Parliament is of moment. Should the rules clash with existing Statutes, the Statutes would become virtually repealed. When two Acts of the Legislature are inconsistent, the later of the two being the last expressed intention of the Legislature is considered as an abrogation of the former. It is enacted that the rules intended by this section shall "be of like force and effect as if the provision contained therein had been expressly enacted by the Parliament of this Province." The conclusion is manifest. Rules made at different times but inconsistent with each other will be governed by like principles.

(*v*) Provision is only made for laying the rules, &c., before both Houses of Parliament, and yet it shall be lawful for the Governor of the Province to suspend, &c. Either House may also by resolution suspend, &c. It would have been more proper to have provided for laying the rules, &c., before the Governor General, in addition to the two Houses of Parliament. The intention is that any one of the three branches of the Legislature may exercise the power of suspending the rules. Such being the case, each of the three branches of the Legislature should be equally informed, in order to the exercise of the powers conferred by having the rules laid before it. The anomaly is that either one of the three branches

part thereof as shall be so suspended, shall not be binding or obligatory on the said Courts or on any Court of Error and Appeal; (*w*) Provided also, that nothing herein contained shall be construed to restrain the authority or limit the jurisdiction of the said Courts or the Judges thereof, to make rules or orders, or otherwise to regulate and dispose of the business therein. (*x*)

Proviso: Existing power to make rules not affected.

CCCXIV. (*y*) Such new or altered writs and forms of proceedings (*z*) may be issued, entered, and taken, as may by the Judges of the said Court, (*a*) or any four or more of them, of whom the Chief Justices shall be two, (*b*) be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the Judges as aforesaid shall from time so time think fit to order; (*c*) and such writs and proceedings shall be acted on and enforced in such and the same manner as writs and proceedings of the said Courts are now acted upon and enforced, or as near thereto as the circumstances of the case will admit; (*d*) and any existing writ or proceeding, the form of which shall be in any manner altered in pursuance of this Act, shall, nevertheless, be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this Act. (*e*)

Eng. C. L. P. Act, 1852, s. 224. As to issue, &c., of new or altered writs.

As to existing writs of which the form is altered by this Act.

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may exercise the powers, but that two only can regularly have the necessary information.

(*w*) It is enacted that the rules, &c., "suspended" shall "not be binding or obligatory" on the Courts. The word "suspended" seems to be used in the sense of the word "annulled." To annul a thing is to put an end to it for all time to come; but to suspend it is only to put an end to it for a certain time. In this sense we speak of "suspending the Habeas Corpus Act."

(*x*) The rules authorised by this section appear to be general rules of practice, particular rules of practice, rules of pleading, and rules for the disposal of business pending in the Courts.

(*y*) Taken from Eng. Stat. 15 & 16 Vic. cap. 76, s. 224.

(*z*) See note *a* to s. ccxiii.

(*a*) *Court.* "Courts" intended.

(*b*) See note *d* to s. ccxiii.

(*c*) See Schd. of Forms to N. Rs. of T.T. 1856.

(*d*) One great change brought about by the forms attached to the N. Rs, is that of making writs of execution returnable "immediately after the execution thereof:" (See forms Nos. 29 *et seq.* to N.Rs.) Formerly executions were made returnable on a fixed day, in term, appearing in the body of the writ. When not returned on the appointed day the sheriff was liable to be attached for contempt of Court. The sheriff is still liable to attachment for breach of duty in neglecting to return a writ within a reasonable time after its receipt: (see note *h* to s. clxxxix.)

(*e*) With the exception of writs of execution being made returnable "im-

This Act not to affect powers given to any Judge by 13 & 14 Vic., c. 51.

CCCXV. (*f*) Nothing in this Act contained shall in any way restrict or limit the powers now vested by law in any one of the Judges of the Superior Courts of law, sitting apart from the others of them, in Term time, or sitting in Chambers, but all the powers conferred by an Act of the Parliament of this Province, passed in the Session held in the thirteenth and fourteenth years of Her Majesty's Reign, and intituled, *An Act to confirm and give effect to certain rules and regulations made by the Judges of Her Majesty's Court of Error and Appeal for Upper Canada, and for other purposes, relating to the powers of the Judges of the Courts of Law and Equity in that part of the Province, and the practice and decisions of certain of those Courts,* (*g*) shall continue to be exercised by such Judges, and shall extend to all matters and questions to arise and be decided under this Act, (*h*) and wherever any power is given by this Act to the Court or a Judge, the words "a Judge" shall be held to authorise any Judge of either of the said Superior Courts, to exercise such power, although the particular proceeding may not be in a cause pending in the Court whereof he is a Judge. (*i*)

Judges may sit after term for the sole purpose of giving judgment.

CCCXVI. (*j*) It shall be lawful for the Judges of the Superior Courts (*k*) during each term (*l*) to appoint one or more days within three weeks next ensuing the last day of such term, on which they will give Judgment; (*m*) and such Superior Courts on the days appointed may sit in banc, for the purpose only of giving Judgment, and of making Rules and Orders in matters which have been moved and argued in such Courts respectively; (*n*) and all Judgments, Rules, and Orders which

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mediately after the execution thereof," as mentioned in the preceding note, they remain substantially the same as before the C. L. P. A, 1856.

(*f*) This section, which is original, is intended to prevent questions which might arise had it not been passed.

(*g*) 13 & 14 Vic. cap. 51: (Har. Prac. Stats. p. 181.)

(*h*) In connection with 13 & 14 Vic. cap. 51 (*ubi supra*) see 12 Vic. c. 63, s. 9: (Har. Prac. Stats. p. 153.)

(*i*) See *Palmer* v. *Justices Assurance Co*, 28 L. T. Rep. 120.)

(*j*) The origin of this section is Prov. Stat. 4 & 5 Vic. cap. 5.

(*k*) *i.e.* Queen's Bench and Common Pleas.

(*l*) As to the terms see note *n*, *infra*.

(*m*) As to computation of time, see note *d* to s. lvii.

(*n*) Writs were formerly always made returnable at certain stated days in different seasons of the year. These

shall be pronounced and made on such days in pursuance of the authority hereby given, shall have the same effect to all intents and purposes, as if they had been pronounced or made in Term time. (*o*)

Short Title of this Act. (1852, s. 225.)

CCCXVII. (*p*) In citing this Act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The Common Law Procedure Act, 1856." (*q*)

Acts and parts of Acts repealed.

CCCXVIII. (*r*) And be it enacted, That from the time when this Act shall commence and take effect, the fourth, fifth, sixth, seventh, eighth, ninth, fourteenth, and thirty-fifth Sections of an Act of the Parliament of Upper Canada, passed in the second year of the Reign of the late King George the Fourth, intituled, *An Act to repeal part of and amend the laws now in force respecting the practice of His Majesty's Court of King's Bench in this Province;* (*s*) the whole of an Act passed in the fifty-ninth year of the Reign of the late King George the Third, intituled, *An Act to prevent the abatement of any action against a joint obligor, or contractor, or partner, on account of the other joint parties not being made defendants;* (*t*) the whole of an Act passed in the Session of Parlia-

Part of Act of U. C., 2 G. 4, c. 1.

Act of U. C., 59 G. 3, c. 25.

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returns or *Termini ad quos* when they fell very near together collectively, constituted a period of legal business which was generally called *Terminus* or Term: (2 Reeves' His. 56.) The terms are those periods of the year during which the Courts sit for the despatch of business. They are four in number, viz., Trinity, Michaelmas, Hilary, Easter. Trinity begins on the Monday next after 21st August, being the expiration of the long vacation. Michaelmas on the third Monday of November. Hilary on the first Monday in February. Easter on the third Monday in May. Each term beginning on a Monday continues until the Saturday of the ensuing week: (C. L. P. A, 1857, s. 29.) The right to sit *after* term is by this section for the purpose *only* of giving judgment and of making rules and orders in matters which have been moved and argued in such terms respectively.

(*o*) A term generally is considered only as one day, so that a paper intitled as of a particular term may be taken to have reference to the first day of that term.

(*p*) This section corresponds with s. 235 of Eng. St. 15 & 16 Vic. c. 76.

(*q*) The practice of calling Acts of Parliament by short titles is a modern innovation. It is, however, one which owing to its utility is becoming daily of more general application.

(*r*) This section repeals five distinct clauses of Acts, viz., Acts relating to, 1, Practice generally; 2, Absent Defendants; 3, Absconding Debtors; 4, Insolvent Debtors; 5, Gaol Limits.

(*s*) As to parts unrepealed see Har. Prac. Stats. p. 8.

(*t*) As to joinder of parties, &c., see ss. lxvii. *et seq.* of this Act.

ment held in the fourth and fifth years of Her Majesty's Reign, intituled, *An Act to facilitate the despatch of business in the Court of Queen's Bench in Upper Canada*; (*u*) the forty-fourth Section of an Act of the Parliament of this Province, passed in the eighth year of Her Majesty's Reign, intituled, *An Act for the relief of insolvent debtors in Upper Canada, and for other purposes therein mentioned*; (*v*) the whole of an Act of the Parliament of this Province, passed in the eighth year of Her Majesty's Reign, intituled, *An Act to allow the issuing of testatum Writs of Capias ad respondendum in the several districts of Upper Canada, and for other purposes therein mentioned*; (*w*) the nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, thirtieth, thirty-first, thirty-third, thirty-fourth, and thirty-sixth Sections of an Act of the Parliament of this Province, passed in the twelfth year of Her Majesty's Reign, intituled, *An Act to make further provision for the Administration of Justice by the establishment of an additional Superior Court of Common Law, and also a Court of Error and Appeal in Upper Canada, and for other purposes*; (*x*) the first Section of an Act of the Parliament of this Province, passed in the twelfth year of Her Majesty's Reign, intituled, *An Act to amend and extend the provisions of the Act of this Province, intituled, 'An Act to allow the issuing 'of testatum writs of capias ad respondendum in the several 'districts of Upper Canada, and for other purposes therein mentioned;'* (*y*) the whole of an Act of the Parliament of this Province, passed in the Session holden in the fourteenth and fifteenth years of Her Majesty's Reign, intituled, *An Act to alter and settle the mode of proceeding in the action of Ejectment*; (*z*)

Act of Canada, 4 & 5 V., c. 6.

Part of Act of Canada, 8 V., c. 48.

Act of Canada, 8 V., c. 36.

Part of Act of Canada, 12 V., c. 63.

Part of Act of Canada, 12 V., c. 68.

Act of Canada, 14, 15 Vic., c. 114.

(*u*) Substantially re-enacted by s. cccxvi. of this Act.

(*v*) As to parts unrepealed see Har. Prac. Stats. p. 95.

(*w*) The *Testatum* Writs Act is repealed because no longer necessary: (ss. xxvii–xxxi.)

(*x*) As to parts unrepealed see Har. Prac. Stats. p. 150.

(*y*) There is only one section of this Act remaining unrepealed. It was framed to remove doubts as to certain judgments entered on cognovits in outer districts where no process had issued before the passing of the Act. Having no prospective operation it is of no general importance.

(*z*) This Act is re-enacted and much amplified by the C. L. P. A.: (see ss. ccxx. *et seq.*

the whole of an Act of the Parliament of this Province, passed in the Session holden in the fourteenth and fifteenth years of Her Majesty's Reign, intituled, *An Act to alter the period for holding certain Courts in the County of York*; (*a*) the whole of an Act of the Parliament of this Province, passed in the Session holden in the fourteenth and fifteenth years of Her Majesty's Reign, intituled, *An Act to provide a remedy against absent Defendants*; (*b*) the whole of an Act of the Parliament of this Province, passed in the sixteenth year of Her Majesty's Reign, intituled, *An Act to explain an Act intituled, 'An Act to provide a remedy against absent Defendants';* (*c*) the first twelve Sections inclusive, the fifteenth, twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth Sections of an Act passed in the sixteenth year of Her Majesty's Reign, intituled, *An Act to provide for the more equal distribution of business in and to improve the practice of the Superior Courts of Common Law in Upper Canada, and for other purposes therein mentioned*; (*d*) the forty-third, forty-fourth, and forty-fifth Sections of an Act passed in the eighteenth year of Her Majesty's Reign, intituled, *An Act to amend the Criminal Law of this Province*; (*e*) the whole of the Act of the Parliament of Upper Canada, passed in the second year of the Reign of the late King William the Fourth, intituled, *An Act to afford means for attaching the property of Absconding Debtors*; the whole of an Act of the Parliament of Upper Canada, passed in the fifth year of the Reign of the late King William the Fourth, intituled, *An Act to continue and amend the law for attaching the property of Absconding Debtors*; the whole of an Act of the Parliament of this Province, passed in the twelfth year of Her Majesty's Reign, intituled, *An Act to reduce the expense of proceedings in Upper Canada against the property of Absconding or Concealed Debtors*; (*f*) the whole

Act of Canada, 14, 15 V., c. 15.

Act of Canada, 14, 15 V., c. 10.

Act of Canada, 16 V., c. 88.

Part of Act of Canada, 16 V., c. 175.

Part of Act of Canada, 18 V., c. 92.

Act of U. C., 2 W. 4, c. 5.

Act of U. C., 5 W. 4, c. 5.

Act of Canada, 12 V., c. 67.

(*a*) New provision is made by s. cliii. *et seq.*

(*b*) The provisions of the C. L. P. A. as to British subjects, &c., resident abroad (s. xxxv.) and as to absconding debtors have rendered this Act unnecessary.

(*c*) For the reasons mentioned in the last note this Statute is also repealed.

(*d*) For parts unrepealed see Har. Prac. Stats. p. 246.

(*e*) See C. L. P. A. 1857, s. 30.

(*f*) Owing to the consolidation of

of an Act of the Parliament of Upper Canada, passed in the forty-fifth year of the Reign of the late King George the Third, intituled, *An Act for the relief of Insolvent Debtors;* the whole of An Act of the Parliament of Upper Canada, passed in the second year of the Reign of the late King George the Fourth, intituled, *An Act to make further regulations respecting the weekly maintenance of Insolvent Debtors;* the whole of an Act of the Parliament of Upper Canada, passed in the eighth year of the Reign of the late King George the Fourth, intituled, *An Act for the further relief of Insolvent Debtors;* the whole of an Act of the Parliament of Upper Canada, passed in the fourth year of the Reign of the late King William the Fourth, intituled *An Act to afford relief to persons confined on mesne process;* (*g*) the whole of an Act of the Parliament of Upper Canada, passed in the eleventh year of the Reign of the late King George the Fourth, intituled, *An Act to repeal and amend the laws now in force respecting the limits of the respective Gaols in this Province;* the whole of an Act of the Parliament of Upper Canada, passed in the fourth year of the Reign of the late King William the Fourth, intituled, *An Act to extend the limits assigned to the respective Gaols in this Province, and to afford to Plaintiffs the means in some cases of more effectually compelling the payment of debts due to them by Defendants in execution;* the whole of an Act of the Parliament of Upper Canada, passed in the fifth year of the Reign of the late King William the Fourth, intituled, *An Act to mitigate the law in respect to imprisonment for debt;* the whole of an Act of the Parliament of this Province, passed in the Session held in the tenth and eleventh years of the Reign of Her Majesty, intituled, *An Act to amend the law of imprisonment for debt in Upper Canada;* (*h*) together with all other Acts or parts of Acts of the Parliament of Upper Canada or of this Province, at variance or inconsistent with the provisions of this Act, shall be and the same are hereby

Act of U. C., 45 G. 3, c. 7.
Act of U. C., 2 G. 4, c. 8.
Act of U. C., 8 G. 4, c. 8.
Act of U. C., 4 W. 4, c. 3.
Act of U. C., 11 G. 4, c. 3.
Act of U. C., 4 W. 4, c. 3.
Act of U. C., 5 W. 4, c. 3.
Act of Canada, 10, 11 V., c. 15.

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the laws as to *Absconding* debtors: (s. xliii. *et seq.*) this and the two preceding Acts are repealed.

(*g*) Owing to the consolidation of the laws as to *Insolvent* debtors the repeal of the three preceding Acts is necessary: (s. cccl.)

(*h*) Owing to the consolidation of the laws as to *Gaol limits* the repeal of this and the three preceding Acts became necessary.

repealed, (*i*) except so far as the said Acts, or any of them, or anything therein contained, repeal any former Act or Acts, or any part thereof, all which last mentioned Act or Acts shall remain and continue so repealed, (*j*) and excepting also so far as the said Acts or parts of Acts are repealed, and the provisions thereof or any of them, shall and may be necessary for supporting, continuing and upholding any writs that shall have been issued, or proceedings that shall have been had or taken before the commencement of this Act, and any further proceedings taken or to be taken thereon. (*k*)

Other inconsistent enactments.

Exception.

(*i*) On every act professing to repeal or interfere with the provisions of a former Act, it is a question of construction whether it operate as a total or partial, or temporary repeal. The word "repealed" is not to be taken in an absolute, if it appear upon the whole Act to be used in a limited sense: (Dwarris on Stats. 534.) Where several Acts of Parliament upon the same subject had been totally repealed and others repealed in part, it was held that it must have been the clear intention of the legislature that only the part of an Act particularly pointed out should be repealed: (*Ib.*)

(*j*) By the repeal of a repealing Statute (the new law containing nothing in it that manifests the intention of the Legislature that the former Act shall continue repealed) the original Statute is revived; but if a Statute be repealed by several Acts, a repeal of one Act or two and not of all does not revive the first Statute: (Dwarris on Stats. 534.) If a repealing Statute and part of the original Statute be repealed by a subsequent Act, the residue of the original Statute is revived. If an Act of Parliament be revived, all Acts explanatory of that so revived are revived also: (*Ib.* p. 535.) It is, however, usual when no revival is intended expressly to provide against the revival, as is done in the section here annotated.

(*k*) The law of arrest before the C. L.P.A. 1856, was St. 8 Vic. c. 48, s. 44. It was continued by Stat. 18 Vic. cap. 85, to 1st January, 1856, and from thence "to the next ensuing session of Parliament and no longer." The next ensuing session was that of 1856, which ended on 1st July, 1856. The C.L.P. Act, which came into force on 21st 21st August, 1856, repeals 8 Vic. cap. 48, s. 44, with the exception here annotated, for the support of pending proceedings. Held that between 1st July and 21st August, 1856, there was no power to arrest under 8 Vic. cap. 48, s. 44; but that the right to arrest existed under the old Statute of 2 Geo. IV. cap. 1, s. 8, which during that period was revived: (*Barrow* v. *Capreol*, Chambers, Sept. 26, 1856, Burns, J. II. U. C. L. J. 210.)

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SCHEDULE A.

(*a*) No. 1.—(*Vide* Section xvi.)

WRIT OF SUMMONS WHEN THE DEFENDANT RESIDES WITHIN THE JURISDICTION.

Upper Canada, } VICTORIA, by the Grace of God, &c.
County of } To C. D. of in the County of
(SEAL.)

We command you that within ten days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of , in an action at the suit of A. B.; and take notice that in default of your so doing, the said A. B. may proceed therein to Judgment and Execution.

Witness, &c.

In the margin.

Issued from the Office of the Clerk (*or* Deputy Clerk) of the Crown and Pleas, in the County of

(*Signed*) J. H., Clerk (*or* Deputy Clerk).

Memorandum to be subscribed on the Writ.

N.B.—This Writ is to be served within six calendar months from the date thereof, or if renewed, from the date of such renewal, including the day of such date, and not afterwards.

Indorsements to be made on the Writ before the service thereof.

This Writ was issued by E. F., of , Attorney for the said Plaintiff, *or* this Writ was issued in person by A. B., who resides at (*mention the City, Town, Incorporated or other Village, or Township within which such Plaintiff resides.*)

Also the Indorsement required by the twenty-sixth Section of the Act.

Indorsement to be made on the Writ after service thereof.

This Writ was served by X. Y. on C. D. (the Defendant *or* one of the Defendants), on the day of one thousand eight hundred and

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(*b*) No. 2.—(*Vide* Section xxii.)

WRIT OF CAPIAS.

Upper Canada, } VICTORIA, &c.,
County of } To the Sheriff of, &c.
(SEAL.)

We command you that you take C. D., if he shall be found in your (County *or* United Counties), and him safely keep until he shall have given you bail in an action (on promise *or* of debt, &c.) at the suit of A. B., or until the said C. D. shall by other lawful means be discharged from your custody: And we do further

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(*a*) Eng. Stat. 15 & 16 Vic. cap. 76, Sch. A. No. 1.
(*b*) Prov. Stat. 12 Vic. cap. 63, Sch. No. 3.

command you, that on execution hereof you do deliver a copy hereof to the said C. D.; [and We hereby require the said C. D. to take notice that within ten days after execution hereof on him, inclusive of the day of such execution, he cause special bail to be put in for him in our Court of , according to the warning hereunder written (*or* indorsed hereon), and that in default of his so doing, such proceedings may be had and taken as are mentioned in the said warning:] And We do further command you, the said Sheriff, that immediately after the execution hereof, you do return this Writ to the said Court, together with the manner in which you shall have executed the same, and the day of the Execution thereof, or if the same shall remain unexecuted and shall not be renewed according to law, then that you do return the same at the expiration of six calendar months from ths date hereof, or of the last renewal hereof, or sooner if you shall be required thereto by order of the Court or of a Judge.

Witness, &c.

In the margin.

Issued from the Office of the Clerk (*or* Deputy Clerk) of the Crown and Pleas, in the County of

(*Signed*) J. H., Clerk (*or* Deputy Clerk).

Memorandum to be subscribed on the Writ.

N.B.—This Writ is to be executed within six calendar months from the date hereof, or if renewed, then from the date of such renewal, including the day of such date, and not afterwards.

Warning to the Defendant.

1. If a Defendant being in custody shall be detained on this Writ, or if a Defendant being arrested thereon shall go to prison for want of bail, the Plaintiff may declare against any such Defendant before the end of the Term next after such arrest, and proceed thereon to Judgment and Execution.

2. If a Defendant having given bail to the Sheriff on the arrest, shall omit to put in special bail conditioned for his surrender to the Sheriff of the County from which the Writ of Capias issued, and to file the bail piece in the Office of the Clerk or Deputy Clerk of the Crown and Pleas for the same County, the Plaintiff may proceed against the Sheriff or on the bail bond.

3. If a Defendant having been served with this Writ and not arrested thereon, shall not enter an appearance within ten days after such service, in the Office of the Clerk or Deputy Clerk of the Crown from which the Writ issued, the Plaintiff may proceed to Judgment and Execution.

Indorsement to be made on the Writ before the Service thereof.

This Writ was issued by E. F. of , Attorney, &c., *as in form No.* 1.
Bail for £ , by affidavit, *or* by Judge's order, *as the case may be.*

Also the Indorsement required by the twenty-sixth Section of the Act.

Indorsement to be made on the Writ after execution thereof.

This Writ was executed by X. Y., by arresting C. D., *or as the case may be, as to service on any Defendant*, on the day of one thousand eight hundred and

(*c*) No. 3.—(*Vide* Section XXXV.)

WRIT WHERE THE DEFENDANT, BEING A BRITISH SUBJECT, RESIDES OUT OF UPPER CANADA.

Upper Canada, County of } VICTORIA, &c.
To C. D., of
(SEAL.)

We command you that within (*here insert a sufficient number of days according to the directions in the Act,*) days after the service of this Writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of , in an action at the suit of A. B.; and take notice that in default of your so doing, the said A. B. may, by leave of the Court or a Judge, proceed therein to Judgment and Execution.

Witness, &c.

In the margin.

Issued from the Office of, &c. (*as in foregoing cases*).

Memorandum to be subscribed on the Writ.

N.B.—This Writ is to be served within six calendar months from the date thereof, or if renewed, then from the date of such renewal, including day of such date, and not afterwards.

Indorsements to be made on the Writ before the Service thereof.

This Writ is for service out of Upper Canada, and was issued by E. F. of Attorney for the Plaintiff, *or* this Writ was issued in person by A. B. who resides at (*mentioning Plaintiff's residence, as directed in form No.* 1.)

(*Also the Indorsement required by the twenty-sixth Section of the Act, allowing the Defendant two days less than the time limited for appearance, to pay the debt and costs.*

(*d*) No. 4.—(*Vide* Section XXXVI.)

WRIT WHERE THE DEFENDANT, NOT BEING A BRITISH SUBJECT, RESIDES OUT OF UPPER CANADA.

Upper Canada, County of } VICTORIA, &c.
To C. D., late of , in the County of
(SEAL.)

We command you that within days (*insert a sufficient number according to the directions of the Act*) after notice of this Writ is served on you, inclusive of the day of such service, you do cause an appearance to be entered for you in our Court of , in an action at the suit of A. B.; and take notice that in default of your so doing, the said A. B. may, by leave of the Court or a Judge, proceed thereon to Judgment and Execution.

Memorandum to be subscribed on the Writ.

The same as on form No. 3.

Indorsement also as on form No. 3.

And in the margin.

Issued from the office of, &c. (*as in foregoing cases*).

(*c*) Eng. Stat. 15 & 16 Vic. cap. 76, Sch. A, No. 2.
(*d*) Ibid. No. 3.

Notice of the foregoing Writ.

To C. D., late of (the City of Hamilton, in Upper Canada,) *or* (now residing at Buffalo, in the State of New York).

Take notice that A. B., of , in the County of , Upper Canada, has commenced an action at law against you, C. D., in Her Majesty's Court of , by a Writ of that Court, dated the day of , A.D. one thousand eight hundred and , and you are required within days after the receipt of this notice, inclusive of the day of such receipt, to defend the said action, by causing an appearance to be entered for you in the Office of the (Clerk *or* Deputy Clerk) for the County of , to the said action, and in default of your so doing, the said A. B. may, by leave of the Court or a Judge, proceed thereon to Judgment and Execution.

(*Signed*) A. B., the Plaintiff in person.
or
E. F., Plaintiff's Attorney.

(*e*) No. 5.—(*Vide* Section xli.)

SPECIAL INDORSEMENT.

(*After the Indorsement required by the twenty-sixth Section of the Act, this special Indorsement may be inserted.*)

The following are the particulars of the Plaintiff's claim:

1851. January	10.—Five barrels of Flour, at 20s	£	5 0
July	2.—Money lent to the Defendant		30 0
October	1.—A Horse sold to Defendant		25 0
		£	60 0
	Paid		7 10
	Balance due	£	52 10

Or,

To Bread (*or* Butcher't Meat) supplied between the 1st January, 1851, and the 1st January, 1852	£	40 0
Paid		12 10
Balance due	£	27 10

(*If any account has been delivered, it may be referred to with its date, or the Plaintiff may give such a description of his claim as on a particular of demand, so as to prevent the necessity of an application for further particulars.*)

Or,

£100, principal and interest, due on a bond, dated the day of , conditioned for the payment of £200 and interest.

Or,

£100, principal and interest, due on a covenant contained in a deed dated the day of , to pay £500 and interest.

Or,

£100, on a Bill of Exchange for that amount, dated the 2nd February, 1851, accepted (*or* drawn *or* indorsed) by the Defendant, with interest and Notarial charges.

(*e*) Eng. Stat. 15 & 16 Vic. cap. 76, Schd. A, No. 4.

Or,

£100, on a Promissory Note for that amount, dated the 2d February, 1851, made (*or* indorsed) by the Defendant, with interest and Notarial charges.

Or,

£100, on a Guarantee, dated the 2d February, 1851, whereby the Defendant guaranteed the due payment by E. F., of goods supplied (*or* to be supplied) to him.

(*In all cases where interest is lawfully recoverable, and is not above expressed, add* "the Plaintiff claims interest on £ from the day of until Judgment.")

N.B.—Take notice, that if a Defendant served with this Writ within Upper Canada, do not appear according to the exigency thereof, the Plaintiff will be at liberty to sign final Judgment for any sum not exceeding the sum above claimed (with interest), and the sum of for costs, and issue execution at the expiration of eight days from the last day for appearance.

(*f*) No. 6.—(*Vide* Section xlii.)

WRIT OF CAPIAS IN AN ACTION ALREADY COMMENCED.

Upper Canada, } VICTORIA, &c.
County of } To the Sheriff of, &c.

(SEAL.)

We command you, that you take C. D., if he shall be found in your (County *or* United Counties), and him safely keep, until he shall have given you bail in the action (on promises *or* of debt, &c.), which A. B. has commenced against him, and which action is now pending, or until the said C. D. shall, by other lawful means, be discharged from your custody. And we do further command you, that on execution hereof, you do deliver a copy to the said C. D., and that immediately after execution hereof, you do return this Writ to our Court of , together with the manner in which you shall have executed the same, and the day of the execution hereof; and if the same shall remain unexecuted, and shall not be renewed according to law, then that you do so return the same at the expiration of six calendar months from the date hereof, or of the last renewal hereof, or sooner if you shall be required thereto by order of the said Court or a Judge. And We do hereby require the said C. D., that within ten days after execution hereof on him, inclusive of the day of such execution, he cause special bail to be put in for him in our said Court, according to the warning hereinunder written or indorsed hereon, and that in default of his so doing, proceedings may be had and taken as are mentioned in the warning in that behalf.

Witness, &c.

In the margin.

Issued from the Office of the (Clerk *or* Deputy Clerk) of the Crown and Pleas, in the County of

(*Signed*) J. H. (Clerk *or* Deputy Clerk).

Memorandum to be subscribed on the Writ.

N.B.—This Writ is to be executed within six calendar months from the date hereof, or if renewed, then from the date of such renewal, including the day of such date, and not afterwards.

(*f*) Original.

Warning to the Defendant.

1. This suit which was commenced by the service of a Writ of Summons, will be continued and carried on in like manner as if the Defendant had not been arrested on this Writ of Capias.

2. If the Defendant having given bail to the Sheriff on the arrest on this Writ, shall omit to put in special bail for his surrender to the Sheriff of the County from which the Writ of Capias issued, and to file the bail piece in the office of the Clerk or Deputy Clerk of the Crown and Pleas for the County of , the Plaintiff may proceed against the Sheriff or on the bail bond.

Indorsements to be made on the Writs before the execution thereof.

1. This Writ was issued by E. F. of, &c. (*as in form No.* 1).
2. Bail for £ by affidavit *or* by Judge's order (*as the case may be*).

Also the indorsement required by the twenty-sixth section of the Act.

Indorsement to be made on the Writ after the execution thereof.

This Writ was executed by arresting C. D. (*according to the facts*), on the day of 18 .

(*g*) No. 7.—(*Vide* Soction xliii.)

WRIT OF ATTACHMENT.

Upper Canada, } VICTORIA, &c.
County of } To the Sheriff of, &c.
(SEAL.)

We command you, that you attach, seize, and safely keep all the real and personal property, credits, and effects, together with all evidences of title or debts, books of account, vouchers and papers belonging thereto, of C. D., to secure and satisfy A. B, a certain debt (*or* demand) of £ (*the sum sworn to*), with his costs of suit, and to satisfy the debt and demand of such other creditors of the said C. D., as shall duly place their Writ of Attachment in your hands, or otherwise lawfully notify you of their claim, and duly prosecute the same. And we also command the said C. D., that within (*the time named in the Judge's order or rule of Court*) days after the service of this Writ on him, inclusive of the day of such service, he do cause special bail to be entered for him in our Court of , in an action to recover £ (*the sum sworn to*), at the suit of the said A. B.: And we require the said C. D. to take notice, that his real and personal property, credits, and effects in Upper Canada have been attached at the suit of the said A. B., and that in default of his putting in special bail as aforesaid, the said A. B. may, by leave of the Court or a Judge, proceed therein to Judgment and execution, and may sell the property so attached: And we command you, the said Sheriff, that as soon as you have executed this Writ you return the same with the inventory and appraisement of what you have attached thereunder.

Witness, &c.

In the margin.

Issued from the Office of, &c. (*as in foregoing cases*).

Memorandum to be subscribed on the Writ.

N.B.—This Writ is to be served within six calendar months from the date thereof, or if renewed, then from the date of such renewal, including the day of such date, and not afterwards.

(*g*) Original.

Indorsement to be made on the Writ before service thereof.

This Writ may be served out of Upper C[illegible]da, and was issued by E. F., of , Attorney, &c. (*as on a Writ of Summons*).

(*h*) No. 7 (*bis*).—(*Vide* Section lx.)

In the (Q. B. *or* C. P.)
On the day of , A.D. 18 .

(*Day of signing Judgment.*)

Upper Canada, } A. B. in his own person (*or* by , his Attorney, sued
to wit: } out a Writ of Summons against C. D., indorsed according to The Common Law Procedure Act, 1856, as follows:

(*Here copy special Indorsement.*)

And the said C. D. has not appeared, therefore it is considered that the said A. B. recover against the said C. D., £ , together with £ , for costs of suit.

(*i*) No. 8.—(*Vide* Section lxxvii.)

In the (Q. B. *or* C. P.)
The day of , in the year of our Lord, 18 .
County of } Whereas A. B. has sued C. D., and affirms, and
to wit: } denies,

(*Here state the question or questions of fact to be tried.*)

And it has been ordered by the Honorable Mr. Justice , according to The Common Law Procedure Act, 1856, that the said question shall be tried by a Jury; therefore let the same be tried accordingly.

(*j*) No. 9.—(*Vide* Section cciii.)

FORM OF A RULE OR SUMMONS WHERE A JUDGMENT CREDITOR APPLIES FOR EXECUTION AGAINST A JUDGMENT DEBTOR.

(*Formal parts as at present.*)

C. D., to show cause why A. B. (*or as the case may be*), should not be at liberty to enter a suggestion on the roll in an action wherein the said A. B. was Plaintiff, and the said C. D., Defendant, and wherein the said A. B. obtained Judgment for £ , against the said C. D., on the day of , that it manifestly appears to the Court that the said A. B. is entitled to have execution of the said Judgment, and to issue execution thereupon, and why the said C. D. should not pay to the said A. B. the costs of this application to be taxed.

NOTE.—*The above may be modified so as to meet the case of an application by or against the representative of a party to the Judgment.*

(*h*) Eng. Stat. 15 & 16 Vic. cap. 76, Schd. A, No. 5.
(*i*) Ibid. No. 6.
(*j*) Ibid. No. 7.

(*k*) No. 10.—(*Vide* Section cciv.)

FORM OF SUGGESTION THAT THE JUDGMENT CREDITOR IS ENTITLED TO EXECUTION AGAINST THE JUDGMENT DEBTOR.

And now, on the day of it is suggested and manifestly appears to the Court, that the said A. B. (*or* E. F., as executor of the last Will and Testament of the said A. B., deceased, *or as the case may be*) is entitled to have execution of the Judgment aforesaid, against the said C. D. (*or* against G. H., as executor of the last Will and Testament of the said C. D., *or as the case may be*); therefore it is considered by the Court, that the said A. B. (*or* E; F., as such executor as aforesaid, (*or as the case may be*) ought to have execution of the said Judgment against the said C. D. (*or* against G. H. as such executor as aforesaid, *or as the case may be*).

(*l*) No. 11.—(*Vide* Section ccv.)

FORM OF WRIT OF REVIVOR.

VICTORIA, &c.,

To C. D., of GREETING:

We command you, that within ten days after the service of this Writ upon you, inclusive of the day of such service, you appear in our Court of , to show cause why A. B. (*or* E. F., as executor of the last Will and Testament of the said A. B., deceased, (*or as the case may be*) should not have execution against you, (*if against a representative, here insert*, as executor of the last Will and Testament of , deceased, *or as the case may be*) of a Judgment whereby the said A. B., (*or as the case may be*) recovered against you (*or as the case may be*), £ ; and take notice that in default of your doing so, the said A. B., (*or as the case may be*), may proceed to execution.

Witness, &c.

(*m*) No. 12.—(*Vide* Section ccxxi.)

EJECTMENT.

VICTORIA, &c.,

To X., Y., Z., and all persons entitled to defend the possession of (*describe the property with reasonable certainty*) in the Township of , in the County of , to the possession whereof A., B., and C., some or one of them claim to be (*or* to have been on and since the day of , A.D.) entitled, and to eject all other persons therefrom. These are to will and command you or such of you as deny the alleged title, within sixteen days of the service hereof, to appear in our Court of , to defend the said property or such part thereof as you may be advised, in default whereof Judgment may be signed, and you turned out of possession.

Witness, &c.

(*n*) No. 13.—(*Vide* Section ccxxxi.)

JUDGMENT IN EJECTMENT IN CASE OF NON-APPEARANCE.

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

The day of , 18 (*date of the Writ*).

(*k*) Eng. Stat. 15 & 16 Vic. cap. 76, Schd. A, No. 8.
(*l*) Ibid. No. 9.
(*m*) Ibid. No. 13.
(*n*) Ibid. No. 14.

County of } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court in these words, that is to say:

VICTORIA, &c. (*copy the Writ*), and as no appearance has been entered or defence made to the said Writ, therefore it is considered that the said (*insert the names of the persons in whom title is alleged in the Writ*) do recover possession of the land in the said Writ mentioned, with the appurtenances.

(*o*) No 14.—(*Vide* Sections ccxxxi-ii.)

In the Q. B. (*or* C. P.)
On the day of , 18 , (*date of the Writ*).

County of } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court, in these words, that is to say:

VICTORIA, &c. (*copy the Writ*), and C. D. has on the day of , appeared by , his Attorney (*or* in person), to the said Writ, and has defended for a part of the land in the Writ mentioned, that is to say (*state the part*), and no appearance has been entered or defence made to the said Writ, except as to the said part; therefore it is considered that the said A. B. (*the Claimant*) do recover possession of the land in the said Writ mentioned, except the said part, with the appurtenances, and that he have execution thereof forthwith; and as to the rest, let a Jury come, &c.

(*p*) No. 15.—(*Vide* Section ccxxxii.)

In the Q. B. (*or* C. P.)
On the day of , 18 , (*date of the Writ*).

County of } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court, in these words, that is to say:

VICTORIA, &c., (*copy the Writ*), and C. D. has on the day of , appeared by , his Attorney, (*or* in person) to the said Writ, and defended for the whole of the land therein mentioned; therefore, let a Jury come, &c.

(*q*) No. 16.—(*Vide* Section ccxxxiv.)

Afterwards on the day of , A.D. , before Justice of our Lady the Queen, assigned to take the assizes in and for the within County, come the parties within mentioned, and a Jury of the said County being sworn to try the matters in question between the said parties, upon their oath, say: that A. B. (*the Claimant*) within mentioned, on the day of , A.D. , was and still is entitled to the possession of the land within mentioned, as in the Writ alleged; therefore, &c.

(*r*) No. 17.—(*Vide* Section ccliv.)

In the Q. B. (*or* C. P.)
On the day of , 18 , (*date of the Writ*).

(*o*) Eng. Stat. 15 & 16 Vic: cap. 76, Schd. A, No. 15.
(*p*) Ibid. No. 16.
(*q*) Ibid. No. 17.
(*r*) Ibid. No. 18.

County of } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court, in these words, that is to say:

VICTORIA, &c. (*copy the Writ*), and C. D. has on the day of appeared by , his Attorney (*or* in person) to the said Writ, and A. B. has discontinued the action: therefore, it is considered that the said C. B. be acquitted, and that he recover against the said A. B. £ for his costs of defence.

(*s*) No. 18.—(*Vide* Section cclvi.)

In the Q. B. (*or* C. P.)
On the day of , 18 , (*date of Writ*).

County of } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court, in these words, that is to say:

VICTORIA, &c. (*copy the Writ*), and C. D. has on the day of appeared by , his Attorney (*or* in person), to the said Writ, and A. B. has failed to proceed to trial, though duly required so to do; therefore, it is considered that the said C. D. be acquitted, and that he do recover against the said A. B. £ for his costs of defence.

(*t*) No. 19.—(*Vide* Section cclvii.)

In the Q. B. (*or* C. P.)
The day of , 18 , (*date of the Writ*).

County of } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court, in these words, that is to say:

VICTORIA, &c. (*copy the Writ*), and C. D. has on the day of appeared by , his Attorney (*or* in person), to the said Writ, and the said C. D. has confessed the said action (*or* has confessed the said action as to part of the said land, that is to say: (*state the part*); therefore, it is considered that the said A. B. do recover possession of the land in the said Writ mentioned, (*or* of the said part of the said land) with the appurtenances, and £ for costs.

(*u*) No. 20.—(*Vide* Section cclxvi.)

In the Q. B. (*or* C. P.)
The day of , 18 , (*date of Writ*).

County of } On the day and year above written, a Writ of our Lady the
to wit: } Queen issued out of this Court, with a notice thereunder written, the tenor of which Writ and notice follows in these words, that is to say:

(*Copy the Writ and notice, which latter may be as follows:*)

"Take notice that you will be required, if ordered by the Court or a Judge, to "give bail by yourself and two sufficient sureties, conditioned to pay the costs "and damages which shall be recovered in the action."

And C. D. has appeared by , his Attorney, (*or* in person) to the said Writ, and has been ordered to give bail pursuant to the Statute, and has failed so to do; therefore, it is considered that the said (*landlord's name*) do recover possession of the land in the said Writ mentioned, with the appurtenances, together with £ for costs of suit.

(*s*) Eng. Stat. 15 & 16 Vic. cap. 76, Schd. A. No. 19.
(*t*) Ibid. No. 20.
(*u*) Ibid. No. 21.

SCHEDULE B.

FORMS OF PLEADINGS (*Vide* Section cxl).

On Contracts.

1.—(*v*) Money payable by the Defendant to the Plaintiff (*these words* "money payable," &c., *should precede money counts like* 1 *to* 11, *but need only be inserted in the first*) goods bargained and sold by the Plaintiff to the Defendant.

2.—(*w*) Work done and materials provided by the Plaintiff for the Defendant at his request.

3.—(*x*) Money lent by the Plaintiff to the Defendant.

4.—(*y*) Money paid by the Plaintiff for the Defendant at his request.

5.—(*z*) Money received by the Defendant for the use of the Plaintiff.

6.—(*a*) Money found to be due from the Defendant to the Plaintiff on accounts stated between them.

7.—(*b*) A messuage and lands sold and conveyed by the Plaintiff to the Defendant.

8.—(*c*) The Defendant's use by the Plaintiff's permission of messuage and lands of the Plaintiff.

9.—(*d*) The hire (*as the case may be*) by the Plaintiff let to hire to the Defendant.

10.—(*e*) Freight for the conveyance of the Plaintiff for the Defendant at his request of goods in (ships, &c.)

11.—(*f*) The demurrage of a (ship) of the Plaintiff kept on demurrage by the Defendant.

12.—(*g*) That the Defendant on the day of A.D. by his Promissory Note now overdue, promised to pay to the Plaintiff £ (*two*) months after date, but did not pay the same.

13.—(*h*) That one A, on, &c., (*date*) by his Promissory Note now overdue, promised to pay to the Defendant or order £ (*two*) months after date, and the Defendant indorsed the same to the Plaintiff, and the said note was duly presented for payment and was dishonored, whereof the Defendant had due notice, but did not pay the same.

14.—(*i*) That the Plaintiff on, &c. (*date*), by his Bill of Exchange now overdue, directed to the Defendant, required the Defendant to pay to the Plaintiff £ , (*two*) months after date, and the Defendant accepted the said Bill, but did not pay the same.

15.—(*j*) That the Defendant on, &c. (*date*), by his Bill of Exchange to A. required A to pay to pay to the Plaintiff £ , (*two*) months after date, and the said Bill was duly presented for acceptance and was dishonored, of which the Defendant had due notice, but did not pay the same.

(*v*) Eng. St. 15 & 16 Vic. c. 76, Sch. B, No. 1.
(*w*) Ibid. No. 2.
(*x*) Ibid. No. 3.
(*y*) Ibid. No. 4.
(*z*) Ibid. No. 5.
(*a*) Ibid. No. 6.
(*b*) Ibid. No. 7.
(*c*) Ibid. No. 9.
(*d*) Ibid. No. 12.
(*e*) Ibid. No. 13.
(*f*) Ibid. No. 14.
(*g*) Ibid. No. 15.
(*h*) Ibid. No. 16.
(*i*) Ibid. No. 17.
(*j*) Ibid. No. 18

16.—(*k*) That the Plaintiff and Defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the Plaintiff has always been ready and willing to marry the Defendant, yet the Defendant has neglected and refused to marry the Plaintiff.

17.—(*l*) That the Defendant by warranting a horse to be then sound and quiet to ride, sold the said horse to the Plaintiff, yet the said horse was not then sound and quiet to ride.

18.—(*m*) That the Plaintiff and Defendant agreed by charter party, that the Plaintiff's schooner called the *Toronto*, should with all convenient speed sail to *Hamilton*, and that the Defendant should there load her with a full cargo of flour and other lawful merchandize, which she should carry to *Kingston*, and there deliver, on payment of freight per barrel, and that the Defendant should be allowed four days for loading and four days for discharging, and four days for demurrage, if required, at £ per day; and that the Plaintiff did all things necessary on his part to entitle him to have the agreed cargo loaded on board the said schooner at *Hamilton*, and that the time for so loading has elapsed, yet the Defendant made default in loading the agreed cargo.

19.—(*n*) That the Plaintiff let the Defendant a house, being (*designate it*) for years, to hold from the day of A.D. at £ a year, payable quarterly, of which rent quarters are due and unpaid.

20.—(*o*) That the Plaintiff by deed let to the Defendant a house (*designate it*), to hold for seven years from the day of A.D. , and the Defendant by the said deed covenanted with the Plaintiff, well and substantially to repair the said house during the said terms (*according to the covenant*), yet the said house was during the said term out of good and substantial repair.

For Wrongs independent of Contract.

21.—(*p*) That the Defendant broke and entered certain land of the Plaintiff, called lot No. &c. and depastured the same with cattle.

22.—(*q*) That the Defendant assaulted and beat the Plaintiff, gave him into custody to a Constable, and caused him to be imprisoned in the Common Gaol.

23.—(*r*) That the Defendant debauched and carnally knew the Plaintiff's wife.

24.—(*s*) That the Defendant converted to his own use (*or* wrongly deprived the Plaintiff of the use and possession of) the Plaintiff's goods, that is to say (*mentioning what articles, as for instance*, household furniture).

25.—(*t*) That the Defendant detained from the Plaintiff his title deeds of land, called lot No. &c. in, &c. that is to say (*describe the deeds*).

26.—(*u*) That the Plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the Defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill.

(*k*) Eng. St. 15 & 16 Vic. cap. 76, Sohd. B, No. 19.
(*l*) Ibid. No. 20.
(*m*) Ibid. No. 22.
(*n*) Ibid. No. 23.
(*o*) Ibid. No. 24.
(*p*) Ibid. No. 25.
(*q*) Ibid. No. 26.
(*r*) Ibid. No. 27.
(*s*) Ibid. No. 28.
(*t*) Ibid. No. 29.
(*u*) Ibid. No. 30.

27.—(*v*) That the Defendant having no reasonable or proper cause for believing that the Plaintiff was immediately about to leave Upper Canada with intent and design to defraud the Defendant, maliciously caused the Plaintiff to be arrested and held to bail for £

28.—(*w*) That the Defendant falsely and maliciously spoke and published of the Plaintiff the words following, that is to say, "He is a thief" (*if there be any special damage, here state it, with such reasonable particularity as to give notice to the Defendant of the peculiar injury complained of, as for instance,* whereby the Plaintiff lost his situation as shopman in the employ of N).

29.—(*x*) That the Defendant falsely and maliciously published of the Plaintiff in a newspaper called the words following, that is to say, "He is a regular prover under bankruptcies," the Defendant meaning thereby that the Plaintiff had proved, and was in the habit of proving, fictitious debts against the estates of bankrupts, with the knowledge that such debts were fictitious.

COMMENCEMENT OF PLEA.

30.—(*y*) The Defendant by , his Attorney (*or* in person), says (*here state the substance of the Plea.*)

31.—(*z*) And for a second Plea the Defendant says (*here state the second Plea*).

Plea in Actions on Contracts.

32.—(*a*) That he never was indebted as alleged. (N.B.—*This plea is applicable to other declarations like those numbered* 1 *to* 11.)

33.—(*b*) That he did not promise as alleged. (*This plea is applicable to other declarations on simple contracts not on bills or notes, such as those numbered* 16 *to* 19. *It would be objectionable to use* "did not warrant," "did not agree," *or any other appropriate denial.*)

34.—(*c*) That the alleged deed is not his deed.

35.—(*d*) That the alleged cause of action did not accrue within years (*state the period of limitation applicable to the case*) before the suit.

36.—(*e*) That before action he satisfied and discharged the Plaintiff's claim by payment.

37.—(*f*) 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) the Plaintiff's claim for (*state the cause of set off as in a declaration, see form* ante), which amount the Defendant is willing to set off against the Plaintiff's claim (*or*, and the Defendant claims to recovor a balance from the Plaintiff).

38.—(*g*) That after the claim accrued, and before this suit, the Plaintiff, by deed, released the Defendant therefrom.

(*v*) Eng. St. 15 & 16 Vic. cap. 76, Schd. B, No. 31.
(*w*) Ibid. No. 32.
(*x*) Ibid. No. 33.
(*y*) Ibid. No. 34.
(*z*) Ibid. No. 35.
(*a*) Ibid. No. 36.
(*b*) Ibid. No. 37.
(*c*) Ibid. No. 38.
(*d*) Ibid. No. 39.
(*e*) Ibid. No. 40.
(*f*) Ibid. No. 41.
(*g*) Ibid. No. 42.

Pleas in Actions for Wrongs independent of Contract.

39.—(*h*) That he is not guilty.
40.—(*i*) That he did what is complained of by the Plaintiff's leave.
41.—(*j*) That the Plaintiff first assaulted the Defendant, who thereupon necessarily committed the alleged assault in his own defence.
42.—(*k*) That the Defendant, at the time of the alleged trespass, was possessed of land, the occupiers whereof, for twenty years before this suit, enjoyed, as of right and without interruption, a way on foot and with cattle from a public highway over the said land of the Plaintiff to the said land of the Defendant, and from the said land of the Defendant over the said land of the Plaintiff, to the said public highway, at all times of the year, for the more convenient occupation of the said land of the Defendant, and that the alleged trespass was the use by the Defendant of the said way.

Replications.

43.—(*l*) The Plaintiff takes issue upon the Defendant's first, second, &c., pleas.
44.—(*m*) The Plaintiff as to the second Plea, says: (*here state the answer to the plea, or in the following forms.*)
45.—(*n*) That the alleged release is not the Plaintiff's deed.
46.—(*o*) That the alleged release was procured by the fraud of the Defendant.
47.—(*p*) That the alleged set off did not accrue within six years before this suit.
48.—(*q*) That the Plaintiff was possessed of land whereon the Defendant was trespassing and doing damage, whereupon the Plaintiff requested the Defendant to leave the said land, which the Defendant refused to do, and thereupon the Plaintiff gently laid his hands upon the Defendant in order to secure him, doing no more than was necessary for that purpose, which is the alleged first assault by the Plaintiff.
49.—(*r*) That the occupiers of the said land did not for twenty years before this suit, enjoy, as of right and without interruption, the alleged way.

New Assignment.

50.—(*s*) The Plaintiff as to the and pleas, says, that he sues not for the trespesses therein admitted, but for trespasses committed by the Defendant in excess of the alleged rights, and also in other parts of the said land, and on other occasions and for other purposes than those referred to in the said pleas.

(*h*) Eng. St. 15 & 16 Vic. c. 76, Sch. B, No. 43.
(*i*) Ibid. No. 44.
(*j*) Ibid. No. 45.
(*k*) Ibid. No. 46.
(*l*) Ibid. No. 48.
(*m*) Ibid. No. 49.
(*n*) Ibid. No. 50.
(*o*) Ibid. No. 51.
(*p*) Ibid. No. 52.
(*q*) Ibid. No. 53.
(*r*) Ibid. No. 54.
(*s*) Ibid. No. 55.

If the Plaintiff replies and new assigns, the new assignment may be as follows :

51.—(*t*) And the Plaintiff as to the and pleas, further says that he sues not only for the trespasses in those pleas admitted, but also for, &c.

If the Plaintiff replies and new assigns to some of the pleas, and new assigns only to the other, the form may be as follows :

52.—(*u*) And the Plaintiff as to the and pleas, further says that he sues, not for the trespasses in the pleas, (*the pleas not replied to*) admitted, but for the trespasses in the pleas, (*the pleas replied to*) admitted, and also for, &c.

(*t*) Eng. St. 15 & 16 Vic. c. 76, Sch. B, No. 56.
(*u*) Ibid. No. 57.

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THE

COUNTY COURTS PROCEDURE ACT, 1856.

19 & 20 Vic.—Cap. 90.

An Act to simplify and expedite the proceedings in the County Courts in Upper Canada, and to alter and amend the law in relation to these Courts. [Assented to 1st July, 1856.] (*a*)

Whereas it is expedient to simplify and expedite the proceedings in the several County Courts in Upper Canada, and to alter and amend the law in relation to these Courts: (*b*) Preamble.

(*a*) This, a companion Act to the C. L. P. A., 1856, is designed to accomplish for County Courts that which the C. L. P. A, 1856, does for the Superior Courts, namely, *Simplify and Expedite their Procedure.* In citing the Act, it will be sufficient to use the short title, "The County Courts Procedure Act, 1856:" (s. 27.) In one particular the Act, as indicated both in the title and the preamble, goes beyond the C. L. P. Act, 1856. Its design is not only to simplify and expedite the proceedings in County Courts, but "to alter and amend the *law* in relation to these Courts." This last is done by s. 20, which enlarges and more clearly defines the jurisdiction of the Courts. So in s. 21, which provides for the payment of fees for business done not strictly in relation to pending suits, but authorised or required to be performed by County Judges.

(*b*) As the due administration of justice is an object of paramount importance, the means by which it may be best secured should be one of the first objects of government. No individual should be barred from asserting a right, however trifling, which the law recognises. But if the tribunals through which he is to obtain redress are difficult of access or their procedure slow and expensive, there is a practical denial of justice to the poor man, whose claim is too small to bear the expenses necessarily attendant upon close and thorough investigation. The essence of civil jurisprudence comprehends the principle that the differences between man and man of which the law takes cognizance should be decided in a manner the most speedy and cheap, that is consistent with the due dispensation of justice. A sum of money which to one man might be a trifle, to another man might be "his all." All suitors should receive equal consideration—all, if possible, should be placed on an equal footing. The recovery of disputed claims whether great or small can only be had upon proper investigation by persons competent to adjudicate. The work of investigation is not to be measured by the amount at stake. The right decision of a question for a subject matter of five pounds may involve principles, the apprehension and application of which demand not only sound judgment but trained

Therefore, Her Majesty, by and with the advice and consent of

ability. At the same time it is obvious that where large amounts and large interests are concerned a more elaborate and expensive machinery may be required than in smaller demands where the primary interests of those concerned is to secure a speedy and inexpensive adjudication. Hence the difficulty of combining speed and economy with that which is sound in administration.

It was the wise provision of the law of England at a very remote period, to bring justice to every man's door, by constituting Courts of Judicature not only in every County but even in smaller localities throughout the Kingdom. All administration of justice was at first in the hands of the King. When by the increase of the people the burden was not only too great for the King but oppressive to the people, and the kingdom was divided into Counties, hundreds, &c., so the administration of justice was distributed amongst various Courts, of which the sheriff had the County Courts, and lords of liberties, their leet courts. As early as 1517 a Court for the recovery of small debts, known as a Court of Conscience or Court of Requests, was, by Act of the Common Council established in London. In 1605 the same Court was fully confirmed by Act of the Legislature: (3 Jac. I. cap. 15.) This Court having been found very beneficial in London, Courts of a similar nature were established by numerous Acts of the Legislature in different parts of the kingdom. The accumulation of inferior Courts throughout England exhibited the popular desire for the local administration of justice. By reason of the diversity of these Courts and the defects in their constitution, and in order that "one rule and manner of proceeding for the recovery of small debts and demands should prevail throughout England," all small Courts were abolished, and a system of County Courts fully established: (9 & 10 Vic. cap. 95.) The principles on which the earlier Courts were based have been re-asserted and carried out in the present County Court system of England. In the words of a writer in U. C. L. J. the new system is but "a resuscitation of the County Courts improved by a simple procedure, and made effective by a learned and independent judiciary."

The origin of local Courts in Canada is almost coeval with its population. Immediately after the conquest, by the proclamation of October, 1763, constituting the Province of Quebec, power was given to the Governor of the Province to erect Courts of Judicature as well criminal as civil. It was under this authority that the earliest tribunals in Canada were established. Of their nature and jurisdiction the Editor is not in a position to say anything. In 1774, by the Statute 14 Geo. III. cap. 83, this proclamation and the Courts constituted under it were in great part superseded. Provision was made for the erection of new Courts, of which the Government of the day seems to have availed itself; for in 1787, under an ordinance of that year, a portion of the Province of Quebec now constituting Upper Canada, was divided into four Districts, viz., Luneberg, Mecklenburg, Nassau, and Hesse, in each of which Courts, called Courts of Common Pleas, appear to have been established: (27 Geo. III. c. 4.) These Courts consisted of a first Judge and several of the principal magistrates of the District; their jurisdiction was restricted to civil cases. In November, 1791, by proclamation of that date, Upper, was separated from Lower, Canada, and made a distinct Province. This proclamation was issued under the authority of an existing Statute which conferred all the necessary powers: (31 Geo. III. cap. 31.) Then Upper Canada began to legislate for itself. By an Act of 1792 the names of the districts were changed and new districts created, having as before, it would appear, a Court in each dis-

the Legislative Council and Assembly of Canada, enacts as follows:

trict: (32 Geo. III. cap. 8.) Doubts having arisen as to the constitution of these Courts they were afterwards placed upon a surer basis: (34 Geo. III. cap. 3.) From the first the people of Upper Canada were favorable to a system of local administration. In the first session of the Parliament of Upper Canada, besides the Acts already noticed, the Legislature, anxious to contribute to the convenience of the inhabitants, established Courts for the recovery of "small debts," known as Courts of Requests: (32 Geo. III. cap. 6.) These Courts, however objectionable in other respects, had at least the merit of being uniform in constitution and jurisdiction. Their jurisdiction was gradually increased and their procedure improved. At first presided over by Commissioners who were not professional men, the Courts fell into disrepute. Afterwards the appointment of professional men of standing improved the efficiency of Division Courts (the new name for Courts of Request), and gave to them a character which commands the respect and favor of the masses. Division Courts now possess an ordinary jurisdiction to ten pounds, and in certain cases of contract to twenty-five pounds. Thus they embrace a large share of the business of the country. But the Editor's present business being with County Courts, it is not his intention to do more than make this incidental reference to Division Courts. The origin of District Courts, as already explained, probably may be dated back as far as 1787. However, the first Act which gave them a standing and influence was that of 1794, intitled "An Act to establish a Court for the cognizance of small causes in each and every District of this Province:" (34 Geo. III. cap. 3.) It was amended by 37 Geo. III. cap. 6; 38 Geo. III. cap. 3; 51 Geo. III. cap. 6; and 59 Geo. III. cap. 9. A consolidation of all these Acts next followed: (2 Geo. IV. cap. 2); but the Act consolidating them was itself repealed, amended and re-enacted: (8 Vic. cap. 13.) In these Acts may be traced the growth of the County Courts now existing in Upper Canada. At first it was not necessary that the Judges who presided over these Courts should be barristers, but in 1845, when the practice underwent some improvement, the Judges were thenceforth required to be barristers and residents within the local limits of their respective jurisdictions: (8 Vic. cap. 13, s. 3.) The jurisdiction of the Courts was at first merely local, and their process had no effect beyond the limits of the particular district. From this the first great step was that of allowing writs both of mesne and final process to be served or executed in any County of Upper Canada: (13 & 14 Vic. cap. 52, ss. 2, 3.) The extent of jurisdiction, originally £15 in cases of unliquidated demand and £40 in cases of liquidated demand: (2 Geo. IV. c. 2, s. 3), has also been gradually enlarged. The amounts at present are respectively £50 and £100: (Co.C.P.A, 1856, s. 20.) Equity powers to a limited extent have also been conferred: (16 Vic. cap. 119.) The enactments regulating the practice of County Courts, formerly few in number, are now very considerable.

It is indispensable that every Court of Justice be governed by fixed rules of practice restraining caprice and securing uniform action. But if the rules be either too refined or too difficult of application, they may operate as a denial of justice. On the other hand, if there be no rules or rules disregarded, the Court becomes arbitrary. The chief end of legislative action in reference to County Courts has been to apply to them only such rules as are suitable to their constitution and jurisdiction. The Act now under consideration is in this respect a great improvement upon all Acts preceding it. It having been found

Certain sections of the Acts,

I. (*c*) From the time when this Act shall commence and take effect, the tenth, eleventh, twelfth, fourteenth, fifteenth,

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necessary to simplify and expedite proceedings in the Superior Courts, the same was found necessary for County Courts. This has been done so as to conform the practice of County Courts as nearly as possible to that of the Superior Courts. Where there are many Courts of co-ordinate jurisdiction, it is advisable that there be uniformity of practice. The attainment of such an object cannot be better effected than by having the Superior Courts not merely as Courts possessing an appellate jurisdiction, but as models for the imitation of inferior Courts. The Judges of the latter have all the benefit of judicial expositions in the former. From these expositions if having a relation directly or indirectly to County Courts there can be no departure of long continuance. The exercise of the appellate jurisdiction of the Superior Courts must always have the effect of compelling a due observance of established precedents. Hence a tendency to one general uniform and universal practice in all our Common Law Courts of Record, superior and inferior. To the bench, to the bar, and indeed to the profession at large, this is an immense advantage. Instead of there being several sets of rules for as many separate Courts, there will be one set of rules equally to be observed in all the Courts. The lawyer who studies these rules becomes capable with satisfaction to himself and security to his client to practice in any one of the Courts or in all of them.

The mode taken in the Act under consideration to assimilate the practice of County Courts to that of the Superior Courts may now be explained. It is first by the repeal of those clauses in existing County Courts statutes which would interfere with the new practice, and second, having regard to the constitution, nature, and objects of County Courts by incorporating in the Co. C. P. Act, 1856, all the provisions of the C. L. P. A, 1856, which are applicable to these Courts. The Ejectment clauses of the C. L. P. A. are not incorporated in the Co. C. P. A, for County Courts have no jurisdiction in any action where the title to land shall be brought in question. Nor are the Mandamus clauses of the C.L.P.A, 1856, because probably of the prerogative nature of the proceeding. Nor the injunction clauses, perhaps for similar reasons. But all the clauses relating to ordinary procedure from the commencement to the conclusion of an action and proceedings subsequent to judgment have been extended to County Courts. In this manner the practice of our Superior and Inferior Courts is as nearly as possible placed on the same footing. And that it was the manifest intention of the Legislature to do so may be gathered from the enactment, which declares that in any case not expressly provided for by law, the practice and proceedings in County Courts shall be regulated by and conform to the practice of the Superior Courts: (Co. C. P. A, 1856, sec. 19.) The mode of extending the practice of the Superior Courts to the County Courts, and of making the one conformable to the other, is first by expressly *applying* such sections of the C.L.P.A, 1856, as could with certain general modifications be readily applied: (Co. C. P. A, s. 2), and the second is by *altering* the language of the sections in the C. L. P. A, 1856, that could not be thus applied, so as to suit the constitution, jurisdiction, and periods of sitting in the County Courts. Of this, s. 4 of the Co. C. P. A, 1856, taken from ss. iv. and v. of the C. L. P. A, 1856; s. 6, taken from s. x. of the C. L. P. A, 1856; and s. 15, taken from s. cli. of C.L.P.A, 1856, may be mentioned as examples.

(*c*) In pursuance of the plan mentioned in the preceding note, the legislature here repeal certain parts of existing Acts either inconsistent with the practice here enacted or otherwise

sixteenth, seventeenth, eighteenth, nineteenth, twenty-second, twenty-third, twenty-fourth, twenty-eighth, thirty-first, thirty-second, thirty-fifth, thirty-ninth, forty-first, forty-fifth, and forty-sixth sections of an Act of the Parliament of this Province passed in the eighth year of Her Majesty's Reign, intituled, 8 Vic. c. 13. *An Act to amend, consolidate, and reduce into one Act the several laws now in force, establishing or regulating the practice of District Courts in the several Districts of that part of*

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unnecessary. The sections repealed are principally those which have reference to matters of practice for which other and more ample provision is now made. Thus, since s. xcviii. and following sections of C. L. P. A, 1856, as to pleading have been expressly applied to County Courts, ss. 10, 11, 12 of 8 Vic. cap. 13, which contain regulations on the same subject are unnecessary and therefore repealed. In the same manner s. xxii. and following sections of C. L. P. A, 1856, which provide for the commencement of bailable actions having been expressly extended to County Courts, ss. 14, 15, 16, 17, and 18 of 8 Vic. c. 13, relating to the same subject have also been repealed. So one might if necessary proceed, accounting in detail for the repeal of each part of an Act in words repealed by the section here annotated. To do so would be of no real utility, though probably not a little interesting. Those interested, however, can by a simple comparison of the C.L.P.A, 1856, with the repealed sections with certainty and without difficulty satisfy themselves. It by no means follows that all parts of Acts regulating the practice of County Courts which are not in words repealed yet remain in full force. For instance, s. 9 of 8. Vic. cap. 13, which enacts that the time for pleading, &c., shall be *four* days, must be taken to be virtually repealed by s. cxii. of C.L.P.A, 1856, made to apply to County Courts, which enacts that the time shall be *eight* days. The two provisions are wholly inconsistent. The latter being expressly adopted in the Co. C. P. A, as if "repeated at length" therein, and being the more recent provision of the two, is the last declared intention of the legislature, and therefore an abrogation of a former inconsistent declaration. The same may be said of s. 5 of 13 & 14 Vic. cap. 52, as to summons and orders to compute when read in connection with s. cxli. of C.L. P.A, 1856, which makes other provision for computations, and is applied to County Courts. The view taken as to s. 9 of 8 Vic. c. 13, being impliedly abrogated, is confirmed by subsequent express action of the legislature, for by the C. L. P. A, 1857, that section is expressly repealed: (s. 19.) There are still other clauses which though not in words repealed, and though not inconsistent with the new Act are unnecessary and to a great extent superseded. Such is s. 47 of 8 Vic. cap. 13, authorising County Judges under certain circumstances to order references to arbitration. This clause must be more or less overridden by ss. lxxxiv. and clvi. of C.L.P.A, 1856, as to references to arbitration, which have been applied to County Courts. Indeed, s. 10 of the Co. C. P. A. 1856, also contains provisions of a like nature: (see ss. 10 *et seq.*) If there be a provision retained in the old Act precisely the same as one to be found in the new Act, the retention of the former, though unnecessary, cannot be of any harm. Thus, it is enacted by s. 2 of 13 & 14 Vic. cap. 52, that writs of summons, &c., "may be served in any County of Upper Canada.' As to writs of summons, s. xxxi. of the C.L.P.A, 1856, which is applied to

this Province formerly Upper Canada; (*d*) the second, third, and fourth sections of an Act of the Parliament of this Province, passed in the twelfth year of Her Majesty's Reign, intituled, *An Act to amend and extend the provisions of the Act of this Province, intituled, 'An Act to amend, consolidate and reduce into one Act the several laws now in force, establishing or regulating the practice of the District Courts in the several Districts of that part of this Province, formerly Upper Canada;* (*e*) the fourth section of an Act of the Parliament of this Province, passed in the thirteenth and fourteenth years of Her Majesty's Reign, intituled, *An Act to alter and amend the Act regulating the practice of the County Courts in Upper Canada, and to extend the jurisdiction thereof;* (*f*) together with all other Acts or parts of Acts of the Parliament of Upper Canada or of this Province at variance or inconsistent with the provisions of this Act, shall be and the same are hereby repealed, (*g*) except so far as the said Acts or any of them, or anything therein contained repeal any former Act or Acts, or any part thereof, all which said last mentioned Act or Acts shall remain and continue so repealed, (*h*) and excepting also so far as the said Acts or parts of Acts hereby repealed and the provisions thereof, or of any of them, shall and may be necessary for supporting, continuing and upholding any Writs that shall have been issued, or proceedings that shall have been had or taken, before the commencement of this Act, and any further proceedings taken or to be taken thereon. (*i*)

12 V. c. 00, — and

13 & 14 V. c. 52;

And other provisions inconsistent with this Act repealed.

Exception: as to repealed Acts, pending proceedings, &c.

County Courts, is not only in effect but in words the same. As to writs of execution there is a similar provision unrepealed: (13 & 14 Vic. cap. 52, s. 3.) And with the latter provision s. clxxxvi. of C. L. P. A. 1856, corresponds. How far early provisions are superseded by those more recent, it is for the Courts to decide. The exercise of caution with respect to the repeal of the old Acts, was not without reason, and must be so considered at least when it is remembered that County Courts, unlike the Superior Courts, have no jurisdiction that is not derived from statute: Their powers nherent but statutory. The repeal of a section containing a power without adequate substitution might have led to very serious inconvenience. Feeling this, the Legislature no doubt thought it safer to repeal too little than to repeal too much.

(*d*) For the unrepealed portions of this Act see Har. Prac. Stats. p. 73.

(*e*) For same, see Har. Prac. Stats. p. 166.

(*f*) For same, see Har. Prac. Stats. p. 183.

(*g*) See note *i* to s. cccxviii. of C. L. P. A, 1856.

(*h*) See note *j* to same.

(*i*) See note *k* to same.

II. (*j*) The enactments contained in the ninth, fourteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, thirtieth, thirty-first, thirty-second, thirty-third, thirty-fourth, thirty-fifth, thirty-sixth, thirty-seventh, thirty-eighth, thirty-ninth, fortieth, forty-first, forty-second, forty-third, forty-fourth, forty-fifth, forty-sixth, forty-seventh, forty-eighth, forty-ninth, fiftieth, fifty-first, fifty-second, fifty-third, fifty-fourth, fifty-fifth, fifty-sixth, fifty-seventh, fifty-eighth, fifty-ninth, sixtieth, sixty-first, sixty-second, sixty-third, sixty-fourth, sixty-fifth, sixty-sixth, sixty-seventh, sixty-eighth, sixty-ninth, seventieth, seventy-first, seventy-second, seventy-third, seventy-fourth, seventy-fifth,

Certain sections of the Common Law Procedure Act of this Session, and certain Rules to be made under it, to apply to the County Courts.

(*j*) In pursuance of the plan described in note *b* to s. 1 it is the design of this enactment to apply many sections of the C.L.P.A, 1856, to County Courts. This is not without precedent. The Eng. C. L. P. A, 1854, applies absolutely certain of its provisions to every Court of civil judicature in England and Ireland: (s. 103.) It also gives power to the Queen in Council to apply all or any parts of its provisions to all or any of the Courts of Record in England and Wales: (s. 105). Few of the sections of our C. L. P. A, 1856, can be applied to our County Courts without some modification making necessary either an actual or presumed alteration of language. With the latter alteration only is the Editor at present concerned. The sections applied are extended to County Courts as if "repeated at length in this Act," but subject to the following general modifications—*First.* "All the powers under the said sections exercisable by the Court of Queen's Bench or the Court of Common Pleas, or by any one of the Judges thereof, shall and may in like manner be exercisable by the Judges of the County Courts respectively in term or vacation as the case may require as to matters and proceedings therein within the jurisdiction of the said County Courts respectively." *Second.* "Such of the said sections as relate to proceedings in *Banc* or at *Nisi Prius* respectively shall be understood as referring and relating to the sittings of the said County Courts in term and the sittings thereof for the trial of issues of fact as the case may be." *Third.* "All the provisions of the said sections applicable to Deputy Clerks of the Crown shall apply to the Clerks of the County Courts respectively." *Fourth.* In order that there may be no failure of the intention of the legislature, the provisions are applied "subject to such other modifications as may be necessary to give full and beneficial effect to the said several sections in their extension and application to the County Courts, and all actions and proceedings therein within the jurisdiction of the same Courts respectively." The value of the last mentioned provision, which is ample enough to cover the preceding provisions, cannot at present be fully estimated. It reposes in the tribunals, whose duty it is to construe the sections a most extensive discretion. No difficulty of moment calling for an exercise of that discretion, much less a difference of opinion among the many Judges presiding over County Courts has yet arisen. Latent difficulties, though few, do however exist. The first section applied is s. ix. of C. L. P. A, 1856. It enacts that all proceedings

seventy-sixth, seventy-seventh, seventy-eighth, seventy-ninth, eightieth, eighty-first, eighty-second, eighty-third, eighty-eighth, eighty-ninth, ninetieth, ninety-first, ninety-second, ninety-third, ninety-fourth, ninety-fifth, ninety-sixth, ninety-eighth, ninety-ninth, one hundredth, one hundred and first, one hundred and second, one hundred and third, one hundred and fourth, one hundred and fifth, one hundred and sixth, one hundred and seventh, one hundred and eighth, one hundred and ninth, one hundred and eleventh, one hundred and twelfth, one hundred and thirteenth, one hundred and fourteenth, one hundred and fifteenth, one hundred and sixteenth, one hundred and seventeenth, one hundred and eighteenth, one hundred and nineteenth, one hundred and twentieth, one hundred and twenty-

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to final judgment shall be carried on in the office from which first process in the action was sued out, and that the service of all papers and proceedings subsequent to the writ shall be made upon the defendant or his attorney, and that "if the attorney of either party do not reside or have not a duly authorised agent residing in the county wherein such action was commenced, then service may be made upon the attorney wherever he resides, or upon his duly authorised agent in Toronto." There appears to be no reason why this provision should not be read as incorporated in the Co. C. P. A, 1856, without special modification. Then if so read, what is the effect of it? That if the attorney of either party reside out of the county, in the County Court of which an action has been commenced, and have no duly authorised agent resident in that county, papers and proceedings subsequent to the writ may be served on such attorney in whatever county he resides or on his agent in Toronto. The service of papers and proceedings on the Toronto agent of a country attorney in a County Court suit is the point to which the Editor chiefly desires to direct attention. This at first blush appears to be an extension in words if not in practice of the agency system. Whether the practice prevailed to any extent before the passing of the Act or not, there seems to be now for the first time an express provision to authorise it. This provision ought perhaps to be read in connection with N. R. 137, which requires country practitioners to make an entry in Toronto (in a book to be kept for the purpose) of the name and address of his agent, and provides that if such country attorney "neglect to make the entry in this rule mentioned, the fixing up of a copy of any pleading, notice, summons, order, rule, or other proceeding for, such country attorney in the Crown Office at Toronto shall be deemed a sufficient service." It is further enacted by the C.L.P.A, 1857, that "the provisions of the C. L. P. A, 1856, and all rules of Court made under or by virtue thereof shall, so far as the same are or may be made applicable extend and apply to all proceedings to be had or taken under this Act," &c.: (s. 31); and that s. 31 shall extend and apply to and be in force in the several County Courts in Upper Canada and actions and proceedings therein respectively, as also the rules and forms already made or to be made as mentioned in the said twentieth (*qu.* thirty-first) section, subject to the modifications expressed in the second section of the County Courts Procedure Act, 1856:" (s. 32.) It may be held as a result of these enactments that

first, one hundred and twenty-second, one hundred and twenty-third, one hundred and twenty-fourth, one hundred and twenty-fifth, one hundred and twenty-sixth, one hundred and twenty-seventh, one hundred and twenty-eighth, one hundred and twenty-ninth, one hundred and thirtieth, one hundred and thirty-first, one hundred and thirty-second, one hundred and thirty-third, one hundred and thirty-fourth, one hundred and thirty-fifth, one hundred and thirty-sixth, one hundred and thirty-seventh, one hundred and thirty-eighth, one hundred and thirty-ninth, one hundred and fortieth, one hundred and forty-first, one hundred and forty-second, one hundred and forty-fourth, one hundred and forty-fifth, one hundred and forty-eighth, one hundred and forty-ninth, one hundred and fifty-

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N. R. 137 entitles a party in a County Court suit under the circumstances specified in the rule, to fix up papers in the Crown Office, which shall be deemed good service thereof. The point, however, is involved in doubt. The N. R. 137 is under the operation of the C. L. P. A. 1857, so far as *applicable* in force as to proceedings in County Courts. If applied to its fullest extent so as in the cases intended to authorize service of papers in a County Courts suit by affixing them "in the Crown Office at Toronto," the first question would be, which Crown Office is meant —that of the Queen's Bench or Common Pleas? for in each of the Superior Courts there is a "Clerk of the Crown and Pleas:" (12 Vic. cap. 63, s. 11.) Section x. of C. L. P. A., 1856, the next in order, which authorises judgment to be entered upon a *cognovit actionem, &c.*, which "shall have been given in the first instance and before the suing out of any process," being incapable of extension to County Courts except with *special* modifications, has been so modified and substantially enacted in the Co. C. P. A, 1856: (s. 6.) The three subsequent sections (xi. xii. xiii.) belong for the most part exclusively to Superior Courts, and owing to the constitution of County Courts could not either with general or special modifications be applied to those Courts. Then s. xiv. as modified, empowering clerks of County Courts to sign and issue rules on Sheriffs and Coroners for the return of process applies in its integrity. The section which directs that a Deputy Clerk of the Crown shall keep books "in which shall be minuted and docketed all judgments entered by such Deputy Clerk of the Crown:" (s. xv), instead of being absolutely applied as other sections, is made the subject of a distinct provision in the Co. C. P. A, 1856: (s. 7.) Then follow in the C. L. P. A, 1856, twenty-seven sections "with respect to the writs for the commencement of personal actions in the said Courts against defendants whether in or out of the jurisdiction of the Courts: (ss. xvi–xlii.) All of these, with the exception of s. xxix, are applied in express terms to County Courts. The first three sections of this class (ss. xvi. xvii. xviii.) as to the form and contents of the writ of summons in personal actions require no explanation in this place. But s. xix. cannot be passed over without remark. It enacts that every writ of summons and capias "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." This pro-

sixth, one hundred and fifty-seventh, one hundred and fifty-eighth, one hundred and fifty-ninth, one hundred and sixtieth, one hundred and sixty-first, one hundred and sixty-second, one hundred and sixty-third, one hundred and sixty-fourth, one huddred and sixty-fifth, one hundred and sixty-sixth, one hundred and sixty-seventh, one hundred and sixty-eighth, one hundred and sixty-ninth, one hundred and seventy-first, one hundred and seventy-second, one hundred and seventy-third, one hundred and seventy-fourth, one hundred and seventy-fifth, one hundred and seventy-sixth, one hundred and seventy-seventh, one hundred and seventy-eighth, one hundred and seventy-ninth, one hundred and eightieth, one hundred and eighty-first, one hundred and eighty-second, one hundred and

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vision may for convenience be divided into two branches; 1st, that all writs of summons and capias shall be tested in the name of the Chief Justice for the time being; 2d, that if there be no Chief Justice, these writs shall be tested in the name of the senior Puisne Judge. The first branch of the provision with modification by substitution for "Chief Justice" of the words "senior Judge of the County Court," is clearly applicable to County Courts. (16 V. c. 20, s. 1.) The second branch of the provision is not entirely so free from doubt. Though there may be one or more Judges in each County the one whose commission is "of the oldest date" being considered the Senior: (8 Vic. cap. 13, s. 2; 16 Vic. cap. 20), or in the case of the illness, unavoidable absence, or absence on leave of a sole County Judge, there may be a deputy appointed: (Co. C. P. A, 1857, s. 14); in neither case can there be said to be a *vacancy* in the office of the Senior Judge. The absence of a Judge from the Province does not make it improper to test writs in his name: (see note *u* to s. xix. of C L. P. A, 1856.) The next section applied which requires the officer issuing a writ to make the ordinary memorandum in the margin needs no comment: (s. xx.) nor the section which requires the attorney to make the usual indorsements on the writ: (s. xxi.) But s. xxii, which provides that in all all actions wherein it shall be intended to hold any person to special bail, the process "may be directed to the Sheriff of any County or Union of Counties in Upper Canada," deserves some attention. Since a plaintiff is not obliged in ordinary personal actions to sue a defendant in the County Court of the county where he resides, the utility of the provision secures for it an absolute adoption as a part of the County Courts Procedure. It is not clear but that the fact of its adoption is of itself an extension of the jurisdiction of County Courts. Before 1850 writs of summons could only be served, and writs of capias only executed within the limits of the county from the Court of which process issued. By a Statute of that year it was enacted that "all writs of *summons* sued out, &c. (not mentioning *capias*), may be served in any County of Upper Canada:" (13 & 14 Vic. cap. 52, s. 2); and that "writs of subpœna and writs of execution against goods and chattels, lands and tenements, and also *all process against the person when authorised by law*, &c., may be issued from the County Court in which any *judgment* has already or hereaftor may be entered up, or action brought into any other County in Upper Canada, and served and executed there," &c.: (*Ib.* s. 3.)

eighty-third, one hundred and eighty-fourth, one hundred and eighty-fifth, one hundred and eighty-sixth, one hundred and eighty-seventh, one hundred and eighty-eighth, one hundred and eighty-ninth, one hundred and ninetieth, one hundred and ninety-first, one hundred and ninety-second, one hundred and ninety-fourth, one hundred and ninety-fifth, one hundred and ninety-sixth, one hundred and ninety-seventh, one hundred and

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Of these two sections of the Act of 1850 the one is not meant to extend to writs of *capias*, and the other is so singularly worded as to leave the meaning obscure. Upon the question whether a writ of *capias* as first process can be issued from the County Court of one county to be executed in another county, there is no longer room for doubt. The enactment of s. xxii. of C. L. P. A, 1856, and its extension to County Courts has set the doubt at rest. S. xxiii. of C. L. P. A, 1856, is also applied to County Courts. It enacts that it shall not be lawful to issue any writ of capias unless an affidavit be first made by plaintiff, his servant, or agent of plaintiff's cause of action, and provides that "it shall not be necessary that any such affidavit shall be at the time of the making thereof entitled of or in any Court, but that the style and title of the Court may be added at the time of suing out the process," &c. There is no reason why this proviso should be held applicable to County Courts. The cause which made it necessary as regards Superior Courts does not exist in County Courts. The cause is sufficiently explained in note *t* to s. xxiii, and need not be here repeated. There is no reason why affidavits made for the purpose of issuing writs of capias from a County Court should not be intitled in that Court. The proviso, however, though not applicable to County Courts with the same force as to Superior Courts, cannot be said to be wholly without existence. The sections between s. xxiii. and s. xxix. need no remark; but s. xxix. as already noticed, not being applied to County Courts in express terms is in substance enacted in the C. L. P. A, 1856: (s. 8.) There is nothing in any of the sections between xxix. and xxxv. that appears to need any remark. It is enacted in s. xxxv. that "in case any defendant being a British subject is residing out of the jurisdiction of the said Superior Courts it shall be lawful for the plaintiff to issue a writ of summons," &c. Here, if the words "County Courts" be substituted for the words "Superior Courts," according to the ordinary general verbal modifications, there can be nothing gained by the extension of the section, thus altered, to County Courts. The phrase "residing out of the jurisdiction of the Superior Courts," &c., is descriptive of *locality*, the jurisdiction of these Courts extending over Upper Canada. The section as applied to County Courts ought, it is presumed, to be read, "In case any defendant being a British subject is residing *out of Upper Canada* it shall be lawful, &c." If this be done, the result is a further extension of the jurisdiction of County Courts. The Act of 1850 gave any one County Court a jurisdiction throughout Upper Canada. The Act here annotated gives jurisdiction without Upper Canada. This is an important change. To give any effect whatever to s. xxxv. the construction must be as herein supposed. To give "full and beneficial effect" to it the construction ought to be so. The declared intention of the Act is not only "to simplify and expedite the proceedings in County Courts, but to alter and amend the *law* in relation to these Courts." These observations will equally apply to s. xxxvi, allowing actions to be conducted against per-

ninety-eighth, one hundred and ninety-ninth, two hundredth, two hundred and first, two hundred and second, two hundred and third, two hundred and fourth, two hundred and fifth, two hundred and sixth, two hundred and seventh, two hundred and eighth, two hundred and ninth, two hundred and tenth, two hundred and eleventh, two hundred and twelfth, two hundred and thirteenth, two hundred and fourteenth, two hundred and

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sons not being British subjects residing without the jurisdiction of the Superior Courts. The two following sections (ss. xxxvii., xxxviii.) explain themselves without alteration or amendment. In s. xxxix. which enacts that a writ for service within the jurisdiction may be issued and marked as a concurrent writ with one for service out of the jurisdiction, and *vice versa*, the modifications suggested in ss. xxxv. and xxxvi. if made will be strongly marked; thus "a writ for service within Upper Canada may be issued and marked as a concurrent writ with one for service without Upper Canada," &c. In s. xl. similar special modification must be made; but upon the consideration of this section a still further question presents itself. It enacts that any affidavit for the purpose of enabling the Court or a Judge to direct proceedings to be taken against a defendant resident out of the jurisdiction of the Superior Courts may be sworn before certain public functionaries named, and then provides "that if any person shall forge any signature to any such affidavit, or shall use or tender in evidence any such affidavit with any false, forged, or counterfeit signature thereto, knowing the same to be false, &c., he shall be guilty of felony, and shall upon conviction be liable at the discretion of *the* Court to be kept confined at hard labour in the Public Penitentiary of this Province for any term not less than four years nor more than ten years," &c. It might seem upon reading this section as applied to County Courts that *the* Court intended is *any* County Court, and that *quoad* the matters contained in the section criminal jurisdiction is conferred upon these Courts; but the more likely construction is, that "the Court" means *a* Court *having criminal jurisdiction;* such as Courts of Oyer and Terminer and General Gaol Delivery, &c. *First*, there is a statement of the offence, "forge any signature, &c.," which, if a party do, "he shall be guilty of felony." Thus far the offence is defined and characterized. Then *secondly*, it is declared what shall be the punishment of the party for such offence, "and shall upon conviction be liable at the discretion of the Court to be kept confined, &c." The offender shall upon *conviction*—that is to say, upon enquiry, trial, and judgment, before a tribunal having power to convict, be liable, &c. This would seem to intend some ordinary Court now having criminal jurisdiction, such as Courts of Assize, Oyer and Terminer, General Gaol Delivery, and Quarter Sessions. It is also provided by s. xl. of C. L. P. A. 1856, as applied to County Courts, that "if any person shall wilfully and corruptly make a false affidavit before such Chief Justice, &c., every person so offending shall be deemed and taken guilty of perjury," &c. The foregoing remarks as to forgery apply equally to the offence of perjury and its punishment. The next section is xli, which commences by enacting that "in all cases where the defendant resides within the jurisdiction of the Court, &c., the writ may be specially indorsed," &c. This may be read "in all cases where the defendant resides within Upper Canada," &c. Such is the obvious intent of the section when examined in connection with ss. xxxv-vi. already noticed. Then as to

fifteenth, two hundred and sixteenth, two hundred and seventeenth, two hundred and eighteenth, two hundred and nineteenth, two hundred and eighty-seventh, two hundred and eighty eighth, two hundred and eighty-ninth, two hundred and ninetieth, two hundred and ninety-first, two hundred and ninety-second, two hundred and ninety-fifth, two hundred and ninety-sixth, two hundred and ninety-seventh, two hundred and

s. xlii, which enables plaintiff, after having commenced a suit by writ of summons to issue a *capias* "that may be directed to the sheriff of any County or Union of Counties in Upper Canada, the remarks upon s. xxii. *ante*, will apply. This completes so much of the C. L. P. A, 1856, as relates to "writs for the commencement of personal actions against defendants," &c., "whether in or out of the jurisdiction of the Courts." The sections of the C. L. P. A, 1856, having been arranged according to the ordinary course of an action from first process to execution, and these sections having been adopted in numerical order, the sections as read in the Co. C. P. Acts must preserve the arrangement, which is both desirable and convenient. The class of sections next in order of succession is that which relates to "absconding debtors," which being a class *sui generis* does not form a link in the course of an ordinary suit. This class numbers sixteen sections: (ss. xliii–lviii,) all of which have been extended to County Courts. Of these sections s. xliv. is the first that engages attention. The question which arises upon the construction of it is whether Judges of County Courts have jurisdiction to issue attachments for amounts beyond the jurisdiction of their Courts. This question received consideration in note *d* to s. xliv. of C. L. P. A, 1856. In addition to the observations there made, it is only necessary to state that as the question has never been brought judicially before the Courts to the Editor's knowledge, the observations have neither been confirmed nor reversed. They must therefore stand upon their own merits. The opinion of the Editor still is that County Judges may issue attachments against absconding debtors for any amount, however large; but that no proceedings to judgment can be had in a County Court unless for an amount within the limited jurisdiction of such Court. In the first case, where the amount exceeds the jurisdiction of County Courts, County Judges act as it were in aid of the Judges of the Superior Courts. In the second case, where the amount is within their jurisdiction, they exercise the ordinary jurisdiction of their own Courts. The only alterations necessary in s. xlv. seem to be general modifications. The next section (s. xlvi.) which admits of the issue of concurrent writs of attachment "to any sheriff other than the sheriff to whom the original writ was issued," fully coincides in letter and in spirit with the ordinary jurisdiction of County Courts: (18 & 14 Vic. cap. 52, s. 2.) Then s. xlvii. requires no remark; but s. xlviii, which enacts that upon putting in and perfecting special bail, &c., "the action shall proceed as in ordinary cases begun by writ of capias," must be read in respect of County Courts only so far as the amount due is within the jurisdiction of those Courts. The same may be said of that part of the section which upon defendant proving that he was not an absconding debtor at the time of the issue of the attachment, gives to defendant his costs and allows plaintiff to issue execution only for the balance between the defendant's costs and plaintiff's verdict. The balance in such a case must, it is apprehended, be one within the ordinary jurisdiction of County Courts. A still further

ninety-eighth, two hundred and ninety-ninth, three hundredth, three hundred and first, three hundred and second, three hundred and third, three hundred and fourth, three hundred and fifth, three hundred and sixth, three hundred and seventh, three hundred and eighth, three hundred and ninth, three hundred and tenth, and the three hundred and twelfth sections of an Act passed in the present session of Parliament and

question, however, may arise when the balance is so small as to be within the jurisdiction of a Division Court: (see 13 & 14 Vic. cap. 53, s. 78; Har. Prac. Stats. p. 185.) From s. xlviii–lviii. the Editor has not been able to discover any provision requiring more than general modifications. Then come a number of sections "with respect to the appearance of the defendant and the proceedings of the plaintiff in default of appearance." These number eight, being from lix–lxvi, all of which are applied to County Courts. Their application, subject to general modifications, is not to be questioned. The Editor therefore passes on to the ten following sections (lxvii–lxxvi), "with respect to the joinder of parties to actions." Upon reading these, until one reaches s. lxxv. there appears to be nothing demanding special attention. The last named section enacts that "causes of action of whatever kind, provided they be by and against the same parties and in the same rights, may be joined in the same suit," &c. Replevin and ejectment are excepted. The exception of ejectment is superfluous, inasmuch as County Courts have no jurisdiction as to that form of action. The section then proceeds to enact "that where two or more causes of action so joined are *local* and arise in *different* counties the venue may be laid in either of such counties," but that the Court or Judge "may order separate records to be made and separate trials to be had," &c. The application of this section in its entirety to County Courts leaves the power of a County Judge in some doubt. Without question the County Judge of any county may say to a plaintiff "You have no right to sue for all these causes of action in one suit in my county," but he cannot say, "You must make up separate records for the counties of B. C. and D. and have separate trials in those counties." The Judge of the latter counties is free to act independently of any such order. The law is different with regard to Superior Courts, which have a jurisdiction in each one and all of the counties of Upper Canada, and may order trials in any of them to be named for the purpose. But an examination of the Co. C. P. A, 1856, proves the extension of s. lxxv. to County Courts without special modifications to be a clerical error. The legislature, acting as if it were not in words extended has modified it so as to suit County Courts and enacted it in separate form as an independent section: (Co. C. P. A, 1856, s. 9.) Section lxxvi., which is the last of the group of sections relating to the joinder of parties, appears to need no remark. The sections which follow (lxxvii–lxxxiii), seven in number, are all applied and applicable to County Courts. They are enacted "for the determination of questions raised by the consent of the parties without pleading." They must all, however, be read in reference to the limited jurisdiction of County Courts as to pecuniary demands. Thus, s. lxxviii, which provides that "the parties may if they think fit, proper, &c., enter into an agreement that upon the finding of the jury, &c., a sum of money to be fixed by the parties, &c., shall be paid by one of such parties to the other of them either with or without the costs of the action." The sum here intended must, it is believed, be one in no event

known as the "Common Law Procedure Act, 1856," and the several provisions of the Rules to be made in pursuance of the said Act, or such of them as may relate to the said sections, shall apply and extend to the several County Courts in Upper Canada, and actions and proceedings therein respectively; and this Act shall be read and construed as if the said several sections of the said "Common Law Procedure Act, 1856," were

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exceeding the jurisdiction of County Courts when the suit is pending in one of these courts. This observation holds good as regards s. lxxxii, which contains a similar provision as the last, where judgment is given by the Court in *banc*, upon points of law and not of fact. The sections "for the more expeditious determination of matters of mere account," next call for consideration. In the C. L. P. A, 1856, there are fourteen sections relating to this subject, viz., lxxxiv–xcvii. Five out of the fourteen of these have not been applied to County Courts. Four of them (lxxxiv–lxxxvii) owing to the necessity for much alteration in language have with special modifications been substantively enacted: (Co. C.P. A, 1857, 10–18.) The remaining section (xcvii) cannot from its nature apply to any other than the Superior Courts. Of the nine sections which are left, with perhaps the exception of xcvi. nothing suggests itself for observation in this place. It enacts that when any award made on any submission directs that possession "of any lands or tenements capable of being the subject of an action of ejectment shall be delivered to any party, &c., it shall be lawful for the Court of which the document authorising the reference is or is to be made a rule or order to order any party, &c., to deliver possession, &c., and such rule or order to deliver possession shall have the effect of *a judgment in ejectment*, &c." To show the inapplicability of this section to County Courts, it is only necessary to mention that County Courts have in general no jurisdiction whatever in ejectment. The Editor cannot help thinking that the legislature did not intend to apply it to County Courts, and that the insertion of it with the sections extended to County Courts was inadvertent. The next class of sections in the C.L.P.A, 1856, is that "with respect to the language and form of pleadings in general." These are nine in number: (xcviii–cvi), and have all been applied to County Courts. Saving s. cii. none call for comment. It is provided by this section that "no rule to declare, reply, plead, &c., shall be allowed but a notice requiring the opposite party to declare, &c., within *eight* days, otherwise judgment shall be sufficient." The application of this section in its integrity to County Courts must for the reasons mentioned in note *c* to s. 1 of this Act be taken to be an abrogation of s. 9 of 8 Vic. cap. 13, although that section is by some oversight preserved in the repealing clause of this Act. This view has been confirmed by the Legislature in the repealing clause of C. L. P. A, 1857: (s. 19.) Nearly allied to the last class of sections is that which follows, passed "with regard to the time and manner of declaring:" (cvii–cx.) These, four in number, of which three have been applied to County Courts, need no more than general modifications to make them fully applicable to County Courts. They require no explanation as regards their application. The fourth section and that which is not applied, relates to averments in actions of libel and slander: (s. cx.) The next class of sections is that "as to pleas and subsequent pleadings:" (cxi–cxxix.) These are twenty-nine in number, and are applied to County Courts. With respect to s. cxii. which enacts that "in cases where the defendant is within

The said sections to be subject to certain modifications, as applied to County Courts.

repeated at length in this Act; subject to the following modifications, that is to say, all the powers under the said sections exercisable by the Court of Queen's Bench or the Court of Common Pleas, or by any one of the Judges thereof, shall and may in like manner be exercisable by the Judges of the County Courts respectively in term or vacation, as the case may require, as to matters and proceedings therein within the jurisdiction of

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the jurisdiction, the time for pleading in bar unless extended, &c., shall be *eight* days," &c., the remarks already made upon s. cii. may be read as applicable to it. Little is requisite in this class of cases to assimilate it to County Courts jurisdiction and practice. Sec. cxxiii. which declares that a plea shall be good though it treat an alleged breach of contract as a wrong, is confirmed by s. 20 of Co. C. P. A, 1856, which in effect does away with the distinction between actions on contract and for tort. The legislature in the C. L. P. A, 1856, next give "examples of the statements of causes of action and of forms of pleading." This is done in one section (cxl), including schedules, the whole of which are applied to County Courts, and being applicable subject to general modifications call for no remark. Next there is a class of sections "with respect to judgment by default and the mode of ascertaining the amount to be recovered thereon:" (cxli–cxlv.) These number five, four of which have been applied to County Courts. The one not applied (cxliii), which makes provision for ascertaining the amount of damages to be recovered by plaintiff when substantially a matter of calculation, is in effect enacted in the Co. C. P. A, 1856: (s. 14.) The class of sections which follow "with respect to notice of trial or of assessment of damages and countermand thereof:" (ss. cxlvi–cxlviii), next demand attention. Two of these (ss. cxlvi–vii) which provide that notice of trial shall be eight days and countermand four days, have not been extended to County Courts. The old law upon this head declaring that there shall be six days' notice of trial and three days' countermand, still exists: (8 Vic. cap. 13, s. 29.) The section applied absolutely which enacts that "a rule for costs of the day for not proceeding to trial pursuant to notice or not countermanding in sufficient time may be drawn up on affidavit without motion made in Court explains itself as regards County Courts: (s. cxlviii.) The section which abrogates the Eng. St. 14 Geo. II. cap. 17 as to judgment in case of nonsuit is applied to County Courts, and needs no comment: (s. cxlix.) But the two sections following (s. cl–cli), instead of being so applied are with special modifications substantively enacted: (Co. C. P. A, 1856, s. 15.) The sections "with respect to the holding of Courts of Assize and Nisi Prius, and to the Nisi Prius record and trial," next follow: (s. cliii–clxiv.) They make two divisions, the one relating Courts of Nisi Prius and Assize, the other relating to general procedure at the trial. The first division, composing ss. cliii–clv, is of course quite inapplicable to County Courts and therefore not extended to them. It may, however, be mentioned that so much of s. cliv. as enacts that records shall not be sealed or passed is in effect applied to County Courts under s. 19 of the Act under consideration. Indeed there never was any practice requiring records to be *passed* in County Courts. The second division composing ss. clvi–clxiv, which in a manner may be made to relate to all Courts are, subject to general modifications, applied to County Courts. The same may be said of the sections "with respect to the admission of documents," three in number, all of

the said County Courts respectively; such of the said sections as relate to proceedings in *Banc.* or *Nisi Prius* respectively, shall be understood as referring and relating to the sittings of the said County Courts in term, and the sittings thereof for the trials of issues of fact, as the case may be; all the provisions of the said sections applicable to Deputy Clerks of the Crown,

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which are absolutely extended to County Courts: (ss. clxv–clx[illegible].) The section "with respect to rules for new trials or to enter a verdict or nonsuit," requires no comment, being quite applicable and fully applied to County Courts: (s. clxviii.) Next, there are thirteen sections "with respect to procuring affidavits from unwilling persons and the production of documents generally, and also for the discovery of documents and other matters from parties to a cause:" (ss. clxix–clxxxi.) All of these, excepting clxx, have been applied to County Courts, and it is enacted with special modifications: (Co. C. P. A, 1856, s. 16.) The next is a class of sections "with respect to execution." They number twenty: (ss. clxxxii–cci), and are, with the exception of s. cxciii, all applied to County Courts. The section not applied is substantively enacted in the Co. C. P. A, 1856: (s. 17.) It is only necessary to remark upon one of this class of sections, viz., clxxxvi. It enacts that it shall not be necessary to issue any writ directed to the sheriff of the county or united counties where the venue is laid, but that writs of execution may issue at once into any county or united counties, and may be directed and executed by the sheriff of any county or united counties without reference to the counties or united counties where the venue is laid, &c. The section seems to go no further than existing provision in the County Courts Act of 1850: (13 & 14 Vic. c. 52, s. 3.) "With respect to proceedings for the revival of judgments and other proceedings by and against persons not parties to the record," there are six sections in the C.L.P.A, 1856: (ss. ccii–ccvii), all of which, subject to general modifications, are applied to County Courts. In consequence of the error mentioned in note *n* to s. ccii, that section has been repealed by the legislature and re-enacted as amended: (C. L. P. A, 1857, s. 10.) For the same reason the legislature have expressly declared that it shall not extend to County Courts, but have substantially enacted it in amended form in the Co. C. P. A, 1857, s. 1. The next class of sections applied to County Courts is that "with respect to the effect of death or marriage upon the proceedings in an action:" (ss. ccviii–ccxvi.) These sections, nine in number, are all applied to County Courts, and require no observations. Then follow the sections "with respect to the proceedings upon motions to arrest the judgment and for judgment *non obstante veredicto*:" (ss. ccxvii–ccxix), which, subject to general modifications, are also extended to County Courts. Since County Courts have in general no jurisdiction as to ejectment: (8 Vic. cap. 13, ss. 5–13; C. L. P. A, 1856, s. xx.) none of the fifty-four sections of the C.L.P.A, 1856, "with respect to the action of ejectment" have been so extended. Owing to the prerogative character of the mandamus clauses they have not, it is believed, been applied to County Courts: (ss. cclxxv–cclxxxii.) For similar reasons it is thought the injunction clauses are also omitted: (ss. cclxxxiii–cclxxxvi.) Then come four sections regulating equitable pleading, all of which are extended to County Courts: (ss. cclxxxvii–ccxc.) The s. cclxxxvii. for the causes mentioned in the Editor's note *n* to that section has been repealed and re-enacted in amended form: (C. L. P. A, 1857, s. 11), and has been

shall apply to the Clerks of the County Courts respectively; and also subject to such other modifications as may be necessary to give full and beneficial effect to the said several sections in their extension and application to the County Courts, and all actions and proceedings therein within the jurisdiction of the same Courts respectively.

Consol for 4 C. ch 22 s339

Clerks to be subject to certain Rules.

III. (*a*) The Clerk of each County Court shall be subject to such rules for his governance in his office as may from time to time be made in that behalf (*b*) according to the provisions of

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declared not to apply to County Courts, but as amended is enacted in the Co. C. P. A, 1857, (s. 2.) Next as to s. ccxci, enlarging the powers of amendment vested in the Courts and Judges. It is, subject to general modifications, extended to County Courts, and can without difficulty be read as being incorporated in the Co. C. P. A, 1856. So also s. ccxcii. "with regard to actions on bills of exchange or other negotiable instruments." Then ss. ccxciii–iv. "with respect to proceedings in error and appeal," being from their nature and character unsuited to County Courts, have not been applied to these Courts. However, the sixteen sections "with respect to the payments of the weekly allowance to insolvent debtors, and as to gaol limits, and to the discharge of such debtors: (ss. ccxcv–cccx) have, subject to general modifications, been extended to County Courts, and are quite adapted to the practice and constitution of the Courts. Indeed some of them, s. ccxcv. for example, upon the face of it applies to County Courts. The next section: (s. cccxi) being a temporary provision as to costs in Superior Courts is not so applied. But s. cccxii. as to costs in actions of trespass or trespass on the case, a most important provision, is extended to County Courts. The last proviso, which is "that nothing herein contained shall be construed to entitle any plaintiff to recover costs as of an action brought in a Superior Court in any case where by law his action might properly have been brought in an inferior Court," when read as incorporated in the Co. C. P. A, relative to inferior Courts must be understood to have reference to cases of the cognizance of Division Courts: (13 & 14 Vic. c. 53, s. 78; Har. Prac. Stats. p. 185.) This completes the review intended of the two hundred and eleven sections of the C. L. P. A, 1856, originally made applicable to County Courts, some of which, for instance, s. xcvi, though applied in words, is inapplicable in fact; and others, for instance, ss. ccii, ccl xxxvii, owing to error in the original enactments, though at the time made to apply, have since been declared inapplicable, and other provisions substituted.

(*a*) This section corresponds with s. iii of C. L. P. A, 1856, which relates to the Clerk of the Process in the Superior Courts.

(*b*) The Clerk of a County Court is an officer of the Court appointed by the Crown. No British subject, whatever his profession, calling, or employment, is disqualified to hold the office: (12 Vic. cap. 66, s. 12.) The duties of the office are various, both in respect of the Crown and of the public. In relation to the Crown, the duties are, amongst other things, to keep accounts: (8 Vic. cap. 13, s. 62; Har. Prac. Stats. p. 86); to pay over moneys to the proper officer in that behalf: (*Ib.* s. 64; Har. Prac. Stats. p. 87); and for the performance of these duties the Clerk is required to give security: (*Ib.* s. 65; Har. Prac. Stats. p. 87.) In relation to the public the

the three hundred and thirteenth and three hundred and fourteenth sections of "The Common Law Procedure Act, 1856," in like manner as Deputy Clerks of the Crown. (*c*)

Com. stat. for U.C. c/c 22 s. 57-6

Clerks to sign and seal writs, &c., and account for fees.

IV. (*d*) The Clerk of each County Court shall sign and seal all writs and process whatsoever which are to be issued from such County Courts, and shall account for and pay over all fees due and receivable by County Court Clerks for writs, processes,

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duties are various; but all incident to the nature of the office, such as issuing process, filing pleadings, &c. No attempt to describe these duties in a single note would be at all satisfactory. As an officer of the Court the Clerk is subordinate to the Judge and bound to obey all rules that may be lawfully made for his governance. For the most part an infringement of any such rule is an offence which may be made the subject of complaint to the Judge. There are other offences of a graver nature, such as extortion, bribery, and the like, which appear to be punishable at common law: (see note *d* to s. ii. of C. L. P.A, 1856.) Clerks of County Courts are in general *ex officio* Deputy Clerks of the Crown; but there is a saving in favor of present incumbents: (12 Vic. cap. 63, s. 11; Har. Prac. Stats. p. 154.) The office of the Clerk should be in the Court-house of the County, or if apartments be not there provided for him, in some other convenient place within the county town of his county: (12 Vic. cap. 66, s. 12; Har. Prac. Stats. p. 166.) The office must be kept open on every day (Sunday and the legal holidays excepted) from the hour of ten in the forenoon to the hour of three in the afternoon, and in term time from the hour of nine o'clock in the morning to the hour of four o'clock in the afternoon: (*Ib.*) As to the effect of discharging duties of any kind either before or after office hours, see the latter part of note *x* to s. xiii. of C. L. P. A, 1856.

(*c*) All the provisions of the C. L. P. A, 1856, extended to County Courts, which relate to Deputy Clerks of the Crown, apply to Clerks of County Courts: (s. 2 of Co. C. P. A, 1856.) The rules, however, of T. T. 1856, under s. cccxiii. of C. L. P. A, 1856, have not been in words extended by the legislature to County Courts. But as regards Clerks of County Courts so much of the rules as relate to Deputy Clerks of the Crown in effect extend to the former under the operation of the section here annotated: (see *Chard* v. *Lount*, Chambers, Oct, 4, 1856, Burns, J, II. U. C. L. J. 227.) To dispel any existing doubts upon this subject, it is now enacted that the Judges of the Superior Courts shall have power to extend and apply to County Courts "all or any of the rules and orders made or to be made under any Statute now in force in Upper Canada, with and under any modifications they may deem necessary," and shall also have power "to make such rules and orders for and specially applicable to the said County Courts as may appear to them expedient for carrying into beneficial effect the laws applicable to the said County Courts" and that "all rules and orders of the Superior Courts that may *hereafter* be made shall (*unless the contrary be expressed therein*) be in force in and apply and extend to the several County Courts in Upper Canada, and actions and proceedings therein respectively, *subject to the modifications expressed in the second section of the County Courts Procedure Act*, 1856:" (Co. C. P. A, 1857, s. 9.)

(*d*) This section corresponds with ss. iv. and v. of C. L. P. A, 1856, relating to the Clerk of the Process in the Superior Courts.

summonses, orders, and proceedings under this Act, (*e*) as they are now bound by law to do for all other fees received by them and with and under like responsibilities. (*f*)

In what County suits must be commenced.

V. (*g*) In cases in which the cause of action shall be transitory, (*h*) and within the jurisdiction of a County Court, (*i*) the action may be brought and the plaintiff may sue out the writ for the commencement of the action in any County Court; (*j*) where the venue is local (*k*) the writ for the commencement of the action shall be sued out from the Office of the County Court within the proper County. (*l*)

Final judgment on *cognovit, &c.*, not over £100, may be in any County Court.

VI. (*m*) Final judgment may be entered upon a *cognovit actionem* or Warrant of Attorney to confess judgment, (*n*) [or an amount not exceeding one hundred pounds], (*o*) which shall have been given or executed in the first instance and before the suing out of any process, (*p*) [in any County Court], (*q*) at the

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(*e*) In the Superior Courts it is the duty of the Clerk of the Process to sign, seal, and issue all process whatsoever "which are to be issued from such Courts respectively:" (C.L.P.A, 1856, s. 4.) It is also his duty to keep accounts, make returns, and pay over all fees received by him: (*Ib.* s. 5.) Similar duties as regards County Courts devolve upon the Clerks of these Courts under the section here annotated.

(*f*) See ss. 62 and 64 of 8 Vic. cap. 13: (Har. Prac. Stats. pp. 86, 87.)

(*g*) This section corresponds with ss. vi–vii. of C. L. P. A, 1856.

(*h*) As to when causes of action are transitory, see note *j* to s. vi. of C. L. P. A, 1856.

(*i*) As to jurisdiction, see s. 20 of this Act (Co. C. P. A, 1856), and notes thereto.

(*j*) No distinction is made, it will be perceived, in respect of the residence of either plaintiff or defendant. The process, whether bailable or non-bailable, may, when the cause of action is transitory, not only be sued out from any County Court but may be served or executed in any County of Upper Canada: 13 & 14 Vic. cap. 52, s. 2; Har. Prac. Stats. p. 184, as extended by s. xxxi. of C. L. P. A, 1856, which has been applied to County Courts.

(*k*) As to when, local, see note *j* to s. vi. of C. L. P. A, 1856.

(*l*) When the cause of action is local, the "proper County" is that county in which the cause of action arose.

(*m*) This is copied from s. x. of C. L. P. A, 1856, with special modifications hereafter noticed.

(*n*) For the difference between a cognovit actionem and a warrant of attorney, see note *u* to s. x. of C.L.P. A, 1856.

(*o*) The words in brackets form a special modification in the original section, and have reference to the jurisdiction of County Courts as described in s. 20 of this Act.

(*p*) As to the difference prevailing between the law of England and of Upper Canada in this respect, see note *u* to s. x. of C. L. P. A, 1856.

(*q*) The words in brackets are substituted for the words "in any of the said offices" in the original section, intending offices of Deputy Clerks of the Crown of the several counties of Upper Canada.

option of the plaintiff, unless some particular Court (*r*) in which the judgment is to be entered be expressly stated in such *cognovit* or warrant. (*s*)

Clerk to keep a book for docketing judgments, and what it shall contain.

VII. (*t*) [The Clerk of each and every County Court] (*u*) shall keep a regular book, in which shall be minuted and docketed all Judgments entered by such Clerk; and such minute shall contain the name of every Plaintiff and Defendant, the date of the commencement of the action, (*v*) the date of the entry of such judgment, the form of action, the amount recovered, (*w*) the amount of costs taxed, and whether such judgment was entered upon, or by verdict, default, confession, *non pros*, non-suit, discontinuance, or how otherwise; (*x*) and in case the original judgment-roll be lost or destroyed, so that no exemplification or examined copy thereof can be procured, (*y*) a copy of the entry in such docket book, certified by the Clerk having such book in his custody, shall be evidence of all matters therein set forth and expressed; (*z*) and when any such Clerk shall enter up any Judgment in either of the said Courts, (*a*) he may give to the party on whose behalf it is en-

Copies of entries to be evidence in certain cases.

(*r*) The word "Court" is substituted for "office" in the original section for the reason given in the preceding note.

(*s*) As to Superior Courts see N. Rs. 26, 27, 28, of T. T, 1856.

(*t*) This is taken from s. xv. of C.L.P.A, 1856, with special modifications hereafter noticed.

(*u*) The words in brackets are substituted for "Every Deputy Clerk of the Crown and Pleas" in the original section. This being rather a general than a special modification, the Editor avails himself of the opportunity of stating that wherever general modifications occur in the subsequent sections of this Act, no special notice will be taken of them. Wherever they do occur, a little reflection makes them sufficiently obvious.

(*v*) See note *z* to s. xv. of C.L.P.A, 1856.

(*w*) The original section reads thus, "the form of action, the amount [of *debt or damages*] recovered," &c. For the reasons mentioned in note *b* to that section (xv) the language of the section here annotated appears to the Editor the more correct.

(*x*) The original section here goes on to provide that each Deputy Clerk of the Crown shall within three months after the entry of judgment in his office transmit the papers to the principal office in Toronto. This being a practice wholly inapplicable to the constitution and jurisdiction of County Courts, is here omitted.

(*y*) County Courts being Courts of Record: (8 Vic. cap. 13, s. 2; Har. Prac. Stats. p. 78), it is very properly enacted that they may furnish exemplifications of judgment rolls.

(*z*) The original section reads thus, "a copy of the entry in either of such docket books," &c., intending the docket books in the office of the Deputy Clerk of the Crown, as well as the principal office at Toronto: (see note *x*, *supra*.

(*a*) "In *either* of the said Courts,"

tered, or to his legal representative, a certificate signed by him, of such Judgment, containing the like particulars as are required in certificates of Judgments given by the Clerks of the Crown and Pleas, (*b*) and such certificate may be registered in the Registry Office of any County in Upper Canada, and the same certificate and the registration thereof shall have the like force and effect in binding or operating as a charge upon lands, tenements, or hereditaments situate within such County, as if the certificate had been granted by a Clerk or Deputy Clerk of the Crown.[3] (*c*)

Certificates may be given and registered so as to bind lands.

VIII. (*d*) When any Writ of Summons or Capias in any such action shall have been issued before, and shall be in force [at the time of] (*e*) the commencement of this Act, such Writ may, at any time before the expiration thereof, be renewed under the provisions of, and in the manner directed by this Act, (*f*) and where any Writ, issued in continuation of a preceding Writ, according to the provisions of the laws in force in the County Courts before the passing of this Act, (*g*) shall be in force and unexpired, or where one month next after the expiration thereof shall not have elapsed at the commencement of this Act, such continuing Writ may, without being returned *non est inventus*, or entered of record according to the

As to writs issued before this Act shall be in force.

Continuing writs.

&c. The language of the C. L. P. A, 1856, is followed too closely. "Either" is grammatically incorrect when applied to the several County Courts. The word "any" is intended.

(*b*) See note *d* to s. xv. of C.L.P.A, 1856.

(*c*) See note *e* to same section. It is now enacted that "every judgment registered against lands in any county shall cease to be a lien or charge upon the land of the party against whom such judgment has been rendered, or any one claiming under him, in three years after such judgment has been registered, or within one year after the passing of this Act, unless before the expiration of the said period of three years, or within one year after the passing of this Act, such judgment shall be re-registered, and that such lien or charge shall cease whenever the period of three years shall at any time be allowed to elapse without a further re-registry:" (C.L.P.A, 1857, s. 19.)

(*d*) This is a copy of s. xxix. of C. L. P. A, 1856, with special modifications hereafter noticed.

(*e*) The words in brackets are not in the original section.

(*f*) This Act adopts s. xxviii. of C. L. P. A, 1856, which contains the necessary provisions for renewal, and as s. xxviii. is adopted "as if repeated at length in this Act:" (Co. C.P.A, 1856, s. 2), it may be well said that writs shall be renewed "under the provisions of and in the manner directed by this Act."

(*g*) In the original section a special reference is here made to 12 Vic. cap. 63, which extends only to the Superior Courts of Common Law.

provisions of the said laws (*h*) be filed in the proper office of the Court, within one month next after the expiration of such Writ, or within twenty days after the commencement of this Act, (*i*) and the original Writ of Summons or *Capias* in such action may thereupon, but within the same period of one month next after the expiration of the continuing Writ, or within twenty days after the commencement of this Act, (*j*) be renewed under the provisions of, and in the manner directed by this Act; (*k*) and every such Writ shall, after such renewal, have the same duration and effect for all purposes, and shall be, if necessary, subsequently renewed in the same manner as if it had originally issued under the authority of this Act. (*l*) Renewal thereof.

IX. (*m*) Causes of action of whatever kind, provided they be by and against the same parties and in the same rights, (*n*) may be joined (*o*) in the same suit, (*p*) but this shall not extend to replevin or ejectment, (*q*) or to causes of action which are local and arise in different Counties, (*r*) and the Court or a Judge shall have power to prevent the trial of different causes of action together, if such trial would be inexpedient, (*s*) and in such case the Court or a Judge may order separate records to be made up and separate trials to be had; (*t*) Provided always, that nothing herein contained shall be construed to restrict or diminish the obligation or right of a Plaintiff to include in one action all or any of the drawers, makers, endorsers, and acceptors of any Bill of Exchange or Promissory Note. (*u*) What causes of action may be joined. Proviso.

(*h*) "According to the provisions of the said laws," *i.e.* the laws in force in the County Courts before the passing of this Act.

(*i*) As to the computation of time, see note *d* to s. lvii.

(*j*) See preceding note.

(*k*) See note *f*, *supra*.

(*l*) See note *j* to s. xxix. of C.L.P.A, 1856.

(*m*) This is a copy of s. lxxv. of C. L. P. A, 1856, with special modifications hereafter noticed; besides, though evidently an error, s. lxxv. is with general modifications extended to County Courts: (C.L.P.A, 1856, s. ii.)

(*n*) See note *j* to s. lxxv.

(*o*) See note *k* to same section.

(*p*) See note *l* to same section.

(*q*) See note *m* to same section.

(*r*) "Or to causes of action which are local and arise in different counties." These words are substituted for "where two or more of the causes of action so joined are local and arise in different counties, the venue may be in any of such counties." The modification is a special one, and necessary for the reasons pointed out in note *j* to s. ii. of C.L.P.A, 1856.

(*s*) See note o to s. lxxv.

(*t*) *i.e.* Separate records to be made up and separate trials to be had in the county over which such Judge presides: (see note *j* to s. ii. of C.L.P.A, 1856.)

(*u*) See note *p* to s. lxxv.

Con Stat for U.E. Ch 22 §158 -

Matters of account may be decided summarily or referred.

X. (*v*) If it be made to appear, at any time after the issuing of the Writ (*w*) [of any County Court], (*x*) to the satisfaction of the Judge, upon the application of either party, (*y*) that the matters in dispute consist wholly or in part of matters of mere account, (*z*) which cannot conveniently be tried in the ordinary way, (*a*) it shall be lawful for such Judge, upon such application, if he think fit, to decide such matter in a summary manner, (*b*) or to order (*c*) that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, (*d*) upon such terms as to costs and otherwise as such Judge shall think reasonable; (*e*) and the decision or order of such Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a Jury upon the matter referred. (*f*)

(*v*) This is a copy of s. lxxxiv. of C. L.P.A, 1856, with special modifications hereafter noticed.

(*w*) See note *v* to s. lxxxiv.

(*x*) The words in brackets are of course not to be found in the original section.

(*y*) See note *w* to s. lxxxiv.

(*z*) See note *x* to same section. In the first part of note *x* as printed, a slight error exists. For the word "wholly" in the eighth line of the note, the words "in part" must be substituted. The commencement of the note thus amended will read "that the matters in dispute consist wholly or in part of matters of mere account." "These words are susceptible of two modes of interpretation, 1. Either that where the matters in dispute consist wholly of matters of account, the whole may be referred, and that where it consists *in part* of matters of mere account such part only may be referred," &c. If it appear to the Court that defendant intends to set up defences wholly independent of matters of account, which defences should be disposed of by a jury, no reference will be made under this section: (*Evans* v. *Jackson*, Chambers, March 10, 1857, Robinson, C. J, III. U. C. L. J, 88.)

(*a*) See note *y* to s. lxxxv. of C. L. P. A, 1856.

(*b*) See note *z* to same section.

(*c*) See note *a* to same section. There is nothing to prevent the Court amending the particulars of a plaintiff's demand after a reference made under this section: (*Atterbury* v. *Jarvis*, 29 L. T. Rep. 129.) Whether a similar power exists after a reference by consent is not yet decided.

(*d*) The words in the original section are "or to an officer of the Court or in country causes to the Judge of any County Court," &c., which, read in reference to the Superior Courts is easily understood.

(*e*) See note *f* to s. lxxxv. of C.L.P. A, 1856. Where a plaintiff having obtained an order for a reference to the Master under Eng. C. L. P. A, 1854, s. 3, and the Master declined it, and plaintiff thereupon obtained an order to rescind the former order and proceed to trial: Held that he was not entitled to costs in these proceedings as costs in the cause: (*Gribble* v. *Buchanan*, 18 C. B. 691.) Where by the terms of an order granted under the said section, the costs of the reference and award are directed to abide the event of the award, and the event is partly in favor of plaintiff and partly in favor of defendant, no costs are payable on either side: (*Ib.*)

(*f*) See note *g* to s. lxxxv.

XI. (*g*) If it shall appear to the Judge that the allowance or disallowance of any particular item (*h*) or items in such account (*i*) depends upon a question of law fit to be decided by the Court, or upon a question of fact fit to be decided by a Jury, (*j*) it shall be lawful for such Judge to direct a case to be stated (*k*) or an issue or issues to be tried; (*l*) and the decision of the Judge upon such case, (*m*) and the finding of the Jury upon such issue or issues, (*n*) shall be taken and acted upon by the arbitrator as conclusive. (*o*)

Questions of law or fact as to items in such account how determined.

XII. (*p*) It shall be lawful for the arbitrator upon any compulsory reference under this Act, (*q*) if he shall think fit, (*r*) and if it is not provided to the contrary, (*s*) to state his award as to the whole or any part thereof, (*t*) in the form of a special case for the opinion of the Court; (*u*) and when an action is referred, (*v*) judgment, if so ordered, may be entered according to the opinion of the Court. (*w*)

Arbitrator may state special case in award.

XIII. (*x*) The proceedings upon any such arbitration as aforesaid (*y*) shall, except otherwise directed hereby or by the submission or document authorising the reference, be conducted in like manner and subject to the same rules (*z*) and enactments as to the power of the arbitrator and of the Court, the attendance of witnesses, (*a*) the production of documents, enforcing

Proceedings in arbitration cases.

(*g*) This is a copy of s. lxxxv. of C. L. P. A, 1856. The only modifications made are general and need not be specifically noticed.

(*h*) See note *i* to s. lxxxv.

(*i*) See note *j* to same section.

(*j*) See note *k* to same.

(*k*) See note *m* to same.

(*l*) See note *n* to same.

(*m*) See note *o* to same.

(*n*) See note *p* to same.

(*o*) See note *q* to same.

(*p*) This is a copy of s. lxxxvi. of C. L. P. A, 1856, with special modifications hereafter noticed.

(*q*) See note *s* to s. lxxxvi. The words in the original section "or upon any reference by consent of parties where the submission is or may be made a rule or order of any of the Superior Courts of Law or Equity in Upper Canada," are here omitted.

(*r*) See note *w* to s. lxxxvi.

(*s*) See note *x* to same.

(*t*) See note *y* to same.

(*u*) See note *z* to same.

(*v*) See note *a* to same.

(*w*) See note *b* to same.

(*x*) This is a copy of s. lxxxvii. of C. L. P. A, 1856, with special modifications hereafter noticed.

(*y*) See note *d* to s. lxxxvii.

(*z*) See note *e* to same.

(*a*) See note *f* to same. In reading this note it will be necessary to remember that County Courts, unlike the Superior Courts, have no jurisdiction at common law. The affidavit upon which an application is made for an order for the attendance of witnesses and production of documents before arbitrators, must show that the documents required are such as the witnesses would be compelled to produce at a

(*b*) or setting aside the award, or otherwise, (*c*) as upon a reference made by consent under a rule of [the Superior Courts] (*d*) or Judge's order. (*e*)

Con stat for u.c. ch 22 §161

Matters of mere calculation need not be referred.

XIV. (*f*) In actions in which it shall appear to the Judge that the amount of damages which ought to (*g*) be recovered by the Plaintiff is substantially a matter of calculation, (*h*) it shall not be necessary to assess the damages by a Jury, (*i*) but the Judge may ascertain (*j*) the amount for which final Judgment is to be signed, and the attendance of witnesses and the production of documents before such Judge (*k*) may be compelled by subpœna, in the same manner as before a Jury; (*l*) and it shall be lawful for such Judge (*m*) to appoint the day for hearing the case, and to adjourn the inquiry from time to time, as occasion may require; (*n*) and such Judge shall make an order in writing, (*o*) declaring the amount found by him, (*p*) and such and the like proceedings may thereupon be had, as to taxation of costs, signing Judgment, and otherwise, as upon the finding of a Jury upon an assessment of damages. (*q*)

Where the Plaintiff neg-

XV. Where any issue is or shall be joined in any cause (*s*)

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trial. (*Carroll et al* v. *Bull*, Chambers, Nov. 14, 1856, Draper, C. J., III U. C. L. J. 12). An order was granted *exparte* upon an affidavit of plaintiff that the cause had been duly referred, that the arbitrators appointed certain days for proceeding, and that certain parties whose names and residences were given, were material and necessary witnesses for the plaintiff: (*Gallena* v. *Cotton*, Chambers, Nov. 17, 1856, McLean, J., III U. C. L. J. 47.)

(*b*) See note *g* to s. lxxxvii.

(*c*) See note *a* to same.

(*d*) For the words in brackets read "Court" in the original section.

(*e*) See note *i* to s. lxxxvii.

(*f*) This is a copy of s. cxliii. of C. L. P. A., 1856, with special modifications hereafter noticed.

(*g*) See note *l* to s. cxliii.

(*h*) See note *m* to same. In an action on the Common Courts for goods sold, interlocutory judgment having been signed the Court will not grant a reference under this action, if any dispute be likely to arise as to quality or price: (*Hutchison* v. *Sidaways*, 14 U. C. R. 472.)

(*i*) See note *n* to s. cxliii.

(*j*) In the original section the power is to the Court or Judge to *direct* the amount to be ascertained by certain officers therein named. Here it is for the Judge himself to ascertain, &c.

(*k*) See note *s* to s. cxliii.

(*l*) See note *t* to same.

(*m*) See notice *u* to same.

(*n*) See note *v* to same.

(*o*) The original sections read thus, "shall endorse upon the rule or order for referring the amount of damages to him the amount," &c.

(*p*) The original section reads, "and shall deliver one rule or order with such endorsement to plaintiff."

(*q*) See note *y* to s. cxliii.

(*r*) This is a copy of s. cli. of C. L. P. A. 1856, with special modifications hereafter noticed.

(*s*) See note *e* to s. cli.

and the plaintiff has neglected or shall neglect to bring such issue (*t*) on to be tried [at the first sittings of the Court (*u*) then next following, whether the plaintiff shall in the meantime have given notice of trial or not,] (*v*) the defendant may give twenty days' notice to the plaintiff (*w*) to bring the issue on to be tried at the next sittings of the Court, (*x*) after the expiration of the notice; (*y*) and if the plaintiff afterwards neglects to give notice of trial for such sittings (*z*) or to proceed to trial as required by the said notice given by the defendant, (*a*) the defendant may suggest on the record that the plaintiff has failed to proceed to trial, although duly required so to do, (*b*) (which suggestion shall not be traversable, but only be subject to be set aside if untrue,) (*c*) and may sign Judgment for his costs; (*d*) provided that the Judge shall have power to extend the time for proceeding to trial, with or without terms. (*e*)

Defendant may give notice to bring the matter to trial; Plaintiff may apply, &c.

And sign judgment.

XVI. (*f*) Upon the hearing (*g*) of any motion or Summons, (*h*) it shall be lawful for the Judge, at his discretion (*i*) and upon such terms as he shall think reasonable, from time to time (*j*) to order such documents as he may think fit to be produced, (*k*) and such witnesses as he may think necessary, to appear and be examined *viva voce* (*l*) either before such Judge [or before the Clerk of the Court], (*m*) and upon hearing

Judge may require witnesses or documents, on hearing motions, &c.

con stat for c.c. ch 22 s 121

(*i*) See note *f* to s. cli.

(*u*) As to sittings and terms in County Courts see ss. 16, 17, of Co. C. P. A. 1857.

(*v*) The words in brackets are inserted instead of a corresponding part of the original section, which relating as it does to the division of causes into town and country causes, and referring to the assizes and terms of the Superior Courts is wholly inapplicable to County Courts.

(*w*) See note *m* to s. cli.

(*x*) "Assizes" in the original section.

(*y*) See note *o* to s. cli.

(*z*) "Assizes" in original section. See note *p* to s. cli.

(*a*) See note *q* to same.

(*b*) See note *r* to same.

(*c*) See note *s* to same.

(*d*) See note *t* to s. cli.

(*e*) See note *v* to same. The original section here continues, and "provided also, that no rule for trial by proviso shall thereafter be necessary." (See note *w* to s. cli.)

(*f*) This is a copy of s. clxx. of C. L. P. A. 1856, with special modifications hereafter noticed.

(*g*) See note *t* to s. clxx.

(*h*) See note *u* to same.

(*i*) See note *v* to same.

(*j*) See note *w* to same.

(*k*) See note *x* to same.

(*l*) See note *y* to same.

(*m*) Instead of the words in brackets read in the original section "or before a Judge of any County Court, or before any Clerk or Deputy Clerk of the Crown."

such evidence or reading the report (*n*) of the Clerk, to make such order as may be just. (*o*)

Judgment creditor may have his debtor examined as to his property.

XVII. (*p*) It shall be lawful for any creditor who has obtained a Judgment (*q*) [in any County Court] (*r*) to apply to the Judge for a rule or order that the Judgment debtor should be orally examined as to any and what debts are owing to him, (*s*) before such Judge of any County Court or before any other person to be specially named, (*t*) and the Judge may make such order (*u*) for the examination of such Judgment debtor, and for the production of any books or documents, (*v*) and the examination shall be conducted in the same manner as in the case of an oral examination of an opposite party under this Act. (*w*)

And with respect to costs: (*x*) Be it enacted:

(*n*) See note *d* to s. clxx.

(*o*) See note *e* to same.

(*p*) This is a copy of s. cxciii. of C. L. P. A. 1856, with special modifications hereafter noticed.

(*q*) See note *w* to s. cxciii.

(*r*) In original section "in any of the Superior Courts." See note *x* to s. cxciii.

(*s*) See note *z* to same.

(*t*) In original section "before the Judge of any County Court, or before any Clerk or Deputy Clerk of the Crown, or any other person to be specially named."

(*u*) See note *b* to same.

(*v*) See note *c* to same. Disobedience no doubt in a Superior Court case, upon the order being made, a rule of Court would be punishable as contempt of Court. The attachment, however, it has been held, cannot be granted by a Superior Court Judge sitting in Chambers: (*Greene et al.* v. *Ward*, Chambers, Mar. 30, 1857, Robinson, C. J., III. U. C. L. J., 113.]

(*w*) See note *d* to s. cxciii.

(*x*) The costs in County Courts until lately were regulated by Stat. 8 Vic. cap. 13, the schedule of which was thus sub-divided.

1.—Fees to be received by the Clerk, and to belong to and be paid over to the Fee Fund: (Amended by 9 Vic. cap. 7, sched. A.)

2.—Fees to the Sheriff.

3.—Fees to a Commissioner,

4.—Fees to the Attorney.

5.—Fees to the Crier.

6.—Fees to the Clerk: (Amended by 9 Vic. cap. 7, sched. B.)

By the Co. C. P. A. 1856, that part of the schedule of 8 Vic. which applied to fees to be received by the Clerk, and to belong to and be paid over to the Fee Fund, (sub-div. 1. *supra*), and the amending enactment 9 Vic. cap. 7, sched. A, were repealed and a new tariff enacted: (s. 23.)

By the Co. C. P. A. 1857, that part of the schedule of 8 Vic. which applied to fees to the Attorney (sub-div. 4 *supra*) was repealed with a view to a new tariff, to be enacted under s. 8 of the same Act, which authorizes the Judges of the Superior Courts to determine and adjudge "all and singular the fees which shall and may be allowed to be taken by Counsel and Attorney, sheriffs, coroners, and officers of the said Courts respectively:" (s. 8.) Power was given to the Judges of the Superior Courts, when framing or altering the table of costs, to associate a Judge of a County Court with them.

Fees to remain as now until altered.

XVIII. (*y*) Until otherwise ordered by rule of Court made in pursuance of the "Common Law Procedure Act, 1856," (*z*) the costs of Writs issued under the authority of this Act, and of all other proceedings under the same, shall be and remain, as nearly as the nature thereof will allow, the same as heretofore, but in no case greater than those already established, (*a*) except that there shall be payable to the Clerks of the County Courts for and to form part of the general fee fund, (*b*) the following fees, viz.: for every Special Hearing before the Judge five shillings, and the sum of ten shillings for every day's sittings in taking examinations and evidence, and the like sum on every reference to the County Judge from the Superior Courts, together with one shilling per folio on the evidence taken before him, and five shillings for every report thereon; (*c*) Provided always, that hereafter no mileage shall be taxed or allowed for the service of any Writ, paper or proceeding, without an affidavit being made and produced to the proper taxing officer,

Exception.

Proviso.

The Judges of the Superior Courts having associated with them James Robert Gowan, Esq., Judge of the County of Simcoe, have, in the exercise of the powers conferred upon them, framed and issued "A Table of Costs for the several County Courts of Upper Canada." There being a legislative extension of the practice of the Superior Courts to County Courts, and a legislative declaration that in matters not expressly provided for the practice of the County Courts should conform to that of the Superior Courts the new tariff for County Courts is as respects subject matter common with that framed for the Superior Courts in 1856. The business of the Courts, both Superior and Inferior, being as nearly as possible the same, the only real difference between the two tariffs is the *amount* chargeable for the business done. The new tariff, though not affecting the amount to be paid to Clerks of County Courts for the Fee Fund, as established under C. L. P. A. 1856, s. 23, supersedes the whole of the tariff set forth in the schedule to 8 Vic. cap. 13.

(*y*) This, like s. cccxi. of C. L. P. A. 1856 is a temporary provision.

(*z*) The Rules of T. T. 1856, made pursuant to the C. L. P. A. 1856, were held not in any way to affect the amount of costs chargeable in County Courts: (*Chard* v. *Lount*, Chambers, Oct. 4, 1856, Burns, J., II. U. C. L. J, 227; *Coulter* v. *Willoughby*, Simcoe, Gowan, Co. J., III. U.C.L.J., 214.) A doubt having been entertained as to the power of the Judges of the Superior Courts under C. L. P. A. 1856, to frame a tariff for County Courts, that power is now conferred by the Legislature in language positive and unmistakeable: (C. L. P. A. 1857, s. 8.)

(*a*) The fees established by the tariff recently issued, "and no other or greater shall be allowed in taxation, or taken or received by any Council, Attorney, Sheriff, or Officer:" (See the order preceding the tariff, Har. Man. of Costs in Co. Courts, p. 7.)

(*b*) In addition to the fees made payable under s. 23 of this Act.

(*c*) These are made necessary in consequence of the alterations in the practice effected by the C.L.P.A. 1856.

stating the sum actually disbursed and paid for such mileage and the name of the party to whom such payment was made. (*d*)

Practice in cases not provided for.

XIX. (*e*) In any case not expressly provided for by law, the practice and proceedings in the several County Courts in Upper Canada shall be regulated by and shall conform to the practice of the Superior Courts of Common Law at Toronto; and the practice of the said Superior Courts, as the same remains now or may be hereafter altered, shall, in matters not expressly provided for as aforesaid, apply and extend to the County Courts and to all actions and proceedings therein.

Recital.

XX. (*f*) And whereas it is expedient to enlarge and more clearly define the jurisdiction of the several County Courts in

(*d*) N. R. 160 of T. T. 1856, is substantially the same as this provision.

(*e*) This is one of the most important sections in Co. C. P. A. 1856. Its operation is very extensive. Its effect will be to secure as much as possible uniformity of practice in all the Courts of Record of Common Law jurisdiction. The anomaly of a practice in the County Courts defective in that in which the practice of the Superior Courts is complete cannot now well occur. Provision has been made in express language for extending to County Courts so much of the practice of the Superior Courts as appeared to the Legislature to be suited to the Inferior Courts. But so infinite, as remarked by a writer, are the possible combinations of events and circumstances that they elude the power of enumeration, and are beyond the reach of human foresight. The least reflection serves to evince that it would be impossible by positive and direct legislative authority specially to provide for every particular case which *may* happen: (Doug. Rep. Preface.) However much, therefore, is the subject of express provision, there may as regards the practice of County Courts be more for which no positive provision is made. To meet such it is enacted that "in any case not expressly provided for by law the practice and proceedings in the several County Courts of Upper Canada shall be regulated by and shall conform to the practice of the Superior Courts of Common Law at Toronto, &c." The Superior Courts of Upper Canada are not so restricted with regard to practice as the County Courts. The Court of Common Pleas has the same jurisdiction, powers, authorities, and privileges, as are exercised by the Queen's Bench, (12 Vic. cap. 63, s. 8), and the Queen's Bench possesses all such powers and authorities as by the law of England are incident to a Superior Court of Civil and Criminal Jurisdiction: (34 Geo. III. cap. 2, s. 1)

(*f*) The object of this section is "to *enlarge* and more *clearly define* the jurisdiction" of the County Courts. Though slightly increased in cases of tort, the jurisdiction is not materially enlarged as to amount, but rather as to subject matter. And the jurisdiction is not only enlarged, but is more clearly defined, by doing away with the distinction between different forms of actions, and giving a general jurisdiction in "*all personal actions where the amount claimed is not more than* £50." The demands cognizable in County Courts may be divided into two classes—those liquidated or ascertained by the act of the parties or the signature of the defendant—and those not so ascertained. This two-fold division has been observed since the

Upper Canada—It is enacted, That for and notwithstanding anything contained in the first section of an Act of the Parliament of this Province, passed in the thirteenth and fourteenth years of Her Majesty's Reign, intituled, *An Act to amend and* Jurisdiction of County Courts enlarged, notwithstanding

first constitution of the Courts. There never was jurisdiction in cases where the title to land came in question. The enlargement in jurisdiction has been progressive, as the following synopsis will show.

The jurisdiction was: *In* 1822, of "all matters of contract from 40s. to £15," where the amount was "liquidated or ascertained either by the act of the parties or the nature of the transaction, to £40; "and in all matters of tort relating to personal chattels" where the damages did "not exceed £15," and the title to the land did "not thereby be brought into question:" (2 Geo. IV. cap. 2, s. 3.) *In* 1845, of "all causes or suits relating to debt, covenant, or contract, to the amount of £25," and "in cases of contract or debt on the common counts," where the amount was "ascertained by the signature of the defendant to £50," and also "in all matters of tort to personal chattels "where the damage did" not exceed £20, "and where titles to land" were "not brought in question:" (8 Vic. cap. 13, s. 5.) *In* 1850, of "all causes or suits relating to debt, covenant, or contract, to the amount of £50," and "in cases of debt or contract," where the amount was "ascertained by the signature of the defendant to £100," and also "in all matters of tort relating to personal chattels" where the damages "did not exceed £30, and where the title to land" was "not brought in question:" (13 & 14 Vic. cap. 52, s. 1.) *In* 1856, of "all personal actions where the debt or damages is not more than £50," and of "all cases or suits relating to debt, covenant, or contract, where the amount is liquidated or ascertained by the act of the parties or the signature of the defendant to £100." "Provided that the said Courts shall not have cognizance of any action where the title to land shall be brought in question, or in which the validity of any devise, bequest, or limitation, under any will or settlement, may be disputed, or for any libel or slander, or for criminal conversation, or for seduction:" (Co. C. P. A. 1856, s. 20.)

In 1822 there was not, it will be observed, any distinction as to forms of action, excepting those on contracts and those for torts. In 1845 the jurisdiction as to amount was not only increased, but a distinction without a difference was made in speaking of debt, covenant, *or contract*, as if neither debt nor covenant were a species of action on contract. In 1850, though the jurisdiction as to amount was still further increased, the language as to forms of action remained unchanged. In 1856 the distinction between actions *ex contractu* and *ex delicto* is to some extent done away with, for jurisdiction is given "of *all* personal actions where the *debt* or *damages* is not more than £50," &c. The rule is now that in all personal actions where the amount claimed does not exceed £50, County Courts have jurisdiction. In this proposition there are two branches or subordinate rules—the first regarding the description of action—the second the amount of claim. To each there is an exception. Though actions for libel, slander, criminal conversation, and seduction, are personal actions, there is no jurisdiction as to them. Next as to the amount claimed. The general rule is that in no personal action for an amount exceeding £50 shall County Courts have jurisdiction. The exceptions are "causes or suits relating to debt, covenant, or contract, where the amount is liquidated, or ascertained by the act of the parties or the signature of the defendant," in which cases there is jurisdiction to £100. In each of the foregoing instances the exception proves the rule.

* The effect of this proposed
See Latham v Spedding
next page

13 & 14 Vic. cap. 52.

alter the Acts regulating the practice of the County Courts in Upper Canada, and to extend the jurisdiction thereof, (*g*) or any other Act of the Parliament of this Province, the said County Courts respectively shall hold plea of all personal actions where the debt or damages claimed is not more than fifty pounds, (*h*) and of all causes or suits relating to debt, covenant or contract, (*i*) where the amount is liquidated or ascertained by the act of the parties or the signature of the defendant, to one hundred pounds; (*j*) Provided always, that the said County Courts shall not have cognizance of any action where the title to land shall be brought in question, (*k*) or in which the validity of any devise, bequest or limitation under any will or settlement may be disputed, (*l*) or for any libel or slander, or for criminal conversation or seduction. (*m*)

Proviso: as to cases involving title to land.

Latham v Spedding
17 2 B 440
20 L J 2 B 302
Overholt v Paris
Dundas R C
7 U C C P 293

(*g*) 18 & 14 Vic. cap. 52: (Har. Prac. Stats., p. 183.)

(*h*) It is enacted in the C. L. P. A. 1856, that in all actions where the plaintiff recovers a sum of money the amount to which he is entitled shall be awarded to him by the judgment generally without any distinction being therein made as to whether such sum is recovered by way of debt or damages: (s. cxliv, applied to County Courts.) The propriety, therefore, of superseding the rule which gave jurisdiction to County Courts in actions on contract to one amount, and in actions for torts, where damages only are claimed, to a different amount, is sufficiently obvious. Whether the sums ought to be recovered be £50 or under, whether claimed as debt or damages, there is jurisdiction.

(*i*) The technical distinction between forms of action having been abolished (C.L.P.A, 1856, s. xvii, applied to County Courts) the Court will look at what is substantially the nature of the action, in order to determine any question contingent thereupon: (*Legge* v. *Tucker*, 28 L. T. Rep., 145.) It may be that the words "debt, covenant, or contract," as used in this section, are descriptive of causes rather than forms of action.

(*j*) In either of the cases mentioned, though the amount claimed be £100, Co. Courts have jurisdiction. These are, where "the amount is liquidated, or ascertained by the act of the parties or the signature of the defendant." The word "liquidated" seems to refer "to the act of the parties," and the word "ascertained" "to the signatures of the defendant."

(*k*) Ejectment may strictly speaking be maintained in certain cases where the *title* to land is not in question. Thus for example ejectment by a landlord against his tenant to recover possession of property leased, owing to forfeiture for non-payment of rent, (C. L. P. A. 1856, s. cclxiii), in which case the tenant is estopped from disputing his landlord's title. Whether County Courts have jurisdiction of ejectment in the case supposed, or indeed in any other case, is a point deserving consideration. The fact that none of the ejectment clauses of the C. L. P. A. 1856, having been extended to County Courts, is an argument against such a view.

(*l*) In these cases title to land may be brought in question.

(*m*) See note *f supra*.

XXI. (*n*) In all applications and proceedings before the County Judges, not relating to suits instituted in any Court of Civil Judicature in Upper Canada, there shall be payable to the Clerks of the several County Courts, for and to form part of the general fee fund thereof, (*o*) such fees, as nearly as the nature of the case will allow, as are now payable on proceedings under the Act for the relief of insolvent debtors. (*p*)

Fees in certain special cases.

XXII. (*q*) Every County Judge shall be paid by a certain salary of not more than six hundred and fifty pounds or less than two hundred and fifty pounds; (*r*) and the Governor in

Judge's salary to be from £250 to £650, and

(*n*) There are many kinds of proceedings, not relating to suits, directed to be had before County Judges. They are generally termed the collateral duties of the County Judges. For these proceedings when had certain fees are under this section made payable to the general fee fund: (See note *v* to s. 23 of this Act.

(*o*) In all applications and proceedings before County Judges not relating to suits instituted in any Court of Civil Judicature there shall be payable to and forming part of the general fee fund, the same fees as are mentioned in the new tariff for ordinary proceedings in the Courts, "so far as the same are applicable:" (See Har. Man. of Costs in Co. Courts, p. 14.) So with regard to the Clerks and attorneys for similar applications and proceedings, the fees made payable for ordinary proceedings in the Courts, "so far as the same are applicable," are also directed to be paid: (*Ib.* p. 18.)

(*p*) Stat. 8 Vic. cap. 48, Har. Prac. Stats., p. 95. The fees were in pursuance of the statute framed by the judges of the Court of Queen's Bench in H. T., 9 Vic. The following is an extract from the tariff as regards fees, to the *Clerk*: "Fee for filing petition for protection, with schedule, 1s.; drawing every order for protection *ad interim*, 1s. 3d.; each renewal for protection, 1s. 3d.; each order of appointment of assignee, 1s. 3d.; for attendance of petitioner or other person for the purpose of disclosure, and for production of books, papers, &c., 1s. 3d.; to appraise excepted articles, 1s. 3d.; to substitute the name of surviving assignee or new assignee, 1s. 3d.; notice of final order, 2s. 6d.; final order for protection, 2s. 6d.; every order for rescinding final order for protection, 2s. 6d.; every order for discharge of petitioner, 2s. 6d.; order on official assignee to sell, 2s. 6d.; order respecting lease or agreement to lease to petitioner, 2s. 6d.; order for a dividend, 2s. 6d.; order on assignee to sell or assign debts, 2s. 6d.; on every writ or warrant of commitment or attachment, 2s. 6d.; every summons to a witness, 1s. 3d.; drawing certificate of appointment of assignee, 1s. 3d.; swearing affidavit, 1s.; every order not hereinbefore specified and necessary to be made, 1s. 3d.; copies of all proceedings made by Judge or Commissioner, or by desire of party, per folio of 100 words, 6d.; every certificate of authentication, 1s. 3d.; filing each necessary proceeding in a case, 6d." (II U. C. L. J., 180.)

(*q*) It is the object of this section to regulate the payment of salaries to County Judges. It in effect supersedes so much of s. 61 of 8 Vic. cap. 13, (Har. Prac. Stats., p. 86) as is inconsistent with it.

(*r*) "In no case more than £500 or less than £250," under Stat. of 8 Vic cap. 13. s. 61.

fixed by Governor in Council.

Council (*s*) shall fix the remuneration to be paid to the Judges respectively, having due regard as well to the population of the several Counties or Union of Counties, as to the amount of fees received by the County Treasurer, under the several statutes establishing fee funds; (*t*) and the remuneration of Judges may be increased, or as vacancies shall occur may be diminished, by the Governor in Council. (*u*)

Con stat for u.c.c.h 23 § 15 sch: 32

Part of Schedule of fees to 8 V. c. 13 repealed, and the whole of that to 9 V. c. 7.

XXIII. (*v*) So much of the Schedule of Fees annexed to the Act passed in the eighth year of Her Majesty's Reign, chaptered thirteen, as applies to the "Fees to be received by the Clerk, and to belong to and be paid over to the Fee Fund," and the whole of Schedule A annexed to an Act passed in the ninth year of Her Majesty's Reign, chaptered seven, shall be and the same are hereby repealed, and the following schedule is substituted therefor:

New Schedule substituted.

The Schedule.

Every Writ of Summons or *Capias ad Respondendum*, one shillings and six pence, (*w*)

Every Verdict, six shillings and three pence,

Executing each Writ of Trial and Enquiry and making Return thereto, six shillings and three pence, (*w*)

Every Report made by the Judge of the proceedings on executing a Writ of Trial or Enquiry, five shillings,

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(*s*) For the legislative interpretation of these words see 12 Vic. cap. 10, s. 5, sub-s. 3: (Har. Prac. Stats., p. 140.)

(*t*) 8 Vic. cap. 13, s. 62, C. L. P. A. 1856, s. 23.

(*u*) The latter part of this section is substantially the same as the latter part of sec. 61, 8 Vic. cap. 13. Within the maximum sum prescribed a judge's salary may be increased, but during his incumbency the remuneration once fixed cannot be diminished. The salaries of the County Judges can only be diminished "as vacancies shall occur."

(*v*) The design of this section is to increase the Fee Fund of each County Court. With this object existing statutes regulating the payment of fees to the Fee Fund at a rate lower than that mentioned in this section are repealed. The Fee Fund, it may be mentioned, is a fund established in 1845 (8 Vic. cap. 13), and intended to defray the disbursements necessary on account of County Courts, including the salaries of County Judges: (s. 66). In the event of a deficiency the Governor General is authorized to issue his warrant in favor of the County Treasurer for the amount required to make up the Judge's salary.

(*w*) "Executing each Writ of Trial and Inquiry, &c." The clauses of 8 Vic. cap. 13, authorizing Writs of Trial and Inquiry (ss. 51–56) have been repealed: (Co. C. P. A. 1857, s. 19). This and the succeeding item are therefore done away with.

Every Certificate of proceedings made by the Judge to be transmitted to the Court of Queen's Bench, two shilllings and six pence,

Every Rule requiring a motion in open Court, one shilling and six pence,

Every Rule or Order of Reference, one shilling and six pence,

Every other Rule or Judge's Order, one shilling and three pence,

Every Recognizance of Bail taken by the Judge, one shilling and six pence,

Every Affidavit administered by Judge, one shilling,

Every Computation of principal and interest on a Bill, Note, Bond, or Covenant, for payment of money, three shillings,

Every Writ of Subpœna, one shilling,

Every Judgment entered, six shillings and three pence,

Every Oath administered in open Court, one shilling.

Sheriff's mileage and poundage.

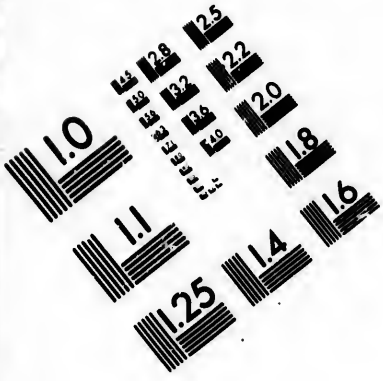
XXIV. (*x*) In addition to the fees now received by each Sheriff for mileage and poundage, it shall be lawful for him to charge and receive for mileage, two pence per mile on all writs executed, and for poundage, upon all moneys actually made under a *fi. fa.* or a *ca. sa.*, six pence in the pound.

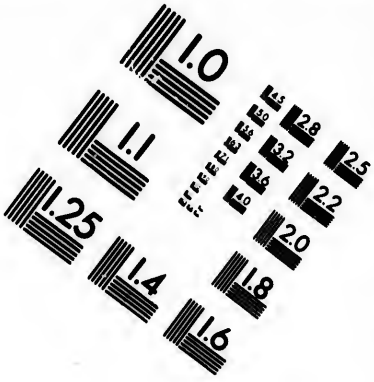
Extra allowance to Clerk of York and Peel.

XXV. (*y*) It shall be lawful for the Governor in Council to cause to be paid to the Clerk of the County Court for the United Counties of York and Peel, and after the dissolution of the Union of such Counties, to the Clerk of the County Court

(*x*) This section is in effect superseded by the New Tariff of Fees for County Courts (see Har. Man. of Costs in Co. Courts, p. 15); thus, "*mileage*, going to arrest when arrest made, per mile, 6d." "Actual mileage from the Court-house to the place where service of any process or proceeding is made, per mile necessarily travelled, 6d." "*Poundage* on executions and on attachments in the nature of executions, upon the sum actually made in the pound, 1s."

(*y*) The Fee Fund for the United Counties of York and Peel is annually greater in amount than that of any other County or Union of Counties in Upper Canada, and the surplus after defraying all necessary disbursements on account of the Court is greater than that of any other Co. Court. Out of this surplus the Governor General is here authorized to pay to the Clerk of the County Court of the United Counties of York and Peel over and above all fees "an allowance not to exceed one hundred pounds per annum.' The payment, however, can only be made "after all present charges thereon shall have been first defrayed."





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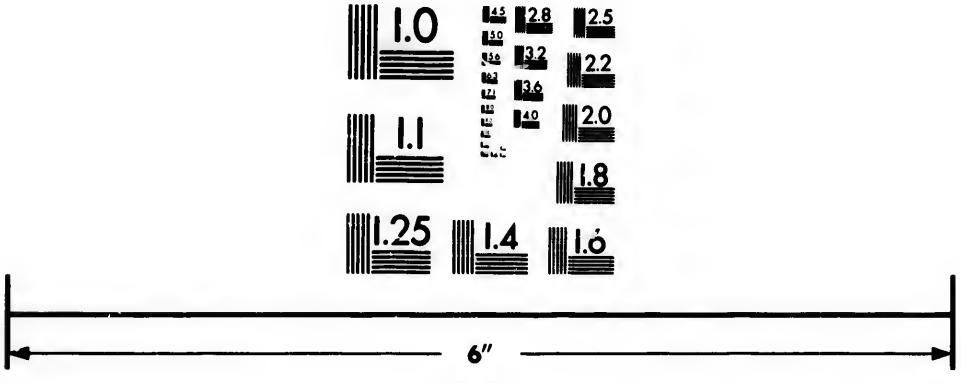

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some matter of fact, *exempli gratiâ*—the drawing or making, or indorsing or accepting, or presenting, or notice of dishonour of the bill or note. (*h*)

8.—(*i*) In every species of action on contract, all matters in confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable in point of law, (*j*) on the ground of fraud, or otherwise, (*k*) shall be specially pleaded, (*l*) *exempli gratiâ*,—infancy, coverture, release, pay-

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does not prohibit the plea of the general issue to a count on a bill where the plea is given by statute: (*Weeks* v. *Argent*, 16 M. & W. 817.)

(*h*) The effect of the rule is to compel the defendant to traverse or admit each material allegation from which his liability arises: (*Sibley* v. *Fisher*, 7 A. & E. 444.) In an action by indorsee against indorser of a bill, the defendant cannot deny the making because the indorsement admits it: (*Allen* v. *Walker*, 2 M. & W. 317.) So the acceptor of a bill payable to the order of the drawer cannot deny the authority of the drawer to draw or indorse such bill: (*Halifax* v. *Lyle*, 3 Ex. 446.) But if the defendant charged as maker deny it, he may succeed if he show that he was indorser only: (*Gwinnell* v. *Herbert*, 5 A. & E. 436.) A plea denying the indorsement puts in issue not only the fact of the signature but also a delivery with intent to transfer: (*Marston* v. *Allen*, 1 Dowl. N S. 442; see also *Bell* v. *Ingestre*, 12 Q.B. 31.) And as to the effect of a plea denying plaintiff to be the holder, see *Kemp* v. *Watt*, 15 M. & W. 672. Any plea which compels the plaintiff to produce the bill or note will enable the defendant to take advantage of any defect apparent on the face of the instrument: (*Cock* v. *Coxwell*, 2 C. M. & R. 281; *Calvert* v. *Baker*, 4 M. & W. 417; *Dawson* v. *Macdonald*, 2 M. & W. 26; *M'Dowall* v. *Lyster*, 2 M. & W. 52; *Jenkins* v. *Crouch*, 5 Dowl. P.C. 293; *Field* v. *Woods*, 7 A. & E. 114; but see *Mason* v. *Bradley*, 1 D. & L. 380.) Where to a declaration, the first count being on a promissory note, and the other counts being common counts, the defendant without leave to plead several matters pleaded to the first count a traverse of the making of the note in that count and "for a further plea to the whole declaration," *non assumpsit*, it was held that the plaintiff was entitled to sign judgment: (*Harvey* v. *Hamilton*, 4 Ex. 43.)

(*i*) Taken from Eng. R. G. Pl. No. 8 of H. T. 1853, the origin of which is Eng. R. G. No. 3 of H. T. 4 Wm. IV. (Jerv. N. R. 129) with which our old Rule Q. B. No. 1 of E. T. 5 Vic. (Cam. R. 55) corresponded.

(*j*) The meaning of this part of the rule is to require matter to be specially pleaded which would have been the subject of proof on the part of the defendant, as usury, fraud, &c., and not to exempt the plaintiff from proving anything which he would formerly have been required to prove: (*Buttermere* v. *Hayes*, 5 M. & W. 456.) Therefore the general issue is a denial that the requisites of the Statute of Frauds (29 Car. II. c. 3) and Lord Tenterden's Act (13 & 14 Vic. cap. 71) have been complied with in cases where these Statutes apply: (*Turnley* v. *Macgregor*, 6 M. & G 46; *Eastwood* v. *Kenyon*, 11 A. & E. 438; *Leaf* v. *Tuton*, 10 M. & W. 392.)

(*k*) In *indebitatus assumpsit* for goods sold and delivered, where there has been a sale in point of fact the defendant cannot show under the general issue that *the plaintiff had no title to the goods at the time of sale*: (*Walker* v. *Mellor*, 11 Q.B. 478.) In this case it will be observed that the defendant confesses that plaintiff did sell in point of fact and then attempts to show that the sale was void: (*Ib.*)

(*l*) Illegality must be specially pleaded, though it appear from the

ment, (*m*) performance, illegality of consideration either by statute or common law, (*n*) drawing, indorsing, accepting bills, &c, or notes, by way of accommodation, (*o*) set off, mutual credit, unseaworthiness, mis-

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plaintiff's own case: (*Fenwick* v. *Laycock*, 1 Q. B. 414; *Daintree* v. *Hutchinson*, 10 M. & W. 85; *Bennett* v. *Bull*, 1 Ex. 593; *Allport* v. *Nutt*, 1 C. B. 974); for instance, that the attorney was guilty of maintenance in the suits in respect of which he sues: (*Potts* v. *Sparrow*, 1 Bing. N. C. 594;) in an action for demurrage that the plaintiff defrauded the customs: (*Alcock* v. *Taylor*, 6 N. & M. 296); in an action for money had and received that it was the produce of an illegal wager: (*Martin* v. *Smith*, 4 Bing. N. C. 446.) So partial failure of consideration must be pleaded: (*Head* v. *Baldrey*, 6 A. & E. 670.) If a simple contract debt be merged in a specialty subsequently given it must be specially pleaded: (*Weston* v. *Foster*, 2 Bing. N. C. 693.) So if a subsequent account be stated upon which the defendant relies: (*Fidgett* v. *Penny*, 1 C. M. & R. 108.)

(*m*) Where goods are sold for ready money and payment is made accordingly no debt arises, and such payment is therefore proveable under the general issue: (*Bussey* v. *Barnett*, 9 M. & W. 312.) So if there be a prepayment: (*Smith* v. *Winter*, 21 L. J. C. P. 158; see also *Littlechild* v. *Banks*, 7 Q. B 739.)

(*n*) The defendant cannot avail himself of illegality unless specially pleaded, though it appear from the plaintiff's own case: (see note *l*, *supra*.)

(*o*) If the defence be that the bill or note was drawn indorsed or accepted by way of accommodation, or that it was obtained by fraud or under any circumstances which disentitle the plaintiff to sue upon it, this defence must be specially pleaded. The plea of want of consideration must be proved by the defendant: (*Lacey* v. *Forrester*, 2 C. M. & R. 59; *Noel* v. *Boyd*, 4 Dowl. P. C. 415), unless indeed the plaintiff state the consideration in his replication in answer to the plea and make it part of the issue: (*Low* v. *Burrows*, 2 A. & E. 483.) This plea in form must show the real grounds of defence, and state the circumstances under which the bill or note was given, for it is not sufficient to state generally that the defendant received no consideration for the bill or note: (*Stoughton* v. *Kilmorey*, 1 C. M. & R. 72; *Graham* v. *Pitman*, 3 A. & E. 521; *Trinder* v. *Smedley*, 3 A. & E. 522; *Low* v. *Chiffney*, 1 Bing. N. C. 267; *French* v. *Archer*, 3 Dowl. P. C. 130; *Reynolds* v. *Ivemy*, 3 Dowl. P. C. 453; *Kearns* v. *Darell*, 6 C. B. 596.) If, however, the plaintiff take issue on a plea that "there was not consideration for the bill," the defendant will be at liberty to give in evidence all matters of defence to which such plea is applicable: (*Easton* v. *Pratchett*, 1 C. M. & R. 798; *Mills* v. *Ody*, 2 C. M. & R. 103.) So it is not sufficient to cast a suspicion on the plaintiff's title—the circumstances which constitute the defence must be specially pleaded: (*Stern* v. *Yylesias*, 1 C. M. & R. 565; *Bramah* v. *Roberts*, 1 Bing. N.C. 469.) If the plea alleges the circumstances under which the bill was given, and conclude that there was no consideration, a traverse of the first averment will be sufficient: (*Atkinson* v. *Davies*, 11 M. & W. 236.) It is a general rule that a defendant cannot in defence to an action on a bill or note, set up a contract different from that which the bill or note imports: (*Besant* v. *Cross*, 10 C. B. 895.) He may, however, impeach the consideration or set up a collateral agreement furnishing an answer to the demand for payment: (*Foster* v. *Jolly*, 1 C. M. & R, 703.) For instance, he may show that the bill, &c., was to be renewed: (*Thompson* v. *Chubley*, 1 M. & W 212), either generally or upon a condition broken: (*Byass* v. *Wyllie*, 1 C. M. & R. 686.) It was at one time sufficient to cast a suspicion upon a bill in order to require

representation, concealment, deviation, and various other defences (*p*) must be pleaded.

9.—(*q*) 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. (*r*) 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.—(*s*) 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; (*t*) and all other defences shall be specially pleaded including

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the plaintiff to prove consideration. The rule is now different. The *onus* lies on the defendant to prove want or illegality of consideration and in each case to trace the vice of the bill to the plaintiff, although in one case (*Mills* v. *Barber*, 1 M. & W. 425) it was doubted whether this was necessary where the bill has been obtained by fraud: (*Percival* v. *Frampton*, 2 C. M. & R. 180; *Lewis* v. *Parker*, 6 N. & M. 294: *Whittaker* v. *Edmunds*, 1 A. & E. 638; *Edmunds* v. *Groves*, 9 M. & W. 742; see also *Smith* v. *Martin*, 9 M. & W. 304; *Bingham* v. *Stanley*, 2 Q. B. 117.) Where the defendant pleads illegality or fraud of the original party to the bill: (*Masters* v. *Ibbertson*, 8 C.B. 100), and that the plaintiff took the bill without value: (*Brown* v. *Philpott*, 2 M. & W, 285), on proof of the illegality or fraud, the *onus* is thrown upon the plaintiff. Upon the trial of such an issue it is not the duty of the Judge to determine as a preliminary fact whether fraud is sufficiently proved to cast on the plaintiff the *onus* of proving consideration, but only whether there is evidence of fraud for the jury. And it is correct for him to direct them that if they think the fraud proved in the absence of proof by the plaintiff of consideration, the defendant is entitled to a verdict: (*Bailey* v. *Bidwell*, 13 M. & W. 73; *Harvey* v. *Towers*, 6 Ex. 656.) Payment or tender by the acceptor after the bill becomes due is no answer to the action: (*Poole* v. *Tumbridge*, 3 M. & W. 223; *Chapman* v. *Vaudevelde*, 1 H. & W. 685.)

(*p*) As to the nature and quality of pleas in confession and avoidance see Steph. Pl. 199.

(*q*) Taken from Eng. R. G. Pl. No. 9 of H.T. 1853, the origin of which is Eng. R. G. Pl. 4 of H.T. 4 Wm. IV. (Jerv. N. R. 130) with which our old Rule Pl. Q. B. No. 4 of E. T. 5 Vic. (Cam. R. 55) corresponded.

(*r*) In a declaration on a policy of insurance it is necessary truly to describe the interest on which the policy is effected: (*Cohen* v. *Hannam*, 5 Taunt. 101.) If therefore A. and B., *jointly* interested, effect an assurance, and there be two counts, one averring interest in A. and the other in B, plaintiff cannot recover on either count: (*Ib.*) An averment that A. and B. and certain other persons trading under the firm of A. B. & Co., were interested in the property, is sufficient, on a motion in arrest of judgment: (*Wright* v. *Welbie*, 1 Chit. Rep. 49.)

(*s*) Taken from Eng. R. G. Pl. No. 10, of H. T. 1853, the origin of which is Eng. R. G. Pl. No. 1 of H. T. 4 Wm. IV. (Jerv. N. R. 130), with which our old Rule Pl. Q. B. No. 1 of E.T. 5 Vic. (Cam. R. 55) corresponded.

(*t*) Thou[illegible] party against whom a deed is all[illegible] may be allowed to say *non est fact*[illegible], viz., that the deed is not his, he is on the other hand precluded from denying its effect or operation, because if allowed to say *non concessit* or *non demisit*, when the instrument purports to grant or demise, he would be permitted to contradict his own deed, from which by law he is estopped. In the case of a person not a party but a stranger to the deed, the

matters which make the deed absolutely void, as well as those which make it voidable. (*u*)

11.—(*v*) The plea of *nil debet* shall not be allowed in any action. (*w*)

12.—(*x*) All matters in confession and avoidance shall be pleaded specially, as above directed in actions on simple contracts. (*y*)

13.—(*z*) 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. (*a*) But this rule is not to apply to cases where the plaintiff,

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rule is reversed, and the form of traverse is in that case *non concessit*, &c, the reason of which seems to be that estoppels do not hold with respect to strangers: (Steph. Pl. 198.)

(*u*) See *Trott* v. *Smith*, 12 M. & W. 688.

(*v*) Taken from Eng. R. G. Pl. No. 11 of H. T. 1853, the origin of which is Eng. R. G. Pl. No. 2 of H.T. 4 Wm. IV. (Jerv. N.R. 130) with which our old Rule Pl. Q. B. No. 2 of E. T. 5 Vic. (Cam. R. 56) corresponded.

(*w*) It was at one time doubted whether the rule of William (with which the rule here annotated corresponds) in terms applied to actions of debt on penal statutes: (*Faulkner* v. *Chevell*, 5 A. & E. 213.) It was however afterwards decided that it did not, and that *nil debet* is still a good plea in such actions: (*Spencer* v. *Swannell*, 3 M. & W. 155; see also *Burgess* v. *Bodgear*, 7 M. & G. 428 n; *Williams* v. *Bryant*, 5 M. & W. 477.) If *nil debet* be pleaded to a declaration containing a count on an account stated, it is bad for the whole declaration, although to the other counts it is a good plea by Statute: (*Calvert* v. *Moggs*, 10 A. & E. 632.)

(*x*) Taken from Eng. R. G. Pl. No. 12 of H. T. 1853, the origin of which is Eng. R. G. Pl. No. 3 of H.T. 4 Wm. IV. (Jerv. N.R. 130) with which our old R. Pl. No. 3 of E. T. 5 Vic. (Cam. R. 57) corresponded.

(*y*) See R. No. 6, *supra*.

(*z*) Taken from Eng. R. G. Pl. No. 13 of H. T. 1853, the origin of which is Eng. R. G. Pl. of T.T. 1 Vic. as extended to set-off (Jerv. N.R. 156) with which our old Rule No. 15 of E. T. 5 Vic. (Cam. R. 23) corresponded. With respect to the extension to cases of set-off, see *Shirley* v. *Jacobs*, 2 Bing. N. C. 88; *Ernst* v. *Brown*, 3 Bing. N. C. 647; *Kenyon* v. *Wakes*, 2 M. & W. 764; *Nicholl* v. *Williams*, 2 M. & W. 758; *Coates* v. *Stevens*, 2 C. M. & R. 118; *Booth* v. *Heward*, 5 Dowl. P.C. 438; *Eastwick* v. *Harman*, 6 M. & W. 13; *Rowland* v. *Blaksley*, 1 Q. B. 403.)

(*a*) A plaintiff is not bound to give the defendant a statement of the items of payment admitted: (*Myatt* v. *Green*, 13 M. & W. 377; see also *Townson* v. *Jackson*, 13 M. & W. 374; *Lamb* v. *Micklethwait*, 1 Q. B. 400; *Nosotte* v. *Page*, 20 L. J. C. P. 81.) When the payments are admitted in the particulars, the effect of the rule is to put the admission on the same footing as if there had been a plea of payment and no evidence of it except the admission in the particulars: (*Goatley* v. *Herring*, per Maule, J, 12 L. J. C. P. 32; *Russell* v. *Bell*, 10 M. & W. 340; *Turner* v. *Collins*, 2 L. M. & P. 99.) Where the plaintiff in his particulars of demand admits a payment generally, as "Cr. by bills," &c., this is to be taken as a payment admitted to have been made to the plaintiff *by the defendant*: (*Smethurst* v. *Taylor*, 12 M. & W. 545.)

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. (*b*)

14.—(*c*) 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. (*d*)

15.—(*e*) 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, (*f*) and no other defence than such denial shall be admissible under that plea. (*g*)

But that admission may be explained by showing on what account such payments were made. Thus in an action for use an occupation to recover £42 8s. 10d., the balance of an account of £64 0s. 10d., where the particulars of demand contained an admission "on account £21 12s.," and the plaintiff at the trial proved a debt to the amount of £14 3s. 6d., it was held that the plaintiff might explain on what account the £21 12s. had been paid, and on evidence being given that £12 10s. of that sum had been paid for a debt not due to the plaintiff, that he was entitled to recover £5 1s. 6d. being the difference between the amount of the debt and that part of the payments in the particulars of demand remaining unexplained: (*Mercy* v. *Galot*, 3 Ex. 851.) Where the plaintiff gave credit for a bill and then debited it as dishonored, it was held that these statements must be taken together and that there was no admission of payment: (*Green* v. *Smithies*, 1 Q. B. 796.) It has been held by Pollock, C.B, that if a plaintiff in his particulars of demand delivered in a cause do not give credit for any sum paid, but in it refer to "full particulars" already delivered, and those full particulars do give credit for a sum paid by defendant, this would not dispense with the necessity of the defendant's pleading such payment: (*Hart* v. *Middleton*, 2 C. & K. 9; see also *Bosley* v. *Moore*, 8 Dowl. P.C. 375.)

(*b*) Where a party demands a balance without stating how it arises, if the defendant plead payment, the plaintiff may show that in his balance credit has already been given for the sum pleaded: (see *Lamb* v. *Micklethwaite*, 9 Dowl. P.C. 531; *Townson* v. *Jackson*, 2 D. & L. 369; *Morris* v. *Jones*, 1 Q. B. 397.)

(*c*) Taken from Eng. R. G. Pl. No. 14 of H. T. 1853, the origin of which is the latter part of Eng. R. T. T. 1 Vic. (Jerv. N.R. 157) with which the latter part of our old Rule No. 15 of E. T. 5 Vic. corresponded.

(*d*) Payment cannot be given in evidence even for the purpose of showing that the jury ought not to give damages in respect of interest: (*Adams* v. *Polk*, 3 Q. B 2; see also *Lane* v. *Mullins*, 2 Q B. 254.)

(*e*) Taken from Eng. R. G. Pl. No. 15, the origin of which is Eng. R. G. Div. III. of H. T. 4 Wm. IV. (Jerv. N. R. 13), with which our old Rule Div. III. of E.T. 5 Vic. (Cam. R. 57) corresponded.

(*f*) The word "detention" in this rule or "detained" in a plea, means an adverse detention. Therefore a pledge to defendant cannot be given in evidence under the plea of "non detinet," because it sets up a right to the goods: (*Clements* v. *Flight*, 16 M. & W. 42; see also *Owen* v. *Knight*, 4 Bing. N. C. 52; *Phillips* v. *Hayward*, 3 Dowl. P. C. 362; *Barnwell* v. *Williams*, 7 M. & G. 493; *Crossfield* v. *Such*, 22 L. J. Ex. 65.)

(*g*) If the defence be that plaintiff is not possessed of the goods, or that defendant is justified in detaining them, such a defence should be specially pleaded: (*Richards* v. *Frankum*, 6 M.

16.—(*h*) In actions for *torts*, the plea of "not guilty" (*i*) shall

& W. 420.) The defendant cannot either under a plea of *non detinet* or of not possessed, set up a tenancy in common with the plaintiff: (*Mason* v. *Furnell*, 12 M. & W. 674), nor upon a plea denying property in plaintiff, can defendant as a defence set up that there are other persons co-tenants with the plaintiff who are not joined in the action: (*Broadbent* v. *Ledward*, 11 A. & E. 209); but under a plea that the goods are not the goods of the plaintiff defendant may set up a lien: (*Lane* v. *Tewson*, 12 A. & E. 116 n.) Formerly the defendant could not traverse the bailment: (*Walker* v. *Jones*, 2 C. & M. 672; *Whitehead* v. *Harrison*, 6 Q. B. 423; *Crossman* v. *White*, 7 Q.B. 43.)

(*h*) Taken from Eng. R. G. Pl. No. 16, the origin of which is Eng. R. G. of H. T. 4 Wm. IV. Div. IV. (Jerv. N.R. 131) with which our old Rule of E.T. 5 Vic. Div. IV. (Cam. R. 57) corresponded.

(*i*) The plea of "not guilty" which operates as a denial of the breach of duty or wrongful act and admits the inducement, does not admit circumstances irrelevantly stated nor preclude the defendant from disputing under that plea the character of the act upon which frequently the action is founded. Thus in an action for malicious arrest, "not guilty" denies the malice and want of probable cause, though it admits the arrest: (*Cotton* v. *Browne*, 3 A. & E. 312; *Drummond* v. *Pigou*, 2 Bing. N. C. 114; *Watkins* v. *Lee*, 5 M. & W. 270; *Coles* v. *Bank of England*, 10 A. & E. 437; *Hounsfield* v. *Drury*, 11 A. & E. 98.) So in an action for keeping mischievous animals, it denies the *scienter*: (*Thomas* v. *Morgan*, 2 C. M. & R. 496; *Card* v. *Case*, 5 D. & L. 509.) So in an action for a deceitful representation, it puts in issue both the representation and the deceit: (*Norton* v. *Scholefield*, 9 M. & W. 665; *Mummery* v. *Paul*, 14 L. J. C. P. 9.) So in an action for erecting a cesspool near a well and thereby contaminating the water of the well, not guilty puts in issue both the fact of the erection of the well and the averment that the water was thereby contaminated: (*Norton* v. *Schofield*, *ubi supra*.) So in an action for running down the plaintiff's carriage, it may under not guilty be proved to have resulted from accident or from the plaintiff's negligence: (see *Dodd* v. *Holme*, 1 A. & E. 493; *Dawson* v. *Moore*, 7 C. & P. 25; *Whalley* v. *Pepper*, 7 C. & P. 506; *Gough* v. *Bryan*, 2 M. & W. 770; *Bridge* v. *Grand Junction R. Co*, 3 M. & W. 244; *Dakin* v. *Brown*, 7 D. & L. 151; *South Shields Waterworks Co.* v. *Cockson*, 15 L. J. Ex. 315; *Holden* v. *Liverpool Gas Light Co*, 3 C. B. 1.)

It is, however, to be observed as an established rule of pleading not affected by the New Rules, that matters of inducement not material to the action cannot be traversed, and therefore are not admitted by the plea of not guilty: (see *Mummery* v. *Paul*, 1 C. B. 316; *Mitchell* v. *Crassweller*, 22 L. J. C P. 100.) But it must not be supposed that not guilty admits only so much of the inducement as is necessary to found the action if the wrongful act be done. Additional duties may be created by subsequent and additional facts, and if such subsequent statement raise an additional duty, it is admitted by not guilty, even though without it an action might be maintained. Thus in an action against a sheriff for breach of duty in executing process upon the delivery of the writ against goods, he is bound to look out for the goods, if he find them he is bound to levy, if he levy he is bound to pay over the money; for the breach of each of these duties an action would lie, but if all are stated all the duties but not the breaches thereof, are admitted by the general issue: (see *Wright* v. *Lainson*, 6 Dowl. P. C. 146; *Lewis* v. *Alcock*, 6 Dowl. P. C. 389; *Rowe* v. *Ames*, 6 M. & W. 747; *Needham* v. *Fraser*, 1 C.B. 815; *Atkinson* v. *Ruleigh*, 3 Q.B. 379.) It has been decided in an action for running down the plaintiff's chaise

operate as a denial only of the breach of duty or wrongful act alleged

that if the declaration allege that the defendant by his servant was possessed of a horse, &c., such possession is admitted by not guilty: (see *Wheatley* v. *Patrick*, 2 M. & W. 650; *Hart* v. *Crowley*, 12 A. & E. 378; *Taverner* v. *Little*, 7 Scott, 796; *Darnford* v. *Trattles*, 12 M. & W. 529.) But this does not seem to be quite consistent with the general rule, for if the defendant were guilty of the wrongful act either by himself or servant, the possession is immaterial and therefore not traversable. So to a declaration that the defendant was employed by commissioners of sewers to make a sewer in a public highway, that he kept and continued in the highway two iron gratings lying thereon in the custody and care of the defendant in forming the sewer, without placing any light to show that the gratings were there, not guilty does not put in issue the averment that the gratings were in the custody and care of the defendant, for it is an immaterial averment: (*Grew* v. *Hill*, 6 D. & L. 664; see also *Atkinson* v. *Raleigh*, 3 Q. B. 79; *Greenfield* v. *Edgecombe*, 7 Q.B. 661; *Bennett* v. *Peninsular & Oriental Steamboat Co*, 6 D. & L. 387.) Every material allegation in the inducement must be specially traversed, even though improperly incorporated with the breach: (see *Frankum* v. *Falmouth*, 2 A. & E. 452; *Dukes* v. *Gosling*, 1 Bing. N.C. 588; *Drummond* v. *Pigou*, 2 Bing. N.C. 114; *Dunford* v. *Trattles*, 1 D. & L. 554; *Wren* v. *Heslap*, 12 Q.B. 227; *Brink* v. *Wiguard*, 2 C. & K. 657.) In an action for negligently driving a horse and cart against the plaintiff's horse, defendant cannot under not guilty show that he was not the person driving when the injury happened and that the cart did not belong to him: (*Taverner* v. *Little*, 5 Bing. N. C. 676.) Where the plaintiff's possession of the cart is alleged by way of inducement it is admitted by the plea of not guilty: (*Emery* v. *Clarke*, 2 M. & R. 260; see also *Hart* v. *Crowley*, 12 A. & E. 378.) Leave and license may be given in evidence to an action for an assault. (see *Christopherson* v. *Bare*, 11 Q. B. 473; *Rughar* v. *Clements*, 12 Q.B. 260; see further *Benyon* v. *Davison*, 3 M. & W. 179; *Edmund* v. *Grover*, 3 M. & W. 177; *Martin* v. *Stone*, 9 M. & W. 808; *Bingham* v. *Stanley*, 2 Q.B. 126); but in an action for keeping a mizzen near the plaintiff's house, whereby the air was corrupted, defendant was not allowed under not guilty to give in evidence an uninterrupted user for twenty years: (*Flight* v. *Thomas*, 2 P & D. 531.) In trover not guilty puts in issue the wrongful conversion: (*Young* v. *Cooper*, 6 Ex. 161; overruling *Stancliffe* v. *Hardwick*, 3 Dowl. P. C. 762), and the defendant might under that plea have proved a tenancy in common with the plaintiff unless he have destroyed the article: (*Stancliffe* v. *Hardwick*, 2 C, M. & R. 1; *Farrar* v. *Beswick*, 1 M. & W. 782.) Under not guilty the defendant cannot set up an absolute property in himself by purchase from the plaintiff: (*Barton* v. *Brown*, 5 M. & W. 298); nor a right to detain the goods on a delivery of them to him by the plaintiff as a security for rent: (*White* v. *Teal*, 4 P. & D. 43.) The plea of not possessed puts in issue the right of the plaintiff to the possession of the goods at the time of the conversion: (*Isaac* v. *Belcher*, 7 Dowl. P. C. 516.) A lien may be given in evidence under a plea that "the plaintiff was not lawfully possessed:" (*Brandao* v. *Barnett*, 1 M. & G. 208.) In general, under this plea defendant may show that plaintiff has no right to immediate possession: (*Owen* v. *Knight*, 6 Dowl. P. C. 245.) Thus he may shew that the goods were with the consent of the plaintiff handed over to a third party: (*Vernon* v. *Shipton*, 2 M.& W. 9); or pledged by the plaintiff to a third party because the plea raises in question the right of possession as well as the right of property: (*Samuel* v. *Morris*, 6 C. & P. 520.) But under such plea the defendant cannot

to have been committed by the defendant, (*j*) and not of the facts stated in the inducement, (*k*) 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: (*l*) *Exempli gratiâ.* (*m*)

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, (*n*) and will not operate as a denial of the plaintiff's occupation of the house.

In an action for obstructing a right of way, (*o*) 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

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show an execution as his justification for making a seizure of the goods: (*Samuel* v. *Duke*, 3 M. & W. 622); nor a claim to seize the goods for toll dues for landing them at a particular wharf: (*Webb* v. *Tripp*, 1 Dowl. N. S. 589.) He may however show that the sale of the goods to the plaintiff was fraudulent: (*Ashby* v. *Minett*, 3 N. & P. 231; *Nicolls* v. *Bastard*, 2 C. M. & R. 659; see also *Pickard* v. *Sears*, 6 A. & E. 469.) The plea of not guilty and not possessed together make up the old plea of not guilty, and whatever might be given in evidence under not guilty before the New Rules of Pleading were first framed may be proved under one or other of these pleas: (*Whitmore* v. *Green*, per Alderson, B, 13 M. & W. 107; see also *Kyniston* v. *Crouch*, 14 M. & W. 266.

(*j*) See *Pickwood* v. *Neale*, 10 M. & W. 206; *Mummery* v. *Paul*, 1 C.B. 316.

(*k*) See *McGregor* v. *Gregory*, 11 M. & W. 287.

(*l*) As to the effect of omitting to deny material traversable averments or averments immaterial, see note *i*, *ante*.

(*m*) The instances which here follow are merely illustrations of the general application of the rule.

(*n*) In an action for erecting a cesspool near a well and thereby contaminating the water of the well, the plea of not guilty puts in issue both the fact of the erection of the cesspool and that the water was thereby contaminated: (*Norton* v. *Scholefield*, 9 M. & W. 665.) Where a declaration in case stated that before, &c., the defendant was employed by certain persons, &c., to make a sewer in a highway, and thereupon theretofore, &c., the defendant kept and continued upon the said highway two iron gratings then lying on the said last mentioned highway, in the custody and care of the defendant for the purpose of forming the said sewer, without placing any light or signal at or near such gratings, whereby, &c. Plea not guilty. Held that the allegation that the gratings were in the custody and care of the defendant was not matter of inducement or material, and was therefore not admitted by the plea of not guilty: (*Greew* v. *Hill*, 6 D. & L. 664.)

(*o*) There are, according to Coke, three kinds of ways—first, a footway, which is called *iter, quod est jus eundi vel ambulandi homini*, and this was the first way. The second is a footway and a horseway, which is called *actus, ab agendo.* The third is *via* or *aditus*, which contains the other two, and also a cartway, &c., for this is *jus eundi vehendi et vehiculum vel jumentum ducendi:* (Co. Litt. 56 a.)

trade, the plea of "not guilty" will operate in denial of speaking the words, of speaking them maliciously, and in the defamatory sense imputed, (*p*) and with reference to the plaintiff's office, profession, or

(*p*) In an action for libel or slander the plea of not guilty puts the malice in issue: (*Hoare* v. *Silverlock*, 9 C. B. 20.) Where, however, the words are proved the inference of malice may be disproved: (*McNab* v. *McGrath*, H. T 7 Wm. IV. *M.S.* R. & H. Dig. Libel and Slander, III. 211.) Under the general issue in libel the defendant may disprove the fact of publication, or show that it is not of an injurious character, or that it was published on some justifiable occasion (*O'Brien* v. *Clement*, 3 D. & L 676); but the truth of the defendant's remarks on the report of a trial and the evidence given thereat cannot be given in evidence under not guilty (*Small* v. *McKenzie*, Dra. Rep. 183), and if comment be made the defendant may plead that the supposed libel was a fair and bona fide comment without malice, on the conduct of the plaintiff in a public capacity: (*Lucas* v. *Smith*, 2 Jur. N. S. 1170.) To an action for libel contained "in any public newspaper or other periodical publication," defendant may plead that the libel was inserted without malice and without gross negligence, and that he published or offered to publish an apology (13 & 14 Vic. cap. 60, s. 3, Har. Prac. Stats. p. 208), and may notwithstanding 7 Wm. IV. cap. 3, pay money into Court: (*Ib.*) If the action be for slander all the circumstances immediately attending and preceding the speaking of the words may be given in evidence under the general issue: (*Feegan* v. *Robson*, 6 U. C. R. 375) So the defendant may give facts and circumstances in evidence in mitigation of damages: (*Johnson* v. *Eastman*, Tay U. C. R. 327.) If the words be not actionable *per se* the plea of not guilty puts in issue the special damage alleged as well as the uttering the words: (*Wilby* v. *Elston*, D. & L. 143) The defendant spoke to the plaintiff's mistress words charging the plaintiff with irregularity in her conduct as a servant girl, in consequence of which she lost her place Held, that under not guilty the defendant might disprove malice in the various methods by which it is usually disproved, yet that he was stopped from giving evidence of the truth of the facts as rebutting the malice, because he had not pleaded that the facts were true: (*Ramsey* v. *Webb*, Car. & M. 104, Coltman, J.) Though in such case the absence of the proof of special damage (that the plaintiff thereby lost her place) cannot effect the verdict, yet the jury may consider it in assessing damages: (*Ib.*) When the declaration contains prefatory allegations the defendant will not be allowed under not guilty to go into evidence as to the prefatory allegations: (*Gwynne* v. *Sharpe*, Car. & M. 533, Patteson, J.; *Hemming* v. *Power*, 10 M. & W. 564.) The prefatory allegations must be taken to be perfectly true as the defendant has not denied them, which he might have done if he had meant to put the plaintiff to the prove of them: (*Ib.*) The defendant may, however, show that the words spoken were used in a privileged communication (*Richards* v. *Boulton*, 4 O. S. 95), and where the words imputed as slanderous were spoken on an occasion when either from public duty, private interest, or the relation of the parties to each other, the character of the party complaining may be freely discussed, the jury must find express malice upon evidence sufficient to warrant their finding before the defendant can be pronounced guilty: (*Ib.*) Privileged communications comprehend all statement made bona fide in the performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them: (*Somervill* v. *Hawkins*, 10 C B. 583; see also *Tuson* v. *Evans*, 12 A. & E. 733; *Coxhead* v. *Richards*, 2 C.B. 569; *Blackburn* v. *Pugh*, *Ib.* 611; *Bennett*

trade, (*q*) 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. (*r*)

In actions for an escape, it will operate as a denial of the neglect or default of the sheriff or his officers; (*s*) but not of the debt, (*t*)

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v. *Deacon*, *Ib.* 628; *Wilson* v. *Robinson*, 7 Q. B. 68; *Griffiths* v. *Lewis*, 7 Q. B. 61; *Hopwood* v. *Thorn*, 8 C B. 293; *Taylor* v. *Hawkins*, 16 Q. B. 306.) The onus of proving malice in such cases lies on the plaintiff: (*Ib.*) In order to entitle the plaintiff to have the question of malice left to the jury he need not show circumstances necessarily leading to the conclusion that malice existed, or such as are inconsistent with its non-existence, but they must be such as to raise a probability of malice, and be more consistent with its existence than its non-existence: (*Ib.*)

(*q*) Where in an action by a person describing himself in the declaration as a druggist, vender of medicines and apothecary, the witnesses proved that several persons practising physic had purchased medicines from him, this evidence upon a motion for a non-suit was considered sufficient to support the verdict: (*Terry* v. *Starkweather*, Tay. U. C. R. 68.) But where the plaintiff described himself as a physician and surgeon licensed to practice according to the laws of the Province, it was held that proof that he acted as such was insufficient without showing a license: (*Burwell* v. *Hamilton*, H. T. 2 Wm. IV. *M.S.* R. & H. Dig. Libel and Slander, H. 8.)

(*r*) In an action for a libel the defendant at first pleaded not guilty, but afterwards pleaded to the further maintenance of the action that the plaintiff had recovered damages against another person for the same grievances. New assignment that the pending action was brought for other and different grievances. Plea to the new assignment not guilty. Held, that this did not admit the inuendos, and that by pleading not guilty to the new assignment the defendant had raised precisely the same issue, as if the libel had been set out in the declaration and the defendant had pleaded not guilty to it: (*Brunswick* v. *Pepper*, 2 C. & R. 83, Erdel.) To an action for words imputing to the plaintiff in the way of his trade that he was dishonest and a cheat, the defendant pleaded a judgment recovered in a former action. Upon the trial of the issue upon *nul tiel record*, the record when produced showed that the former action had been brought for calling the plaintiff a thief simply and not in the way of his trade. Held no bar: (*Wardsworth* v. *Bentley*, 1 B. & C. 203.)

(*s*) An action for an escape should be brought against the sheriff and not against the bailiff who arrested, unless the defendant has been guilty of a rescue: (*Wilson* v. *McCullough*, 5 O. S. 680.) The Court refused to discharge a prisoner from custody upon the ground that the gaoler having taken him before a magistrate without warrant had suffered a voluntary escape: (*Robinson* v. *Hall*, Tay, U. C. R. 625); but where in England a debtor in custody on *mesne* process was after the writ was returnable taken by the gaoler to a revising barrister in the same county though returned to gaol on the same day, this was held to be an escape: (*Williams* v. *Mostyn*, 4 M. & W. 145.)

(*t*) In an action against a sheriff for the escape of A. B., arrested on a *ca. re.* at the instance of the plaintiff, the declaration averred "that he (A. B.) was indebted to the plaintiff in a large sum of money, to wit, &c., upon and in respect of certain causes of action before then accrued to the plaintiff against the said A. B.," &c. Pleas, 1st, not guilty, 2d, denying that A. B. was indebted to the plaintiff *modo et forma*, &c. Held that under these pleadings plaintiff was entitled to recover if he showed that *any debt* accrued to him against A. B. before he sued out the writ: (*O'Reilly* v. *Moodie*, 4 U. C. R. 266.) In debt for an escape

judgment or preliminary proceedings. (*u*)

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

17.—(*x*) All matters in confession and avoidance shall be pleaded specially, as in actions on contract. (*y*)

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the sheriff cannot plead in bar of the action satisfaction previous to the issuing of the writ: (*Munson* v. *Hamilton*, 5 O. S. 118.)

(*u*) It is not open to a sheriff sued for an escape to set up technical objections in regard to forms of action and points of practice having nothing to do with the fact of the existence of a debt: (*O'Reilly* v. *Moodie*, 4 U.C.R. 266.) To an action against a sheriff for the escape of a party attached, the sheriff will not be allowed to deny the submission or the award, or to set up any defence which might have been taken in the proceedings upon the award—he cannot go further back than the order authorizing the attachment: (*Huntley* v. *Smith*, 4 U. C. R. 181.)

(*v*) A person engaged to transport goods for hire is not by virtue of such engagement merely a common carrier and as such liable for all accidents, whether negligent or not: (*Benedict* v. *Arthur*, 6 U.C.R. 204.) So where the declaration alleged that the defendants were common carriers of passengers from Southampton to Gibraltar, a place beyond the seas, to which the defendants pleaded that they were not common carriers *modo et forma*. Held that the plea only put in issue the fact of the defendants carrying passengers from Southampton to Gibraltar for hire, and not whether they were common carriers in the strict technical sense of the term: (*Bennett* v. *The Peninsular and Oriental Steamboat Co*, 6 D. & L. 387.) Where several defendants are charged as common carriers and plead traversing only, the delivery to them of the parcel without saying "or any or either of them," the plea notwithstanding is good: (*Parke et al.* v. *Davis*, 4 U. C. R. 411.)

(*w*) The defendant under not guilty cannot set up that the goods were lost through the negligence of the plaintiff: (*Webb* v. *Page*, 6 M. & G. 196); nor is it competent for defendant under such a plea to set up as a defence that the plaintiff misrepresented the weight of the goods which the defendant agreed to carry: (*Webb* v. *Page*, 6 Scott, N. R. 951.) The defendant ought to plead the misrepresentation specially or traverse the acceptance of the goods for the purpose of being carried: (*Ib.*) In an action (by the plaintiffs in an action of ejectment) against defendants as common carriers for not delivering within a reasonable time the record of *Nisi Prius* at the assize town, it was held not open to the defendants to put in issue the plaintiff's title to the land, the subject of the action of ejeotment: (*Parke et al.* v. *Davis et al*, 6 U. C. R. 411.)

(*x*) Taken from Eng. R. G. Pl. No. 17 of H.T. 1853, the origin of which is Eng. R.G. of H.T. 4 Wm. IV. "Case" sub-div. 2 (Jerv. N.R. 133) with which our old Rule of E. T. 5 Vic. "Case" sub-div. 2 (Cam. R. 60) corresponded.

(*y*) If the breach or wrongful act be admitted, and the defendant seek to protect himself from the consequences thereof by other circumstances, he must plead specially. Thus it has been held that a carrier to avail himself of a Statute which requires notice must plead it: (*Symes* v. *Chaplin*, 5 A. & E. 634; *Smith* v. *Thomas*, 2 Bing. N.C. 372; *Perrin* v. *Harris*, 2 M. & R. 5; *Webb* v. *Page*, 6 M. & G. 196.) Formerly in trover a lien could not be given in evidence under not guilty: (*White* v. *Teal*, 12 A. & E. 106; *Stancliffe* v. *Hardwicke*, 3 Dowl. P.C. 762; see also *Kynaston* v. *Cronk*, 14 M. &

18.—(*z*) 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, (*a*) in failure whereof the plaintiff may be ordered to amend with costs, or give such particulars as the Court or Judge may think reasonable. (*b*)

19.—(*c*) 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

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W. 266); but now it seems it may, and is at all events clearly admissible under not possessed: (*Richards* v. *Symons*, 8 Q.B. 90.)

(*z*) Taken from Eng. R. G. Pl. No. 18 of H. T. 1853, the origin of which is Eng. R.G. "Trespass" sub-div. 1 of H. T. 4 Wm. IV. (Jerv. N.R. 134) with which our old Rule "Trespass" sub-div. 1 of E.T. 5 Vic. (Cam. R. 60) corresponded.

(*a*) The plaintiff must prove the abuttals as alleged, and though he will not be defeated by a minute variance, yet he must show that the close in which the trespass was committed is faithfully described in substance, so as to give the defendant full information: (*Webber* v. *Richards*, 1 Q. B. 439.) A statement of two abuttals only may be sufficient: (*North* v. *Ingamells*, 9 M. & W. 249.) The description, as of a particular township, must be proved as laid: (*Mattice* v. *Farr et al*, Tay, U.C.R. 289.) A house, in one part of which the plaintiff's shop was kept, and in the rest of which the plaintiff's clerk and his family resided, although the plaintiff never resided there was held to be properly described as plaintiff's dwelling-house: (*Beatty* v. *Mc Masters et al*, T. T. 2 & 3 Vic. *MS.* R. & H. Dig. Trespass, II. 10.) Where the declaration stated that the defendant broke and entered "certain lands of the plaintiff covered with water, being the bed and channel of the river T, and under the same in the several parishes of L. and L, in the county of Y," it was held that the *locus in quo* was sufficiently described by name: (*Beaufort* v. *Vivan*, 7 Ex. 580.) The *locus in quo* should be designated by abuttals or other description as it was at the time of the trespass and not at the time of the declaration filed: (*Humfrey* v. *The London & North West R. Co.*, 7 Ex. 325; see also *Lempriere* v. *Humfreys*, 8 A. & E. 181.) In trespass to a dwelling-house it has been held a bad plea to plead that the close in which, &c., is the close of the defendant: (*Vail* v. *Noble et al*, 2 U.C. R. 142.) So in trespass for breaking and entering the *close* of the plaintiff, it was held a bad plea for the defendant to plead that the *closes* in which, &c., was not nor was either of them the close of the plaintiff: (*Woodruff et al.* v. *Davis*, 2 U.C.R. 404.) To a declaration setting out the close by metes and bounds, the defendant pleaded that the part of she close on which, &c., was his close, and not the close of the defendant, as stated in the plea, the replication was held good: (*Hiscott* v. *Coz*, 1 U. C. R. 489.) To support an action of trespass upon the plea of the close not being the close of the plaintiff, the plaintiff must prove an actual and immediate occupation of the *locus in quo*: *McNeil* v. *Train*, 5 U.C.R. 91.) And under that plea, the question of possession is a fact for the jury: (*Ib.*)

(*b*) *Court or Judge*—Relative powers see note *m* to s. xxxvii. of C. L. P. A. 1856.

(*c*) Taken from the Eng. R. G. Pl. No. 19 of H. T. 1853, the origin of which is Eng. R.G. "Trespass" sub-div. 2 of H. T. 4 Wm. IV. (Jerv. N. R. 134) with which our old Rule "Trespass" sub-div. 2 of E. T. 5 Vic. (Cam R. 60) corresponded.

right of possession of that place, which, if intended to be denied, must be traversed specially. (*d*)

20.—(*e*) 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. (*f*)

(*d*) The plea of not guilty denies the possession stated in the declaration, *i. e.*, a sufficient possession to sustain the action: (*Heath* v. *Milward*, 2 Bing. N. C. 98; *Harrison* v. *Dixon*, 12 M. & W. 142.) that is to say, as against a mere wrong doer the *actual* possession; as against a defendant alleging title *the legal right to possession*: (*Purnell* v. *Young*, 3 M. & W. 288; *Harrison* v. *Dixon, ubi sup.*; *Jones* v. *Chapman*, 2 Ex. 803.) The plaintiff complained of an injury to a messuage and premises in his possession, and the defendant pleaded not possessed; and it being found that the defendant had only part of the house, the defendant occupying the rest, it was held that the plaintiff was entitled to a verdict: (*Fenn* v. *Grafton*, 2 Bing. N. C. 617.) The plea of not possessed puts in issue the possession of the close described in the declaration, (*Bond* v. *Downton*, 2 A. & E. 617), and if more than one close be described the issue upon the plea is divisible, and the defendant will be entitled to a verdict as to so much as is not proved: (*Phythian* v. *White*, 1 M. & W, 216; *Wilcox* v. *Montgomery*, 5 O. S. 312.) Where in a trespass *quare clausam fregit* by one of two tenants in common it was proved that the defendant entered upon the land under a writ of execution against the goods of the other tenant, it was held that such entry could not be given in evidence under not guilty, but should be specially pleaded: (*Newkirk* v. *Payne*, 6 O.S. 458.) The plea of *liberum tenemenium* admits the possession and renders it incumbent on the defendant to prove title either by deed or by showing twenty years' actual possession: *Brest* v. *Lever*, 7 M. & W. 593.) On this plea the defendant is entitled to a verdict if he establish a title to that part of the close on which the trespass was committed, and is not bound to prove title to the whole close: (*Smith* v. *Royston*, 8 M. & W. 381.) To a declaration in trespass *quare clausam fregit*, and for carrying away the plaintiff's hay and corn, the plea of *liberum tenemenium* was held bad: (*Wilcox* v. *Montgomery*, 5 O.S. 312.)

(*e*) Taken from Eng. R. G. Pl. No. 20 of H. T. 1853, the origin of which is Eng. R.G. Pl. of H. T. 4 Wm. IV. "Trespass" sub-div. 3 (Jerv. N.R. 134), with which our old Rule of E. T. 5 Vic. "Trespass" sub-div. 3 (Cam. R. 61) corresponded.

(*f*) The plea of no property puts in issue the property as well as the possession: (*Harrison* v. *Dixon*, 14 M. & W. 142; *Ashmore* v. *Hardy*, 7 C. & P. 501.) If the defendant claim the goods he may under this plea show his title and that the plaintiff's title is fraudulent; for in such a case as against the defendant the plaintiff has no property: (*Nicolls* v. *Bastard*, 2 C. M. & R. 659; *Ashby* v. *Minnett*, 8 A. & E. 121.) In England it has been held that if the defendant justify taking the goods as assignee of a bankrupt and the plaintiff reply that the goods are not the goods of the assignee but the goods of him, the plaintiff, he cannot under that replication dispute the bankruptcy: (*Jones* v. *Brown*, 1 Bing. N.C. 495.) In trespass for taking goods the defendant cannot under the general issue even in mitigation of damages prove a repayment by him after action of the money produced by the sale of the goods: (*Rundle* v. *Little*, 6 Q. B. 174; see further *Clarke* v. *Durham et al*, E. T. 3 Vic. *MS.* R. & H. Dig. Trespass, II. 19; *Carey* v. *Tate*, 6 O.

21.—(*g*) 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," (*h*) 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, (*i*) and shall specify whether such acts are public or otherwise—otherwise such plea shall be taken not to have been pleaded by virtue of any Act of Parliament; (*j*) and such memorandum shall be inserted in the margin of the issue and of the *nisi prius* record. (*k*)

22.—(*l*) A plea containing a defence arising after the commencement

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S. 147; *Abrams* v. *Moon*, 1 U. C. R. 552; *Lunn* v. *Turner*, 4 U. C. R. 252.)

(*g*) Taken from Eng. R. G. Pl. No. 21 of H.T. 1853, the origin of which is Eng. R. G. of T. T. 1 Vic. (Jerv. N. R. 156), with which our old Rule. No. 16 of E. T. 5 Vic. (Cam. R. 24) corresponded.

(*h*) "According to the Statute" instead of "by Statute" written in the margin, may be sufficient: (*Robertson* v. *Cooley et al*, 7 U. C. R. 305.) The Court will not in general with this plea allow other pleas: (*Neale* v. *McKenzie*, 2 Dowl. P. C. 702; *Fisher* v. *Thames Junction Co*, 5 Dowl. P.C. 773; *O'Brien* v. *Clement*, 15 M. & W. 435; *Legge* v. *Boyd*, 1 M. & G. 898; but see *Langford* v. *Woods*, 7 M. & G. 625; *Bartholomew* v. *Carter*, 10 L. J. C. P. 257; *Coy* v. *Forester*, 8 M. & W. 312.)

(*i*) Under our old Rule the words "by Statute" in the margin were sufficient. It was not necessary to give the year of the passing of the Statute, much less the chapter and section. The old English rule was not more exacting. But where in an action of trespass for hunting over plaintiff's land, the defendant pleaded not guilty by Statute, the Court on an affidavit of the plaintiff that he could not discover the Statute under which the defendant meant to justify, made absolute a rule upon the defendant to point out within three days the Statute under which the plea was pleaded, or else that the words "by Statute" should be struck out of the margin of his plea: (*Coy* v. *Forrester*, 8 M. & W. 312.) The comprehensiveness of the general issue "by Statute" is not affected by any of the new rules: (*Ross* v. *Clifton*, 11 A. & E. 631;) and notwithstanding the Statute 7 Wm. IV. cap. 3, s. 1, corresponding with the Eng. Stat. 3 & 4 Wm. IV. cap. 42, s. 41, where the defendant seeks to give special matter in evidence under the general issue, pursuant to some statutory provision, it is necessary that he should insert the words "by Statute" in the margin of his plea: (*Bartholomew* v. *Carter*, 9 Dowl. P. C. 896.)

(*j*) If the defendant omit to follow the requirements of this rule, he cannot give special matter in evidence to bring himself within the terms of an Act of Parliament which allows a plea of not guilty; but if at the end of the plaintiff's case it appear that the defendant was entitled to a notice of action, and to have the venue laid in the proper county, and the plaintiff gave no notice of action, and the venue be in the wrong county, this is not aided by the defendant having omitted to add the words "by Statute" in the margin of his plea: (*Coy* v. *Forester*, 8 M. & W. 312.)

(*k*) Where a defendant pleaded not guilty, intending to justify under a Statute, but the *nisi prius* record had not the words "by Statute" added to the margin, the Judge at *Nisi Prius* refused to allow an amendment by the addition of these words, as it could not be shown that they were in the margin of the defendant's plea: (*Forman* v. *Dawes*, 1 C. & Marsh, 127.)

(*l*) Taken from Eng. R. G. Pl. No. 22 of H. T. 1853.

of the action, may be pleaded, together with pleas of defences arising before the commencement of the action; (*m*) 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. (*n*)

23.—(*o*) When a plea is pleaded with an allegation that the matter of defence arose after the last pleading, (*p*) 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; (*q*) 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. (*r*)

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

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

(*m*) It is enacted by the C. L. P. A, 1856, that "any defence arising after the commencement of the action shall be pleaded according to the fact:" (s. cxvii.) The notes to that section may be read with reference to the rule here annotated.

(*n*) Between pleas *puis darrein continuance* and the pleas contemplated by this rule there is a difference. See note *p* to s. cxvii. of C. L. P. A, 1856. The next rule (No. 13) seems to apply exclusively to pleas *puis darrein continuance*.

(*o*) Taken from Eng. R. G. Pl. No. 23 of H.T. 1853.

(*p*) Commonly known as a plea *puis darrein continuance*: (see s. cxviii. of C. L. P. A, 1856, and notes thereto.)

(*q*) If the plea go to part only of the action, the plaintiff may enter a *nolle prosequi* or discontinuance; but if he reply or demur and the defendant succeed, the defendant will be entitled to his costs up to the time of pleading: (*Lyttleton* v. *Cross*, 4 B. & C. 117.)

(*r*) It has in England been held that if one of several defendants plead a plea of bankruptcy at Nisi Prius, the plaintiff cannot confess such plea and go to trial with the other defendants: (*Pascull* v. *Horsley*, 8 C. & P. 372.)

(*s*) Taken from Eng. R. G. Pl. No. 30 of H. T. 1853.

(*t*) If the defendant appear, and the claimant do not appear at the trial, the claimant shall be non-suited: (C. L. P. A. 1856, s. ccxxxvii.)

(*u*) Taken from Eng. R. G. Pl. No. 31 of H.T. 1853, the origin of which is Eng. R.G. Pl. No. 2 of H.T. 4 Wm. IV. (Jerv. N. R. 115) with which our old Rule No. 23 of E. T. 5 Vic. (Cam. R. 29) corresponded.

(*v*) These forms, all of which have been long disused, may, as a matter of curiosity, be found upon reference to 2 Wms. Saund. 214.

SCHEDULE A.

OF

FORMS TO THE ~~COMMON LAW PROCEDURE ACT, 1856.~~ New Rules of Court

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 Hon. 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 Sec.* 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 Hon. 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 Sec.* 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 submission 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 Attornies 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 Hon. , 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 plaintiff's 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 upon 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 afore-

said 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 Hon. , 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 plaintiff's claim in the declaration within alleged; and they further say, that the balance due from the plaintiff to the defendant, 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 signing 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.* (*a*)

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 Queen's 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 cases 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 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.

(*a*) Since the framing of these forms, s. 51 of 8 Vic. cap. 13, authorising writs of trial has been repealed: (C. L. P. A. 1857, s. 19.)

15.—*Form of Endorsement of the Verdict on the Writ of Trial.* (*b*)

Afterwards, on the day of 18 , (*the date 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.* (*c*)

(*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.* (*d*)

(*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.* (*e*)

Victoria, &c. (*as in Form No.* 14.)

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

Whereas, &c. (*as in Form No.* 14, *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*

(*b*) (*c*) (*d*) See note *a* to form 14.

(*e*) S. 54 of 8 Vic. cap. 11, which authorised the issue of writs of inquiry, is repealed by C. L. P. A. 1857, s. 19.

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.* (*f*)

Afterwards on the day 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.* (*g*)

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.* (*h*)

(*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 open 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

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(*f*) (*g*) (*h*) See note *e* to form 19.

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 and Trial of 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 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 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 sitting for the trial of issues joined in the said Court, and that he make known to 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.* (*i*)

(*Commence the Writ as in number* 17, *setting out the pleadings, joinder in issue, &c., as the case may be, and according to the suitable form given in number* 20, *and then proceed.*) We, therefore, pursuant to the statute in such case made and provided, command 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 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.* (*j*)

Afterwards on the day of 17 , (*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

(*i*) (*j*) See note *e* to form 19.

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

25.—*Form of Nonsuit thereon.* (*k*)

(*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.* (*l*)

(*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 day on which Judgment is*
to wit, } *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 shown that the said C. D. 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; and if 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.)

(*k*) (*l*) See note *e* to form 19.

WRITS OF EXECUTION. (*m*)

29.—*Fieri Facias on a Judgment for Plaintiff in assumpsit.*

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

To the Sheriff of , Greeting.

We command you that of the goods and chattels in your Bailiwick of , you cause to be made £ , which lately in our Court of Queen's Bench (*or* Common Pleas) before the Justices of our said Court at Toronto, recovered against for damages which had sustained, as well by reason of the not performing certain promises and undertakings then lately made by the said to the said as for costs and charges by about suit in that behalf expended, whereof the said is convicted as appears of record, and have that money before our Justices aforesaid at Toronto immediately after the execution hereof to be rendered to the said , and in what manner you shall have executed this our Writ make appear to our Justices aforesaid at Toronto immediately after the execution hereof, and have you there then this Writ.

Witness at Toronto, the day of in the year of our Lord, 18 .

30.—*The like in Debt.*

(*Commence as in No.* 29, *and proceed down to* "cause to be made," *then proceed as follows,*) as well a certain debt of £ , which lately in our Court of Queen's Bench (*or* Common Pleas) before the Justices of our said Court at Toronto recovered against , as also (*if the judgment be in that form*) for damages which had sustained, as well by occasion of the detaining of that debt as for his costs and charges, &c. (*conclude as in the foregoing form, which may be varied to suit cases in trespass and other kinds of action, except ejectment.*)

31.—*The like against Lands.*

Victoria, &c.

To the Sheriff, &c.

We command you that of the lands and tenements of , in your Bailiwick, you cause to be made, &c., (*as before*) and have that money before our Justices aforesaid at Toronto immediately after the expiration of twelve months from the day of your receipt hereof, and in what manner, &c. (*as before to the end.*)

32.—*Fieri Facias on a rule for payment of money under a judgment in form No.* 27.

Victoria, &c.

To the Sheriff, &c.

We command you that of the goods and chattels of C. D. in your Bailiwick, you cause to be made £ which lately in our Court of Queen's Bench (*or* Common Pleas) by a rule of our said Court (*or* by an order of the Honorable , one of the Justices of our Court of ,) dated the day of 18 , were ordered to be paid by the said C. D. to A. B.,* as appears of record, and have that money before our Justices of our said Court of at Toronto immediately after the execution hereof, and in what manner you shall have executed this our Writ, make appear to our Justices aforesaid at Toronto immediately after the execution hereof, and have you there then this Writ.

Witness, &c.

(*m*) It is well to notice that although it is enacted by the C. L. P. A. 1856, that "it shall not be necessary to mention any form or cause of action in any writ of summons, or in any notice of writ of summons issued under the authority of this Act:" (s. 14.) yet the Judges in framing the following forms have seen fit to retain forms of action, and to observe the distinctions between them.

33.—*Fieri Facias on a rule for payment of Money and Costs.*

Victoria, &c., (*as in form No.* 32 *down to the* *) together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said Court at £ , and have those monies before, &c. (*concluding as in preceding form No.* 32.)

34.—*Fieri Facias on a rule for payment of costs only.*

Victoria, &c , (*same as in form No.* 32, *to* "made £ ,") for certain costs which by a rule of our Court of Queen's Bench (*or* Common Pleas) dated the day of 18 , were ordered to be paid by the said C. D. to A. B., which said costs have been taxed and allowed by our said Court at the said sum as appears of record, and have that money before, &c. (*concluding as in preceding form No.* 32.)

35.—*Writ of Capias ad satisfaciendum on a Judgment for Plaintiff.*

To the Sheriff of, &c.

We command you that you take C. D., if he shall be found in your Bailiwick, and him safely keep so that you may have his body before our Justices of our Court of Queen's Bench (*or* Common Pleas) at Toronto immediately after the execution hereof, to satisfy £ ,* (the amount of all monies recovered by the judgment) which the said A. B. lately in our Court of Queen's Bench (*or* Common Pleas) recovered against the said C. D., for his damages (*or* debt and damages, *or otherwise according to the form of action*) whereof the said C. D. is convicted, as appears to us of record, and have you then there this Writ.

Witness, &c., (*as in preceding form No.* 32.)

36.—*Writ of capias ad satisfaciendum on a rule for payment of money.*

Victoria, &c., (*same as in form No.* 35, *to the* *) which lately in our Court of Queen's Bench (*or* Common Pleas) by a rule of our said Court (*or* by an order of the Honorable , one of the Justices of our Court of .) dated the day of 18 , were ordered to be paid by the said C. D. to A. B., as appears to us of record, and have you then there this Writ.

Witness, &c.

37.—*Writ of capias ad satisfaciendum on a rule for payment of money and costs.*

Victoria, &c., (*same as No.* 36, *down to the words* 'were ordered') were ordered to be paid by the said C. D. to the said A. B., together with certain costs in the said rule mentioned, which said costs have been taxed and allowed by our said Court at £ , (*the amount of the allocatur or allocaturs, if more than one*), as appears to us of record, and further to satisfy the said A. B. the said last mentioned sum, and have you then there this Writ. Witness, &c.

38.—*Writ of capias ad satisfaciendum on a rule for the payment of costs only.*

Victoria, &c., (*same as in No.* 35, *down to the word* "immediately,") immediately after the execution hereof, to satisfy A. B. £ for certain costs, which, by a rule of our Court of Queen's Bench (*or* Common Pleas *or* by an order of the Honorable one of the Justices of our Court of), dated the day of 18 , were ordered to be paid by the said C. D. to the said A. B., which said costs have been taxed and allowed by our said Court at the said sum, as appears to us of record, and have you there then this Writ. Witness, &c.

39.—*Writs of execution, where the Court or a Judge decides on matters of account, under section* 84.

(*All these may be framed upon the forms already given, vide forms No.* 32, *et seq. to No.* 38, *inclusive.*)

40.—*Writs of execution where matter of account is referred to and decided on by an Arbitrator. Officer of the Court, or Judge of the County Court.*

(*The same as directed in the next preceding form, but instead of stating the levy to be of money ordered by a rule or order to be paid, say*) £ , which by an award (*or* certificate) dated the day of 18 , (*date of award or certificate*) made by E. F., an arbitrator appointed by the parties, or by E. F., Clerk of the Crown and Pleas (*or other officer, naming his office*), of our Court of *or* by E. F., Esquire, the Judge of the County Court of , (*or otherwise, as the case may be*) was awarded (*or* certified) to be due and payable from the said C. D. to A. B. as appears to us of record, and have you there then this Writ. Witness, &c.

41.—*Writ of habere facias in ejectment, upon a Judgment by default.*

Victoria, &c.

To the Sheriff of, &c.

Whereas A. B., lately in our Court of Queen's Bench (*or* Common Pleas) by the judgment of the said Court recovered possession of , (*describe the property as in the Writ of ejectment, or if part only of the land has been recovered describe such part as in the judgment*) with the appurtenances in your Bailiwick. Therefore we command you that without delay you cause the said A. B. to have possession of the said land and premises, with the appurtenances, and in what manner, &c. (*as in form No.* 29.)

42.—*Writ of habere facias and fieri facias for costs upon a judgment for Plaintiff in ejectment where defendant has appeared.*

Victoria, &c. Whereas A. B., lately in our Court of Queen's Bench (*or* Common Pleas) recovered possession of (*describe the property as in the writ of ejectment or if part only of the land has been recovered, describe such part as in the judgment*) with the appurtenances in your bailiwick, in an action of ejectment at the suit of the said A. B. against the said C. D. Therefore we command you that without delay you cause the said A. B. to have possession of the said land and premises, with the appurtenances—and we also command you that of the goods and chattels of the said C. D. in your bailiwick, you cause to be made £ , which the said A. B., lately in our said Court, recovered against the said C. D., for the said A. B.'s costs of the said suit, whereof the said C. D. is convicted, and have that money in our said Court immediately after the execution hereof, to be rendered to the said A. B., and in what manner, &c. (*as in form No.* 29.)

43.—*Writ of fieri facias for costs only on a judgment for Plaintiff in ejectment where defendant has appeared.*

Victoria, &c. (*as in form No* 29, *down to the word* "recovered") recovered against him for the said A. B.'s costs in an action of ejectment brought by the said A. B. against the said C. D. in that Court whereof the said C. D. is convicted, and have that money, &c. (*as in the next preceding form to the end.*)

44.—*Writ of habere facias possessionem on a rule to deliver possession of land pursuant to an award under section* 96.

Victoria, &c.

To the Sheriff of, &c.

We command you that without delay you cause A. B. to have possession of

(*here describe the lands and tenements as in the rule for the delivery of possession*), and of which lands and tenements by a rule of our Court of Queen's Bench (*or* Common Pleas) dated the day of 18 , made pursuant to the 96th section of the Common Law Procedure Act, 1856, E. F. (*the party named in the rule*) was ordered to deliver possession to the said A. B., and in what manner you have executed this our said Writ, make appear to our said Court at Toronto immediately after the execution hereof, and have you there then this Writ.

Witness, &c.

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45. *Fi Fa. against a garnishee under the 196th section when the debt is not disputed or garnishee does not appear.*

Victoria, &c.

To the Sheriff, &c.

We command you that of the goods and chattels of E. F. in your Bailiwick you cause to be levied £ , being the amount of (*or* part of the amount of, *if the debt be more than the judgment debt*) a debt due from the said E. F. to C. D. heretofore attached in the hands of the said E. F. by an order of the Honorable , one of the Justices of our Court of Queen's Bench (*or* Common Pleas) dated the day of 18 , pursuant to the statute made in such case, to satisfy (*or if the debt be less than the judgment debt*) towards satisfying £ which A. B. lately in our Court of Queen's Bench (*or* Common Pleas) recovered against the said C. D., whereof the said C. D. is convicted, as appears to us of record, and that you have that sum of £ before our said Court immediately after the execution hereof to be rendered to the said A. B. and in what manner, &c. (*concluding as in form No.* 29.)

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46. *Ca Sa in the like case.*

Victoria, &c.

To the Sheriff, &c.

We command you that you take E. F. if he be found in your Bailiwick, and him safely keep so that you may have his body before our Justices of our Court of at Toronto, immediately after the execution hereof, to satisfy A. B., £ being the amount (*or* part of the amount *if the debt be more than the judgment debt*) of a debt due from the said E. F. to C. D. heretofore attached in the hands of the said E. F. by an order of the Hon. one of the Justices of our Court of , dated the day of 18 , pursuant to the statute in such case made to satisfy (*or* towards satisfying, *if the debt be less than the judgment debt*) £ which the said A. B. lately in our said Court of recovered against the said C. D. whereof the said C. D. is convicted as appears to us of record and have you there then this Writ.

Witness, &c.

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47. *Writ against garnishee to shew cause why the judgment creditor should not have execution against him for the debt disputed by him, under section* 197.

Victoria, &c.

To E. F. of in the County of

We command you, that within eight days after the service of this Writ upon you, inclusive of the day of such service, you appear in our Court of Queen's Bench (*or* Common Pleas) to show cause why A. B. should not have execution against you for £ , being the amount (*or* part of the amount *if the debt exceeds the judgment debt*) of a debt due from you to C. D. to satisfy (*or* towards satisfying *if the debt be less than the judgment debt*) £ , which on the day of 18 , (*date of judgment*) the said A. B. by a judgment of our Court of recovered against the said C. D. and for costs of suit in this behalf, and

take notice that in default of your not so doing the said A. B. may proceed to execution against you.

Witness, &c.

The following endorsement must be made on the Writ—This Writ was issued by R. A. (*Plaintiff's Attorney's name in full*) of (*place of abode in full, also if sued out as agent for another Attorney here say* 'as agent for A. A. of ,') Attorney for the said A. B.) *or if sued out by the Plaintiff in person,* "This Writ was issued in person by the Plaintiff within named who resides at ," (*mentioning the City, Town Incorporated, or other Village, or the Township within which such Plaintiff resides.*) The Plaintiff claims £ (*the amount of the debt claimed from the garnishee*) and £ for costs, and if the amount thereof be paid to the Plaintiff or his Attorney within eight days from the service hereof, further proceedings will be stayed. (*Within three days after the service fill up the following endorsement,*) This Writ was served by me X. Y. on E. F. on the day of 18 .

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48. *Declaration thereon.*

In the Queen's Bench (*or* Common Pleas.)

The day of A.D. 18 .

(*Venue*) A.B. by his attorney (*or* in person) sues E. F. by a Writ issued out of this Court in these words—Victoria, &c. (*copy the Writ*) and the said E. F. has appeared to the said Writ, and the said A. B. by his attorney aforesaid says that the said debt due from the said E. F. to the said C. D. is for, &c. (*here state the debt as in a declaration in ordinary cases*), and the said A. B. prays that execution may be adjudged to him accordingly for the said £ , and for costs in this behalf.

49.—*Plea thereto.*

In the Queen's Bench (*or* Common Pleas).

E. F. ats. A. B. } The day of 18 . The said E. F. by his attorney, says that he never was indebted to the said C. D. as alleged (*or plead such other defence or several defences as in other cases.*)

50.—*Issue thereon.*

(*Copy the Declaration and Pleadings, and conclude thus*), Therefore let a Jury come, &c.

51.—*Postea thereon.*

The same as in ordinary cases, omitting the assessment of damages.

52.—*Judgment for Plaintiff therein.*

The same as in ordinary cases to the statement of the Judgment, which may be thus, Therefore it is considered that the said A. B. have execution against the said E. F. for the said £ , the amount (*or* part of the amount) of the said debt due from him to the said C. D., to satisfy (*or* towards satisfying, *if the debt be less than the Judgment debt,*) the said £ , which the said A. B. on the said day of 18 , (*date of judgment against judgment debtor*) by the judgment of this Court recovered against the said C. D., and it is further considered that the said A. B. do recover against the said E. F. £ , for his costs of suit in this behalf.

53.—*Fi. Fa. therein.*

Victoria, &c., (*as in No.* 29, *down to*) that of the goods and chattels of E. F. in your Bailiwick, you cause to be made £ , the amount (*or* part of the amount, *if the debt be more than the Judgment debt,*) of a debt due from the said E. F. to C. D., to satisfy (*or* towards satisfying, *if the debt be less than the judgment debt*) £ , which A. B. on the day of 18 , (*date of Judgment against Judgment debtor,* by the Judgment of our Court of Queen's Bench (*or* Common Pleas) recovered against the said C. D., and whereupon it has been adjudged by our said Court that the said A. B. should have execution against the said E. F. for the said £ , and also £ , which in our same Court were adjudged to the said A. B. for his costs of suit which he hath been put to on occasion of our said Writ, sued out against the said E. F. at the suit of the said A. B. in that behalf, whereof the said E F. is convicted, and have the said moneys before our said Court at Toronto immediately after the execution hereof, to be rendered to the said A. B., and in what manner, &c.

54.—*Ca. Sa. therein.*

Victoria, &c. (*beginning as in the preceding form*) that you take E. F., if he be found in your Bailiwick, and him safely keep, so that you may have his body before our Court of Queen's Bench (*or* Common Pleas) at Toronto, immediately after the execution hereof, to satisfy A. B., £ , the amount (*or* part of the amount, *if the debt be more than the judgment debt*) of a debt due from the said E. F. to C. D., and for the levying of which it has been adjudged by our Court of Queen's Bench (*or* Common Pleas) that the said A. B. should have his execution against the said E. F., to satisfy (*or* towards satisfying, *if the debt be less than the judgment debt*) £ , which the said A. B. on , (*date of the judgment against the judgment debtor*) by the judgment of the said Court, recovered against the said C. D., and further to satisfy the said A. B., £ , which in our same Court were adjudged to the said A. B. for his costs of suit which he hath been put to on occasion of our Writ against the said E. F., at the suit of the said A.B. in that behalf, whereof the said E. F. is convicted, and have you there then this Writ. Witness, &c.

55.—*Judgment for Plaintiff after verdict that a Mandamus do issue under section* 277.

(*The same as in the ordinary form of an entry of judgment to the end of the postea and then proceed,*) Therefore it is considered that a Writ of Mandamus do issue, commanding the defendant (*state the duty to be performed or the thing to be done as claimed by the declaration*), and it is also considered that the plaintiff do recover of the defendant the said monies by the Court aforesaid, in form aforesaid, above assessed, and also £ , for his costs aforesaid in that behalf.

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

56.—*Writ of Inquiry to ascertain the expense incurred by the doing of an act for the doing of which a Writ of Mandamus was issued under section* 280.

Victoria, &c.

To the Sheriff of the County (*or* United Counties) of , greeting.

Whereas upon an application by A. B., the plaintiff, in an action against C. D., in our Court of Queen's Bench (*or* Common Pleas) at Toronto, our said Court did, on the day of 18 , (*date of order*) direct that (*state the terms of the order directing the act to be done at the defendant's expense*), and the said A. B. (*or* and E.F. *if another person than the plaintiff has been appointed by the Court to do the act*), has done the said act so directed to be done, and in order to enable

our said Court to ascertain the amount of the expense of doing the same, we command you that by the oath of twelve good and lawful men of your Bailiwick, you do proceed diligently to enquire what is the amount of the expenses incurred by the said A. B. (*or by E. F., as the case may be*) in the doing of the said act, and that you send to our Justices of our said Court at Toronto, on the day of , now next ensuing, the inquisition, which you shall thereupon take under your seal, and the seals of those by whose oath you shall take the inquisition, together with this Writ. Witness, &c.

57.—*Writ of Execution in detinue under section* 201, *for the return of the chattel detained, and for a distringas until returned, separate from a Writ of execution for damages or costs.*

Victoria, &c.

To the Sheriff, &c.

We command you that without delay you cause the following chattels, that is to say (*here enumerate the chattels recovered by the judgment for the return of which execution has been ordered to issue*) to be returned to A. B., which the said A. B., lately in our Court of at Toronto, recovered against C. D. in an action for the detention of the same, whereof the said C. D. is convicted.* And we further command you that if the said chattels cannot be found in your Bailiwick you distrain the said C. D. by all his lands and chattels in your Bailiwick, so that neither the said C. D. nor any one for him do lay hands on the same until the said C. D. render unto the said A. B. the said chattels and in what manner, &c. (*concluding as in Form No.* 29.)

58.—*The like, but instead of a distress until the chattel is returned, commanding the Sheriff to levy on defendant's goods the assessed value of it.*

(*Follow the preceding form until the* *, *and then proceed*) and we further command you that if the said chattels cannot be found in your Bailiwick—of the goods and chattels of the said C. D. in your Bailiwick, you cause to be made £ (*the assessed value of the chattels*) whereof the said C. D. is also convicted, and that you have that sum of £ , &c. (*concluding as in No.* 29.)

59.—*Indorsement on Writ of Summons of claim of a Writ of Injunction under section* 283.

The plaintiff intends to claim a writ of injunction to restrain the defendant from (*here state concisely for what the Writ of Injunction is required—as for example thus*) "felling or cutting down any timber or trees standing, growing, or being in or upon the land and premises at in the county of , and from committing any further or other waste or spoil in or upon the said land and premises." And take notice that in default of the defendant's entering an appearance as within commanded, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain such Writ.

60. *Form of Debt Attachment Book under Section 199 of the Common Law Procedure Act*, 1856.

Name of Plaintiff.	
Name of Judgment Debtor.	
Amount of Judgment.	
Date of Judgment.	
Name of Garnishee.	
Date of Order for Attachment.	
Amount ordered to be paid by Garnishee.	
Date of such Order.	
Date of Order for Execution against Garnishee.	
Date of Order that Judgment Creditor may proceed against Garnishee.	

SCHEDULE B.

TABLE OF COSTS.

General Allowance for Plaintiffs and Defendants, as well between Attorney and Client as between Party and Party.

TO THE ATTORNEY.

WRITS.

	£	s.	d.
Summons, including attendance	0	10	0
Concurrent Summons	0	7	6
Renewed Summons	0	7	6
Capias	0	10	0
Concurrent Capias	0	7	6
Renewed Capias	0	7	6
Capias ad satisfaciendum	0	10	0
Renewed Capias ad satisfaciendum	0	7	6
Capias ad satisfaciendum for the residue	0	10	0
Renewed do. do.	0	7	6
Fieri Facias	0	10	0
Renewed Fieri Facias	0	7	6
Concurrent Fieri Facias	0	7	6
Fieri Facias for the residue	0	10	0
Renewed do. do.	0	7	6
~~Habere Facias possessionem and Fieri Facias or Capias ad satisfaciendum for costs in one writ~~	~~0~~	~~15~~	~~0~~
Habere Facias possessionem alone	0	10	0
Special endorsement of demand on Writ of Summons	0	5	0
Writ of Revivor	0	10	0
Ejectment, (summons in)	0	10	0
Writ of Trial, drawing, if under seven folios	0	6	8
if above, 6d. per folio for all above.			
Writ of Enquiry the same.			
Subpœna ad testificandum	0	5	0
Subpœna duces tecum	0	6	8
and if above four folios, additional per folio, 6d.			
Attachment against Goods of absconding debtor	0	10	0
Attachment against Garnishee	0	10	0
Habeas Corpus obtained by Plaintiff, including allowance thereof	0	10	0
Procedendo	0	10	0
Venditioni exponas	0	10	0
Supersedeas	0	6	8
Mandamus	0	10	0
Injunction	0	10	0

NOTE.—The above allowances include all charges for attendance for the writ, and delivering it to the officer.

COPY AND SERVICE OF WRITS OF SUMMONS AND OTHER PROCESS.

For each copy, including copies of all notices required to be endorsed,	£0	5	0
Service of each copy of Writ, if not done by the Sheriff, or an officer employed by him, when taxable to the Attorney	0	2	6
Mileage per mile, for the distance actually and necessarily travelled, when taxable to the Attorney	0	0	6

INSTRUCTIONS TO THE ATTORNEY.

Taking Instructions to sue or defend	0	10	0
" " " ejectment)			
Instructions for Pleading:			
For Special Affidavits, when allowed by the Master, and instructing Counsel on special matters	0	5	0
Instructions to Counsel in common matters	0	2	6
for proceedings in Court		7	6

NOTE.—No Fee allowed for instructions to Counsel, where such Counsel is attorney in the suit, or his partner.

Instructions for Brief	0	5	0
~~Do. if difficult and many witnesses or documents, the taxing officer, on sight of the Brief, may allow~~	~~0~~	~~10~~	~~0~~
Do. for every suggestion	0	5	0
Do. for issue of fact by consent	0	7	6
Do. for suggestion to revive, or for writ of revivor, when no rule necessary	0	5	0
Do. for rule for writ of revivor when necessary	0	5	0
Do. to defend for Executor, after suggestion of death of original defendant	0	5	0
Do. for agreement of damages	0	5	0
Do. for confession of action in ejectment, as to the whole or in part	0	5	0
Do. to strike or reduce a Special Jury	0	10	0

DRAWING PLEADINGS, &c.

Declaration, inclusive of instructions and Engrossing, and of attendance to file or serve, but not inclusive of copies to serve	0	12	6
If above 10 folios, for every folio above ten, in addition	0	1	0
One or more Pleas, if three folios or under, ~~exclusive of instructions, but inclusive of engrossing, and copies to serve~~	0	5	0
If above three folios, for every folio in addition, ~~exclusive of copy to serve~~	0	1	0
Joinder of Issue, inclusive of copies and engrossing	0	2	6
Demurrer, ~~inclusive of engrossing, and copy to serve~~	0	5	0
Joinder of Demurrer, inclusive of copies and engrossing	0	2	6
Marginal statement of matters of Law for argument, exclusive of copies for the Judges	0	5	0
Replications, new Assignments, and other Pleadings, the same as the foregoing charges for Pleas.			
Postea, including engrossing	0	5	0
Judgment, whether by default or final	0	2	6
Authority to Receive Moneys out of Court	0	2	6
Suggestions, Pleas to Suggestions, and subsequent Pleadings of three folios or under, inclusive of engrossment ~~and copies~~	0	4	0
If above three folios, for every folio, drawing and engrossing	0	1	0
Issue for the trial of facts by agreement, for every folio	0	1	0
Special Case, per folio	0	1	0

Drawing interrogatories or answers for any purpose required by Law, including engrossing, per folio	0	1	0	
Agreement of Damages, and copy, if five folios or under	0	5	0	
Above five folios, for every folio, drawing and engrossing	0	1	0	
~~Copy per folio~~	~~0~~	~~0~~	~~6~~	
Special particulars of demand, or set-off, ~~including copy~~, per folio	0	1	0	
Short ditto ~~and copy~~	0	3	6	2.6
Bill of Costs and copy for taxation	0	5	0	
~~Copy for the opposite party~~	~~0~~	~~2~~	~~6~~	
Taking Cognovit, and entering Judgment thereon, when there has been no previous proceeding, and the true debt does not exceed £50	2	0	0	
For the same services, when the true debt exceeds £50	3	0	0	
Drawing and Engrossing Cognovit, and attending execution, where there have been previous proceedings	0	5	0	
Replication, accepting money out of Court, in full of demand, ~~inclusive of instructions~~	0	3	6	
~~In all the above items Engrossing included, unless separately allowed for.~~ Every necessary letter on the business of the Cause				2.6

COPIES.

Declarations, when not exceeding ten folios ~~each~~	0	6	8	5.0
Do. above ten folios, per folio ~~each~~	0	0	6	
Other Pleadings before enumerated above, ~~three~~ folios, per folio ~~each~~	0	0	6	
Issue (Pleadings), if fifteen folios or under	0	7	6	
If above fifteen folios, for every folio	0	0	6	
All Proceedings, Interrogatories, Answers, and other papers, of which copies are to be delivered, per folio	0	0	6	
Judgment for non-appearance on specially Endorsed Writs, or Writs of Revivor, and in Ejectment, to be taken as nine folios, including the Writ.				
Special & Common Rules per folio not otherwise 1.6				
Special rule above 3.8				
Summons & Order 3.8				

NOTICES ~~to the opposite party~~

To declare, reply, and subsequent ~~pleadings, copy and service~~	0	2	6	
By defendant to bring issue to trial, ~~copy and service~~	0	3	6	2.6
To Executor or Administrator of sole Defendant deceased, to appear to writ and suggestion	0	3	6	2.6
Of appearance, when appearance duly entered and notice given on the day of appearance, but not otherwise	0	2	6	
Of appearance to Writ of Revivor	0	2	6	
To Plead	0	2	6	
Of Declaration, when necessary, ~~copy and service~~	0	2	6	
Of objection for mis-joinder or non-joinder of plaintiff, ~~copy and service~~	0	2	6	
To Sheriff to discharge a prisoner out of custody, ~~copy and service~~	0	3	6	2.6
Notice in ejectment to defend for part of the premises, ~~and service~~	0	5	0	
If above three folios, for every folio additional	0	1	0	
Notice of claimant's or defendant's title, ~~under sections 222 and 224~~, the same fee.				
Notice of admission of right, and denial of ouster by a Joint Tenant, &c., ~~and service~~	0	3	6	2.6
If above three folios, for every folio	0	1	0	
Of discontinuance by claimant in ejectment, ~~and service~~	0	3	6	2.6
Of confession of action of ejectment, as to the whole or in part, ~~and service~~	0	5	0	2.6
Of trial or assessment, ~~copy and service~~	0	3	6	2.6
Demand of residence of plaintiff and all other common notices, ~~copy and service~~	0	2	6	

To admit or produce, if not exceeding two folios, ~~copy and service~~	0	2	6
For each folio above two	0	1	0

~~Note.—Copy and service included in the above items, when not otherwise expressed.~~

COPY AND SERVICE.

Of special and common rules	0	3	0
Of special rule, above three folios, per folio additional	0	1	0
Of summons or order of a Judge	0	2	6
Of order to charge a prisoner in execution	0	3	6

Mileage on services, as on a writ of summons.

EJECTMENT.

Instructions to sue and examining deeds, as in other cases.

If title contested	1	0	0

ATTENDANCES.

Attendance at Judges' Chambers, ~~at the Crown offices, and all other common attendances in the course of a cause~~	0	2	6
Fee on every record, writ of trial, or enquiry	0	5	0
Fee on every rule of Court, or Judge's order	0	5	0
Attending Assizes if cause entered, where no fee is charged by the attorney as counsel	0	5	0
Attendance on Master on special matters	0	5	0
For every hour after the first	0	5	0
Taxation of costs on postea	0	5	0
~~Of costs of cause, otherwise than on postea~~	~~0~~	~~2~~	~~6~~
~~Of interlocutory matters~~	~~0~~	~~2~~	~~6~~

BRIEFS.

For drawing per folio of original and necessary matter	0	1	0
Copies of the pleadings or documents when required	0	0	6
Copy for second counsel, where fee taxed to him, per folio	0	0	6

TERM FEES.

Term fee, after declaration filed	0	5	0
~~Every necessary letter on the business of the cause~~	~~0~~	~~2~~	~~6~~

AFFIDAVITS.

Drawing ~~Special~~ Affidavit, per folio, ~~including engrossing~~	0	1	0
Copies of Affidavits, when necessary, per folio	0	0	6
Common Affidavit ~~for two folios or under~~, including copy and oath	0	5	0

DEFENDANTS.

~~Entering~~ appearance	0	3	6
For each additional defendant	0	1	3

A second summons, and order for time to plead, shall be allowed in special cases when necessary.

COUNSEL FEES.

Fee on Motion of Course, or on motion for Rule Nisi, or on Motion to make Rule Absolute in matters not special	0	10	0
On special motion for Rule Nisi (only one counsel fee to be taxed)	1	5	0
To attend reference to Master, where counsel necessary	1	5	0

r.

ervice.....	0	2	6
.....	0	1	0
e expressed.			
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ed).....	1	5	0
.....	1	5	0

t is **Ordered**, that so much of the Rule of thi
tes to the Taxing of Fees to Counsel, be rescinded,
Easter Term next, and that the following be substitut

COUNSEL FEES

Fee on Motion of Course, or on Motion for Rule Ni
make Rule Absolute, ~~in matters not specified~~

On Special Motion for Rule Nisi, only one Counsel
~~may be employed at a fee not exceeding £5 currency~~
To attend Reference to Master when Counsel is nec
~~on issuing fiat~~ ~~not to~~
For argument on supporting or opposing Rules on R

on argument of Demurer, Special Case or Appeal,

To be increased ~~at~~ the discretion of the Master, at Toronto,
£6 5 0, ~~subject to Appeal to the Court or a Judge, to reduce t~~

Fee with brief on Assessments, - - -

Fee with brief at Trial, in cases of Tort, or in Ejectm
of Contract, when the sum to be recovered exceeds

To be increased by the Taxing Officer in his discretion, to a sum
Senior Counsel, and £2 10 0 to Junior Counsel, in actions of
~~power is given~~ nature, ~~subject to an Appeal to the Master~~ (at Toronto) ~~of the Court~~
~~brought, who~~ shall have power to tax ~~fees to the Senior Counsel to~~
~~£10, and to the Junior Counsel not exceeding £5, provided that~~
~~Fee shall not be allowed in any case~~ not of a special and important
~~than this in any case~~
~~Fee with brief in other Cases~~
Fee on writ of Trial in C.C - - -

Fee to Counsel on argument or Examination in Chamb
by the ~~Judge at the time~~ ~~master~~ when he considers ~~that~~ the atte
necessary, ~~not less than 10s, nor more than 25s~~ ~~in~~
~~by Master to £5~~ £20,
any item which may be referred to Master
it may be demanded by either Party of
the Taxing Officer to refer at any
time

February, 1859.

It is Ordered, that so much of the Rule of this Court and of the Table of Fees as relates to the Taxing of Fees to Counsel, be rescinded, upon, from, and after the First day of Easter Term next, and that the following be substituted.

COUNSEL FEES.

Fee on Motion of Course, or on Motion for Rule Nisi, or on Motion to make Rule Absolute, in matters not special -	£0 10 0
On Special Motion for Rule Nisi, only one Counsel Fee to be Taxed,	1 5 0
To attend Reference to Master when Counsel is necessary, - -	1 5 0
For argument on supporting or opposing Rules on Return of Rule Nisi, on argument of Demurrer, Special Case or Appeal, - - - -	2 10 0

To be increased in the discretion of the Master, at Toronto, to a sum not to exceed £6 5 0, ~~subject to Appeal to the Court or a Judge, to reduce the amount allowed.~~

Fee with brief on Assessments, - - - - - - - -	1 5 0
Fee with brief at Trial, in cases of Tort, or in Ejectment, or in matters of Contract, when the sum to be recovered exceeds £100, - -	2 10 0

To be increased by the Taxing Officer in his discretion, to a sum not exceeding £5, to Senior Counsel, and £2 10 0 to Junior Counsel, in actions of a special and important nature, ~~subject to an Appeal to the Master~~ (at Toronto) ~~of the Court where the action was brought, who~~ shall have power to tax fees ~~to the Senior Counsel, to any sum not exceeding £10, and to the Junior Counsel, not exceeding £5; provided that more than one Counsel Fee shall not be allowed in any case not~~ of a special and important nature.

~~Fee with brief in other Cases~~ - - - - - - - -	1 5 0
Fee to Counsel on argument or Examination in Chambers, to be allowed by the ~~Judge at the time~~ when he considers the attendance of Counsel necessary, ~~not less than~~ 10s, ~~nor more than 25s.~~	

J. B. ROBINSON, *C. J.*
W. H. DRAPER, *C. J., C. P.*
A. McLEAN, *J.*
ROBERT E. BURNS, *J.*
WM. B. RICHARDS, *J.*

9th February, 1859.

In the Q. B. and C. P.

HILARY TERM, 22 VIC.

ORDER OF COURT

AS TO COUNSEL FEES.

For argument or
or argumen
To be increased in th
Fee with Brief o
Fee with Brief a
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Every appearanc
Every appearanc
Filing every affi
Amending every
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Every special ru
Every judgment
Every final Judg
Taxing every bi
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Do. £100 and
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including a
Exemplication,
Every search, if
Every search ex
Every search ex
Every affidavit,
Every allowance
Taking recogniz
Filing affidavit a
attorney ...
Every admission
Entering satisfa
any necessa
Every commissi
Every commissi
Entering exoner
Making up reco
Entering and do
For making the

For argument on supporting or opposing rules on return of Rule Nisi, or argument of demurrer, special case, or appeal	2	10	0
To be increased in the discretion of the Master, subject to appeal to the Court or a Judge.			
Fee with Brief on Assessments	1	5	0
Fee with Brief at Trial, in cases of Tort or in ejectment, or in matters of contract, where the sum to be recovered exceeds £100 (to be increased by the Master in his discretion, to a sum not exceeding £5 in actions of a special and important nature) or by a Judge, to such sum as shall appear to him proper under the circumstances of the case, not exceeding in any case £20	2	10	0
Fee with Brief, in other cases	1	5	0
Fee to counsel on argument or examination in chambers, to be allowed by the Judge at the time, when he considers the attendance of counsel necessary, not less than 10s nor more than 25s.			

FEES

Fees to fee fund cons. Act. U.C. 4/13.

To be Taken and Received by the Clerks of the Crown and Pleas, or their Deputies or by the Clerk of the Process.

In addition to all fees expressly imposed by statute—			
Every Writ	0	2	6
Every concurrent, alias, pluries, or renewed writ	0	2	6
Every appearance entered, and filing memorandum thereof	0	1	0
Every appearance, each defendant after the first	0	0	6
Filing every affidavit, writ, or other proceeding	0	0	4
Amending every writ or other proceeding	0	1	3
Every ordinary rule	0	1	3
Every special rule not exceeding six folios, per folio	0	1	0
Every judgment by default	0	2	6
Every final Judgment otherwise than judgment by default	0	2	6
Taxing every bill of costs, and giving allocatur	0	3	4
Every reference, inquiry, examination, or other special matter referred to the Master, for every meeting not exceeding one hour	0	5	0
Do. do. for every additional hour or less	0	5	0
Upon payment of money into Court, for every sum under £50	0	5	0
Do. £50 and under £100	0	10	0
Do. £100 and above that sum	1	0	0
Every certificate made evidence by law, or required by the practice, including any necessary search	0	2	6
Exemplication, or office copy of proceedings, per folio	0	0	6
Every search, if not more than two terms	0	0	6
Every search exceeding two, and not more than four terms	0	1	0
Every search exceeding four terms, or a general search	0	2	6
Every affidavit, affirmation, &c., taken before them	0	1	0
Every allowance and justification of bail	0	1	3
Taking recognizance of bail	0	1	3
Filing affidavit and enrolling articles previous to the admission of an attorney	0	2	6
Every admission of an attorney	0	10	0
Entering satisfaction on record, and filing satisfaction piece, including any necessary search	0	2	6
Every commission for the examination of witnesses	0	5	0
Every commission for taking bail and affidavit (to be on parchment)	0	10	0
Entering exoneretur on bail piece	0	1	3
Making up records of conviction, or of acquittal, per folio	0	0	6
Entering and docketing judgment	0	2	6
For making the entry required in the debt attachment book	0	2	6

In the Q. B. and C. P.

CLERK OF ASSIZE AND MARSHALL.

The Fees provided by 14 & 15 Vic. cap. 118, to be accounted for to the Fee Fund.

CLERK IN CHAMBERS.

Every Summons	0	1	3
Every Order	0	2	6
For receiving and taking charge of Nisi Prius records and exhibits in each cause	0	2	6
Filing each paper	0	0	4
Every fiat for a rule of Court	0	1	3
Taking every affidavit or affirmation	0	1	0
Office copies of papers, per folio	0	0	6
For searching, the same allowance as to the Clerk of the Crown and Pleas.			

SHERIFF—(CIVIL SIDE).

Every warrant to execute any process, mesne or final, when given to a bailiff	0	2	6
Arrest, when amount endorsed does not exceed £50	0	5	0
Do. do. over £50 and under £100	0	10	0
Do. do. " £100 and over	1	0	0
Mileage, going to arrest, when arrest made, per mile	0	0	6
Do. conveying party arrested from place of arrest to the Gaol, per mile	0	0	6
Bail bond, or bond for the limits	0	5	0
Assignment of the same	0	5	0
For an undertaking to give a bail bond	0	5	0
Service of process, not bailable, scire facias, or writ of revivor (including affidavit of service), each defendant	0	5	0
For each summoner on writ of scire facias, to be paid by the sheriff	0	2	6
Serving subpœna, declaration notices, or other papers (besides mileage for each party served)	0	2	6
Receiving, filing, entering, and endorsing all writs, declarations, rules, notices, or other papers to be served, each	0	1	3
Return of all process and writs (except subpœnas)	0	2	6
Every search, not being by a party to a cause, or his attorney	0	1	0
Certificate of result of search, when required	0	2	6
Fee on striking special jury	1	0	0
Serving each special juror	0	1	3
Summoning special jury, each mile's travel from the Court-house	0	0	6
Returning panel of special jurors	0	5	0
Every jury sworn	0	5	0
Poundage on executions, and on attachments in the nature of executions, where the sum made shall not exceed £100, five per cent.			
Where it exceeds £100, and is less than £1000, five per cent. for the first £100, and 2½ per cent. for residue.			
Over £1000, 1¼ per cent. on whatever exceeds £1000, in addition to the poundage allowed up to £1000, in lieu of all fees and charges for services and disbursements, except mileage, in going to seize, and disbursements for advertising, and except disbursements necessarily incurred in the care and removal of property, in cases exceeding £1000, to be allowed by the Master in his discretion.			
Schedule of goods taken in execution, including copy to defendant, if not exceeding five folios	0	5	0

Each folio above five	0	0	6
The sum actually disbursed for advertisements required by law to be inserted in the official *Gazette* or other newspaper.			
Drawing up advertisements, when required by law to be published in the official *Gazette* or other newspaper, and transmitting the same in each suit	0	5	0
Every notice of sale of goods in each suit	0	2	6
Every notice of postponement of sale on execution, in each suit	0	1	3
Service of writ of possession or restitution, besides mileage	1	0	0
Bringing up prisoner on attachment or habeas corpus, besides travel at 1s. per mile	0	5	0
Actual mileage from the Court-house to the place where service of any process paper or proceeding is made, per mile	0	0	6
Seizing estate and effects, on attachment against an absconding debtor	0	10	0
Every inventory, to be charged as on executions.			
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the Master, or by order of the Court or a Judge.			
Presiding on execution of writ of enquiry, under sect. 280 of the Common Law Procedure Act, 1856	1	0	0
Summoning jury	0	5	0
Bailiff's fee, summoning jury, mileage per mile	0	0	6
Hire of room, if actually paid, not to exceed 10s.			
Mileage from Court-house, to place where writ executed, per mile	0	0	6
Bond to secure goods taken under an attachment, under sec. 50 of the Common Law Procedure Act, 1856, if prepared by the sheriff	0	5	0

IN REPLEVIN.

Precept to the bailiff	0	2	6
Notice for service on defendant	0	2	6
Delivering goods to the party obtaining the writ	0	10	0
For writ, &c., de retorno habendo	0	5	0
Replevin bond	0	5	0

CRIER.

Calling and swearing jury	0	2	6
Calling plaintiff on non-suit	0	1	0
Proclamation and calling parties on recognizance, each person	0	1	0
Swearing each witness, or constable	0	0	6

JURORS.

Where not specially provided for by Statute.

Special jurors, each day's actual attendance, to be paid to those only who are sworn	0	5	0
Common jurors, when not paid by the county, every cause in the inferior jurisdiction, each juror	0	0	7½
In every other case, each juror	0	1	3

ALLOWANCE TO WITNESSES.

To witnesses residing within three miles of the Court-house, per diem.	0	3	9
To witnesses residing over three miles from the Court-house	0	5	0
Barristers and attorneys, physicians and surgeons, when called upon to give evidence, in consequence of any professional service rendered by them, or to give professional opinions, per diem	1	0	0

Engineers and surveyors, when called upon to give evidence of any professional service rendered by them, or to give evidence depending upon their skill or judgment, per diem.....	1	0	
If the witnesses attend in one cause only, they will be entitled to the full allowance. If they attend in more than one case, they will be entitled to a proportionate part in each cause only.			
The travelling expenses of witnesses, over ten miles, shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed one shilling per mile, one way.			

COMMISSIONER.

For taking every affidavit.....	0	1	0
Taking every recognizance of bail.....	0	2	6

20TH VICTORIA, CAP. 5.

An Act to amend the Laws in Upper Canada, respecting Appeals, and to alter the Constitution of the Court of Error and Appeal.

[Assented to 27th May, 1857.]

HER Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows: Preamble.

I. The thirty-ninth section of an Act of the Parliament of Canada, passed in the twelfth year of Her Majesty's Reign, intituled, *An Act to make further provision for the Administration of Justice, by the establishment of an additional Superior Court of Common Law, and also a Court of Error and Appeal, in Upper Canada, and for other purposes*, is hereby repealed. Sect. 39 of 12 V. c. 63, repealed.

II. The Court of Error and Appeal shall be composed henceforth of the Judges of the several Courts of Queen's Bench, Chancery and Common Pleas in Upper Canada, who shall be *ex officio* members thereof, and of such other persons being Barristers of the Upper Canada Bar, and having held the office of Judge of some or one of the Superior Courts of Common Law or Equity in Upper Canada, as the Governor of this Province shall, by Commission under the Great Seal thereof, appoint to be a Judge of and in the said Court of Error and Appeal, and every person to be so appointed shall take such rank and precedence, after the Chief Justice of the Court of Queen's Bench, the Chancellor of Upper Canada, and the Chief Justice of the Court of Common Pleas, in that Court, as shall be designated in his Commission. How the Court of Error and Appeal shall hereafter be composed.

Powers of the Court.

III. The Court of Error and Appeal so composed shall have, possess, exercise and enjoy the same powers and authorities as are contained and conferred in and by the above mentioned Act, passed in the twelfth year of Her Majesty's Reign.

Sittings of the Court.

IV. The Court of Error and Appeal shall hold its sittings at the city of Toronto, on the second Thursday next after the several Terms of Hilary, Easter and Michaelmas, and shall have power to adjourn from time to time, and to meet again at the time fixed by such adjournment, for the transaction of business; and the Chief Justice of the Court of Queen's Bench, for the time being, and in his absence, the Judge of the said Court entitled to precedence over all the Judges actually present, shall preside therein, and seven members of the Court, shall be necessary to constitute a quorum.

Who shall preside.

Quorum.

How the Act shall apply to pending cases.

V. All appeals which shall be depending in the said Court at the time this Act shall come into force, shall be carried on under the provisions of this Act, but where any such appeals shall be standing for Judgment, Judgment may be given as if this Act had not been passed.

Court may quash proceedings in certain cases.

VI. The Court of Error and Appeal shall have power to quash proceedings in all cases brought before it, in which Error and Appeal does not lie, or where such proceedings are taken against good faith, or in any case in which proceedings might heretofore have been quashed in the said Court, according to the law and practice in England.

May give the Judgment the Court below ought to have given: and award restitution and costs.

VII. The Court of Error and Appeal shall in all cases have power to dismiss the Appeal, or to give such Judgment or Decree, and to award such process or other proceeding as the Court whose decision is appealed againt ought to have given, without regard to the party alleging Error, and may also award restitution of payment of costs; and the Judgment, Decree or Award shall be certified by the Clerk of the Court of Error and Appeal to the proper Officer of the Court below, who shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken there-

Judgment to be executed as if given by the Court below.

upon, as if the Judgement, Decree or Award had been originally given in and by the Court below. (2)

Appellant may always discontinue proceedings.

VIII. The appellant shall in all cases be at liberty to discontinue his proceedings by giving to the respondent a notice headed in the Court and cause, and signed by the appellant or his Attorney, stating that he discontinues such proceedings; and thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in Appeal, and may either sign judgment for such costs, or obtain an Order for their payment in the Court below, and may take all further proceedings in the Court below as if no appeal had been brought.

Consequence of such discontinuance.

Respondent may consent to reversal.

IX. The respondent shall in all cases be at liberty to consent to the reversal of the Judgment, decree or proceeding appealed against by giving to the appellant a notice headed in the Court and cause, and signed by the respondent or his Attorney, stating that he consents to the reversal of such Judgment, decree or other proceeding, and thereupon the Court shall pronounce Judgment of reversal as of course.

Judgment thereon.

Appeal not to abate by death of appellant after security given.

X. The death of the appellant after the security required by law to be given by him shall have been perfected, and have been, or shall stand allowed, shall not cause the appeal to abate but it may be continued as hereinafter mentioned.

Nor by death of respondent.

XI. The death of the respondent shall not cause the appeal to abate, but it may be continued as hereinafter mentioned.

Nor by marriage of female party.

XII. The marriage of a woman appellant or respondent, shall not abate the appeal, but the proceedings in error and appeal shall go on as if no such marriage had taken place, and the decision of the Court shall be certified as in other cases.

Appeals from Q. B. & C. P.

And as to appeals from the Court of Queen's Bench and Common Pleas; Be it enacted as follows:

Appeal to lie from judgment on special case, unless, &c.

XIII. An appeal shall lie upon a Judgment upon a special case in the same manner as upon a Judgment upon a special verdict, unless the parties agree to the contrary; and the proceedings for bringing a special case before the Court of Error and Appeal shall, as nearly as possible, be the same

Proceedings.

as in the case of a special verdict, and the Court of Error and Appeal are required to draw any inferences of fact from the facts stated in such special case, which the Court where it was originally decided ought to have drawn.

Con Stat for U.C. ch 13 § 23

And on rules to enter verdict, &c., on point reserved.

XIV. An appeal shall lie in all cases of rules to enter a verdict or non-suit upon a point reserved at the trial, if the rule to shew cause be refused, or if granted, be afterwards discharged or made absolute.

Con Stat for U.C. ch 13 § 24 & 26

And on rules for new trial on certain grounds.

XV. In all cases of motion for a new trial upon the ground that the Judge has not ruled according to law, if the rule to shew cause be refused, or if granted, be afterwards discharged or made absolute, the party decided against may appeal, provided any one of the Judges dissent from the rule being refused, or when granted, being discharged or made absolute, as the case may be, or provided the Court in its discretion think fit that an appeal should be allowed; provided that were the application for a new trial is upon the matter of discretion only, as on the ground that the verdict was against the weight of evidence or otherwise, no appeal shall be allowed.

Provided one Judge dissents or Court allows appeal.

Not to lie in certain cases.

Con Stat for U.C. ch 13 § 25

Notice of appeal to be given, and to whom and where.

XVI. No appeal shall be allowed in either of the cases mentioned in the three next preceding sections, unless notice thereof be given in writing to the opposite party or his Attorney and to the Clerk of the Crown of the proper Court within fourteen days after the decision complained of, or within such further time as may be allowed by the Court or a Judge.

Con Stat for U.C. ch 13 § 27

Appeal in ejectment.

XVII. An appeal shall lie in ejectment in the same manner and to the same extent as in any other case.

Con Stat for U.C. ch 13 § 28

Or from judgment quashing a Municipal By-Law.

XVIII. An appeal shall lie in all cases in which any By-law of a Municipal Corporation has been quashed by rule of Court after argument.

Con Stat for U.C. ch 13 § 30

No other appeal except on judgment &c. of record.

XIX. No other appeals from the decision of the said Courts of Queen's Bench or Common Pleas, shall be allowed, unless the judgment, decision, or other matter appealed against, shall appear of record.

XX. A Writ of Error and Appeal shall not be necessary or used in any cause, and the proceedings to appeal against any Judgment shall be a step in the cause, and shall be taken in manner hereinafter mentioned: but nothing in this Act contained shall invalidate any proceedings already taken or to be taken by reason of any Writ of Error and Appeal issued before the commencement of this Act.

Writ of Error and Appeal abolished.

Pending cases saved.

Con stat for U.C. ch 13 § 32

XXI. Either party alleging error in law, may deliver to the Clerk of the Crown of the Court wherein the suit was instituted, a Memorandum in writing, in the form contained in the Schedule A to this Act annexed (No. 1.) or to the like effect, entitled in the Court and cause, and signed by the party or his Attorney, alleging that there is error in law in the record and proceedings, whereupon the Clerk shall file such Memorandum, and deliver to the party lodging the same a note of the receipt thereof, and a copy of such note together with a statement of the grounds of error, intended to be argued, may be served on the opposite party or his Attorney.

Party alleging error may file memorandum in form of Schedule A. and serve a copy and statement of grounds of error on the opposite party.

Con stat for U.C. ch 13 § 33

XXII. Proceedings in any appeal from decisions in the Courts of Common Law shall be deemed a supersedeas of execution, from the time of the perfecting and allowance of the security required by the fortieth section of the above mentioned Act, passed in the twelfth year of Her Majesty's Reign; Provided always, that if the grounds of Error or Appeal shall appear to be frivolous, the Court whose judgment is appealed from, or a Judge upon summons, may order execution to issue.

Proceedings in appeal to supersede execution, and from what time.

Proviso, if appeal be declared frivolous.

Con stat for U.C. ch 13 § 35

XXIII. The assignment of and joinder in error in law shall not be necessary or used, and instead thereof a suggestion to the effect that error is alleged by the one party and denied by the other, may be entered on the Judgment-roll, in the form contained in Schedule A to this Act annexed (No. 2.) or to the like effect: Provided that in case the respondent intends to rely upon the proceeding in error being barred by lapse of time or by release of error or other like matter of fact, he may give four day's notice in writing to the appellant, to

Assignment and joinder in error unnecessary

Suggestion substituted.

Proviso, if respondent relies on proceedings in error being barred.

Con stat for U.C. ch 13 § 36 & 38

file and serve a copy of his grounds of error and appeal as heretofore, instead of entering the suggestion, and he shall within eight days plead thereto the bar by lapse of time, or release of error or other like matter of fact, and thereupon further proceedings may be had according to the law and practise in England.

Con Stat for U.C. ch 13 §39

Roll to be made up, &c. within a certain time; or defendant may sign judgment of *non pros.*

XXIV. The roll shall be made up, and the suggestion last aforesaid entered by the appellant, within ten days after the service of the note of the receipt of the Memorandum alleging error, or within such other time as the Court or a Judge may order, and in default thereof, or of assignment of error in cases when an assignment is required, the respondent, his executors or administrators, shall be at liberty to sign Judgment of *non pros.*

Con Stat for U.C. ch 13 §40

Provision in cases where of several parties against whom judgment is given, one or some only appeal.

XXV. In case of an Appeal on a Judgment given against several persons, and one or some only shall appeal, the Memorandum alleging error, and the note of the receipt of such Memorandum shall state the names of the persons who appeal, and in case the other persons against whom Judgment has been given decline to join in the appeal, the same may be continued and the suggestion last aforesaid entered, stating the persons who appeal without any summons and severance or if such other parties elect to join, then the suggestion shall state them to be and they shall be deemed appellants although not mentioned as such in previous proceedings.

Con Stat for U.C. ch 13 §41

Upon entry of error alleged and denied, and security allowed, &c., transcript of judgment to be transmitted to Court of Error and Appeal.

XXVI. Upon such suggestion of error alleged and denied being entered, and after the security required to be given by the appellant shall have been duly allowed, the cause may be set down for argument in the Court of Error and Appeal as heretofore, and the Clerk of the Court appealed from shall, on payment of his lawful fees, prepare a full transcript of the Judgment appealed from and certify the same under the seal of the Court, and shall forthwith transmit the same to the Clerk of the Court of Error and Appeal.

Con Stat. for U.C. ch 13 §42 43 44

In appeals upon certain motions or

XXVII. In cases of appeals upon motions or rules for new trials, or to enter a verdict or non-suit, or upon rules whereby

any by-law is quashed, such appeal shall be upon a case to be stated by the parties (and in case of difference to be settled by the Court or a Judge of the Court appealed from) in which shall be set forth so much of the pleadings, evidence, affidavits, documents and the ruling or judgment objected to as may be necessary to raise the question for the decision of the Court of Error and Appeal; and the case so stated and settled shall be forthwith delivered by the appellant to the Clerk of the Court of Error and Appeal, and the cause may, after the security required to be given by the appellant shall have been duly allowed, be set down for argument.

Rules for new trials, &c., case to be stated; , settled if parties do not agree, on such Statement.

XXVIII. The appellant shall deliver to the said Clerk at least four clear days before the day appointed for hearing the argument, for the use of the Judges, a copy for each of the Judges, of the transcript of the Judgment or of the case mentioned in the last section, as the case may be, or in default thereof the appeal may be dismissed with costs.

Appellant to deliver copies of judgment or cases, and when and to whom.

Con. Stat. for U.C. ch. 13 § 45

XXIX. In case of the death of one of several appellants, a suggestion may be made of such death, which suggestion shall not be traversable, but shall only be subject to be set aside if untrue, and the proceedings may be thereupon continued at the suit of and against the surviving appellant, as if he were the sole appellant.

Case of death of one of several appellants, provided for.

Con. Stat. for U.C. ch. 13 § 46

XXX. In case of the death of the sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appellant may, by leave of the Court or a Judge, enter a suggestion of the death, and that he is such legal representative, which suggestion shall not be traversable but shall only be subject to be set aside if untrue, and the proceedings may thereupon be continued at the suit of and against such legal representative as the appellant, and if no such suggestion shall be made the respondent may proceed to an affirmance of the Judgment according to the practice of the Court, or take such other proceedings as he may be entitled to.

Case of death of sole appellant or of all appellants provided for.

Con. Stat. for U.C. ch. 13 § 47

XXXI. In case of the death of one of several respondents, a suggestion may be made of such death, which suggestion

Case of death of one of several

Con. Stat. for U.C. ch. 13 § 48

respondents, provided for.

shall not be traversable but shall only be subject to be set aside if untrue, and the proceedings may be continued against the surviving respondent.

Case of death of sole respondent. or of all respondents, provided for.

XXXII. In case of the death of a sole respondent or of all the respondents, the appellant may proceed upon giving one month's notice of the appeal, and of his intention to continue the same as to the representative of the deceased respondents, or if no such notice can be given, then by leave of the Court or a Judge, upon giving such notice to the parties interested, as the Court or Judge may direct.

Case of marriage of female appellant or respondent, provided for.

XXXIII. If a woman being appellant or respondent shall marry pending the appeal, and Judgment shall be given for her, execution may thereupon be issued in the Court below by the authority of the husband, without any suggestion or Writ of Revivor, and if Judgment be given against her, such Judgment may be executed in the Court below against the wife alone, or by suggestion or Writ of Revivor pursuant to the Common Law Procedure Act, 1856, Judgment may be obtained against the husband and wife, and execution may issue thereon.

Appeals from Chancery.

And as to appeals from the Court of Chancery; Be it enacted as follows:

Mode instituting the appeal from a decree or order.

XXXIV. Every party desirous of appealing from any Decree or Order in the said Court of Chancery, shall file a petition of appeal to be in the form contained in Schedule A to this Act annexed (No. 3.) with the Clerk of the Court of Error and Appeal, and a copy thereof, together with a notice

Notice to opposite party.

of the hearing of the appeal, shall be served on the respondent, his Solicitor or agent, at least two months before the time named in such notice for the hearing of the appeal, and

Petition in appeal not to be answered, but parties to attend and argue the case, at the time appointed.

such petition shall not be answered, but at the time named in the notice of the parties must attend to argue the appeal, and after the filing of the petition and service of a copy thereof, and of the notice aforesaid, proceedings shall go on as if the petition had been answered and the time named in the notice had been appointed by the Court for hearing the appeal.

Con. Stat. for U.C. ch. 13 §§ 55 & 57

Within what time appeals must be brought to a hearing.

XXXV. In appeals from any decree or order of the Court of Chancery, it shall be the duty of the appellant to bring the same to a hearing within the time following, that is to say: upon appeal from any decree or decretal order; within one year from the pronouncing of such decree or decretal order; and upon appeal from any interlocutory order, not being a decretal order, within six calendar months from the pronouncing of the same, or within such further time as may be allowed for that purpose by the said Court of Error and Appeal, or by the Court of Chancery or a Judge thereof, upon special grounds shewn to the satisfaction of the Court or Judge granting the same: Provided always that as to any decrees or orders which, under any general orders of the Court of Chancery, do not become absolute upon the same being pronounced, the time limited for appealing therefrom shall be computed from the time when the same shall have become absolute.

Proviso; delaw to be reckoned time when decree or order become absolute.

Appeals to Privy Council.

And with respect to the giving security in cases of appeal to Her Majesty, in Her Privy Council, and to costs in such cases of appeal; Be it enacted as follows:

Con. Stat. for U.C. ch. 13 § 62.

Any Judge of the Court of Appeal and Error may allow the Bond, &c.

XXXVI. Every Judge of the Court of Error and Appeal shall have authority to approve of and allow the Bond or other security to be given by any party who intends to appeal to Her Majesty in Her Privy Council, whether the application for such allowance be made during any of the terms appointed for the sitting of the said Court, or at any other time: Provided always, that every Appeal to Her Majesty in Her Privy Council shall be made and entered there within six months from the date or time of the allowance of said Bond or other security, and pressed to a hearing and conclusion there with all reasonable speed, in default whereof the Court in which the Judgment shall have been originally pronounced may, in its discretion, by rule of the same Court, order proceedings to be had and pursued upon the Judgment of the said Court of Error and Appeal as if such Judgment were and stood confirmed by Her Majesty in Her said Privy Council at the time of the making of such rule.

Proviso; appeal must be made within a reasonable time and duly pressed to a decision.

Recovery of

XXXVII. Any costs awarded by any decree or order of her

Com. Stat. for U.C. ch 13 § 63

Costs awarded in Privy Council.

Majesty, in Her Privy Council, upon an Appeal from the said Court of Error and Appeal, shall be recoverable by the same process as costs awarded by the said Court of Error and Appeal.

Rules under this Act.

And in order to enable the Judges to carry this Act thoroughly into effect by making rules and regulations, and to frame all necessary proceedings for that purpose; Be it enacted as follows:

Com. Stat. for U.C. ch 13 § 64

Judges in Error and Appeal to make rules for carrying this Act into effect, and tariff of fees under it.

XXXVIII. It shall be lawful for the Judges of the said Court, or any five or more of them, of whom the Chief Justice of the Court of Queen's Bench and the Chancellor shall be two, from time to time to make all such general rules and orders for the effectual execution of this Act, and of the intention and object thereof, and for fixing the costs to be allowed for and in respect of proceedings in the said Court, and for regulating the different proceedings in appeal, as to them may seem expedient for any of the said purposes; and also from time to time to alter and amend any of the existing rules, or any rules to be made under the authority of this Act, and to make other rules instead thereof: Provided always, that until such rules are made, the present rules and the existing practise and mode of proceeding of and in the said Court, except so far as changed, modified and superseded by the provisions of this Act, shall continue and remain in force.

Proviso: present rules to apply until altered.

SCHEDULE A.

REFERRED TO IN THE FOREGOING ACT.

No 1.

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

The day of in the year of our Lord, 18 .

(*The day of lodging note of Error.*)

A. B. and C. D.

The plaintiff (*or* defendant) says that there is error in law in the record and proceedings in this action, and the defendant (*or* plaintiff) says that there is no error therein.

(*Signed*) A. B. Plaintiff.
(*or* C. D. Defendant)
(*or* E. F. Attorney for Plaintiff *or* Defendant.)

No. 2.

The day of , in the year of our Lord, 18 .

(*The day of making the entry on the Roll.*)

The plaintiff (*or* defendant) says that there is error in the above record and proceedings, and the defendant (*or* plaintiff) says there is no error therein.

No. 3.

IN THE COURT OF ERROR AND APPEAL.

Between A. B. Appellant, and C. D. Respondent.

To the Honorable the Judges of the said Court.

The petition of the said A. B. sheweth:

That a Decree (*or* Order) was on pronounced by Her Majesty's Court of Chancery for Upper Canada, in a certain cause depending in the said Court, wherein your petitioner was plaintiff (*or* defendant) and the above named C. D. was defendant (*or* plaintiff), which said Decree (*or* Order) has been duly entered and enrolled.

That your petitioner hereby appeals from the said Decree (*or* Order) and prays that the same may be reversed or varied, or that such other Decree (*or* Order) in the premises may be made as to your honorable Court shall seem meet.

And your petitioner will ever pray, &c.

(*Certificate of Counsel to be added.*)

20TH VICTORIA, CAP. 57.

An Act to amend the Common Law Procedure Act, 1856, *and to facilitate the remedies on Bills of Exchange and Promissory Notes.*

[Assented to 10th June, 1857.]

Preamble.

HER Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows:

Clerks of the Crown and Pleas and their Deputies, and the Clerk of the Process, to give security within a certain time; for what purpose and to what amount &c.

I. The Clerks of the Crown and Pleas, the Clerk of the Process and the Deputy Clerks of the Crown and Pleas in the Courts of Queen's Bench and Common Pleas in Upper Canada, shall, within two calendar months after this Act shall come into force, or within one month next after being appointed to any of the said offices, give security to Her Majesty, Her Heirs and Successors, in such sum, and with so many sureties and in such form as the Governor in Council shall direct, conditioned for the due performance of the duties of their office and for the rendering of the quarterly accounts and returns required from them by law, and for the due payment to the Receiver General of this Province, of all the fees, dues, emoluments, perquisites and profits received by them on account of their said offices respectively, and for and on account of any duty or service done and performed by them respectively, in their said several offices; and the neglect to give such security by any such Clerk or Deputy Clerk or to render quarterly returns or to pay over all such moneys within twenty days next after each quarterly day, shall *ipso facto* render his appointment void, and vacate his office: Provided that such avoidance shall not annul or affect any act, matter or thing done by any such Clerk or Deputy Clerk, during the time that he shall actually hold his appointment.

Failure to give such security to vacate their offices.

Proviso.

Bonds and sureties to be subject to approval of the Governor.

II. The Governor of this Province shall approve of the security and sureties to be given by the said Clerks and Deputy Clerks, (the Judge of the County Court first certifying his

approval in writing of the security and sureties to be given by the Deputy Clerk of the Crown for his County,) and such securities shall, as soon as they are so executed and approved, be duly recorded in the manner provided by the third section of the Statute passed in the session of the Provincial Parliament, held in the fourth and fifth years of Her Majesty's Reign, chaptered ninety-one, and then deposited in the office of the Inspector General of Public Provincial Accounts; and if any surety in any such security shall die or cease to reside in Upper Canada, or become insolvent, it shall be the duty of such Clerk or Deputy Clerk, within one month of his knowledge of the fact or after being thereto required by the Inspector General to give a new security, in manner herein. before provided, and the omission to give such new security shall render the appointment of the Clerk or Deputy Clerk so omitting, void.

Bonds to be recorded under 4 & 5 Vic. c. 91.

New bond to be given in case of death, &c., of a surety.

Failure to avoid office.

III. Every Deputy Clerk of the Crown shall, within twenty-four hours after notice in writing delivered to him at his office for that purpose, enclose, seal up and transmit by post to the proper principal office at Toronto, addressed to the Clerk thereof, any record of *Nisi Prius* in his custody to be mentioned in such notice, together with all exhibits filed at the trial, and in default thereof, he may be adjudged guilty of contempt of Court, and be dealt with in the discretion of the Court accordingly. And if, after such notice, the *Nisi Prius* record shall not be in Court at the time of moving any rule requiring a reference thereto, the party moving may, on filing an affidavit of the service of notice, and that the record, on search, has not been found in the said principal office, be allowed by the Court to move any such rule without the production of the Record of *Nisi Prius*.

Deputy Clerks of the Crown to transmit any *Nisi Prius* record to Toronto, or deliver the same sealed up, on proper notice, &c.

Failure to be a contempt.

After such notice, a party may move although the record be not in Court; first filing affidavit of notice.

And with respect to Bills of Exchange and Promissory Notes, Be it enacted as follows:

IV. From and after the first day of July, in the year of our Lord one thousand eight hundred and fifty-eight, all actions upon Bills of Exchange or Promissory Notes, commenced in either of the Superior Courts of Common Law, within six

Form of summons in actions on Bills or Notes, after 1st July, 1858.

Final judgment may be signed on proof of service, unless Defendant obtain leave to appear and do appear.

months after the same shall have become due and payable, may be by writ of summons in the special form contained in the Schedule to this Act annexed, numbered one, and endorse as is therein mentioned; and it shall be lawful for the Plaintiff on filing an affidavit of personal service of such writ within the jurisdiction of the Court or an order for leave to proceed as provided by the Common Law Procedure Act, 1856, and a copy of the writ of summons and the endorsements thereon, in case the Defendant shall not have obtained leave to appear, and have appeared to such writ according to the exigency thereof, at once to sign final judgment in the form contained in the Schedule numbered two, to this Act annexed, (on which judgment no proceeding in error shall lie) for any sum not exceeding the sum endorsed on the writ, together with interest to the date of the judgment and a sum for costs to be fixed by a rule of Court, unless the Plaintiff claim more than such fixed sum, in which case the costs shall be taxed in the ordinary way, and the Plaintiff may upon such judgment issue execution at the expiration of fifteen days after such judgment has been signed.

Repealed

For what amount &c.

Execution.

How leave to appear may be obtained by defendant

V. A Judge of either of the said Courts, or a Judge of a County Court, shall upon application within the period of sixteen days from such service, give leave to appear to such writ, and defend the action on the Defendant paying into Court the sum endorsed on the writ, or upon affidavits satisfactory to the Judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Judge may deem sufficient to support the application, and on such terms as to security or otherwise as to the Judge may seem fit.

See as to stay for costs 32 & 33 c. 42 s. 19 & 20

Repealed

Judgment may, under special circumstances, be set aside, and how.

VI. After judgment, the Court or a Judge may, under special circumstances, set aside the judgment and if necessary stay or set aside execution, and may give leave to appear to the writ, and to defend the action, if it shall appear to be reasonable to the Court or a Judge so to do, and on such terms as to the Court or Judge may seem just.

Repealed

Deposit of the bill, &c., and security

VII. In any proceedings under this Act, it shall be competent to the Court or a Judge to order the bill or note sought

to be proceeded upon to be forthwith deposited with an officer of the Court, and further to order that all proceedings shall be stayed until the Plaintiff shall have given security for the costs thereof. for costs may be ordered.

VIII. The holder of every dishonored Bill of Exchange or Promissory Note shall have the same remedies for the recovery of the expenses incurred in noting or protesting the same for non-acceptance or non-payment, or otherwise, or of damages where damages for non-payment are by law recoverable, by reason of such dishonor, as he has under this Act for the recovery of the amount of such bill or note. Same remedy for expense of protest damages, &c. as for amount of Bill or Note.

IX. The holder of any Bill of Exchange or Promissory Note may proceed against all the parties to such bill or note under this Act in one action, in conformity with the provisions of the Acts of the Parliament of Upper Canada and of this Province, enabling the bringing a joint action against all the parties to any Bill of Exchange or Promissory Note. All parties to the Bill or Note may be sued in one action under this Act.

And with respect to proceedings for the revival of judgments, Be it enacted as follows: Revival of Judgments.

X. The two hundred and second section of the Common Law Procedure Act, 1856, is hereby repealed; and during the lives of the parties to a judgment or those of them during whose lives execution may at present issue within a year and a day without a *scire facias*, and within six years from the recovery of the judgment, execution may issue without a renewal thereof. Section 202 of 19, 20 V. c. 43 repealed and new provision made.

And with respect to Equitable defences, Be it enacted as follows: Equitable Defences.

XI. The two hundred and eighty-seventh section of the Common Law Procedure Act, 1856, and the words placed between that and the next preceding section, are hereby repealed; and after this Act shall come into force it shall be lawful for the Defendant, or the Plaintiff in replevin, in any cause in either of the Superior Courts, in which, if judgment were obtained he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitle him to such relief by way of defence, and the said Courts are Section 287 of 19, 20 V. c. 43, repealed, and new provision made. Facts entitling to relief may be pleaded.

hereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words "For defence on Equitable grounds," or words to the like effect.

Arbitration.

And as to reference to arbitration ordered at the trial; Be it enacted as follows:

Judge at *N. P.* directing reference at trial, may do so in the manner provided by ss. 84 & 85 of 19, 20 Vic., c. 43, and powers and proceedings of Arbitrators to be as under ss. 86 & 87.

XII. The Judge at *Nisi Prius* directing any reference under the one hundred and fifty-sixth section of the Common Law Procedure Act, 1856, may direct such reference, if he shall see fit to do so, in like manner as he has power to do under the eighty-fourth and eighty-fifth sections of the said Act, and every arbitrator so appointed at *Nisi Prius* shall be subject to the provisions of the said sections, and shall have the powers expressed in the eighty-sixth section and be subject to the same regulations as are mentioned and provided in regard to arbitrators in and by the eighty-seventh section of the said Act.

And as to trials *at bar*, Be it enacted as follows:

Trial at Bar may be demanded and granted for cause.

XIII. The Plaintiff or Demandant, and the Defendant or Tenant, respectively, in any action or suit whatever commenced or brought, or to be commenced or brought in either of the Courts of Queen's Bench or Common Pleas for Upper Canada may, in the Term next after issue joined apply to the said Courts respectively for a trial *at bar*, and each of the said Courts respectively may, in its discretion, upon hearing the parties, grant or refuse the same.

To be had of right in Crown cases.

XIV. In all cases in which the Crown may be actually or immediately interested, a trial *at bar*, may be had as of right upon the same principle, and be regulated and governed thereby as in similar cases in England.

When such trial may be had.

XV. If any trial *at bar* shall be directed by either of the said Courts, it shall be competent to the Judges of such Court to appoint such day or days for the trial thereof as they shall think fit, and the time so appointed, if in vacation, shall, for the purposes of such trial, be deemed and taken to be a part of the preceding term.

Garnishees.

And as to proceedings against Garnishees; Be it enacted as follows:

What order shall be made when the amount is within the jurisdiction of a County or Division Court.

XVI. When the amount claimed as due from any garnishee shall be within the jurisdiction of any County or Division Court, the order to be made under the one hundred and ninety-fourth section of the Common Law Procedure Act, 1856, shall be for the garnishee to appear before the Judge of the County Court of the County within which the Garnishee resides—at some day and place within his County to be appointed in writing by such Judge—and written notice thereof shall be given to the garnishee at the time of the service of the order, and if the garnishee does not forthwith pay the amount due by him, or an amount equal to the Judgment debt, and does not dispute the debt due or claimed to be due from him to the Judgment debtor, or if he does not appear before the Judge named in the order at the day and place appointed by such Judge, then such Judge may, on proof of service of the order and appointment having been made four days previous, make an order directing execution to issue out of the County Court or out of a Division Court according to the amount due, and which order shall be sufficient authority for the Clerk of either of such Courts to issue execution without any previous writ or process, to levy the amount due from such garnishee; and the Sheriff or Bailiff to whom such writ of execution shall be directed, shall be thereby authorized to levy, and shall levy the amount mentioned in the said execution, towards satisfaction of the Judgment debt, together with the costs of the proceeding, to be taxed, and his own lawful fees, according to the practice of the Court from which such execution issues; but if the garnishee disputes his liability, such Judge may order that the Judgment creditor shall be a liberty to proceed against the garnishee according to the usual practice of the County or Division Court as the case may require, for the alleged debt or for the amount due to the Judgment debtor if less than the Judgment debt, and for costs of suit, and payment by or execution levied upon the garnishee, in any such case shall be a valid discharge to him against the Judgment debtor to the amount paid or levied, although the proceeding may be set aside or the Judgment reversed.

Notice to garnishee.

Execution from County or Division Court, if the garnishee does not dispute the debt.

Proceedings if he disputes the debt.

And with respect to confessions of judgment and to judgments and the registration thereof; Be it enacted as follows:

Confessions and cognovits after this Act to be registered.

XVII. No confession of judgment or *cognovit actionem*, by any person, shall be valid or effectual to support any judgment or writ of execution, unless the same, or a sworn copy thereof, shall be filed of record in the proper office of the Court in the County in which the party giving such confession of judgment or *cognovit actionem* shall reside, within one month after the same is given; and a book shall be kept in every such office, to be called the Cognovit book, in which shall be entered the names of the plaintiff and defendant in every such confession or cognovit, the amount of the true debt or arrangement secured thereby, the time when judgment may be entered and execution issued thereon, and the day when such confession or cognovit, or copy thereof, is filed in the said office; and such book shall be open to inspection by any person during office hours, on the payment of a fee of *one shilling*

Confessions or cognovits given before this Act and unsatisfied to be registered.

XVIII. No confession of judgment or *cognovit actionem* given before the passing of this Act, which shall be still unsatisfied when this Act comes into effect, shall be valid and effectual to support any judgment or writ of execution, unless the same, or a sworn copy thereof, shall be filed of record as aforesaid within four months after the passing of this Act; and the same entries shall be made in respect of such confessions or cognovits, in the Cognovit Book, as by the next preceeding section are required in respect of confessions or cognovits given after the passing of this Act.

Registration of judgment to bind land only three years from registration, or one year from passing of this Act, unless registered.

XIX. Every judgment registered against land in any County shall cease to be a lien or charge upon the land of the party against whom such judgment has been rendered, or any one claiming under him, in three years after such judgment has been registered or within one year after the passing of this Act, unless before the expiration of the said period of three years, or within one year after the passing of this Act, such judgment shall be re-registered; and such lien or charge shall cease whenever the period of three years shall at any time be allowed to elapse without a further re-registry.

Registry of judgment may be discharged by certificate of judgment creditor.

XX. Any judgment registered against land shall and may be discharged from the registry of the County where the same is registered, on the production to the Registrar of such County of a certificate signed by the judgment creditor, or, if more than one, by any one of them, his executors, administrators or assigns, to the following effect:

Form and proof of certificate.

"I do hereby certify that a judgment rendered in favour of A. B. against C. D., for the sum of £ , and registered in the Registry Office of the County of ; been discharged."

And such certificate shall be proved to the Registrar by the affidavit of one subscribing witness who has witnessed the execution of such certificate, which affidavit may be taken before any person before whom any affidavit for the registry of any deed or other instrument can be taken: Provided always, that the registry of a judgment may also be discharged in the manner now provided by law.

And in order to facilitate the conduct of suits; Be it enacted as follows:

Power of County Judge when both Attorneys reside in his County.

XXI. In any action in any of the Superior Courts of Common Law, when the attorneys of both plaintiff and defendant reside in the same County, the Judge of the County Court of such County may issue summonses and orders for copy or inspection of documents and particulars of demand or set-off security for costs, and time to plead, with the same effect and authority as if such summonses and orders were issued by any Judge of either of the said Superior Courts.

And with respect to execution; Be it enacted as follows:

Sheriff may seize money and securities for money.

XXII. After this Act shall come into force, the sheriff or other officer having the execution of any writ of *fieri facias* against goods sued or to be sued out of either of the said Courts or out of any County Court, or of any precept made in pursuance thereof, may and shall seize and take any money or bank notes (including any surplus of a former execution against the defendant or party,) and any cheques, bills of exchange, promissory notes, bonds, mortgages, specialties or other securities for

money belonging to the person against whose effects such writ of *fieri facias* shall be sued out, and may and shall pay or deliver to the party suing out such execution, any money or bank notes which shall be so seized or a sufficient part thereof, and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money as a security or securities for the amount by such writ of *fieri facias* directed to be levied, or so much thereof as shall not have been otherwise levied or raised, and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and the payment to such sheriff or other officer by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange promissory note, bond, specialty or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ, the money to be so recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond specialty or other security, unless the party suing out such execution shall enter into a bond with two sufficient sureties for indemnifying him from all costs and expenses, to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof; the expense of such bond to be deducted out of any money to be recovered in such action.

Money seized to be paid over to party taking out the execution.

How the securities seized shall be dealt with.

Payments thereon to the Sheriff to be valid.

Sheriff to pay over moneys so paid to him.

Surplus to be paid to the party against whom the execution issued.

Sheriff not bound to sue until secured

XXIII. The necessary wearing apparel, the bed and bedding, and one stove and the cooking utensils, of a party against whom any writ of execution may be issued, or of his family,

Apparel, tools, &c., exempted from execution.

and also the tools and implements of his trade to the value of fifteen pounds, shall be protected from seizure under any execution from either of the said Courts or from any County Court

Case in which execution shall be out from County Court and Division Court at the same time, against the same debtor, provided for.

XXIV. Where a writ against the goods of a party has issued from either of the said Courts or from any County Court, and a warrant of execution against the goods of the same party has issued from a Division Court, the right to the goods seized shall be determined by the priority of the time of delivery of the writ to the sheriff to be executed, or of the warrant to the bailiff of the said Division Court to be executed; and the sheriff, on demand, shall, by writing signed by him or his deputy or any clerk in his office inform the bailiff of the precise time of such delivery of the writ, and the bailiff, on demand, shall shew his warrant to any sheriff's officer; and such writing purporting to be so signed, and the endorsement on the warrant shewing the precise time of the delivery of the same to such bailiff, shall respectively be sufficient justification to any bailiff or sheriff acting thereon.

Con. Stat for U.C. ch 22 §266

And with respect to debtors in close custody; Be it enacted as follows:

Further condition in the bond—that it shall be allowed by a County Judge within 30 days.

XXV. In all cases in which the sheriff of any County or Union of Counties shall take from any debtor confined in the gaol thereof a bond under the provisions of the three hundred and second section of the Common Law Procedure Act, 1856, such bond shall in addition to the conditions in the said three hundred and second section mentioned, contain a further condition that the said debtor shall, within thirty days from the delivery thereof to the sheriff, cause and procure the said bond, or that to be substituted for the same according to the provisions hereinafter contained, to be allowed by the Judge of the County Court of the County or Union of Counties wherein the debtor is confined, and such allowance to be endorsed thereon by the said Judge; and for this purpose the sheriff shall, upon reasonable notice by the debtor given, cause such first mentioned bond to be produced before the Judge, and upon such allowance being so endorsed, the sheriff shall be

Con. Stat for U.C. ch 24 §§ 254 33

Applies to Co. Co: Arnold v. Murgatroyd 4 U.C.L.J. 280 -

Production of the bond to the Judge for allowance, &c.

discharged from all responsibility respecting such debtor, unless such debtor be again committed to the close custody of such sheriff in due form of law; and the said bond shall, upon any breach of the above mentioned condition, be assignable in like manner and the like remedies be had thereon as is provided in respect of other breaches in the three hundred and fifth section of the said Common Law Procedure Act contained.

Allowance of bond to be on motion and after notice.

XXVI. Such allowance shall be made upon motion by the debtor, and four clear days' notice thereof shall be given in writing to the plaintiff or his attorney, who may object thereon to the sufficiency of the sureties; and if the Judge shall refuse his allowance of such bond, then the debtor may cause another bond made to the sheriff in the same terms and under the same conditions, to be executed without any further application to the sheriff, and may move in like manner and upon the like notice for the allowance thereof; and such bond, if allowed and endorsed as aforesaid, shall be substituted for and take place of and have the like effect in all respects, and the like remedies shall be had thereon, as the bond so first given to the sheriff as aforesaid would have had upon the allowance thereof, and such first given bond shall thereupon become void.

Its effects.

And with respect to interpleader; Be it enacted as follows:

Sheriff's right of interpleading.

XXVII. In all cases of attachment against absconding debtors, the sheriff shall have the like right of interpleading as is provided in respect of writs of execution, and all the provisions of law in that behalf shall in such cases apply.

And with respect to the service of writs; Be it enacted as follows.

Fees not taxable for service of writs unless return indorsed.

XXVIII. No fees shall be taxed or allowed for the service of any writ whereby an action at law is commenced in either of the Superior Courts of Common Law or in any County Court unless a return of the sheriff (or coroner, in actions against the sheriff) of the County in which such service is made, shall be endorsed thereon, unless when the sheriff shall have omitted to serve the said writ within fifteen days after it has been delivered to him for service.

Exception.

Section 19 of 12 V. c. 63, repealed from 21st August, 1857.

XXIX. From and after the twenty-first day of August next the nineteenth section of the Act of Parliament of this Province, passed in the twelfth year of Her Majesty's Reign, intituled, *An Act to make further provision for the administration of Justice, by the establishment of an additional Superior Court of Common Law, and also a Court of Error and Appeal, in Upper Canada, and for other purposes*, shall be and the same is hereby repealed, and the terms of sitting of the Court of Queen's Bench and Common Pleas in Upper Canada, shall be as follows: Trinity Term shall begin on the Monday next after the twenty-first day of August, and shall end on the Saturday of the ensuing week; Michaelmas Term shall begin on the third Monday in November, and shall end on the Saturday of the ensuing week; Hilary term shall begin on the first Monday in February, and shall end on the Saturday of the ensuing week: and Easter Term shall begin on the third Monday in May, and shall end on the Saturday of the ensuing week.

Times at which the Terms of Q. B. and C. P. shall be thereafter held.

Sections 152 & 153 of 19, 20 V. c 43, repealed after Trinity Term, 1857.

XXX. The one hundred and fifty-second and the one hundred and fifty-third sections of the Common Law Procedure Act, 1856, are hereby repealed from and after the last day of Trinity Term next; and thenceforth Courts of Assize and Nisi Prius, of Oyer and Terminer and of General Gaol delivery shall be held in every County or Union of Counties in Upper Canada, (except in that County or Union of Counties within which the City of Toronto is situate,) in each and every year in the vacations between Hilary and Easter Terms and between Trinity and Michaelmas Terms, with or without commissions as to the Governor of this Province shall seem best, and on such days as the Chief Justices and Judges of the said Superior Courts of Common Law in Upper Canada shall respectively name; and if commissions are issued, then such Courts shall be presided over by any one of the persons to be named in such commissions (among whom shall always be the Chief Justices and Judges aforesaid, and any one of whom being present shall always preside in the said Courts,) and to whom may be added such of the Judges of the County Courts or of Her Majesty's Counsel Learned in the Law of

Times at which Courts of Assize and *Nisi Prius* shall be thereafter held.

May be held with or without commissions.

Who shall preside if commissions issue.

the Upper Canada Bar as shall be named in any one or more of such commissions, and who shall preside in the absence of

And if no commissions issue.

of the Chief Justices and Judges of the Superior Courts; But if no such commissions are issued, then the said Courts shall be presided over by one of the Chief Justices or of the Judges of the said Superior Courts, or in their absence then by some one Judge of a County Court, or by some one of Her Majesty's Counsel Learned in the Law of the Upper Canada Bar, upon such Judge or Counsel being requested by any one of the said Chief Justices or Judges of the Superior Courts to attend for that purpose; and each and every of the said Chief

Powers of Judges, &c., presiding at such Courts.

Justices and Judges and of such Judges of the County Court and of such of Her Majesty's Counsel Learned in the Law, presiding at any Court of Assize and Nisi Prius, or of Oyer and Terminer and General Gaol Delivery shall and may possess, exercise and enjoy all and every the like powers and authorities as have been usually set forth and granted in commissions issued for holding all or any of the said Courts; and

Associate Justices need not be named in commissions of Oyer and Terminer and Gaol Delivery or attend at the Courts held under them.

it shall not be necessary to name any associate Justices in any commissions of Oyer and Terminer and General Gaol Delivery that may be issued, or that any associate Justices should be nominated or should attend or be present at any Court of Oyer and Terminer and General Gaol Delivery to be holden after the day in this section mentioned; and all such Courts shall in like manner be held in the County or Union of Counties within which the city of Toronto is situate, three times in each year, to commence on the Thursday next after the holding the Municipal Elections in January, on the second Monday in April, and on the second Monday in October in each

Proviso: Saving power to issue special commissions.

year: Provided that nothing herein contained shall restrict the Governor of this Province from issuing special commissions for the trial of any offenders when he shall deem it expedient to issue any such commissions.

Con Stat for U.C. ch 4 § 30 § 17

Provisions of 19, & 20 V. c. 43, to apply to proceedings under this Act; rules and forms for giving

XXXI. The provisions of the Common Law Procedure Act, 1856, and all rules of Court made under or by virtue thereof, shall, so far as the same are or may be made applicable extend and apply to all proceedings to be had or taken under this Act, and the powers conferred on the Judges by that Act

shall be and are hereby extended to the making from time to time all rules, and new forms of proceedings necessary for giving effect to this Act. Effect to which, may be made.

XXXII. The fourth, fifth, sixth, seventh, eighth, ninth and thirty-first sections of this Act shall extend and apply to and be in force in the several County Courts in Upper Canada, and actions and proceedings therein respectively, as shall also the rules and forms already made or to be made, as mentioned in the said twentieth section, subject to the modifications expressed in the second section of the County Courts Procedure Act, 1856. Certain sections of this Act to apply to County Courts.

XXXIII. In citing this Act in any instrument, document or proceeding, it shall be sufficient to use the expression, "The Common Law Procedure Act, 1857." Short Tittle of this Act.

SCHEDULE REFERRED TO IN THE FOREGOING ACT.

No. 1.

VICTORIA, by the Grace of God, &c.
To C. D. of , in the County of

(PROCESS SEAL.)

We warn you that unless within sixteen days after the service of this Writ on you, inclusive of the day of such service, you obtain leave from one of the Judges of our Court of Queen's Bench, or of Common Pleas (*or as the case may be*), at to appear, and do within that time appear in our Court of in an action at the suit of A. B., the said A. B. may proceed in judgment and execution.

Witness, &c.

Memorandum to be subscribed on the Writ.

N. B.—This Writ is to be served within six calendar months from the date hereof, or if renewed, from the date of such renewal, including the day of such date and not afterwards.

Indorsement to be made on the Writ, before service thereof.

This Writ was issued by E. F., of , Attorney for the Plaintiff, *or* this Writ was issued in person by A. B., who resides at (*mention the City, Town incorporated, or other Village or Township within which such Plaintiff resides*).

Indorsement.

The Plaintiff claims £ , principal and interest, (*or* £ balance of principal and interest) due to him as the payee (*or* "endorsee," &c.,) of a Bill of Exchange, (*or* "Promissory Note," of which the following is a copy (*here Copy Bill of Exchange or Promissory Note, and all endorsements upon it*), and also shillings for noting (*or* "protesting," *as the case may be,*) and £ for damages (*if damages be recoverable on the Bill under* 12 *Vict. chap.* 76,) and £ for costs, and if the amount thereof be paid to the Plaintiff, or his Attorney, within eight days from the service hereof, further proceedings will be stayed.

Notice.

Take notice, that if the Defendant do not obtain leave from one of the Judges of the Queen's Bench or Common Pleas, within sixteen days after having been served with this writ, inclusive of the day of such service, to appear thereto, and do within such time, cause an appearance to be entered for him in the Court out of which this Writ issues, the Plaintiff will be at liberty at any time after the expiration of such sixteen days to sign final judgment, for any sum not exceeding the sums above claimed, and the sum of £ for costs, and issue execution for the same.

Leave to appear may be obtained on an application at the Judge's Chambers, Osgoode Hall, Toronto, supported by affidavit, shewing that there is a defence to the action on the merits, or that it is reasonable that the Defendant should be allowed to appear in the action.

Indorsement to be made on the Writ after service thereof.

This Writ was served by X. Y. on C. D., (the Defendant *or* one of the Defendants,) on day, the day of , 18 .

(Signed,) X. Y.

No. 2.

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

On the day of , in the year of our Lord, 18 .

Upper Canada, to wit: } A. B., in his own person (*or* by his Attorney) sued out a writ against C. D., indorsed as follows:

(*Here Copy Indorsement of Plaintiff's Claim.*

And the said C. D. has not appeared, therefore it is considered that the said A. B. recover against the said C. D., £ together with £ for costs of suit.

20TH VICTORIA, CAP. 58.

An Act to alter and amend the Law in relation to the Upper Canada County Courts.

[Assented to 10th June, 1857.]

HER Majesty, by and with the advice and consent of the Legislative Council and Assembly of Canada enacts as follows: Preamble.

With respect to the proceedings for the revival of Judgments.

I. The two hundred and second section of the Common Law Procedure Act of 1856, shall not extend to the County Courts in Upper Canada; and during the lives of the parties to a Judgment, or those of them during whose lives execution may at present issue within a year and a day without *scire facias* and within six years from the recovery of the Judgment, execution may issue without renewal thereof. Sec. 202 of C. L. P. A. 1856, not to extend to County Courts. Other provision made.

And with respect to equitable defences; Be it enacted as follows:

II. The two hundred and eighty-seventh section of the Common Law Procedure Act, 1856, and the words placed between that and the next preceding section shall not apply or extend to the County Courts in Upper Canada; and after this Act shall come into force, it shall be lawful for the Defendant or the Plaintiff in replevin in any cause in any of the said County Courts, in which if Judgment were obtained, he would be entitled to relief against such Judgment on equitable grounds to plead the facts which entitle him to such relief by way of defence, and the said Courts are hereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words "for defence on equitable grounds" or words to the like effect. Sec. 287 of C. L. P. A. 1856, not to extend to County Courts. Other provision made. Equitable grounds of relief may be pleaded.

And with reference to Arbiration ordered at the trial: Be it enacted as follows:

III. That the Judge of every County Court at the sittings of the said Court for the trial of issues in fact, directing any Appointment of Arbitrators, un-

ders. 156 of C. L. P. A. 1856, and their powers and duties.

reference under the enactments contained in the one hundred and fifty-sixth section of the Common Law Procedure Act, 1856, may direct such reference, if he shall see fit to do so in like manner as he has power to do under the enactments contained in the tenth and eleventh sections of the County Courts Procedure Act, 1856, and every Arbitrator so appointed at such sittings, shall be subject to the provisions of the said sections, and shall have the power expressed in the twelfth section of the last mentioned Act, and be subject to the same regulations as are mentioned and provided in regard to Arbitration in and by the thirteenth section of the said Act.

Sections 10, 11, 12, 13, of C. L. P. A. 1856, to apply.

And as to proceedings against garnishees, Be it enacted as follows:

Con Stat for U.C. ch 22 §296 §297.

What order shall be made when the amount claimed from garnishee is within the jurisdiction of the Division Courts; and proceedings thereon.

IV. When the amount claimed as due from any garnishee shall be within the Jurisdiction of any Division Court, the order to be made in actions in the said County Courts under the enactments contained in the one hundred and ninety-fourth section of the Common Law Procedure Act, 1856, (applied to County Courts) shall be for the garnishee to appear before the Clerk of the Division Court within whose Division the garnishee resides, at his office at some day to be appointed in the said order by the Judge of the County Court; and the said order shall be served on such garnishee, and if the garnishee do not forthwith pay the amound due by him or an amount equal to the judgment debt, and do not dispute the debt due or claimed to be due from him to the judgment debtor, or if he do not appear before the Division Court Clerk named in order at his office at the day appointed by such Judge, then such Judge may, on proof of the service of the order having been made four days previous, make an order directing execution to issue out of the Division Court of the Division in which such garnishee resides, according to the amount due and which order shall be sufficient authority for the Clerk of the said Division Court to issue execution without any previous summons or process, to levy the amount due from such garnishee, and the bailiff to whom such writ of execution shall be directed shall be thereby authorized to levy and shall levy the amount mentioned in the said execution towards satisfaction

of the judgment debt together with the costs of the proceeding to be taxed and his own lawful fees; but if the garnishee dispute his liability, such Judge may order that the judgment creditor in the said County Court shall be at liberty to proceed against the garnishee, according to the practice of the said Division Courts for the alleged debt or for the amount due to the judgment debtor if less than the judgment debt, and for costs of suit; and payment by or execution levied upon the garnishee in any such case, shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although the proceeding may be set aside or the judgment reversed.

If the garnishee dispute his liability.

Payment by garnishee to discharge him.

And with respect to Commissions for the examination of witnesses; Be it enacted as follows:

V. When the plaintiff or defendant in any action now pending or hereafter to be brought in any of the said County Courts shall be desirous of procuring the testimony of any aged or infirm person resident within Upper Canada, or any person who is about to withdraw himself or herself out of the same, or who is residing without the limits of Upper Canada, it shall and may be lawful to and for any of Her Majesty's County Courts, or for any Judge thereof, in vacation, upon hearing the parties upon the motion of such plaintiff or defendant, to issue one or more Commissions under the seal of any such County Court to one or more Commissioners to take the examination of such person, due notice being given to the adverse party to the end that he may cause such witnesses to be cross-examined.

In what cases a Commission may issue for the examination of witnesses.

Consol for U.C. ch 32 § 19—20

VI. In case of witnesses residing without the limits of Upper Canada, such Commission or Commissions, with the examination of the witness or witnesses taken pursuant thereto returned to such County Court, with an affidavit of the due taking thereof thereto annexed sworn before and certified by the Mayor or Chief Magistrate of the City or place where the same shall or may be taken, close under the hand or seal or hands or seals of one or more such Commissioners, shall be taken *prima facie* to have been duly executed and returned and shall be received as evidence in the said cause: Provided

Provision in case the witness be not in Upper Canada.

Consol for U.C. ch 32 § 21

Proviso: examinations not to be used in certain cases.

always, that such examination or examinations shall not be read or given in evidence in the said cause in case the deponent or deponents respectively shall be living within Upper Canada, and of sound mind, memory and understanding at the time such examination or examinations shall be offered to be given in evidence, and provided it is made to appear to the Court before which such examination or examinations is or are put in, that the same has or have not been duly taken.

Con stat for U.C. ch 32 §134 14 -

Power of County Courts to summon and enforce attendance of witnesses, and the production of papers, &c.

VII. The several County Courts in Upper Canada may issue writs of *subpœna ad testificandum* to enforce and secure the attendance of witnesses resident within Upper Canada, and also writs of *subpœna duces tecum* to enforce the attendance of witnesses and the production of deeds and papers, and may proceed against persons who having been duly served with a subpœna shall disregard or disobey the same, with the same powers, in like manner, and by the same mode of proceeding as belongs to and as is practised in the Superior Courts of Common Law at Toronto. Provided always, that every witness shall be entitled to the same allowance as if attending under subpœna from either of the said Superior Courts.

Proviso.

Con stat for U.C. Ch 15 §30 - Ch 19 §62 & 70 " 22 §332.

Judges of Superior Courts to make a tariff of fees for the County Courts.

VIII. It shall be lawful for the Judges of the Superior Courts of Common Law at Toronto, or any three of them, (of whom one of the Chief Justices shall be one) and they are hereby required to frame a table of costs for the several County Courts in Upper Canada, and from time to time to ascertain, determine, declare and adjudge all and singular the fees which shall and may be allowed to be taken by Counsel and Attorney Sheriffs, Coronors, and Officers of the said Courts respectively, in respect of any business hereafter to be done or transacted in the said County Courts, as well as in all matters, causes or proceedings depending in the said Courts as before the Judges thereof, in all actions and proceedings within the jurisdiction of such County Courts or of the Judges thereof; and the costs and fees authorized by such table or by any amended table from time to time made, and no other or greater, shall be taken or received by any Counsel or Attorney, Sheriffs, Coroners and Officers of the said Courts, for any business by them respec-

tively done in the said County Courts or before the Judges thereof; and the said Judges so framing or altering such table of costs may, if they shall think fit, associate with them in framing or altering such table any one of the County Court Judges already appointed or who may hereafter be appointed under and in pursuance of the power and provision contained and set forth in the tenth section of the Upper Canada Division Courts Extension Act of 1853.

Judges may associate a County Court Judge with them in framing the said tariff.

IX. The Judges of the Superior Courts of Common Law at Toronto, or any three of them (of whom one of the Chief Justices shall be one) shall have power to extend and apply to the several County Courts in Upper Canada, all or any of the rules and orders made or to be made under any Statute now in force in Upper Canada, with and under any modifications they may deem necessary, and shall also have power to make such rules and orders for and specially applicable to the said County Courts as may appear to them expedient for carrying into beneficial effect the laws applicable to the said County Courts and all rules and orders of the said Superior Courts that may hereafter be made, shall, (unless the contrary be expressed therein) be in force in and apply and extend to the several County Courts in Upper Canada, and actions and proceedings therein respectively, subject to the modifications expressed in the second section of the "County Courts Procedure Act, 1856."

Judges may extend Superior Court rules to County Courts with modifications.

Superior Court rules hereafter made to apply to County Courts unless otherwise provided.

Con stat for u.c. ch 22 § 339 340

X. The Judges of the several County Courts in Upper Canada now holding office, as well as the Judges to be hereafter appointed, shall hold their offices during their good behaviour; Provided always that it shall be lawful for the Governor to remove any such Judge for inability or misbehaviour when such inability or misbehaviour shall have been established to the satisfaction of the Court by the next section constituted.

County Court Judges to hold office during good behaviour.

Proviso: for removal for inability or misbehaviour.

Con stat for u.c. ch 15 § 3 –

XI. There is hereby constituted and established a Court which shall possess all the incidents, powers and privileges of a Superior Court of Record, and be called the Court of Impeachment, and such Court shall be composed of the Chief Justice of Upper Canada, the Chancellor of Upper Canada,

Court for trying impeachment of County Judges.

Con stat for u.c. ch 14 § 1 4-3

and the Chief Justice of the Court of Common Pleas, and shall hold its sittings at the City of Toronto as occasion may require and the said Court may make such rules and orders as shall from time to time be deemed necessary.

Constat for u.c. ch. 14 §4 to 9.

Governor may refer cases of complaint against County Judges to the said Court of arirlt.

XII. In case any complaint for inability or misbehaviour in office shall be preferred against any County Judge, if the Governor shall find the same to be so sufficiently sustained and of such moment as to demand judicial investigation by the said Court of Impeachment, he shall direct such complaint, and all papers and documents therewith connected, to be transmitted to the Chief Justice of Upper Canada as President of the said Court; and thereupon the said Court shall appoint a day for the meeting of the said Court, at such sittings or at any adjournment thereof the Judges of the said Court shall proceed to the trial of the charges laid and set forth in the said complaint, and to the hearing of the parties complainant and accused, or their counsel, witnesses and proofs respectively, and shall adjudicate upon such complaint and charges, and, if such complaint be for inability, shall determine if such inability has been proved, and if it has, shall state in the judgment of the Court the nature of the inability established, and if the same be, in the opinion of the Court, of such a character as to render it expedient to remove such Judge, and if such complaint shall be for misbehaviour in office, shall determine whether such Judge be guilty or not guilty of such misbehaviour and if not guilty, still, has the conduct of such Judge been censurable or unbecoming; and the judgment of the said Court shall be certified to the Governor in Council, and shall be final and conclusive to all intents and purposes whatsoever.

What points the Court shall decide.

Judgment to be certified to the Governor in Council.

Power of the Court to award costs.

And the said Court shall have power to award reasonable costs to be paid by one party to the other, according to the nature of the adjudicature, viz: If the complaint be adjudged to be false or vexatious, the accused shall be entitled to his costs of defence, if the conduct of the Judge complained against (whether he be found guilty or not guilty) be adjudged to be censurable and unbecoming, the complainant shall be entitled to his costs of prosecution.

In such Court Senior Puisne Judge may sit in absence of Chief Justice.

XIII. In case of the illness or unavoidable absence of any one of the said Judges of the said Court, the Senior Puisne Judge of the Superior Courts of Common Law at Toronto, may act instead of Judge so ill or absent, and with the like powers as aforesaid.

In Counties where there is no Junior County Judge, a Barrister may be appointed to act for the Judge in certain cases.

XIV. In and for each of the several Counties in Upper Canada, where there shall be only one Judge in discharge of the functions of Judge in the County Court, and it shall not be deemed necessary to appoint a second or junior Judge for such County, it shall be lawful for the Governor of this Province, from time to time to appoint during pleasure some B[illegible]rister at Law of at least three years' standing at the Bar of Upper Canada, as Deputy Judge to execute and perform the duties of Judge of the County Court in and for the County to which he is appointed at any time or times during such appointment when it may be necessary so to do by reason of the illness, unavoidable absence, or absence on leave of such Judge (or upon his demise until his successor shall be appointed,) and such Deputy Judge during such illness or absence (or vacancy by death) as aforesaid, shall and may perform and discharge all the ordinary duties and functions of the Judge so ill, absent or deceased as aforesaid, and all other acts and duties incident to the office of County Judge, as fully and effectually as the Judge of the County Court in whose place he may act might or could do; and such Deputy Judge shall have all the powers of the Judge so ill or absent as aforesaid; and such Junior Judge and Deputy Judge need not be Justices of the Peace to entitle them respectively to preside as Chairman at the General Quarter Sessions of the Peace during the illness or absence of the Senior Judge of the County Court as aforesaid, and in case the Judge of the County Court so ill or absent as aforesaid, shall also be the Judge of the Surrogate Court for the County, such Deputy Judge shall likewise during such illness or absence as aforesaid, have all the powers and privileges and perform all the duties of such Judge, as Judge of the Surrogate Court.

His powers as Deputy Judge.

To be Judge of Surrogate Court.

Deputy Judge to be sworn.

XV. And every Deputy Judge so to be appointed as aforesaid, before he shall act as such, shall take an oath before some one authorised to administer the same, to the effect that he

will as occasion may require, truly and faithfully according to his skill and knowledge, execute the several duties, power and trusts of the office without fear or favour; but no such Deputy Judge shall be held to be disabled from practising or carrying on the profession of the Law whilst holding such appointment as Deputy Judge.

Not to be debarred from practising.

And whereas it is expedient to alter the periods of holding the several Courts of Quarter Sessions of the Peace and County Courts in and for the several Counties and Unions of Counties in Upper Canada, Be it enacted:

Act 7 V. c. 32 repealed from 1st August, 1857.

XVI. The Act passed in the seventh year of the reign of Her Majesty, intituled, *An Act to fix the period for holding the Courts of General Quarter Sessions of the Peace and District Courts in that part of the Province formerly Upper Canada*, is hereby repealed from and after the first day of August next after the passing of this Act; and from and after that day the Courts of the General Quarter Sessions of the Peace in and for the several Counties and Unions of Counties in Upper Canada, and the sittings of the said County Courts for the trial of issues in fact, shall be and are hereby directed to be held on the second Tuesday in the months of March, June September and December in each year, respectively, any law or usage to the contrary thereof in any wise notwithstanding; and it shall be lawful for the said Courts at their sittings in the month of March in each year to nominate and appoint a High Constable and a sufficient number of persons to serve the office of constable for their several Counties.

Times for holding Quarter Sessions thereafter.

Appointment of High Constables.

Sec. 3 of 9 V. c. 7, repealed from 1st August, 1857.

XVII. From and after the First day of August next, the third section of the Act passed in the ninth year of Her Majesty's Reign intituled, *An Act to amend an Act passed during the last Session of this Parliament, intituled, An Act to amend, consolidate, and reduce into one Act the several Laws now in force establishing or regulating the practice of District Courts in the several Districts in that part of this Province formerly Upper Canada*, is hereby repealed, and after the said first day of August next, the several County Courts in Upper Canada, shall respectively hold Four Terms in each year which shall severally commence on the first Monday in

Terms of County Courts thereafter.

January, April, July, and October in each year, and shall end on the Saturday of the same week.

Judges may sit out of Term for giving judgment, &c., in cases which have been moved and argued.

XVIII. It shall be lawful for each of the Judges of the several County Courts during each Term, to appoint one or more days within a fortnight next ensuing the last day of such Term, on which he will give judgment; and the said Judges respectively on the days appointed, may sit as of Term, for the purpose only of giving judgment and of making rules and orders in matters which have been moved and argued in such Courts: and all Judgments, Rules, and Orders which shall be pronounced and made on such days in pursuance of the authority hereby given shall have the same effect to all intents and purposes as if they had been pronounced or made in term time.

Certain sections of 8 V. c. 13, repealed when this Act shall take effect.

XIX. From the time when this Act shall commence and take effect, the ninth, thirty-third, thirty-fourth, forty-fourth, fifty first, fifty-second, fifth-third, fifty-fourth, fifty-fifth, and fifty-sixth sections of an Act of the Parliament of this Province passed in the eighth year of Her Majesty's Reign intituled, *An Act to amend, consolidate, and reduce into one Act the several Laws now in force establishing or regulating the practice of District Courts in the several Districts in that part of this Province formerly Upper Canada*, also so much of the Schedule of fees annexed to the said Act as applies to "fees to the Attorney," and the whole of an Act of the Parliament of this Province passed in the ninth year of Her Majesty's Reign chaptered 36, and intituled, *An Act to amend an Act passed in the last Session of this Parliament, entitu-*

Also the whole of the 9 V. c. 36.

led An Act to amend, consolidate, and reduce into one Act the several Laws now in force establishing or regulating the practice of District Courts in the several Districts of that part of this Province formerly Upper Canada, together with all other Acts and parts of Acts of the Parliament of Upper Canada or of this Province, at variance and inconsistent with the provisions of this Act, shall be and the same are hereby repealed, except so far as the said Acts or any of them, or anything therein contained, repeal any former Act or Acts or any part thereof, all which last mentioned Act or Acts shall remain and

Also all other Acts inconsistent with this Act.

Exception.

continue so repealed, and excepting so far as the said Acts or parts of Acts hereby repealed, and the provisions thereof or any of them, shall and may be necessary for supporting, continuing, and upholding any writs that shall have been issued or proceedings that shall have been had or taken before the commencement of this Act, and any further proceedings taken or to be taken thereon.

Effects

Commencement of this Act.

XX. The provisions of this Act shall come into operation on the first day of July in the year of Our Lord one thousand eight hundred and fifty-seven, except the provisions contained in the eighth and ninth sections which shall come into operation on the passing of this Act.

Effects

Short Title of this Act.

XXI. In citing this Act in any instrument, document, or proceeding, it shall be sufficient to use the expression "The County Courts Amendment Act, 1857."

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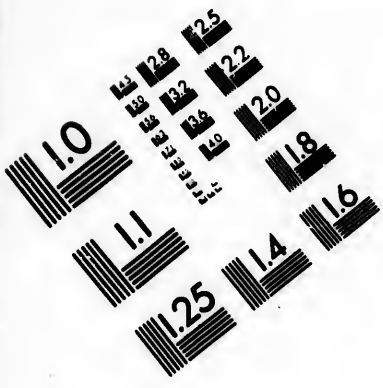

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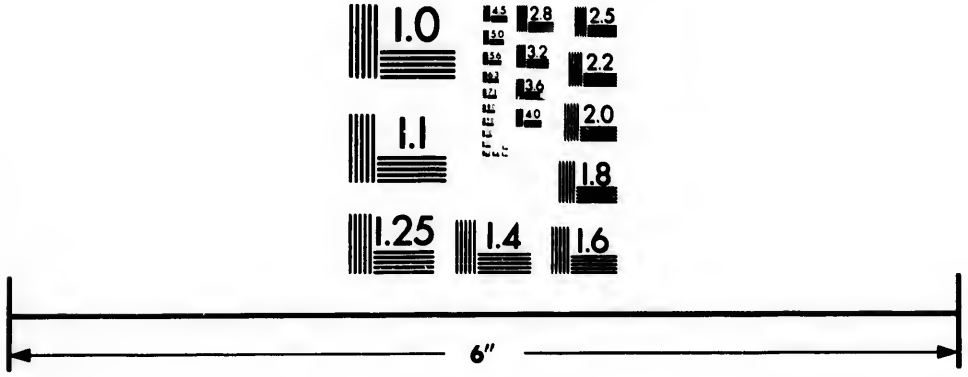

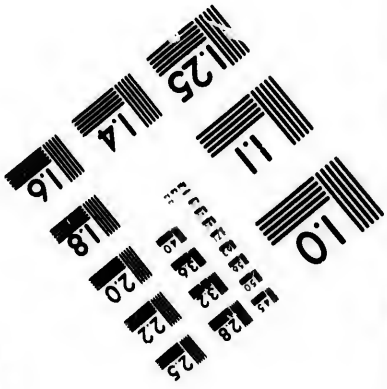

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ADDENDA ET CORRIGENDA.

During the progress through the press of a law book of such dimensions as this volume, it must be expected that in consequence of decisions, new rules, new statutes, or new matter of some kind, alterations and additions will be necessitated. The reader of this work is requested to make the following:—

Page 1, note *b*, line 17, *for* "Both Reports will be found at length in the Introduction," *substitute* "Both Reports are in detached portions where appropriate, embodied in the notes to this work." (See further "Preface.")

Page 4, note *e*, line 17, *after* "Statute" *add* "see N. Rs. Nos. 150 et seq."

" " " *f* at the end *add* "See C. L. P. A. 1867, s. 1, at p. 728 of this work."

Page 7, note *j*, at the end *add* "under the operation of this section, in connexion with s. 5 of 14 & 15 Vic., cap. 64, a writ of replevin when the cause of action is transitory may be issued from the office of a Deputy Clerk of the Crown in one County to be executed in another.—Buffalo & Lake Huron R. Co. v. Gordon, 3 U. C. L. J., 28."

Page 9, note *l*, sub-div. 1, at the end *add* "It is in the discretion of the Judge either to change or not to change the venue on the ordinary grounds, according as he thinks it will further the end of justice.—Crump v. Crew, 4 U. C. L. J., 20. Special grounds may be shewn why a venue should not be changed on the ordinary application. (*Ib.*)"

Page 9, note *l*, sub-div. 2, at the end *add* "An application to change the venue on special grounds should not be made before plea pleaded.—Stewart v. Johnstone, 4 U. C. L. J., 21."

Page 9, note *l*, sub-div. 3, at the end *add* "But changed on the common affidavit in an action of replevin brought for the recovery of goods and chattels detained for a cause other than a distress.—Vance et al. v. Wray, 3 U. C. L. J. 69;" *also*, "will be changed in like manner before issue joined in an action for use and occupation, although it be really for rent accruing on the lease, unless it be shown that the rent was secured by deed, or that the action can be more conveniently tried in the County where the venue was originally laid.—Smith v. O'Brien, 26 L. J. Ex. 30. The practice is now to change the venue to the County where the cause can be most conveniently tried.—*Ib.*; and see Grace v. Wilmer, 26 L. J. Q. B. 2."

Page 9, note *l*, sub-div. 4, at the end, *add* "But where defendant sued by the Municipal Council of the County of Ontario applied for a change of venue to the United Counties of York and Peel, upon the ground that as the Municipal Council of Ontario were plaintiffs, all the inhabitants of that County were interested, and defendants could not get an impartial trial, the application was granted upon payment of costs, and with the understanding that defendants should pay the extra expense of mileage incurred for plaintiffs' witnesses in consequence of the change, and in the event of the defendants' succeeding in the action, that they should not tax against plaintiffs such extra mileage for their own witnesses.—Municipal Council of Ontario v. Cumberland et al, 3 U. C. L. J. 11."

Page 9, note *l*, sub-div. 5, at the end, *add* "Cleghorn v. Carroll, 14 U. C. Q. B. 480."

Page 10, note *l*, sub-div. 7, line 15, *after* "1 U. C. R. 397," *add* "If the venue be laid by mistake in the wrong County it may be changed.—Richardson v. Daniels, 3 U. C. L. J. 205; but the plaintiff will not in general be allowed to change his own venue to a County in which he might have laid it in the first instance, nor will he in general be allowed to change in order to avoid the consequences of his own delay or laches.—Barton et al v. Nowlan, 4 U. C. L. J, 20."

Page 10, *for* note *l*, sub-div. 8, *substitute* the N. Rs. 136, 137.

" 10, note *n*, at the end, *add* "Summons issued from the office of the Deputy Clerk of the Crown for the County of Elgin, venue laid in Middlesex, writ set aside.—Green v. Horton, 2 U.C.L.J. 213."

Page 11, *for* note *r*, *substitute* The N. Rs. 136, 137.

" 12, 2d col. line 1, *for* Rule H. T. 13 Vic. No. 47, *substitute* The N. R. 135.

" 13, " 28, *for* Rule E. T. 9 Geo. IV. *substitute* The N. R. 26.

" 14, 1st, 10, from the bottom, *for* Rule H. T. 11 Vic. *substitute* The N. R. 27.

" 16, " 20, *for* "Agent," "Executor," *substitute* "Agreement," "Execution."

" 16, 2d col, line 13, *for* Rule 44 T. T. 13 Vic. *substitute* N. R. 55.

" 17, 2d col. line 8, from the bottom, *for* "have." *substitute* "has."

" 18, at the end of the first paragraph and the word "Toronto," *add* "There can be no revision of a bill taxed unless taxed in a cause in the Court.—Bouchier et al v. Patton et al, 3 U.C.L.J. 108."

Page 18, 2d col. line 17, *for* Dra. Rules p. 15, *substitute* N. Rs. 154, *et seq.*

" 18, " 9, from the bottom, *for* Rule 1 M. T. 4 Geo. IV. *substitute* N. R. 154.

" 19, " 6, from the bottom, *for* The Rule M. T. 18 Vic. *substitute* The N. R. 146.

" 23, 1st col. line 4, from the bottom, *after* "1853," *add* "and in U. C. by N. Rs. 101, 102."

" 26, note *e*, line 4, *after* "latter Statute," *add* "and s. 19 of C. L. P. A. 1857."

" 26, 2d col. line 7, *for* "entry," *substitute* "Registry."

" 27, note *g*, line 6, *before* "Goods and Chattels," *add* "Debts."

" 28, 1st col. line 26, *after* "to be," *add* "and are hereby declared to be."

" " 27, *for* "entire" *substitute* "exterior."

" " 29, *for* "be," *substitute* "lie."

" " 40, *after* "United," add "States."

" 29, note *l*, line 33, *after* "per Pollock, C.B., p. 638," *add* "Where a writ was directed to 'A. B., in the Township of Nottawasaga, in the County of Simcoe,' and defendant obtained a summons to set aside the writ, on the ground that his place of residence was wrongly described, he having for eighteen months previous to the service of the writ, and being at the time of such service resident in the city of Toronto. In answer to this application plaintiff produced and verified a letter from the defendant, dated at Collingwood, November 13, 1855, written by defendant to plaintiff, and enclosing the note on which the action was brought. Held that plaintiff had sufficient grounds for his supposition that the residence of the defendant was as stated in the writ of summons.—Ullhorn v. Chapman, 2 U. C. L. J. 231."

Page 30, note *n*, line 4, *before* "Rule," *add* "old."

" 31, note *q*, line 5, *before* "Rule." *add* "old."

" 31, 2d col. line 1, *before* "s. lxxi." *add* "under."

" 33, note *y*, at the end, *add* "In England it has been held that if the writ be issued by an attorney in person, it is sufficient in the endorsement to describe him as residing at the place where he carries on his business.—Abbott v. Basham, 25 L. J. Q. B. 239. Place of abode means the place where a person is likely to be found.—Allenburgh v. Thompson, 30 L. T. Rep. 154."

Page 34, 2d col. line 6, *for* "is too beneficial in practice to be neglected," *substitute* "has been re-enacted in N. R. 106."

Page 36, 1st col. line 3, *add* "So where the warning and signature of the Clerk of the Process were indorsed on the back of the copy instead of appearing on its face, the copy was held to be regular.—Gilmour v. McMillan, 3 U. C. L. J. 71."

Page 37. In note *l*, *for* old Rule No. 3, *substitute* The N. R. No. 100; and *for* old Rule No. 4, *substitute* The N. R. No. 132.

Page 39, 2d col. at the end of the first paragraph. *add* "Where one of two or more defendants is arrested for an amount greater than the verdict afterwards obtained, an order to deprive the plaintiff of costs will be granted under our Statute.—Arnold v. Jenkins et al, 3 U.C.L.J, 133."

Page 41, 1st col. line 11, *for* "laws," *substitute* "process."

" 41, 1st col. line 37, *after* "terms," *add* "The rule will not apply if the foreigner arrested, instead of having come to the Province for a temporary purpose, did in fact come to reside here. Blumenthall v. Solomon, 3 U. C. L. J. 11. Defendant applying for his discharge from arrest on the ground that he did not come with an intention to reside, must be explicit in declaring that fact in his affidavit.—*Ib.*"

Page 42, line 3, *for* The Rules T. T. 3 & 4 Wm. IV. and E. T. 4 Wm. IV., *substitute* The N. Rs. 109 *et seq.*

Page 42, line 13, *for* "1 U. C. Cham. R. 108," *substitute* "2 U. C. Cham. R. 108."

" 44, 1st col. line 27, *after* "these cases," *add* "An affidavit where the debt arises on a sealed instrument need not set out the date or other particulars of the deed or if it show distinctly the nature of the debt and of the instrument on which it accrued.—Clarke v. Clarke, 3 U.C.L.J. 149.

Page 46, 2d col. line 17, *after* "R. 31," *add* "But an affidavit concluding 'with intent to defraud deponent as assignee of the estate and effects of plaintiff,' is substantially a compliance with the words of the Act, 'to defraud the plaintiff, &c.'—Bemberg v. Solomon, 3 U. C. L. J. 13."

Page 50, note *s*, line 9, *for* "n. *h*," *substitute* "n. *f*."

Page 51, 1st col. line 19, *after* "s. 131," *add* "It appears also that the Court of a magistrate is a Court where the magistrate having begun an inquiry, a witness coming before it is entitled to privilege.—Montague v. Harrison, 6 W. R. 43; but a person who voluntarily attends before a magistrate and obtains a summons from him in order to enforce a penalty, is not thus privileged, for he is but a common informer and not a witness.—*Ex parte* Cobbett, 29 L. T. Rep. 210."

Page 51, 1st col. line 33, *after* "ignorant," *add* "The privilege only extends to attorneys in the cause, not to attorneys collaterally and incidentally in Court.—Jones v. Marshall, 29 L. T. Rep. 161."

Page 52, at the end of the first paragraph, *add* "Infancy is no ground for discharging a person from arrest.—Clarke v. Clarke. 3 U. C. L. J. 149."

Page 53, 1st col. line 17, *after* "other cases," *add* "See note *n* to s. ccxcv."

Page 56, 1st col. line 22, *before* "except," *add* "within twenty days."

" 58, 1st col. line 6, *after* "87, 88," *add* "also note *x* to s. ccevl."

" 58, note *a*, line 17, *after* "upon him, (*Ib*)" *add* "Upon an application by a defendant grounded on an affidavit of his attorney, stating that he had applied to plaintiff's attorney for particulars of plaintiff's residence, and was informed by the attorney that he did not positively know plaintiff's residence but believed it to be at Windsor, but that he, deponent, had good ground to believe and did believe that plaintiff's residence was not at Windsor but in the United States of America, an order for a stay of proceedings was made, no cause being shown. —Houghton v. G. W. R. Co., 3 U. C. L. J. 70."

Page 61, note *i*, line 31, *before* "D. & L." *add* "3," and *after* "513," *add* "Under the usual order on payment of the debt and costs to be taxed, the plaintiff's attorney cannot immediately after the taxation demand payment of the debt and costs, and on the Clerk or the defendant's attorney being unprepared with the amount, sign judgment.—Perkins v. National Assurance Co, 20 L. T. Rep. 65."

Page 72, at the end of note *e*, *add* "does not apply to actions of ejectment.—Handley v. Holdershott, 2 U. C. L. J. 214."

Page 77, at the beginning of note *r*, *add* "The section empowers the Court or Judge to allow the action to proceed, not in the event of the cause of action having arisen within the jurisdiction, but in the event of their being satisfied that it did arise within the jurisdiction.—Hutton v. Whitehouse, 20 Jur. 379, 4 W. R. 463, 1 H. & N. 32."

Page 77, at the end of note *r*, *add* "A writ of summons in the form given in the schedule, but with no indorsement on it, and nothing to show the defendant the cause of action, was issued in order to sue the defendant, who was a British subject residing out of the jurisdiction. An order to proceed was subsequently made by a Judge on an affidavit, which contained no statement that the cause of action arose within the jurisdiction. It appeared by the affidavit (inferentially at least) that the Judge's order had not been served. A declaration was filed, which the defendant according to English practice took out of the office. Held that by doing so, any previous irregularity on the part of the plaintiff was waived.—Bayne v. Stock, 6 W. R. 171."

Page 81, 1st col. line 15, *after* "1 El. & B." *add* "But where a defendant who had been arrested on a capias applied to set aside the arrest for irregularity, on the ground that a true copy of the writ had not been served on him, and on his application filed the copy served, in which it appeared that the variance consisted in the words 'fifty-six' in the teste of the copy being omitted. Held, the copy having been filed and in the custody of the Court, that under this section, taken in connexion with s. ccxci, it might be amended, which was done in this case on payment of costs.—Wilson v. Story, 3 U. C. L. J. 60."

Page 81, note *l*, line 8, at the end, *add* "Thus plaintiff's attorney may amend the writ of summons before service by correcting a mistake as to the name or number of defendants and may cause it to be resealed without altering the teste.—Gibson v. Varley, 28 L. T. Rep. 158."

Page 82, 2d col. line 7, *after* "*Ib.* p. 463," *add* "Where a party makes an application to full Court in a vexatious and oppressive manner, when his object might have been more speedily obtained at a far less cost upon an application to a Judge in Chambers, the Court may discharge his rule with costs.—The Duke of Brunswick v. Sleman, 5 C. B. 218."

Page 82, 2d col. line 16, *after* "730," *add* "An application may be made to a Judge in Chambers to rescind his own order. If he refuse no appeal can be made to the full Court.—Thompson v. Becke, 4 Q. B. 759." *Also*, "A Judge in Chambers is for the purpose of all motions before him a Judge of all the Courts.—Palmer v. The Justice Assurance Co., 28 L. T. Rep. 120."

Page 82, 2d col. at the end of line 30, *add* "and if having the power he exercise his discretion, in doing so a difference of opinion between him and the Court in the particular case cannot avail against his order.—Bulford v. Tomlinson, 4 Q. B. 642."

Page 82, 2d col. line 7 from the bottom, *after* "373," *add* "The application should as a general rule be made in the course of the term next after the decision.—Orchard v. Moxey, 2 El. & B. 206; upheld in Collins et al v. Johnson, 16 C. B. 588."

Page 90, at the end of note *r*, *add* "So in an action on a guarantee, the writ may be specially indorsed.—Jones v. Greer, 3 U. C. L. J. 91." "See further, McKinstry v. Arnold, U. C. L. J., March, 1858.

Page 97, 1st col., line 2, *after* "together," *add* "Where a warrant of attachment had been issued against an absconding debtor, under the practice that prevailed previous to this Act, and the notice thereby required had been duly given, a writ of attachment was granted under this Act without a new affidavit.—Ross et al v. Cooke, 3 U. C. L. J. 48; Buchanan v. Ferris, 3 U. C. L. J. 48."

Page 99, at the end of note *k*, *add* "Clarke v. Mackintosh, 2 U. C. L. J. 231." *Also*, "Application for leave to proceed under this section should show, 1. Where the defendant resided, and what was his business or occupation when in this Province; 2. What property he has (if any), and in whose hands it is; 3. Whether he has any (and if any, what) friends or relations residing in this Province; 4. That defendant has not put in special bail to the action; 5. What specific efforts have been made to effect personal service on the defendant and to discover his whereabouts.—Stephen et al v. Dennie, 3 U. C. L. J. 69."

Page 100, 1st col. at the end of the second line from the bottom, *add* "2 U. C. L. J. 184." *Also* "See further McDougal v. Gilchrist, 3 U. C. L. J. 28; Kerr et al v. Wilson et al, 3 *Ib.* 13; Ross et al v. Cooke, 3 *Ib.* 43; Buchanan et al v. Ferris, 3 *Ib.* 43; Baxter et al v. Dennie, 3 *Ib.* 69; Lyman et al v. Smith, 3 *Ib.* 107; Kerr et al v. Smith, 3 *Ib.* 108."

Page 110, 2d col. line 16, *erase* "Leamon v. Beal, 566," and *substitute* "Lismore v. Beadle, 1 Dowl. N. S. 566."

Page 112, line 7 of text, *after* plaintiff *add* "(*y y*)"; and in note intitled *y y*, *add* "The order may be had *ex parte* upon an affidavit which shows clearly plaintiff's right to make the application.—Cleaver v. Fraser, 3 U. C. L. J. 107." The affidavits on which the application was made in this case was that of the Sheriff stating that the real and personal property and effects of the defendant were insufficient to satisfy plaintiff's judgment, and that of the plaintiff stating the issue of a writ of attachment, the recovery of judgment, that it was partially unsatisfied, that all the real and personal property of defendant was exhausted and insufficient to satisfy the judgment and that several persons within the jurisdiction of the Court were indebted to defendant.—*Ib.*"

Page 112, note *b*, line 9, *erase* "7," and *substitute* "8."

" 117, 1st col. at the end of line 5, *add* "This return applies only to cases where original process has been served or executed.—Fisher v. Sully, 3 U. C. L. J. 89."

Page 118, 1st col. line 2, *after* "apply," *add* "See Fisher v. Saley, 3 U. C. L. J. 89."

" 118, at the end of note *u*, *add* "Attaching creditors in a Division Court having no priority with the execution defendant will not be allowed, on a summary application in Chambers, to except to a judgment in the Superior Court on the ground of fraud.—Fisher v. Gully, 3 U. C. L. J. 89."

Page 123, 2d col. line 13, from the bottom, *after* "839," *add* "Where an appearance filed by defendant was by mistake indorsed with the letters "C. C.," which misled the Deputy Clerk of the Crown, who was also Clerk of the County Court, and caused him to file the appearance among his County Court papers, and the plaintiff finding no appearance signed judgment, the judgment was set aside upon payment of costs by the defendant.—Dickie et al v. Elmslie et al, 3 U. C. L. J. 107.

Page 124, at the end of note *r*, *add* "On an application to set aside a final judgment on a writ not specially indorsed, or indorsed so improperly, on the ground that the judgment should have been interlocutory, defendant should produce the writ or copy, showing that it was not so indorsed, or that it was not a proper case for special indorsement.—Kerr et al v. Bowie, 3 U. C. L. J. 150."

Page 125, at the end of note *u*, *add* "See Kerr et al v. Bowie, in note o to N. R. Pr. No, 1, page 592, *post*." *Also* "See further Rogers et al v. Johnson, 4 U. C. L. J. 20."

Page 125, 2d col. line 3 from the bottom, *after* "473," *add* "An interlocutory judgment was set aside on terms where defendant though he did not in his affidavit distinctly swear that he had 'a defence to the action on the merits,' yet from the facts stated clearly *disclosed* such a defence.—Bouchier et al v. Patton et al, 3 U. C. L. J. 108." "See further, Dexter v. Fitzgibbon, 4 U. C. L. J. 43; Westlake v. Abbott, *Ib.* 46; Arnold v. Robertson, *Ib.*, March No., 1858."

Page 126, at the end of note *x*, *add* "Also Cuff v. Sproule, 3 U. C. L. J. 12."

" 127, at the commencement of note *i*, *add* "There can be no judgment until judgment is fully signed. An appearance filed while plaintiff is signing judgment is in time though plaintiff affect to disregard it.—Harris v. Andrews, 3 U. C. L. J. 31.

Page 128, at the end of note *j*, *add* "An attorney by accepting service of a writ of summons for his client, undertakes to appear for him, and has the same time to appear as if service had been made on defendant himself—Starratt v. Manning, 3 U. C. L. J. 10."

Page 129, note *u*, line 11, *after* "irregularity," *add* "Jones v. Greer, 3 U. C. L. J. 91.

" 131, at the end of note *e*, *add* "and where an attorney without authority appeared and defendant had not received any notice of the writ, the service of the writ and all subsequent proceedings were set aside.—Wright et al v. Hull, 2 U. C. Prac. Rep. 26."

Page 137, at the end of note *f*, *add* "and at all events not after trial.—Cowburn v. Wearing, 9 Ex. 207."

Page 141, note *z*, line 9, *after* "enactment," *add* "The right to amend a misjoinder after trial is questionable.—Wickens v. Steel et al, 29 L. T. Rep, 161,"

Page 141, note *z*, at the end, *add* "It has been decided that one defendant in ejectment is not entitled at the trial to have his name struck out on disclaiming all right to possession in order to be called as a witness for his co-defendant.—Grogan v. Adair et al, 14 U. C. Q. B. 479."

Page 142, at the end of note *e*, *add* "Also Wickens v. Steel et al, 29 L. T. Rep. 161."

" 142, at the end of note *f*, *add* "The Act evidently refers to the case where a defendant has been erroneously joined, and not to a case when a defendant has been joined not by mistake but for the purpose of trying his liability.—Wickens v. Steel et al, 29 L. T. Rep 161."

Page 142, at the end of note *g*, *add* "A. sued B., C., D., E., F., G., and H., in an action on contract. H. suffered judgment by default, and the action failed as against F. and G. Held that it was competent to the Judge at Nisi Prius to amend the record by striking out the names of F. and G.—Johnson v. Goslett et al, 18 C. B. 728. In a later case at Nisi Prius, Pollock, C.B., refused to allow the plaintiff to amend by striking out the names of one of two defendants, where

the contract upon which the action was brought was proved to have been made by one only and not by both defendants.—Simmonds v. Hughes et al, 29 L. T. Rep. 6."

Page 144, at the end of note *q*, *add* "The Act is silent as to plaintiff's right to costs against defendants joined in consequence of a plea in abatement where they are found to be indebted to plaintiff. The question has recently been adjudicated upon. An action was originally brought for a debt against M. alone, who pleaded the non-joinder of B. and C. The plaintiff amended accordingly, and went on in his action against the three. M. paid £230 into Court, and as to the residue pleaded never indebted. The two others pleaded never indebted. The jury found a verdict for M., that only £230 was due, but against B. and C., that they were jointly indebted with M. to the amount of £212. Upon this state of things, the Master allowed M. his costs against the plaintiff, but allowed the plaintiff his costs against B. and C. His taxation was supported on the first point, but as to the second it was held that plaintiff was not entitled to costs against B. and C. either under the Statute of Gloucester, because he was entitled to no damages, or under the Statute of Anne, as it was not a case of double pleading.—Carneau v. Morris, 25 L. J. Q. B. 126."

Page 151, note *m*, line 4, *after* "action," *add* "Where the first count of a declaration was in replevin, and the second in trespass, a summons to strike out the second was made absolute with costs.—The G. W. R. Co. v. Chadwick, 3 U. C. L. J. 29."

Page 163, at the end of note *n*, *add* "The corresponding clause of the Eng. C. L. P. Act extends to Courts of Equity.—In re Aikens, 6 W. R. 145."

Page 163, note *s*, line 2, *erase* "more," and *substitute* "mere;" and line 8, *erase* "wholly," and *substitute* "in part."

Page 164, 1st col. line 11, *after* "account," *add* "If it appear to the Court that defendant intends to set up defences wholly independent of mere matters of account, which defences should be disposed of by a jury, no reference will be made under this section.—Evans v. Jackson et al, 3 U. C. L. J. 88."

Page 164, 1st col. at the end of line 13, *add* "Judgment by default has been signed."

Page 164, at the end of note *x*, *add* "When once an order has been made under this section, the referee is bound to decide the case as an arbitrator, according to all the ordinary modes, and where one party alleges before the referee that a settlement of account has been obtained by fraud, the referee must consider and decide upon the alleged fraud.—Insul et al v. Morgan, 30 L. T. Rep. 152 5, W. R. 126."

Page 165, at the end of note *e*, add "In England where a county judge refused to act, the superior court refused to rescind the original order of reference and granted a rule in the nature of a mandamus.—Cummins v. Birkett, 30 L. T. Rep. 260. As a ground of reference it must appear that the cause of action is one which cannot be tried in the ordinary way.—Pellatt v. Markwell, 30 L. J. Rep. 275."

Page 166, at the end of note *f*, *add* "Where plaintiff having obtained an order for a reference to the Master under Eng. C. L. P. A. 1854, s. 3, and the Master declined it, and plaintiff thereupon obtained an order to rescind the former order, and proceed to trial. Held that he was not entitled to costs of these proceedings or costs in the cause.—Gribbler v. Buchanan, 18 C.B. 69. Where by the terms of an order granted under the same section, the costs of the reference are directed to abide the event, and the event is partly in favor of plaintiff and partly in favor of defendant, no costs are payable on either side.—*Ib.*"

Page 172. 2d col. line 29, *after* "s. 41," *add* "The affidavit upon which an application is made for an order for the attendance of witnesses and production of documents before arbitrators, must show that the documents required are such as the witnesses would be compelled to produce at a trial.—Carrall et al v. Bull, 3 U. C. L. J. 12. An order *ex parte* was granted upon an affidavit of plaintiff that the cause of action had been duly referred, that the arbitrators had appointed certain days to proceed to business, and that certain persons whose names and residences were given were material and necessary witnesses for plaintiff.—Galiena v. Cotton, 3 U. C. L. J. 47."

Page 178, at the end of note *o*, *add* "The power to remit will not in general be exercised, unless the award be egregiously wrong or not sanctioned by the evidence.—In re Brown and Overholt, 2 U. C. Prac. Rep. 9. Where in an application for an attachment it appeared that the defendant had not attended the arbitration through some misapprehension, the matters were referred back under a power contained in the submission.—Blecker v. Royale, 2 U. C. Prac. Rep. 14. The jurisdiction to remit where there is no clause in the order of reference exists only in cases where, before the C. L. P. A., the Court might have remitted such matter had there been such a clause.—Hodgkinson v. Fernie, 5 W. R. 181.

Page 180, at the end of note *a*, *add* "Where a rule nisi is obtained before the last day of the term in which the award must be moved against, the Court may allow additional affidavits to be filed after that day.—In re Wheeler et al, 2 U. C. Prac. Rep. 32."

Page 182, at the end of note *o*, *add* "The words of the section do not seem to require that the action should be brought upon the very point which is in difference between the parties. It is only necessary that it should be brought in respect of some of the matters agreed to be referred.—Russell v. Pellegrene, 28 L. T. Rep. 121. The question to be referred must be one arising out of the agreement and reasonably presumed to have been contemplated by the parties.—Wallis v. Hirsch, 28 L. T. Rep. 159. Where it appears to the Court that a question of fraud is *bona fide* raised, they will not stay proceedings in order to refer the case.—Ib. It has been held in England that assignees of a bankrupt are not 'persons claiming through or under' the bankrupt within the meaning of the Eng. C. L. P. A.—Pennell et al v. Walker, 18 C. B. 651.

Page 181, at the end of note *u*, *add* "Parties cannot by contract oust the Courts of their ordinary jurisdiction, *i.e.*, they cannot agree that no Court shall have jurisdiction in case of a breach of the contract, but it is quite legal and often beneficial for them to agree that no cause of action shall arise out of the contract until an arbitrator or private tribunal shall have first adjudicated on the subject matter, and settled the sum payable; for in that case there is no ousting of jurisdiction, there being no jurisdiction possible until the sum has been ascertained by an arbitrator.—Scott v. Avery, before H. L., 28 L. T. Rep. 207."

Page 185, at the end of note *t*, *add* "Under a reference to arbitration to be held 'in the usual manner' after each party has chosen an arbitrator, a Judge in Chambers will not, because of a difference between the arbitrators as to an umpire, appoint the umpire desired before the arbitrators themselves have proceeded to settle the matters in dispute.—Rowe v. Cotton, 3 U. C. L. J. 116.

Page 188, at the end of note *q*, *add* "If the parties go on with the reference after the time limited for the making of the award, they will be prevented from afterwards making objection on that account —Tyerman v. Smith, 2 Jur. N. S. 860."

Page 194, note *d*, line 7, *erase* "its," and *substitute* "their."

" 196, at the end of note *k*, *add* "In an action against the maker and indorsers of a note, a joint and several liability need not since the C. L. P. A. be alleged.—Gladstone et al v. Loucher et al, 1 U. C. L. J. 20.

Page 196, at the end of note *l*, *add* "Since the C. L. P. A. a declaration on an executory contract has been held good, although the contract was not averred to be under seal, and there was no allegation of mutual promises.—Ancil v. Bricker, 3 U. C. L. J. 72."

Page 196, at the end of note *m*, *add* "In one case since the C. L. P. A. upon an application by a defendant to a Judge in Chambers to strike out superfluous matter in the declaration, the Judge referred the declaration to the Master, with instructions to do so with costs.—Patton v. Prov. Insurance Co., 3 U. C. L. J. 113."

Page 203, at the end of note *r*, *add* "Chase v. Scripture, 14 U. C. Q. B. 493."

" 206, at the end of note *a*, *add* "See also Fountain v. Chamberlin, 18 C. B. 660."

" 206, *erase* note *c*, and *substitute* the following, "If a rule under this section be made absolute in its terms, the party obtaining it gets costs as costs in the cause.—Barnes v. Hayward, 25 L. J. Ex. 318."

Page 220, at the end of note *r*, *add* "In computing the eight days allowed to plead, the first and last days are inclusive, unless the last day be a dies non.—Moore v. The Grand Trunk R. Co., 4 U. C. L. J. 20. The day of service of the declaration is reckoned as one of the eight days for pleading.—*Ib.*"

Page 227, *erase* the first six lines of note *e*, and *substitute* the following, "Payment of money into Court cannot be pleaded in an action of detinue.—Allan v. Dunn, 28 L. T. Rep. 257; but see Crossfield v. Such, 8 Ex. 159."

Page 242, at the end of note *x*, *add* "A plea bad in part is bad altogether, and cannot be construed distributively under this section.—Lyne v. Heifield, 1 H. & N. 278."

Page 244, 1st col. line 25, *after* "J," *add* "A defendant will not be allowed to traverse that which is not specifically alleged in the declaration.—Jarvis v. Durand, 4 U. C. L. J. 22.

Page 249, at the end of note *w*, *add* "In an action to recover the price of a horse sold by plaintiff to defendant, the latter pleaded that he became and was indebted to the plaintiff by means of the fraud of plaintiff. To this plea the plaintiff applied for leave to demur and reply; it was refused.—Lawton v. Elmore, 30 L. T. Rep. 244.)"

Page 249, note *y*, line 33, *after* "684," *add* "If the action in which leave to plead and demur be be given be an experimental action, and open to question on many grounds, the Court will order the demurrer to be determined before the issues in fact are taken down to trial.—Municipality of Sandwich v. Drouillard, 3 U. C. L. J. 113."

Page 255, at the end of note *g*, *add* "It may be made by an agent of defendant's attorney.—Yeatman v. Distin, 3 U. C. L. J. 51."

Page 255, 2d col. line 5, from the bottom, *after* "Hagarty, J.," *add* "So the acceptor of a bill of exchange was upon application for leave allowed to deny, first, his acceptance; secondly, the indorsement by plaintiff to payee; and thirdly, to plead the Statute of Limitations.—Yeatman v. Distin, 3 U. C. L. J. 51."

Page 260, at the end of note *o*, *add* "An equitable plea cannot be pleaded as a plea of set off, and therefore if pleaded with other pleas without a Judge's order entitles plaintiff to sign judgment.—Watt v. George, 3 U. C. L. J. 71."

Page 272, at the end of note *y*, *add* "A plaintiff following the form of declaration given in s. cviii., declared thus, 'R. D. by E. F. his attorney, sues D. M., who has been summoned, &c., (stating the process as usual) for money payable by the defendant to the plaintiff, for goods bargained and sold by the plaintiff to the defendant. Plaintiff then added a second count on an account stated, and concluded, 'and the plaintiff claims £125.' Demurrer upon the ground that it was not stated that the goods were sold by plaintiff to defendant at his request, nor that the defendant was indebted to plaintiff, nor in what amount, nor that the defendant owed plaintiff anything for the said goods and chattels. Held declaration sufficient and demurrer frivolous.—Davis v. Muckle, 3 U. C. L. J. 115."

Page 293, *erase* s. cliii. of the text, inasmuch as it is *repealed* by s. 30. of C. L. P. A. 1857.

" 296, *erase* s. cliii. for the same reason.

" 299, at the end of note *s*, *add* "See C. L. P. A. 1857, s. 12."

Page 300, at the end of note *t*, *add* "It is for the presiding Judge to determine whether the case will involve the investigation of 'long accounts' within the meaning of the statute.—Wells v. Gwoski, 14 U. C. Q. B. 553."

Page 300, note *y*, line 15, after "No. 8," *add* "All the issues joined must be disposed of either by reference or by verdict taken at the trial.—Wells v. Gwoski, 14 U. C. Q. B. 553."

Page 314, at the end of note *b*, *add* "See Egan v. Corran, 30 L. T. Rep. 223. *Semble*, the decision of the Judge cannot be reversed.—*Ib.* The section under consideration corresponds with s. 30 of the Irish C. L. P. A. 1856. Under it a Judge at Nisi Prius admitted an anonymous letter for the purpose of comparison of handwriting. The letter had not been regularly proved, having been handed casually to a witness without the attention of the Court or opposite counsel having been called to it until the summing up of the defendant. The plaintiff at this stage of the proceedings denied that the letter was in his handwriting. There was a verdict for the defendant, which the Court set aside on the ground that an improper use had been made of the letter, the plaintiff not having been duly apprised.—Egan v. Cowan, 30 L. T. Rep. 233."

Page 317, at the end of note *j*, *add* "Where the notice called on the defendant to admit the authority under which the documents were signed. Held that defendant was not bound to do so, and might reject the whole notice.—Oxford W. & W. Co. v. Sundamore, 1 H. & N. 666.

Page 318, 1st col. line 6, *for* "submission," *substitute* "admission."

" 320, 1st col. line 7 from the bottom, *after* "action," *add* "But see 20 Vic. cap. 5."

" 322, at the end of note *i*, *add* "and it has not altered the rule which in England precludes the granting of a new trial upon the ground of the verdict being against evidence, where the damages are under £20.—Hawkins v. Alder, 18 C. B. 680. Where the plaintiff's counsel persists in offering evidence against the opinion of the presiding Judge, and in claiming damages from the jury founded on that evidence, although it is inadmissible, and the Judge so rules if the jury give such a verdict as to convince the Court that the evidence so forced in must have influenced their minds, the verdict will be set aside without costs.—Shaver v. The G. W. R. Co., 5 U. C. C. P. 321."

Page 323, note *a*, line 21, *after* "16 C. B. 556," *add* "Harris v. The Cockermouth & Worthington R. Co., 6 W. R. 19."

Page 323, 2d col. at the end of the 2d line from the bottom, *add* "In a late case the English Common Pleas decided that the proper time for a party to file affidavits in answer to affidavits used by his opponent in showing cause against a rule, is after the Court has heard the latter affidavits read, and is of opinion they ought to be answered.—Swinfen v. Swinfen, 28 L. T. Rep. 233."

Page 335, 1st col. last line, *after* "121," *add* "Bray v. Finch, 1 H. & N. 468."

" 335, 2d col. at the end of line 10, *add* "Applications having for their object the discovery of the contents of documents should in general be made under the section here annotated.—Ferrie et al v. The G. W. R. Co. 3 U. C. L. J. 151.

Page 335, 2d col. line 23, *after* "163," *add* "It seems that if an application for inspection be one in which, if a bill were filed before the C. L. P. A., no discovery could be had, inspection will be refused. Thus it has been held that the demandant in an action of dower is not entitled against a *bona fide* purchaser for value to inspect the deed of conveyance to her husband then being in the hands of the purchaser.—Gowan v. Parrott, 30 L. T. Rep. 65.

Page 336, 2nd col. line 24, *after* "562," *add* "It would be exceedingly vexatious whenever a tradesman brings an action for the amount of his bill if he were compelled to disclose to his customers his manner of carrying on business.—British Empire Shipping Co. v. Soames, 29 L. T. Rep. 75.

Page 336, 2d col. line 19, *after* "63," *add* "Interrogatories referring merely to the question of damages will not in general be allowed.—Ferrie et al v. The G. W. R. Co., Chambers, 3 U. C. L. J., 151; but see a. c. in banco, 4 U. C. L. J. 40."

Page 338, at the end of note *r*, *add* "But the Court refused to allow plaintiff in ejectment brought for a forfeiture for not insuring to exhibit interrogatories to the defendant as to the subject matter of the action.—May v. Hawkins, 32 L. & Eq. 595." "See further, Phillpotts v. Harrison, 4 U. C. L. J., March No., 1858."

Page 338, at the end of note *t*, *add* "The Court may allow interrogatories to be delivered to a defendant, after he has pleaded, without a special affidavit.—James v. Burns, 17 C. B. 596."

Page 340, at the end of note *y*, *add* "But a plaintiff in ejectment has no right to call upon the party in possession to answer by what title he is in possession.—Horton v. Bett, 29 L. T. Rep. 228. In an action of ejectment by a mortgagee, defendant filed with his appearance, under s. ccxxiv. of C. L. P. A., a notice setting up title in himself under an indenture of lease made to him by plaintiff, to be allowed to tender interrogatories as to the particulars of the lease, was refused.—West v. Holmes, 3 U. C. L. J. 72. Where a party to an action has a specific case, but the materials necessary to support it are in the hands of the opposite party, he is allowed to interrogate him as to this, but is not allowed to deliver to him interrogatories the object of which is to find out how his adversary intends to shape his case, or whether there be some latent

defect in such case, &c.—Moore v. Roberts et al, 3 Jur. N. S. 1221. In an action under 10 & 11 Vic. cap. 6, by the representatives of a person killed through the negligence of defendants, the latter may after plea pleaded put interrogatories affecting the measure of damages.—Ferrie et al v. The G. W. R. Co, 15 U. C. Q. B. 513. It is no ground for refusing to answer interrogatories in an action for the infringement of a patent, that the answers may expose the defendant's customers to actions.—Tetley v. Easton, 18 C. B. 643."

Page 340, note *j*, line 16, *after* "supra," *add* "Sidbottom v. Adkins, 29 L. T. Rep. 310."

" 340, at the end of note *a*, *add* "It is no ground for refusing to answer interrogatories in an action for the infringement of a patent that the answer may expose the defendants' customers to actions.—Fetley v. Easton et al, 18 C. B. 643."

Page 341, at the end of note *b*, *add* "And the attachment will not under any circumstances be granted unless it appear that personal service of the rule nisi has been effected.—O'Toole v. Potts, 28 L. T. Rep. 60."

Page 345, at the end of note *c*. *add* "The practice is not to issue an attachment for disobeying a Judge's order; no attachment can be issued until the order has been made a rule of Court.—Grove v. Scoville, 29 L. T. Rep. 80."

Page 358, at the end of note *s*, *add* "Service of the order upon the wife of the party, without showing that it came to his knowledge, is not sufficient to entitle his opponent to move for an attachment—Mason v. Muggeridge, 18 C. B. 642; but service at the defendant's "usual place of business," plaintiff being unable to discover his usual place of abode, was held sufficient.—Bird v, Wretton, 30 L. T. Rep. 258, 6 W. R. 211.

Page 358, 2d col. line 11 from the bottom, *after* "Richards, J.," *add* "Upheld in Smith v. McGill, 3 U. C. L. J. 134."

Page 359, at the end of note *b*, *add* "Disobedience of it no doubt would be punishable upon the order being made a rule of Court. The attachment, however, it seems cannot be granted by a Judge in vacation.—Greene et al v. Ward, 3 U. C. L. J. 113."

Page 360, note *l*, line 9, *after* "debt," *add* "a debt means something *due*.—Geraghty v. Sharkey. 30 L. T. Rep. 204."

Page 360, 2d col. line 1, *after* "731," *add* "Griswold v. B. B. & G. R. Co., 3 U. C. L. J. 15."

Page 360, 2d col. line 23, *after* "(Ib.") *add* "It seems that a liability which cannot be set off as a debt, cannot be attached as a debt under this section.—Griswold v. B. B. & G. R. Co., 3 U. C. L. J. 115.

Page 360, 2d col. line 9 from the bottom, *after* "debtor," *add* "Where there are cross claims between the garnishee and the judgment creditor, the balance only due the latter can be attached.—Hedley v. B. B. & G. R. Co., *MS*, Chambers, May 30th, 1857, Robinson, C.J."

Page 360, 2d col, line 2 from the bottom, *after* "Ib." *add* "Money due in respect of Saving Bank annuities to the wife of a judgment creditor cannot be attached.—Dingley v. Robinson, 26 L. J. Ex. 55. Nor can a sum of money paid into Court in an action pending by defendant against garnishee, but on which there is no recovery by plaintiff.—Jones et al v. Bront, 29 L.T.R. 79."

Page 362, 2d col. line 3, *after* "assignee." *add* "Where, however, the assignee neglected to give the garnishee precise and distinct notice of the assignment, and his attorney stood by while an order was made upon the garnishee under this section, and the garnishee paid the debt to the judgment creditor, the Court relieved the garnishee from further proceedings taken at the instance of the assignee in the name of the judgment debtor.—In re Jones, 6 U. C. C. P. 149. Where the debt is attachable, it is superior to the lien of an attorney in respect of general costs due to him from the judgment debtor.—Hough v. Edwards, 26 L. J. Ex. 54."

Page 363, 1st col. 1st line, *after* "attached," *add* "The Judge may, if he consider the cause sufficient, at once discharge the summons instead of proceeding under s. xcviii.—Griswold v. B. B. & G. R. Co., 3 U. C. L. J. 115. An order to attach may be granted though the amount do not appear, but a summons to pay over will not be granted unless the amount be stated.—Bank of Montreal v. Yarrington, 3 U. C. L. J. 185. A Judge in Chambers cannot order money paid into Court without authority to be paid to the judgment creditor, but will order it to be returned to the garnishee.—Mellish v. B. B. & G. R. Co., 3 U. C. L. J. 108."

Page 364, note *l*, line 1, *after* "s. cxcvi." *add* "A. B. sold certain goods to C. D., £100 to be paid down, and the rest to be paid by bills at certain specified dates. A. B. was indebted to E. F., who sued him and obtained judgment on 24th May, and on the 28th E. F. obtained an order under Eng. C. L. P. A. 1854, s. 61, against C. D., the garnishee, which was duly served on the 30th, and on the same day C. D., without the knowledge of E. F., the judgment creditor, signed a promissory note for payment of £354, the balance due A. B., the judgment debtor, at stated periods. On 2d June, 1856, A. B. committed an act of bankruptcy, whereon he was duly adjudicated bankrupt, and notice thereof was duly given to the judgment creditor and and to the garnishee early in June. On 2d July, the garnishee paid to the credit of the judgment creditor £100 in payment of the first instalment under the promissory note. The plaintiffs were assignees of the judgment creditor under the bankruptcy. Held that the giving of the promissory note was no protection to the garnishee; that payment to be a protection must be compulsory and not voluntary; and that the assignees were entitled to recover from the garnishee the whole amount due to the judgment debtor at the time the note was given. —Turner v. Jones, 28 L. T. Rep. 341. To an action for work and labour, the defendant pleaded that B. recovered a judgment against the plaintiff, and being such judgment creditor applied for and obtained an order that the debt due from the now defendant to the plaintiff should be

attached to answer the judgment so recovered against the plaintiff by B., that the debt was still unsatisfied, and that the order still remained in force. Held a bad plea, for not alleging that the order was served upon or notice given to the garnishee.—Lockwood v. Nash, 18 C.B. 536."

Page 366, at the end of note *y*, *add* "In an action for trover for goods the defendant cannot insist, after writ, upon returning them, except under the equitable jurisdiction of the Court.—Homer v. Mallett, 30 L. T. Rep. 241. In such case the measure of damages is their value at the time of the conversion, and not at the time of the offer to return.—*Ib.*"

Page 368, s. ccli. of the text is repealed by C. L. P. A. 1857, s. 10. See p. 731 of this work.

Page 369, at the end of note *z*, *add* "The executors of an administrator are not entitled to survive a judgment more than 15 years old by entering a suggestion under this section.—Croft v. Foulkes, 30 L T. Rep. 241."

Page 371, at the end of note *o*, *add* "If the writ omit to recite why it became necessary, it may be set aside as irregular.—Gallusi v. Butler, 3 U. C. L. J. 108."

Page 389, at the end of note *a*, *add* "In an action against defendant for throwing rubbish into a stream, so as to be carried down the stream into the mill-pond of plaintiff, and by choking it up to obstruct his mill, the defendant pleaded as to the throwing a right of prescription to throw into the stream near his mill the ashings and sweepings necessarily arising there, identifying with these the rubbish complained of; but the plea did not contain an averment that during the period of prescription the rubbish had been carried down to the plaintiff's mill in the manner alleged in the declaration. A verdict having been found for the defendant on this plea, plaintiff moved for judgment *non obstante*. Held that plaintiff was entitld to judgment, but on affidavit that the fact was proved at the trial, the rule was suspended to allow defendant to enter a suggestion of the omitted fact.—Murgatroyd v. Robinson, 3 U. C. L. J. 79."

Page 392, at the end of note *z*, *add* "When the writ has not been directed to but served on the tenant in possession, it is questionable whether the tenant can apply to set aside the writ as irregular. However, if, instead of making application for that purpose, he apply for particulars or for other information, and allow ten days to elapse, he will be deemed to have waived the irregularity, supposing it to be such, and his application should then be not to set aside the writ but to be allowed to appear and defend, according to s. ccxxv., which provides for the appearance of persons not named in the writ.—Thompson v. Starle, 25 L. J. Ex. 306."

Page 400, at the end of note *a*, *add* "Thompson v. Welsh, 3 U. C. L. J. 133."

" 401, 1st col. at the end of line 36, *after* "820," *add* "Mercer v. Bond, 3 U. C. L. J. 150."

" 402, at the end of note *l*, *add* "Security for costs cannot be obtained before the entry of appearance.—Crane et al v. McGuire, 3 U. C. L. J. 205. The entry of appearance in ejectment does not put the cause at issue so as so prevent the defendant applying for security for costs.—*Ib.*"

Page 407, note *p*, line 7, *erase* from "whether" to the end of the note, and *substitute* "and plaintiff must proceed to trial as in other actions, or be subject to be proceeded against under s. cclv."

Page 414, at the end of note *d*, *add* "Where the defendant in his notice claimed the whole premises from A. B., he was not allowed at the trial to set up that he was tenant in common with the plaintiff and insist upon proof of ouster.—McCallum v. Boswell, 15 U. C. Q. B. 343."

Page 431, at the end of note *w*, *add* "Where a landlord applies to be allowed to enter judgment for want of appearance against a tenant who has absconded and cannot be personally served, the action being on a power to enter for non-payment of rent, he must if possible produce the lease and show that he is entitled to re-enter.—Leviscompte v. Peucel, 3 U. C. L. J. 185."

Page 446, at the end of note *i*, *add* " Lawrence v. Hogben, 26 L. J. Ex. 55."

" 451, 2d col. line 28, *after* "425," *add* "Norris v. The Irish Land Co., 30 L. T. Rep. 132."

" 453, at the end of note *l*, *add* "But see Norris v. The Irish Land Co, 30 L. T. Rep. 132, in which Lord Campbell overrules himself. See also 4 U. C. L. J., p. 6."

Page 462, at the end of note *k*, *add* "It has been contended that the words 'in like case,' as used in this section, mean in actions of the same description mentioned in s. ccixxv., which gives the remedy in any action except 'ejectment or replevin;' but whether these two forms of action are to be excepted from the operation of the section under consideration is a question.—Fraser v. Robins, 3 U. C. L. J. 112. There is clearly no such exception in s. ccixxvi., which allows interlocutory or temporary injunctions.—*Ib.* In England an injunction has been refused in an action of ejectment.—Hayes v. Lepin, 26 L. J. C. P. 176.

Page 464, note c, line 2, *after* "injunctions," *add* "Fraser v. Robins, 3 U. C. L. J. 112; see also Bell v. White, 3 U. C. L. J. 107.

Page 465, 1st col. at the end of line 6, *add* "But where under a clause contained in a contract for the sale of timber the vendor brought an action of ejectment, claiming a forfeiture for default in payment of the purchase money, an action to restrain the cutting of the timber was refused.—Walsh v. Brown, L. J. U. C., March 1858."

Page 468, at the end of note *q*, *add* "Where to an action to recover damages for a fraudulent representation, the defendant asked leave for a defence on equitable grounds, to plead that the defendant had filed a bill in Chancery for the very same alleged grievances and causes of action, which Court gave judgment in favor of the defendant; the decision in Chancery was held to be no estoppel.—Collins v. Cave, 4 Jur. N. S. 31."

Page 472. at the end of note intitled, "*First—equitable pleas allowed,*" *add* "B's wife had contracted a debt before marriage. After his marriage B. and his wife borrowed moneys on B.'s bond to pay off that debt, and then mortgaged to C. lands which B. and his wife held in fee in right of the wife to raise money to discharge the bond. On the wife's death C. as her heir at law became entitled to the equity of redemption, having before by the mortgage acquired the legal estate. In an action by C. against B. on his covenant in the mortgage deed for payment of the sum of money secured, the foregoing facts were held to be a good equitable defence.—Gee v. Smart, 29 L. T. Rep. 278. Where an equitable plea has been allowed by a Judge, the Court will not strike it out merely because it is doubtful whether it discloses a right to absolute and unconditional relief in equity.—Elliott v. Mason, 26 L. J. Ex. 175.

Page 473, 2d col., at the end of the 6th line from the bottom, *add* "Where a defendant was under terms to take short notice of trial, and it was proposed to plead certain equitable pleas setting up a cross claim, the Court held that the pleas were inconsistent with the terms, and refused, therefore, to allow the pleas permitting the defendant to bring cross actions.—Atterbury v. Moore. 29 L. T. Rep. 128. To a declaration on scl. fa. against a shareholder of a Company the defendant pleaded that he was requested by plaintiff and others to become a transferee in the Company as the nominee for A and B, and for their benefit, and upon the representation of the plaintiff and others that he should incur no responsibility on account of such shares—that relying on such representations he became a transferee of the said shares—that he never had any interest in the shares except as such nominee, &c.—that the said Company and the scheme thereof was entirely abandoned, and no profit was ever acquired by the said Company—that the plaintiff well knew the circumstances under which the defendant became a transferee—and is now inequitably and fraudulently striving to make the defendant liable as a shareholder of the Company. *Held* bad on demurrer. because it contained no allegation that the representation stated to have been made to the defendant was fraudulent, or that there was an agreement that the defendant should be indemnified from all liability to show anything which could be construed as an estoppel to prevent the plaintiff to maintain his action.—Bell v. Richards, 29 L. T. Rep. 184; see also Balfour v. The Eaton Fire Assurance Co., 3 Jur. N. S. 304. To an action on a bill of exchange against the acceptor, the Court refused leave to plead an equitable plea that the bill was accepted on a distinct promise by plaintiff that if the defendant would pay certain discount the plaintiff would renew from time to time until the defendant was of ability to meet the bill.—Flight v. Gray, 4 Jur. N. S. 131."

Page 474, at the end of note *r add* "Where a defendant pleads an equitable plea alone he may possibly have a right to do so without the leave of the Court; but where the application to plead such plea is an appeal from the decision of a Judge at Chambers on a summons to add pleas the allowance of such pleas is in the discretion of the Court to be exercised with reference to all the circumstances under which the application is made.—Atterbury v. Jarvie, 26 L. J. Ex. 176, 29 L. T. Rep. 123."

Page 476, 1st col., line 4, *erase* (*v*), and *substitute* (*w*), and at the end of note *w add* "And *semble* it was not meant by the C. L. P. A. that replications on equitable grounds should be allowed where the matters therein stated disclose that the foundation of the plaintiff's claim is of a purely equitable character.—Per Bramwell B. in Hunter v. Gibbons, 26 L. J. Ex. 1, 28 L. T. Rep. 290. A replication on equitable grounds setting up matters, which, if they had been alleged in the declaration would have rendered the declaration demurrable is bad.—Reis et al. v. The Scottish Equitable Life Assurance Co., 29 L. T. Rep. 113."

Page 477, 1st col., line 18, *after* "1282" *add* "26 L. J., Ex. 1, 28 L. T. Rep. 290."

Page 479, at the end of note *x add* "In an action on a policy of insurance defendants pleaded that the life insured had gone beyond the seas contrary to the terms of the policy, and so vitiated it. Plaintiff proposed to reply on equitable grounds—first, facts showing that at the time of the making of the policy it was expressly agreed that the policy should not be vitiated by the life insured going to places out of Europe; secondly, leave and license to go to places out of Europe. Leave to reply as in the first replication was refused, but granted as in the second.—Reis et al. v. The Scottish Equitable Life Assurance Co., 38 L. T. Rep. 113. The Court cannot deal with an equitable replication which sets up a term of years which *ought to be* surrendered as it has no power to order a surrender.—Goreby v. Goreby, I H. & N. 144."

Page 484, 2d col., line 4, *after* "396" *add* "Makens v. Steel et al., 29 L. T. Rep. 161."

Page 488, at the end of note *s add* "In an action on a bill of exchange alleged to be lost the Court will not stay proceedings until an indemnity be given by plaintiff to defendant. defendant being willing to pay the debt and costs.—Arrangum v. Schoofield, 1 H. & N. 494, 28 L. T. Rep. 105."

Page 494, at the end of note *g add* "An application for discharge must be supported by an affidavit of the turnkey (if the gaoler employ one) that the money has not been paid.—Carpenter v. Tout, 3 U. C. L. J. 151. If the gaoler do not employ a turnkey the affidavit of applicant should show the fact.—*Ib.*"

Page 523, at the end of note *a erase* the following: "Of this N. R. 146, as compared with s. xiii. of C. L. P. A. 1856, is an example.

Page 552, 2d col. line 18, *after* "earliest" add "English," and in line 21 *erase* "is not in a position" and *substitute* "does not think it necessary in this place."

Page 589, 1st col., line 2, *after* "time" *add* "See Rules of Law Society, Harrison's Rules, p. 139."

Page 592, 2d col., line 2, *after* "*Ib.*" *add* "In computing the ten days for appearing the day of service is reckoned inclusive, not exclusive, so that if the writ be served on Saturday judgment may be signed one week from the following day.—Ross et al v. Johnstone et al., 4 U. C. L. J. 21."

Page 600, at the end of note *y*, *add* "In all transitory actions the venue may be changed by either plaintiff or defendant on his showing to the Court or Judge a reasonable ground therefor.—Mercer v. Voght et al, 4 U. C. L. J. 47. The plaintiff must amend his declaration in order to change his venue.—*Ib.* In order to expedite the trial of a cause, when the plaintiff swears that otherwise he will probably lose his debt, it may be considered a reasonable ground for change of venue.—*Ib.*"

Page 602, Rule 22, line 3 of the text, *after* "summons" *add* "unless otherwise."

Page 655, at the end of note *f*, *add* "As to judgment if a verdict have been taken subject to a reference the judgment may be signed in the ordinary course; but if no verdict have been taken the award may be enforced at after publication.—O'Toole [illegible] El. & B. 102, 3 Jur. N. S. 261."

Page 685, at the end of note *k*, *add* "Kerrick v. Harder, 29 L. T. Rep. 92."

Page 692, note *s*, 2d line, *for* "30" *substitute* "29."

Page 693, line 3, *for* "Forms to the Common Law Procedure Act, 1856," *substitute* "Forms to the New Rules of Court."